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The Honorable Vernon A. Williams
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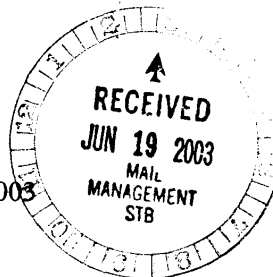
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June 19, 2003

208128

Re: Ex Parte No. 638, Procedures To Expedite Resolution Of
Rail Rate Challenges To Be Considered Under The Stand-Alone
Cost Methodology

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding please find an original and ten copies of the Joint Reply Comments of the Western Coal Traffic League, Edison Electric Institute and The National Industrial Transportation League. Also enclosed is a wordperfect disk containing an electronic copy of the submission.

An additional copy of the filing is enclosed. Please indicate receipt and filing by time-stamping the additional copy and returning it to the bearer of this letter.

Thank you.

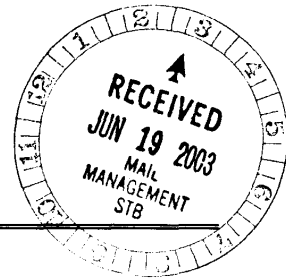
Sincerely,

John H. LeSeur

Enclosures

cc: Parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD



PROCEDURES TO EXPEDITE RESOLUTION)
OF RAIL RATE CHALLENGES TO BE) Ex Parte No. 638
CONSIDERED UNDER THE STAND-ALONE) (Phase II)
COST METHODOLOGY)

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JOINT REPLY COMMENTS
OF
THE WESTERN COAL TRAFFIC LEAGUE
EDISON ELECTRIC INSTITUTE
AND
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

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Dated: June 19, 2003

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

PROCEDURES TO EXPEDITE RESOLUTION	)	
OF RAIL RATE CHALLENGES TO BE	)	
CONSIDERED UNDER THE STAND-ALONE	)	Ex Parte No. 638
COST METHODOLOGY	)	(Phase II)
	)	

**JOINT REPLY COMMENTS
OF
THE WESTERN COAL TRAFFIC LEAGUE
EDISON ELECTRIC INSTITUTE
AND
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE**

The Western Coal Traffic League ("WCTL"), Edison Electric Institute ("EEI") and The National Industrial Transportation League ("NITL") jointly submit these Reply Comments.¹

SUMMARY

The Shippers have reviewed the Railroads'² Opening Comments. Where appropriate, we have modified our opening positions to address the Railroads' specific

¹For convenience, WCTL, EEI and NITL collectively are referred to herein as the "Shippers."

² Burlington Northern and Santa Fe Railway Company ("BNSF"), Union Pacific Railroad Company ("UP") and CSX Transportation Inc./Norfolk Southern Railway Company ("CSXT/NS"). Collectively, these carriers are referred to herein as the "Railroads."

concerns. These modifications include: expanding the amount of discovery Shippers tender at the outset of Stand-Alone Cost (“SAC”) cases; expanding the proposed time periods for carrier production of Standard Discovery Materials³ from 20 to 30 days after a complaint is filed; and proposing a limit of 25 interrogatory requests per side in each case, unless the Board otherwise orders. However, even with these compromises, a large gap remains between the positions taken by the Shippers and the Railroads.

In these Reply Comments, Shippers reiterate the concerns we raised earlier in this proceeding about the discovery problems faced by complainant shippers in SAC cases. Simply summarized, shippers need extensive discovery to meet their burden of proof in SAC cases. However, defendant carriers employ a variety of litigation tactics to thwart this discovery. These tactics result in case delays, increase shipper litigation costs, and, when data is not produced, can lead directly to shipper losses on consequential SAC issues.

Shippers urge the Board to address the serious problems shippers face in SAC discovery by adopting the proposals Shippers presented in our Opening Comments, as modified herein.

³ “Standard Discovery Materials” refers to the materials responsive to the Standard Discovery Requests set forth in Exhibit 1 and 2 to Shippers’ Opening Comments, as amended herein.

I.
PREFACE

This proceeding was initiated to study approaches to “streamline” SAC cases. April 3, 2003 Decision (“Decision”) at 1. In its Decision, the Board adopted several new procedures that Shippers believe will help streamline SAC case procedures while still ensuring a fair SAC hearing for both shippers and railroads. These post-Decision proceedings focus on additional proposals to streamline discovery procedures in SAC cases. After reviewing the Railroads’ Opening Comments, some general observations are in order.

First, as the Board is undoubtably aware, SAC cases raise highly complex and numerous fact issues. SAC cases require shippers to present detailed variable cost evidence, almost always for multiple quarters or years, for each separate origin-to-destination pair (or group) for which relief is sought. Shippers also need to present detailed SAC evidence. This evidence is highly technical and complex as the SAC standard requires a shipper in effect to demonstrate how it could construct and operate an entire new railroad from scratch.

The vast amount of information and evidence that a shipper-complainant must introduce in a SAC case is simply illustrated by reviewing the Board’s governing evidentiary outlines. In a SAC case, the shipper must submit, for each quarter costed, and for each issue movement costed, statistical parameters and variable cost information responsive to (in most cases) 19 specific traffic and operating movement parameters and

25 separate variable cost parameters. Reply Exhibit 1 hereto provides a representative example of such a list from a recent STB decision. (Table A-2 of Reply Exhibit 1 lists the 19 specific traffic and operating statistic items. Tables A-3, lines 1 through 19, and A-7 list the 25 specific variable cost items.)

Stand-alone evidence is even more fact intense. In Ex Parte No. 347 (Sub No. 3),⁴ the STB adopted an evidentiary outline, by topic, of the SAC evidence a shipper must present in a SAC case. The outline contains approximately 92 such topics. Reply Exhibit 2 hereto reproduces the Ex Parte No. 347 (Sub No. 3) decision and accompanying list.

Thus, in a typical stand-alone case, complainant shippers must submit evidence responsive to approximately 44 variable cost topics – for each movement costed for each quarter – and approximately 92 SAC items. These simple lists alone produce a total of approximately 136 separate areas that must be addressed in a case. Even this number is misleadingly low since many of the specific variable and SAC topics require detailed information on subtopics covered, and standard costing procedures utilized, to make specific variable and SAC computations.

Second, complainant shippers need extensive discovery from defendant carriers in SAC cases. Much of the information shippers need to address the Board's variable and SAC evidentiary criteria rests solely in the hands of the defendant carriers.

⁴ General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases (STB served March 12, 2001).

Also, even in instances where shippers may possess (or be able to obtain) specific variable cost or SAC data from sources other than the defendant carrier, shippers need discovery to discover what corresponding data the carriers' may possess, or are likely to use, in presenting their case to the Board.

The Board (and the ICC before it) has long recognized and emphasized the need for shippers to obtain extensive discovery in SAC cases. When the ICC promulgated the SAC standard in 1985, it recognized that complainant shippers would need "broad" discovery against carriers. *See Coal Rate Guidelines – Nationwide*, 1 I.C.C.2d 520, 544 (1985). Subsequent ICC and STB decisions have similarly acknowledged and enforced shipper's discovery rights in SAC cases. *See, e.g., Northern States Power Co. Minnesota, D/B/A/ Xcel Energy v. Union Pacific R.R.*, Docket No. 42059 (STB served May 24, 2002) ("*Northern States Power Company*"); *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Ry.*, Docket No. 42056 (STB served Feb. 9, 2001) ("*TMPA*"); *Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Ry.*, Docket No. 42038 (STB served May 11, 1999) ("*Minnesota Power*"); *Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings*, Ex Parte No. 527 at 9-10 (STB served July 22, 1996); *Increased Rates on Coal, L&N R.R., Oct. 31, 1978, The Dayton Power and Light Co. v. Louisville and Nashville R.R.*, Docket Nos. 37063 and 38025S (ICC decided Nov. 30, 1990) 1999 WL 300638.

Discovery is taking on even more importance in light of recent Board decisions strictly construing burden of proof issues in SAC cases. In these cases, the complainant shipper bears the burden of proof on most SAC issues. In two recent cases, the Board has ruled against the complainant shipper on many consequential SAC issues because the shipper, in the Board's view, failed to present sufficient evidence to meet its evidentiary burden of proof. *TMPA* (STB served March 24, 2003); *PPL Montana, LLC v. The Burlington Northern and Santa Fe Ry.*, Docket No. 42054 (STB served Aug. 20, 2002). To meet the Board's concerns, it is likely that shippers will need to press carriers more vigorously during the discovery phase of the SAC cases to obtain more detailed information.

Also, the Board has emphasized in several recent decisions that shippers must present their "entire" case on opening. See *Public Service Company of Colorado D/B/A Xcel Energy v. The Burlington Northern and Santa Fe Ry.*, Docket No. 42057 at 2 (STB served Apr. 4, 2003); ("*Public Service Company of Colorado*"); *Duke Energy Corp. v. CSX Transportation, Inc.*, Docket No. 42070 (STB served March 25, 2003) ("*Duke Energy Corp.*"). In so ruling, the Board has criticized shippers in some instances for modifying their SAC evidence on rebuttal to respond to the defendant carrier's critiques of the shipper's opening evidence. The Board has gone on to strike, or not consider, evidence the Board finds is improperly submitted on rebuttal. See, e.g., *Duke Energy Corp.*, at 5 (STB served March 25, 2003).

If, as it appears to Shippers, the STB is placing new emphasis on the contours of a complainant's opening evidence, complainant shippers must insist in the discovery phase of the case that the defendant carriers produce all SAC materials the carriers are likely to rely upon in their case-in-chief so that shippers can craft appropriate opening evidentiary submissions.

Third, the Board can and should utilize this proceeding to crackdown on several carrier litigation practices in SAC cases that directly thwart the Board's streamlining objectives. These practices include:

- Late/Incomplete Production Practice. The standard procedural schedule in SAC cases establishes a 75-day discovery period starting from the date a complaint is filed. 49 C.F.R. §1111.8. Typically, defendant carriers wait until the very end of the period to produce critical variable cost and SAC data and, quite often, key data is missing, or incomplete, particularly as it relates to materials which, if produced, would result in lower variable cost and SAC cost calculations. As a consequence, many complainant shippers have faced the Hobson's choice of extending the discovery period – which delays the case – or going forward with incomplete data – which increases the risk of unfavorable results. *See, e.g., Public Service Company of Colorado* (STB served Oct. 9, 2002); *Northern States Power Co.*, (STB served Apr. 24, 2001); *Minnesota Power* (STB served June 8, 1999 and March 6, 2000).

• “We Decide” Practice. Under the “we decide” practice, a responding party never identifies the universe of responsive materials to a particular request but instead raises various objections and goes on to state “we will provide reasonably responsive information to the extent reasonably available.”

The “we decide” practice has been rejected by the federal courts in cases under the Federal Rules of Civil Procedures because it completely undermines fair discovery. As observed by one federal court:

Plaintiffs argue that, as to nine of the nineteen requests for production, the defendant asserts an ambiguous relevance objection. In each of those nine instances, the defendant responds that it objects on the grounds that the request “is not reasonably calculated to lead to discovery of admissible evidence” but that it will produce “relevant, non-privileged” documents that are responsive to that request. Pls. Mot. to Compel Aetna, Ex. 2, *passim*. In other words, the defendant does not object with specificity to the request itself, or to its scope, on relevance grounds. Rather, it merely repeats the discovery standard contained in Fed.R.Civ.P. 26(b)(1), then states that it will determine what documents are relevant and produce those documents only. This type of answer hides the ball. It leaves the plaintiff wondering what documents are being produced and what documents are being withheld. Furthermore, it permits the defendant to be the sole arbiter of that decision. Such an objection is really no objection at all as it does not address why potentially responsive documents are being withheld. The defendant, having no incentive to err on the side of disclosure, has arrogated to

itself the authority to decide the question of relevance which is unquestionably the decision of the judge.

Athridge v. Aetna Casualty and Surety Co., 184 F.R.D. 181, 189 (D.D.C. 1998).

The “we decide” practice is apparent in many carrier responses to shipper discovery in SAC cases.⁵

- “Wrong Question” Practice. Another carrier discovery device is the “you asked the wrong question” practice. Typically, this practice is employed where a shipper requests certain data but the carrier responds that it does not have the data. The carrier then uses data of the type requested in its evidentiary filings. When the shipper subsequently objects to the carrier’s use of the non-produced data, the carrier responds that it had no obligation to produce the data because the shipper “asked the wrong question.” Accordingly, in the next case, shipper counsel will usually endeavor to redraft its questions, and ask new ones, so that it “asks the right question” (as defined by the carrier). Indeed, employment of this practice in responding to variable cost discovery (since the mid-1970's) and stand-alone cost discovery (since 1985) has contributed to the need for shipper counsel to draft what may appear to be in some instances hyper-technical

⁵ In its Comments, UP included its responses to a set of discovery requests made by a shipper in a pending STB maximum rate case. *See* UP Comments, Attachment 3. As the Board can observe from a review of that document, UP employed the “we decide” practice in response to virtually all of the complainant’s individual requests. This is a common practice for other railroads, as well.

discovery requests. Thirty plus years of dealing with the “you asked the wrong question” practice has necessitated these types of questions.

- “Drive the Costs Up” Practice. The carrier practices described above, and others, complicate and prolong discovery. These complications and delays invariably drive up a complainant shipper’s litigation costs. Driving up such costs is itself a litigation practice, and is intended to discourage meritorious cases.

Captive shippers typically bring rate cases only as a last resort. A shipper bringing a case is exposed to the threat (and in some instances the actuality) of a punitive rate increase that must be paid during the litigation.⁶ These rate increases can run into the tens of millions of dollars annually in large cases. Adding to these costs is the cost of litigating the case itself. Carriers intent on discouraging shippers from bringing cases (and who enjoy the benefit of charging very high rates during the litigation) have every incentive to further add to a shipper’s costs by complicating discovery and making the process as expensive and time consuming as possible.

This is not a new concern, nor it is one advanced only by the Shippers. Congress raised and attempted to address these concerns in the ICC Termination Act. *See* 49 U.S.C. §10704(d). The GAO has also issued a report acknowledging these carrier

⁶ *See, e.g., Duke Energy Corporation v. Norfolk Southern Railway Company*, Docket No. 42069, (Complaint filed December 19, 2001) at ¶12; *Post-Evidentiary Brief of Complainant Duke Energy Corporation*, Docket No. 42070 at 36-38 (filed April 17, 2003)(Public Version).

practices and the chilling effect they can have on shippers. See U.S. General Accounting Office, *Railroad Regulation: Current Issues Associated with the Rate Relief Process*, at 28 (GAO/RCED-9-46) (Feb., 1999). Finally, the STB itself recognized these concerns when it barred consideration of product and geographic competitive evidence in STB rate cases. *See Market Dominance Determinations – Product and Geographic Competition*, 3 S.T.B. 937, 946 (1998) and at 8-9 (STB served July 2, 1999).

Fourth, shippers are attempting to listen with an open ear to complaints raised by carriers about the STB discovery process. Shippers certainly have no objections to working with carriers, and their counsel, to ensure a process that is fair to both sides. Indeed, that process already takes place in current cases.

Complainants typically serve most of their variable and SAC discovery requests with, or shortly after, their complaint is filed. Then, in most cases, counsel for complainant and defendant meet (usually more than once) to discuss the requests, determine what can be produced, how requests can be modified so that shippers obtain what they need while minimizing carrier compliance costs, *etc.* Via this process, many discovery disputes are resolved informally by the parties. The Shippers believe that having Board staff participate in the process⁷ will further assist the parties in negotiating and resolving discovery matters, as will the Board's adoption of the proposals Shippers submit in this proceeding.

⁷ See Decision at 6-7.

However, the Shippers cannot accept carrier-sponsored discovery proposals which, if adopted, will prevent complainants in rate cases (either directly or indirectly) from obtaining the information necessary to present their cases to the Board. Shippers also cannot accept carrier-sponsored proposals that will exacerbate current discovery problems in SAC cases.

II. STANDARD DISCOVERY REQUESTS

In its Decision, the Board asked interested parties to submit lists of standard information that should be produced as a “matter of course” in all SAC cases “at the outset of the case.” Decision at 5.

The Shippers responded by presenting two lists: one identifying materials a complainant shipper would produce to the defendant carrier on the same date the complaint is filed (Shippers’ Opening Comments, Exhibit No. 1) and a second identifying materials the defendant carrier would produce to the complainant shipper when the carrier filed its answer (Shippers’ Opening Comments, Exhibit No. 2). The lists the Shippers presented were intended to identify the key qualitative market dominance, variable cost and stand-alone cost materials and to provide for their production early in the discovery process.

As requested by the Board, the Shippers present their comments on the Railroads’ lists.

A. Shipper Production Lists

Both BNSF and UP presented lists of standard discovery materials complainant shippers should produce. For the most part, the lists are similar to the list the Shippers presented in their Opening Comments. The Shippers present a detailed critique of the BNSF and UP lists in Shippers' Reply Exhibit No. 3. The Shippers are amenable to modifying the list we presented in our Opening Comments to:

- Add some additional items included on UP's and BNSF's lists, which were not included in Shippers' initial list; and
- Extend the scope of qualitative market dominance document production to include documents created in earlier time periods.

The Shippers' revised list of standard discovery materials that we propose shipper-complainants produce with their complaints is set forth in Shippers' Reply Exhibit No. 4.

Some of the BNSF and UP proposals for standard shipper production are clearly unacceptable to the Shippers. As is explained in detail in Shippers' Reply Exhibit No. 3, shippers should not, as BNSF and UP appear to suggest, be required to produce privileged cost studies prepared by shipper counsel and consultants in anticipation of litigation. Nor should shippers be required to respond to irrelevant product and geographic competition inquiries. Finally, the Shippers object to BNSF's proposal that complainants

produce the listed information near the end, rather than the beginning, of the discovery period.⁸ BNSF's timing proposal will slow down, not expedite, discovery.

B. Carrier Production Lists

UP and BNSF submitted lists of standard carrier production. The Shippers have carefully reviewed these lists. The Shippers' detailed critique of each list is appended in Reply Exhibit 5. Some general comments follow.

1. UP List

UP submitted a list identifying some qualitative market dominance, variable cost and SAC items for carriers to produce as standard discovery in SAC cases. UP's list identifies some items that carriers typically produce in SAC cases but is severely inadequate for several reasons: (i) it omits key financial drivers in a variable cost/SAC analysis; (ii) it contains no deadline for carrier production of the items on the list; (iii) it allows UP to pick and choose what responsive data it will produce; and (iv) where production is required it appears that it may be incomplete (*e.g.*, a carrier may provide financial data in some instances without accompanying service units needed to make the data usable by complainants).

⁸ BN proposes that complainant shippers produce material on BNSF's proposed shipper production list ten days after mediation is completed. The Board's new rules establish a 60-day mediation period following the filing of a complaint. *See* Decision at 2. BN's proposal could result in its listed production being provided 70 days after the complaint is filed – *i.e.* five days prior to the end of the 75-day discovery period called for under the Board's SAC case rules.

The Shippers submit that UP's proposed list and approach to standard discovery will, if adopted, slow down, rather than streamline, the STB's current discovery procedures.⁹

2. BNSF List

BNSF, generally speaking, appears to oppose the Board's proposal for carriers to produce standard discovery material at an early stage in the case. BNSF proposes that near the end of the standard 75-day discovery period¹⁰ carriers produce the few items set forth on its list. BNSF's proposed list suffers from all the same defects as UP's proposed list – and is in fact worse since it contains significantly fewer items subject to standard discovery.

BNSF proposes that, as an alternative to standard discovery, the Board adopt “scope” limitations on shipper discovery in SAC cases. BNSF's proposal will not streamline current Board SAC discovery procedures, it will further complicate them. The “scope” of evidence needed in SAC cases is well known to the Board and the parties. *See, e.g.,* Shippers' Reply Exhibit Nos. 1 and 2 (identifying scope of variable cost/SAC evidence). BNSF's scope list is unnecessary (and woefully incomplete) and, in the

⁹ As explained in Reply Exhibit No. 5, revised portions of UP's list could be added to Shipper's list. However, UP's list, standing alone, is not acceptable to Shippers.

¹⁰ BN proposes that a defendant carrier produce standard information ten days after the mediation period ends. As discussed above, that could set production of standard data on day 70 of the 75-day discovery period.

Shippers' view, will simply lead to another form of carrier objection – a shipper's request is "outside-the-scope" of carrier-defined SAC discovery

3. CSXT/NS

CSXT/NS present no standard discovery lists. These two carriers appear to oppose any form of standardized discovery. Their shared rationale appears to be that such discovery would (or could) impose new recordkeeping requirements on them.

CSXT/NS do not describe in any detail their recordkeeping concerns so it is not possible for Shippers, or the Board, to evaluate them. The Shippers do note, however, that the Standard Discovery Materials we propose defendants produce in SAC cases consists of basic documents that major carriers should retain in the ordinary course of business in order to properly manage their affairs (and to comply with STB reporting requirements). In any event, carriers should not be permitted to evade producing basic data in SAC cases on grounds that they do not retain the basic data (or that it is hard to retrieve this data). For the regulatory system to work, carriers must keep sufficient records to allow shippers to present SAC cases to the Board.

Congress has directed that rail rates on market dominance traffic be reasonable. 49 U.S.C. §10701(d)(1). Congress has delegated many of the details for implementing this standard to the STB and given the STB substantial authority to direct carriers to maintain records needed for STB ratemaking purposes. *See* 49 U.S.C. §721(b)(3) and §§11161-11164. The STB, in turn, has promulgated maximum rate

standards (including variable cost and SAC standards) that are data dependant – with much of the data, by necessity, consisting of data that carriers must maintain in order for the standards to produce their intended results. The STB simply should not – and cannot – consistent with its Congressional directives – permit carriers to engage in record retention practices that skew the results in SAC cases in the carriers’ favor.

III. **ADDITIONAL DISCOVERY/QUESTION LIMITS**

A. Additional Discovery

The Board’s Decision proposed that standard discovery be supplemented with additional case-specific discovery. The Shippers and the Railroads all acknowledge the need for flexible case-specific discovery. Indeed, under BNSF’s proposals most discovery against carriers would fall into the “additional” category and under CSXT/NS’s proposals all discovery would be case-specific.

While generally supporting additional discovery in whole or part, the Railroads each propose different limitations on this discovery. In their Opening Comments, the Shippers proposed no such limits. However, as discussed below, Shippers are amenable to incorporating discovery question limits consistent with those found in the Federal Rules of Civil Procedure.

B. Question Limits

1. Carrier Proposals

The Railroads all proposed limits on the number of discovery requests, but each proposed different limits:

- BNSF: BNSF proposed a limit of 15 total interrogatories/requests for admissions – if the STB adopted BNSF’s proposed limitations on the scope of SAC discovery.
- UP: UP made two proposals: (i) if the STB adopted UP’s proposed standard discovery request list, UP proposed supplemental requests be limited to 30 requests for shippers and 15 requests for carriers or (ii) if the Board did not adopt UP’s standard discovery request list, UP proposed a limit of 80 requests for shippers and 25 requests for carriers. Requests included in UP’s proposals encompassed interrogatories, document production requests, and requests for admissions.
- CSXT/NS: CSXT/NS proposed a total cap on shipper discovery requests of between 25 and 35 requests.

In our Opening Comments, the Shippers proposed no limits on the number of discovery requests. However, since the Railroads all want limits, Shippers are amenable to capping the number of interrogatories the parties can tender in any SAC case, without leave from the Board, at 25 interrogatories. This approach incorporates the same standard that applies in litigation under the Federal Rules of Civil Procedure. FRCP, Rule 33(a).

For the reasons detailed in our Opening Comments, Shippers are not amenable to placing caps on the number of other forms of discovery requests. No such

caps are contained in the Federal Rules of Civil Procedure, nor do they lend themselves to the fact-intensive and document-intensive discovery needed by shippers in SAC cases. *See* Shipper's Opening Comments at 15-18.

2. Allegations of Question Abuse

The Railroads generally support limits on the number of discovery requests on grounds that complainant shippers tender too many requests in rates cases, the requests contain too many subparts, and the cost of answering many of these requests outweighs the practical utility of the information produced. The Shippers disagree with the Railroads on all counts.

(a) Too Many Questions Asked

As discussed above, shippers need extensive discovery to meet the evidentiary burdens under the Board's maximum rates standards. In most cases, shippers simply ask one or two questions addressing each major topic on the Board's extensive variable and stand-alone topic list. (Reply Exhibits 1 and 2 hereto). By the standards of modern, complex litigation involving large financial stakes, the discovery shippers request in SAC cases is minimal and highly focused.

The examples given by the Railroads in an effort to prove "question abuse" do not support these charges. UP points to a case where a shipper asked multiple questions concerning fuel consumption. *See* UP Comments at 7. What UP does not inform the Board, however, is that these questions were raised principally because UP

produced few documents responsive to the Shippers' initial locomotive fuel consumption requests (and ensuing discussions concerning them)¹¹ (despite the publicly available facts that fuel is a major expense for the carrier that it has employees whose job descriptions clearly include the duty of monitoring and studying locomotive fuel consumption, and that a former UP fuel officer wrote an entire book on the subject). The additional questions were raised in an effort to ask UP the "right question" and obtain the requested data, some of which was subsequently produced.

Similarly, BNSF provides an example of having to respond in the *Otter Tail*¹² case to discovery related to locomotive investment. See BNSF's oral testimony of Feb. 27, 2003. BNSF calls the shipper's inquiry in *Otter Tail* overreaching because the shipper "asked for 24 items on individual locomotives from specific salvage value, accumulated depreciation ... all kinds of things." (Tr. at 153). What BNSF does not tell the Board is that complainants and defendants typically submit movement-specific locomotive investment cost evidence in making variable cost computations; the formula used and endorsed by the Board to make these calculations requires detailed information concerning locomotive investments, including salvage values, accumulated depreciation values and numerous other locomotive-specific data inputs; carriers routinely record such information; the information is available only from the defendant carrier; and without

¹¹ See *Northern States Power Co.*, at 8 (STB served May 24, 2002).

¹² *Otter Tail Power Co. v. The Burlington Northern and Santa Fe Ry.*, Docket No. 42071.

discovery, a shipper could not make the requisite calculations, nor adequately rebut the defendant carrier's calculations.

(b) Subpart Abuse

The Railroads' general criticism of "subparts" is also misguided as a general proposition. The Shippers will not endeavor here to go over all discovery questions complainants typically ask in SAC cases that contain subparts. Instead we will refer to a representative example: crew wages.

UP includes in its Opening Comments the discovery requests tendered by a shipper in a pending SAC case. *See* UP Comments, at Attachment 3. Request No. 23 asks for movement-specific crew wage data for trainmen and engineers. The request contains 23 subparts. To a person not familiar with carrier crew wage data a question with 23 subparts involving crew wages may seem unnecessarily complex. In fact, it is a very reasonable and justified level of detail.

In this request, most of the subparts identify information that is recorded by an employee on his daily time records. Other information is standard information used by the carrier in paying the employee his or her full wages. All information of this type is routinely kept by the carrier and is easily accessible in hard copy or computerized format.

Both carriers and shippers in SAC cases routinely submit detailed movement-specific crew wages that address the subpart components listed in Request No. 23. Without discovery, such as that produced in response to Request No. 23 described

above, a shipper could not submit a valid movement-specific crew wage study, nor could it adequately rebut a defendant carrier's study.

(c) Burden/Benefit Analysis

The Shippers also disagree with the burden/benefit calculus presented by the Railroads. It has been the Shippers' members' general experience in maximum rate cases that a defendant carrier has no difficulty producing large data bases when such production produces data that aides the carrier's case. For example, carriers routinely produce complex crew wage data bases and all information necessary to make movement-specific variable crew cost calculations – calculations that in many cases produce higher than system average costs. Conversely for cost items that in many SAC cases produce lower than system average results (*e.g.* road property investment, maintenance-of-way costs, *etc.*), the defendant carriers routinely delay production of, or simply do not produce, relevant documents.

Also, as discussed above, in the cases the Shippers' members have been involved in, counsel for the complainant has been amenable to negotiating with carrier counsel to reach accords to get the information the shipper needs while, to the extent possible, reducing the defendant carrier's production costs. For example, in a recent case involving UP, counsel for the complainant shipper requested UP to produce a specific data base. UP objected on grounds the data base included data the UP had already produced. In response, shipper counsel asked UP to provide a data sample from the data base for

shipper counsel to review. UP counsel refused. The STB, at the shipper's request, later ordered UP to produce the requested sample. *Northern States Power Co.*, at 3-4 (STB served May 24, 2002).

UP cites Board decisions ordering defendant carriers to produce withheld data in SAC cases as evidence that the Board itself is not applying a proper burden/benefit analysis in resolving SAC discovery disputes. *See UP Comments at 6-7*. Evidently, UP wants the Board to sign off on the "we decide tactic" – *i.e.* defendant carriers, not the Board or the complainant shipper, decides what information is relevant, what is cumulative what is to be produced, *etc.* Obviously, UP's calculus turns fair discovery upside down.

IV. TIME PERIODS

The Board's inquiry concerning discovery time periods embraces three distinct time periods: (i) how far back in time do parties need to go to collect various types of documents; (ii) how far forward in time do parties have to go to collect various types of documents; and (iii) when do parties have to produce documents falling within between the (i) and (ii) time periods.

A. Pre-Complaint Materials

In our Opening Comments the Shippers proposed that a complainant produce, with its complaint, Standard Discovery Materials including all documents that

were currently in effect and, for data and study documents, materials created for a time period beginning two calendar years prior to the date the complaint was filed and ending on the date the complaint was filed. These time periods encompassed all standard shipper production including documents responsive to standard qualitative market dominance inquiries. *See* Shippers Opening Comments at 8-14 and Exhibit No. 1.

Both BNSF and UP propose that longer collection periods apply to shipper production of qualitative market dominance documents. The Shippers are willing to extend the two-year collection period requirement, to encompass the longer time periods as requested by the BNSF and UP for collecting these documents. *See* Shippers' Reply Exhibit No. 3, Item 1.

For carrier production of Standard Discovery Materials, the Shippers continue to support collection of two years worth of data for all cost items except for maintenance and road property, where data covering additional historical periods is needed. As explained in detail in Shippers' Reply Exhibit No. 5, multiple-year data is needed to meet a shipper's discovery needs in those areas.

Finally, for reasons cited in our Opening Comments, the Shippers continue to support having request-specific time limits for additional discovery requests. This flexibility is necessary to meet case-specific issues. *See* Shippers' Opening Comments at 20.

B. Post-Complaint Materials

The Railroads generally do not address the issue of supplementing pre-complaint data with data compiled after the complaint is filed. The Shippers continue to support a requirement that both sides supplement discovery responses (both for Standard Discovery Materials and additional discovery materials) so that additional responsive and available materials are produced and is current as of ninety days prior to the filing of opening evidence. *See* Shippers' Opening Comments at 21.

The Shippers recognize that this supplementation will require each side to produce additional data. However, as a practical matter, virtually all of the data subject to supplementation (*e.g.*, movement-specific train operating data) is data carriers routinely keep, update, and constantly monitor in the ordinary course of business. Providing this data will ensure the Board obtains the most current data readily available. This updating is particularly important in cases where procedural schedules are delayed – a common occurrence in recent STB maximum rate cases.

C. Production Timing

The key to any SAC discovery reform is to impose – and enforce – production deadlines. The Shippers are willing to do their part – our proposals call for immediate production of virtually all discovery typically produced by complainant shippers in SAC cases on Day 1 of the procedural schedule.

The Railroads, however, are not willing to make any meaningful corresponding commitments. Following up on a Board suggestion (Decision at 5) the Shippers proposed that carrier defendants produce their Standard Discovery Materials along with their answer (*i.e.* 20 days after the complaint is filed). Shippers' Opening Comments at 9. The Railroads generally argue that carrier defendants cannot produce material responsive to their proposed standard discovery requests with their answers because (i) the defendant carriers have no advance knowledge of shipper complaints and (ii) the defendant carriers cannot produce responsive data in the 20 day period.

The Board should discount the Railroad's contentions about "surprise" complaints. In all recent SAC cases Shippers are aware of, the cases were preceded by months of negotiations, including, in most instances, negotiations involving discussion of potential STB outcomes. Indeed, earlier in this case, the Railroads themselves acknowledged such discussions routinely took place.¹³ Shippers are unaware of any SAC case in recent years that has come as any surprise to the defendant carrier.

Nevertheless, in light of the Railroads' expressed concerns, Shippers propose to modify and extend their proposed deadline for carrier production of Standard Discovery Materials to 30 days after the complaint is filed. This is sufficient time, even

¹³ See *Initial Comments of the Association of American Railroads*, at 5 (filed Oct. 11, 2002).

with a purported “surprise” factor, for a defendant carrier to produce the Standard Discovery Materials.

It is important to emphasize, again, that Shippers’ proposed Standard Discovery Materials seek production of the key economic drivers in the variable/SAC analysis. Shippers need to obtain this information as early as possible in the SAC case process. Once that data is in hand, shippers can evaluate it and, as necessary, follow-up on missing pieces, additional information, *etc.* in a manner that will allow discovery to close within the 75 day discovery schedule called for under the Board’s SAC rules.

The Shippers also emphasize, again, that having a standard discovery process is meaningless without strict and strictly enforced production deadlines. Otherwise SAC complaints will simply be subject to the normal carrier delay/incomplete production practices described above. Defendant carriers clearly can produce standard discovery data 30 days after the complaint is filed – and should be ordered to do so.

D. Enforcement

In our Opening Comments, the Shippers emphasized the need for the Board to enforce time limits by precluding parties from presenting evidence (i) using material requested but not produced in discovery or (ii) using non-produced data created outside the production time periods. The Railroads’ Opening Comments do not address these important enforcement issues. The Shippers continue to urge the Board to adopt necessary

rules to prohibit the unfair use of material not produced in discovery. *See* Shippers' Opening Comments at 13.

V. COST SHARING

The general rule in American litigation is that each side pays its own litigation costs. *See* Shippers' Opening Comments at 22-25. That rule has traditionally been applied in ICC/STB maximum rate litigations and other proceedings. *See, e.g., Gem City Brick and Builders Supply Co. – Pet. for Declaratory Order*, No. 41057, 1994 ICC LEXIS 291 at *30 (ICC served Jan. 6, 1995); *General Mills, Inc. – Pet. for Declaratory Order*, 8 I.C.C.2d 313, 325 (1992); *Winnebago Farmers Elevator Co. v. Chicago and North Western Transp. Co.*, 354 I.C.C. 859, 883 (1978); *Hightower Box & Tank Co., Inc. v. Alabama G.S.R. Co.*, 294 I.C.C. 503 (1955). In their Opening Comments, the Shippers urged the Board to continue this longstanding practice.

The Railroads, however, each make separate proposals that, if adopted, would shift defendant carriers' litigation costs to complainant shippers. Each of the proposals is addressed below. None should be adopted by the Board.

A. UP Cost-Sharing Proposals

UP proposes that the Board adopt a rule calling for discovery cost shifting in three instances: (i) when the parties agree to it; (ii) to establish a "secure website;" and (iii)

when a party objects to producing information on grounds of burden – but only if the burden can be alleviated by payment. UP’s Comments at 12.

UP’s third proposal is absurd. Like most carriers, UP routinely objects to production of virtually all documents requested by complainant in rate cases as “burdensome.” UP’s proposal would call for the complainant to pay for virtually all, if not all, of the defendant’s discovery costs. UP justifies this proposal on grounds that it has downsized and its employees are needed for “mission critical” assignments. UP obviously fails to recognize that Congress has imposed on UP another “mission critical” duty – charge only reasonable rates on market dominant traffic.

UP’s other two proposals also are problematic. UP appears to be inserting the “agreement” proposal as a basis for refusing discovery unless the complainant agrees to pay for it. Also, Shippers submit that any “website” proposals (and the costs thereof) are best left to a case-by-case discussion between the parties, subject to the directive that discovery will go forward in its normal course absent agreement to the contrary by the parties.

B. BNSF Proposals

BNSF proposes that the parties pay their own discovery costs except when discovery involves production of computerized data. *See* BNSF’s Comments at 10.

BNSF’s “exception” swallows up the general no-cost shifting rule. The data maintained by rail carriers today is largely contained in computerized data bases, and most

discovery responses made by carriers in SAC cases is comprised of computerized data. Shippers are willing to collect this data themselves – if given access to the underlying data bases. Since, as a general rule, carriers refuse this access, the carriers should pay the cost of retrieving the computerized data. *See* Shippers’ Opening Comments at 23-24.

C. CSXT/NS Proposals

CSXT/NS propose that parties “share equally” discovery costs. CSXT/NS Supplemental Comments at 4-5. Such a standard violates basic precedents of American litigation (each side pays its own costs) and has never been accepted as a valid standard either by the STB/ICC or by the federal courts.

D. Maximum Rate Policy

Shippers submit that not only do the Railroads’ cost-sharing proposals violate basic rules of federal law (each side pays its own costs), they are particularly ill-advised in the context of STB maximum rate litigation.

The STB has devised maximum rate SAC standards that require shippers to engage in extensive carrier discovery. Shippers should not be forced to pay discovery costs which are a direct function of the SAC standards promulgated by the Board.

Moreover, as described above, the Congress, the GAO and the Board have all emphasized the importance of reducing shippers’ discovery costs in maximum rate cases. The Railroads are attempting to turn this public policy upside-down by devising

proposals that require shippers to pay carriers' SAC litigation costs. The Board should summarily reject such proposals.

VI. OTHER ISSUES

UP proposes that the Board adopt a standard protective order in SAC cases. That idea has merit. However, Shippers request that before doing so, the Board seek comments from interested parties concerning the form and content of any such standard order.

Shippers note that the protective order UP proposes has certain case-specific provisions that are not contained in protective orders agreed upon by the parties in other cases. Shippers submit the Board would benefit from public comments before adopting a standard form of protective order.

CONCLUSION

WCTL, EEI and NITL urge the Board to adopt discovery rules and practices consistent with the proposals set forth in our Opening and Reply Comments.

Respectfully submitted,

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Dated: June 19, 2003

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SERVICE DATE - LATE RELEASE SEPTEMBER 13, 2001

This decision will be printed in the bound volumes of
the STB printed reports at a later date.

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42051

WISCONSIN POWER AND LIGHT COMPANY

v.

UNION PACIFIC RAILROAD COMPANY

Decided: September 12, 2001

The Board finds that the defendant railroad has market dominance over the
transportation at issue and that the challenged rate is unreasonably high.
Maximum reasonable rates are prescribed and reparations are ordered.

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Table A-2
Traffic and Operating Statistics

ITEM	Black Thunder 1 st Qtr 2000	Antelope 1 st Qtr 2000	Black Thunder 2 nd Qtr 2000	Antelope 2 nd Qtr 2000
1. Lading Weight (tons)	110.8	110.7	111.9	110.8
2. Tare Weight (tons)	22.0	22.0	22.0	22.0
3. Cars Per Train	114.2	115.0	114.8	115.5
4. Loaded Miles	1,270.24	1,244.93	1,270.24	1,244.93
5. Empty Miles	1,263.67	1,238.36	1,263.67	1,238.36
6. Round Trip Miles	2,533.91	2,483.29	2,533.91	2,483.29
7. Origin Loop Miles-Loaded	1.52	1.90	1.52	1.90
8. Origin Loop Miles-Empty	2.56	2.85	2.56	2.85
9. Destination Loop Track Miles*	0.0	0.0	0.0	0.0
10. Round Trip Miles (incl. loop track)	2,537.99	2,488.04	2,537.99	2,488.04
11. Number of Locomotives Units	2.29	2.16	2.29	2.16
12. Cycle Hours	168.7	166.0	163.7	158.8
13. Sw.-Yd. Loco. (SEM per car)	0.2588	0.2570	0.2575	0.2559
14. Sw.-Rd. Loco.-non-yd.(SEM per car)	3.1436	3.1217	3.1272	3.1082
15. Sw.-Rd. Loco.-yd. (SEM per car)	0.1895	0.1882	0.1885	0.1874
16. Gross Ton Miles	196,488.612	192,446.131	197,885.876	192,570.624
17. Train-Miles Per Car	22.2241	21.6351	22.1079	21.5415
18. Locomotive Unit-Miles Per Car	51.3245	47.1522	51.0562	46.9481
19. Total All Freight Car Miles (000)	11,889,257	11,889,257	11,889,257	11,889,257

* On rebuttal, UP agreed that the 0.29 miles of loop track that is owned by WPL should not be included. UP Reb. V.S. Kent/Fisher, at 5-6. However, UP only excluded the 0.29 miles from its variable cost calculation for the Antelope mine in the 1st Quarter of 2000. This table excludes the miles associated with this track from the other mine and other quarter as well.

1. Cycle Time (Item 12)

UP estimated cycle time based on an average of the cycle times for a 1-year period (7/1/99-6/30/00), while WPL relied on actual cycle times for the 1st and 2nd Quarters of 2000. We adopt WPL's cycle time evidence because it uses the actual (rather than estimated) cycle times for the specific quarters for which variable costs are calculated.

Table A-3
Variable Cost Per Ton
Black Thunder Mine to Edgewater Power Plant
(1st Quarter 2000)

ITEM	WPL	UP	STB
1. Carload O/T Clerical Expense	\$ 26.45	\$ 26.51	\$ 26.35
2. Carload Handling - Other Expense	0.96	4.52	0.95
3. Switching Expense - Yard Locomotives	1.09	1.89	1.54
4. Switching Expense - Road Locomotives (Non-Yard)	1.00	3.07	2.76
5. Switching Expense - Road Locomotives (Yard)	0.54	0.58	0.55
6. Gross Ton-Mile Expense	238.21	532.75	428.98
7. Loop Track Expense - Origin Mine	0.26	0.40	0.36
8. Train-Mile Expense - Other Than Crew	17.38	17.39	17.37
9. Train-Mile Expense - T & E Crew	129.45	161.04	161.01
10. Helper Service Expense - Excluding Crew (N/A Here)	---	---	---
11. Helper Service Expense - Crew Expense (N/A Here)	---	---	---
12. Locomotive Unit-Mile Expense	130.40	104.12	89.67
13. Locomotive Ownership Expense	84.47	104.54	90.18
14. Private Car Rental & User Responsibility	4.94	4.95	4.94
15. Car Operating Expense (RR-Owned Only) (N/A Here)	---	---	---
16. Car Ownership Exp. (RR-Owned Only) (N/A Here)	---	---	---
17. Caboose & EOTD Ownership Expense	0.10	0.11	0.09
18. Loss & Damage Expense	0.03	0.39	0.03
19. Make-Whole Adj. for Single Car (N/A Here)	---	---	---
20. Total Variable Cost/Per Carload	635.27	962.27	824.77
21. Variable Cost Per Ton	5.73	8.68	7.44
22. RFA-URCS Linking Factor	0.9934	0.9934	0.9934
23. Linked Variable Cost Per Ton	5.70	8.63	7.39
24. Jurisdictional Threshold (L. 23 x 180%)	10.26	15.53	13.31
25. Rate Per Ton	14.66	14.66	14.66
26. R/VC Percentage (L.25/L.23)	257.19%	169.87%	198.25%

other costs. Listed below is a summary of the GTM expenses included in our restatement of variable costs.

Table A-7
GTM Expense Per Car

	Black Thunder (1st Qtr)	Antelope (1st Qtr)	Black Thunder (2nd Qtr)	Antelope (2nd Qtr)
Maintenance-of-Way Exp.	\$54.56	\$53.43	\$55.24	\$53.76
Return on Road Property Invest.	163.08	159.72	164.24	159.83
Road Property Depreciation	68.50	67.08	69.36	67.49
Locomotive Fuel Expense	73.36	71.86	81.12	78.94
Locomotive Maintenance Exp.	29.35	28.75	29.72	28.92
Other GTM Expense	40.13	39.31	40.64	39.55
TOTAL	\$428.98	\$420.15	\$440.33	\$428.50

a. Maintenance-of-Way Expense—To develop the MOW cost for the route used by this traffic, UP used the “weighted system-average cost” (WSAC) procedure, while WPL relied on the “speed factored gross ton” (SFGT) method used in prior rate cases. We discuss each of these methods below.

i. WSAC—WSAC is a computer program that develops the “wear rate” of road property assets. UP claims that WSAC, which was used in the Amtrak case,⁹⁴ is considerably more detailed than SFGT. UP computed the relationship between the WSAC wear rates for the route used to transport WPL’s traffic and the WSAC wear rates for the entire UP system, and UP adjusted the URCS system-average MOW cost by that ratio.

The WSAC model was used in Amtrak to calculate the incremental (not variable) costs associated with adding passenger traffic to a line;⁹⁵ WSAC has never been accepted for

⁹⁴ National Railroad Passenger Corporation and Consolidated Rail Corporation—Application under Section 402(a) of the Rail Passenger Service Act for an Order Fixing Just Compensation, ICC Finance Docket No. 32467 (STB served Jan. 19, 1996).

⁹⁵ Incremental cost is the additional expense incurred with adding the last unit
(continued...)

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SERVICE DATE - MARCH 12, 2001

This decision will be printed in the bound volumes of
the STB printed reports at a later date.

SURFACE TRANSPORTATION BOARD

DECISION

STB EX PARTE NO. 347 (SUB-NO. 3)

GENERAL PROCEDURES FOR PRESENTING
EVIDENCE IN STAND-ALONE COST RATE CASES

Decided: March 9, 2001

In recent months, several new complaints challenging the reasonableness of rates charged by railroads have been filed.¹ While in the past we have been able to review two stand-alone cost (SAC) presentations² at one time, we now face the prospect of simultaneously reviewing three

¹ Texas Municipal Power Agency v. Burlington Northern and Santa Fe Railway Company, STB Docket No. 42056 (filed Oct. 3, 2000); Public Service Company of Colorado v. Burlington Northern and Santa Fe Railway Company, STB Docket No. 42057 (filed Dec. 20, 2000); Arizona Electric Power Cooperative, Inc. v. Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company, STB Docket No. 42058 (filed Dec. 29, 2000); Northern States Power Company v. Union Pacific Railroad Company, STB Docket No. 42059 (filed Jan. 26, 2001). These are in addition to other pending rail rate cases (in which some or all of the evidence has already been submitted): Wisconsin Power and Light Company v. Union Pacific Railroad Company, STB Docket No. 42051 (filed Dec. 30, 1999); PPL Montana, LLC v. Burlington Northern and Santa Fe Railway Company, STB Docket No. 42054 (filed July 6, 2000). Moreover, we have reopened West Texas Utilities Company v. Burlington Northern Railroad Company, STB Docket No. 41191 (STB served Nov. 7, 2000) to consider a new rate prescription to additional mines.

² The SAC test evaluates the reasonableness of a railroad's rates by comparing the challenged rate to the rate that a hypothetical, fully efficient railroad would need to charge to cover all the costs to serve a traffic group that includes the traffic of the complaining shipper. The SAC test was adopted by our predecessor the Interstate Commerce Commission (ICC) in Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985) (Coal Rate Guidelines). It is used to evaluate rates in cases involving the movement of large quantities of rail dependent traffic. See, e.g., West Texas Util. Co. v. Burlington N.R.R., 1 S.T.B. 638 (1996); McCarty Farms, Inc. v. Burlington Northern, Inc., 2 S.T.B. 460 (1997) (McCarty Farms).

times that number, a daunting task given the statutory deadlines for deciding these cases³ and the limited staff with the technical expertise to review the evidentiary records.⁴ As the parties to these cases should be aware, it requires a significant commitment of resources to review each SAC case,⁵ and, in the past, incompatibilities in the presentations of opposing parties have significantly complicated our review of the evidentiary records. Therefore, in an attempt to process such cases more efficiently, we have developed procedural guidelines for the submission of evidence in SAC cases. This guidance is designed to standardize the format for submitting written presentations, workpapers and electronic spreadsheets, and better focus the evidence so that we can more efficiently and effectively evaluate the records in these cases.

A. Format Matters

1. Textual Materials

In previous SAC cases, the evidentiary presentations, although extensive, have followed no predetermined format. Often several witnesses address the same issues and, because the evidentiary presentations have generally been organized by witness rather than issue, evidence on a particular topic has been dispersed throughout the record, making the evidence on a topic difficult to track, and thereby unnecessarily complicating the case.

The attached appendix contains a general outline of issues that recur in SAC cases. Parties are directed to follow this outline in submitting their evidence. Specifically, we expect the parties to follow the sequence, and to use the descriptive headings and alpha-numeric references, set out in that outline.⁶ For example, all the evidence addressing the amount of traffic that the stand-alone railroad would transport should be contained in a section labeled "III-A-2" and titled "Traffic Group Volumes" in the shipper's opening evidence, the railroad's reply

³ See 49 U.S.C. 10704(c)(1).

⁴ These SAC cases are in addition to other rate-related proceedings involving railroad, pipelines and water carriers that require technical analysis and staff resources.

⁵ In STB Docket No. 42059 (the Northern States Power Company complaint), the shipper and railroad recently entered into a partial settlement that obviates the need for a SAC presentation. The parties have agreed that, should the railroad be found to have market dominance over the transportation, the rate should be limited to 180% of the carrier's variable cost of providing the service. We encourage negotiated settlements of disputes, including ones that limit the issues needed to be addressed. Agreements to narrow the dispute, such as stipulations to use an agreed upon revenue-variable cost percentage as a rate cap, save time and litigation expenses for all concerned.

⁶ We recognize that a case may present unique issues that do not correspond to any of the specific headings in the appendix. Such issues should be addressed at the end of the general section to which they relate under the category "Other."

evidence and the shipper's rebuttal evidence.⁷ Having a more standardized presentation of the evidence, with each issue addressed in a single, uniformly labeled section, will enable us to review the record more expeditiously and with greater assurance that no evidence is overlooked or misinterpreted.⁸

Furthermore, where the evidentiary presentation relies on supporting materials (workpapers or electronic spreadsheets), references to those materials must be included in the textual presentation with sufficient specificity to allow quick access to the referenced materials. Unreferenced supporting materials (or broad, general references to the workpapers) will not be considered.⁹

2. Electronic Copies of Submissions

To facilitate the posting of the voluminous submissions to our network server, all electronic submissions in SAC cases should now be submitted on compact disks.¹⁰ Also our general regulations require that, in addition to the printed version of evidentiary presentations, all textual presentations be submitted electronically in Corel WordPerfect format.¹¹ 49 CFR 1104.3. Absent a waiver for good cause, all electronic versions of textual materials should be filed in WordPerfect format so that they can be quickly and accurately disseminated electronically to the staff.¹² Until we have received all electronic versions of textual presentations in WordPerfect format, or a waiver has been granted, the record will not be considered to be closed for purposes of 49 U.S.C. 10704(c).

⁷ A statement of a witness' qualifications, the specific pages of evidence the witness is sponsoring and a verification statement for each witness should be included at the end of the evidentiary presentation. See outline part IV.

⁸ The concern that this requirement is meant to address is more than a mere theoretical concern. See McCarty Farms, Inc. v. Burlington Northern, Inc., STB No. 37809 (STB served May 11, 1998) (taking into account evidence that had been overlooked in an earlier decision).

⁹ See Vermont Yankee Nuclear Power Co. v. Natural Resources Defense Council, 435 U.S. 519, 553-54 (1978) (an agency not faulted for failure to address "cryptic and obscure reference[s]" in the evidence).

¹⁰ In the past we have accepted electronic submissions on a variety of media (diskette, tape or compact disk). See 49 CFR 1104.3.

¹¹ We currently uses WordPerfect version 9. All electronic filings must be compatible with this version of WordPerfect.

¹² In prior SAC cases textual materials have sometimes been submitted in Microsoft Word, causing difficulty and delay.

B. Workpapers

1. Paper Copies

In addition to the standardized labeling for the evidentiary presentations set forth in the appendix, all workpapers supporting a party's presentation should be filed in separately bound, sequentially paginated "workpaper" volumes containing the same descriptive headings and alpha-numeric labeling as used for the evidentiary presentations.¹³ Each workpaper volume should contain a table of contents. If particular workpapers are submitted as support for more than one section of the evidentiary presentation, those workpapers should be labeled to correspond to the first evidentiary presentation for which they are offered as support. When used as support for subsequent parts of the evidence, a page containing an appropriate cross-reference should be inserted in the workpaper volume under the descriptive and alpha/numeric label corresponding to the subsequent evidentiary presentations for which the workpapers are offered as support, clearly directing our attention to the precise location of the relevant workpaper.¹⁴ If workpapers are not clearly referenced in the evidence and identified in the workpaper volumes, we will assume that the proponent of a specific position is not relying on materials beyond those contained in the evidentiary presentation.

2. Electronic Spreadsheets

Our general regulations require the submission of electronic spreadsheets in Lotus format. 49 CFR 1104.3. We have Excel spreadsheet software and now will accept electronic spreadsheets in either Lotus or Excel format.¹⁵ The parties are reminded, however, that in order to fully evaluate the evidence, we must be able to access and manipulate all spreadsheets. If a spreadsheet does not function (e.g., will not recalculate), the party filing the defective spreadsheet runs the risk that its evidentiary presentation will be treated as incomplete and ultimately unpersuasive.

In some past cases, we have encountered problems with the "links" in spreadsheets functioning properly when the spreadsheets are installed on our desktop computers or network server. To avoid such problems, naming and linking conventions should be used by the parties

¹³ For example, workpapers related to the revenues that the stand-alone railroad would earn should be included in a section of the workpapers labeled "III-A-3—Traffic Group Revenues."

¹⁴ For example, if workpapers are first submitted in support of the volume of traffic the stand-alone railroad would handle, those workpapers should appear in workpaper section III-A-2. If these same workpapers are offered as support for the revenues the stand-alone railroad would earn from the traffic, a page should appear in workpaper section III-A-3 referring us to specific pages in workpaper section III-A-2.

¹⁵ We currently use Lotus 1-2-3 Release 9 and Microsoft Excel 97. All electronic spreadsheets must be compatible with these versions of the software.

that will permit the spreadsheets to operate on our computers.¹⁶ We emphasize the importance of spreadsheet links being functional and documented.

Finally, the source of all values in a spreadsheet must be readily apparent.¹⁷ If a source is not identified parties run the risk that we will assume that the value is unsupported.

3. Electronic Databases

If electronic databases are submitted in SAC cases, they should be compatible with the Microsoft Open Database Connectivity (ODBC) standard.¹⁸ We currently use Microsoft Access 97 and databases submitted should be either in this format or another ODBC compatible format.¹⁹ Otherwise, parties should explain why it is not possible to submit the database in this format and seek a determination as to whether it is feasible for us to accept the database in another format.

C. Order of Presentations and Limitations on Rebuttal Evidence

We remind parties that, in presenting evidence, the party with the burden of proof on a particular issue must present its entire case-in-chief in its opening evidence. Rebuttal presentations are limited to responding to the reply presentation of the opposing party. Rebuttal may not be used as an opportunity to introduce new evidence that could and should have been submitted on opening to support the opening submissions. New evidence improperly presented on rebuttal will not be considered.²⁰

¹⁶ We will not specify a particular naming and linking convention. It is incumbent upon the parties to use generic naming and linking conventions that will permit the spreadsheets to operate on desktop computers or from a network server. Questions concerning naming and linking matters and/or compatibility with our computers can be addressed to William Washburn, Office of Economics, Environmental Analysis, and Administration, at (202) 565-1550.

¹⁷ For example, if road property investment dollars or operating expenses are transferred as values from the spreadsheets where they are initially developed to the discounted cash flow spreadsheet, the discounted cash flow spreadsheet must contain a reference identifying the source (electronic address, including table and cell) from which the value is drawn.

¹⁸ ODBC is a Windows technology that allows a database software package, such as Microsoft Access, to import data from a database created using a different software package.

¹⁹ All databases must be supported with adequate documentation on data attributes, SQL queries, programmed reports, etc.

²⁰ See, e.g., FMC Wyo. Corp. v. Union Pac. R.R., STB No. 42022, slip op. at 103, 172 (STB served May 12, 2000) (FMC).

With respect to SAC evidence, we remind parties that a railroad's SAC evidence should be limited to addressing deficiencies in the complaining shipper's evidence. It is not sufficient for a railroad to show that another way of providing the stand-alone service would be superior, because the purpose of a SAC analysis is to identify the *least* cost at which the current level of service for each member of the traffic group could be provided.²¹

D. Itemization of Cost Differences

We remind all parties that when they dispute cost figures, by countering with figures that differ from the other side's, based on more than one variable they should itemize the portion of the difference attributable to each variable. For example, the cost of land for a stand-alone railroad is affected by both the number of acres that would be needed (which in turn may be based on the width of the right-of-way) and the cost per acre of land. Thus, if a party disagrees with the total land cost estimate of the other party and offers another figure, it should separately quantify and explain that portion of the difference attributable to the per acre value and the portion attributable to the total acreage.

E. Reargument of Settled Issues

Finally, the parties to SAC cases are cautioned not to attempt to relitigate issues that have been resolved in prior cases. Unless new evidence or different arguments are presented, we will adhere to precedent established in prior cases.²²

Because the guidance contained in this decision is merely procedural, we are issuing this decision without seeking public comment. 5 U.S.C. 553(b)(3)(A).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

²¹ See Coal Rate Guidelines, 1 I.C.C.2d at 542; CF Indus., Inc. v. Koch Pipeline Co., STB Docket No. 41685, slip op. at 20-21 n.57 (STB served May 9, 2000) (precluding carrier from introducing SAC evidence to defeat shipper presentation based on another valid rate reasonableness test).

²² See, e.g., Arizona Pub. Serv. Co. v. Atchison T.&S.F. Ry., 2 S.T.B. 367, 385-387 (1997) (rejecting barrier-to-entry arguments resolved in prior case); McCarty Farms, 2 S.T.B. at 484 (reaffirming "unconstrained resource assumption" accepted in prior cases); FMC, slip op. at 74-77 (rejecting the weighted system average cost (WSAC) procedure for developing maintenance-of-way (MOW) expense in favor of the speed factor gross ton (SFGT) approach because WSAC has not been shown to be an appropriate tool for developing MOW costs for freight traffic).

It is ordered:

1. Evidentiary presentations in SAC cases should follow the general procedures outlined in this decision.
2. Notice of this decision will be published in the Federal Register.
3. This decision is effective April 11, 2001.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary

APPENDIX

OUTLINE GOVERNING THE PRESENTATION OF SAC EVIDENCE

I. COUNSEL'S ARGUMENT AND SUMMARY OF EVIDENCE

II. MARKET DOMINANCE

A. QUANTITATIVE EVIDENCE

1. Variable Costs
2. Rate and Resulting R/VC Calculation
3. Other

B. QUALITATIVE EVIDENCE

1. Intramodal Competition
2. Intermodal Competition
3. Other

III. STAND-ALONE COST

A. TRAFFIC GROUP

1. Stand-Alone Railroad Traffic
2. Volumes (historical and projected)
3. Revenues (historical and projected)
 - a. Single-Line
 - b. Divisions— Existing Interchanges
 - c. Divisions—Cross-Over Traffic²³
 - d. Other
4. Other

B. STAND-ALONE RAILROAD SYSTEM

1. Route and Mileage
2. Track Miles and Weight of Track
 - a. Main Line
 - b. Branch Line
 - c. Sidings
 - d. Other

²³ See, e.g., FMC Wyo. Corp. v. Union Pac. R.R., STB No. 42022 , slip op. at 26-30 (STB served May 12, 2000) discussing revenues attributable to cross-over traffic.

3. Yards
 - a. Location and Purpose
 - b. Miles and Weight of Track
 - c. Other
4. Other

C. OPERATING PLAN

1. General Parameters (e.g., number of trains, train characteristics, traffic flow)
2. Cycle Time
3. Other

D. OPERATING EXPENSES

1. Locomotive
 - a. Leasing (if applicable)
 - b. Maintenance
 - c. Servicing
 - d. Fuel, Sand & Lubrication
 - e. Other
2. Rail Cars
 - a. Leasing (if applicable)
 - b. Maintenance
 - c. Private Car Allowance
 - d. Other
3. Personnel (by department)
 - a. Operating
 - i. Staffing Requirements
 - ii. Compensation
 - iii. Materials, Supplies & Equipment
 - iv. Other
 - b. Non-Operating
 - i. Staffing Requirements
 - ii. Compensation
 - iii. Materials, Supplies & Equipment
 - iv. Other
 - c. General & Administrative
 - i. Staffing Requirements
 - ii. Compensation
 - iii. Materials, Supplies & Equipment
 - iv. Other
 - d. Other
4. Maintenance-of-Way
 - a. Operating
 - b. Program (only if asset replacement not provided in road investment)
 - c. Other
5. Leased Facilities (if applicable)

- 6. Loss & Damage
- 7. Insurance
- 8. Ad Valorem Tax
- 9. Other

E. NON-ROAD PROPERTY INVESTMENT

- 1. Locomotives (if applicable)
- 2. Rail Cars (if applicable)
- 3. Other

F. ROAD PROPERTY INVESTMENT

- 1. Land
 - a. Right-of-Way Acreage
 - b. Yard Acreage
 - c. Other Acreage
 - d. Property Values
 - e. Other
- 2. Roadbed Preparation
 - a. Clearing & Grubbing
 - b. Earthworks
 - c. Lateral Drainage
 - d. Culverts
 - e. Other
- 3. Track Construction
 - a. Geotextile Fabric
 - b. Ballast
 - c. Ties
 - d. Track
 - e. Switches
 - f. Other
- 4. Tunnels
- 5. Bridges
- 6. Signals and Communications
 - a. Centralized Traffic Control
 - b. Detectors (e.g., defective equip., automatic equip. identification, slide)
 - c. Communications System
 - d. Other
- 7. Buildings and Facilities
- 8. Public Improvements
 - a. Fences
 - b. Signs & Road Crossing Devices
 - c. Grade Separated & At-Grade Crossings
 - d. Other
- 9. Mobilization
- 10. Engineering

11. Contingencies

12. Other

G. DISCOUNTED CASH FLOW ANALYSIS

1. Cost of Capital

2. Inflation Indices

3. Tax Liability

4. Other

H. RESULTS OF SAC ANALYSIS

IV. WITNESS QUALIFICATIONS AND VERIFICATION

**CRITIQUE OF UP AND BNSF PROPOSALS FOR
STANDARD DISCOVERY FROM SHIPPERS
IN SAC RATE CASES**

UP and BNSF have each proposed that the complainant in a SAC rate case be required to produce certain “standard” information, either simultaneous with the filing of the complaint (UP) or 10 days after the completion of mediation (BNSF).¹ See UP Initial Comments, Attachment 1; BNSF Comments, Exhibit B. There is considerable overlap between the two proposals, and there is also overlap between the railroads’ proposals and the “standard” discovery from shippers proposed by the Shippers in Exhibit No. 1 to their Opening Comments. The Shippers discuss below the categories of information proposed by these parties for “standard” document production by complainants in SAC rate cases. This discussion assumes that production is required of non-privileged documents only. A revised list of standard discovery items that complainants in SAC rate cases should be required to produce, which combines the lists submitted by all three parties, is set forth in the Shippers’ Reply Exhibit No. 4.

1. Documents related to qualitative market dominance

The comments by BNSF, UP and the Shippers all would require the production of materials related to possible competitive alternatives for the complaint traffic (i.e., materials related to the issue of qualitative market dominance, including matters such as discussions with potential alternative service providers concerning rates, construction of a build-out or build-in, etc.). See UP Attachment 1 Items 6-8; BNSF Exhibit B Items 1-6; Exhibit No. 1 to Shippers’ Opening Comments Items 1 and 2.

¹Since the mediation period adopted by the Board is 60 days, BNSF’s proposal would require document production within 70 days after the complaint is filed. This is only five days before the end of the discovery period provided in the Board’s standard schedule for rate cases. Such a lengthy period – particularly if also applied to the production of variable cost and SAC information by the defendant – would exacerbate the problem of last minute “data dumps” that contribute to rate case delay rather than helping to solve it.

2. Documents related to the rate and movement parameters of the complaint traffic

UP's proposal would require the complainant to produce certain documents relating to the movement of the issue traffic which are relevant to the calculation of variable costs (UP Attachment 1 Items 1-5). To the extent a complainant keeps records of these items (for example, not all shippers keep records of train cycle times even when the traffic moves in equipment they supply), the Shippers concur with this aspect of UP's proposal. It has been incorporated into the Shippers' Reply Exhibit No. 4.

3. Documents showing projected volumes of the complaint traffic

Both the Shippers' and UP's proposals would require the "standard" production of materials showing the complainant's projected volumes of the complaint traffic. UP Attachment 1 Item 9; Shippers' Opening Exhibit No. 1 Item 3. In addition, the Shippers' proposal would require the production of forecasts of future volumes of the commodity that comprises the complaint traffic that are expected to be transported to the shipper's other facilities using the potential route of its proposed stand-alone railroad (Shippers' Exhibit No. 1, Item 4). BNSF's proposal did not include any reference to forecasts of the complaint traffic.

The Shippers continue to believe it appropriate that complainants produce projected traffic volumes. Projected volumes of both the complaint traffic and other traffic moving to the shippers' facilities (e.g., for a utility, coal traffic moving to other power plants) via the proposed SARR route is relevant to determining the SARR's future traffic and revenues during the 20-year DCF period normally employed in SAC rate cases.

4. Variable cost calculations

UP and BNSF have both proposed that the complainant be required to prepare and produce a calculation of the defendant's variable cost of transporting the complaint traffic, either with or shortly after the filing of the complaint. UP Attachment 1 Item 10; BNSF Exhibit B Item 8. The Shippers proposed only that any existing, non-privileged cost studies (i.e., studies prepared for purposes other than litigation) be produced. Shippers' Opening Exhibit No. 1 Item 5.

Specifically, BNSF's Item 8 would require the shipper to provide a "[c]alculation of Defendants's revenue to variable cost ratio for the issue traffic movement using publicly available uniform rail costing system data." UP's Item 10 would require the shipper to provide "[a]ll work papers underlying the calculation of

whether rate exceeds the jurisdictional threshold.” The Shippers’ Item 5 would require the shipper to provide “all estimates and/or forecasts of the cost of transporting the traffic subject to the Complaint between the origin(s) and destination(s), for each time period available.”

BNSF’s and UP’s proposals, in essence, require the complainant to prepare a study of the defendant’s variable costs using URCS-based system average costs. This is inappropriate and unnecessarily burdensome; the complainant should not be required to undertake the burden of preparing a cost study prior to the filing of its opening evidence.² See Docket No. 42038, *Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Ry. Co.*, Decision served May 11, 1999 at 3-4. The Shippers submit that their approach is the preferable one. If a complainant has conducted any non-privileged study of the cost of transporting the complaint traffic, it is appropriate to require it to be produced. Cost studies prepared at the request of counsel in anticipation of possible litigation (including such studies prepared by consultants) are privileged and attorney work-product, and must therefore be excluded from the required “standard” production.

5. Commodity Supply Agreements

Defendants in SAC rate cases routinely seek in discovery copies of contracts between the complainant and its suppliers (*i.e.*, coal producers if the complaint traffic is coal). These contracts are also relevant to the SARR’s future traffic volume. Like rail transportation contracts for movements over the SARR’s route, such supply agreements are routinely produced. The Shippers included these documents in their standard production list (Shippers’ Opening Exhibit No. 1 Item 6) but neither UP nor BNSF did so. The Shippers are willing to continue to include them unless the carriers have decided they do not need them. As the Shippers note at p. 14 of their Opening Comments, these agreements usually contain confidentiality provisions. Accordingly, the Board should issue a general order directing the parties in SAC cases to produce all relevant contracts (including both commodity supply agreements and rail transportation agreements) subject to maintaining their confidentiality in accordance with the protective order governing the involved case.³

² In addition, BNSF’s proposal would improperly prohibit the introduction of routine movement-specific cost adjustments.

³ The Shippers note that in the past a separate order directing disclosure of confidential contracts has been required in each individual case.

6. Product and Geographic Competition Information

BNSF's proposed Items 6 and 7 seek the production of broad categories of documents related to the movement of coal "to any coal-fired electricity generating plant." This improperly delves into product and geographic competition matters, which the Board decreed to be off-limits several years ago in Ex Parte No. 627. The Shippers have no objection to the production by a utility complainant of forecasts of future coal traffic volumes for the complaint traffic and the utility's other coal traffic that uses the proposed SARR route, as this information is directly relevant to future SARR traffic volumes. A complainant should not be required to produce voluminous information concerning matters that only peripherally relate to future coal volumes for "any coal-fired electricity generating plant."

* * *

The Shippers' revised list of standard discovery items, which incorporates several of UP's and BNSF's proposals, is set forth in Reply Exhibit No. 4 which follows. The revised list also sets forth the time period covered by each item.

UP proposes that variable cost discovery should reach back for four calendar quarters prior to the filing of the complaint. As indicated in their Joint Opening Comments, the Shippers believe that variable cost discovery should reach back for two calendar years prior to the filing of the complaint. The longer period is necessary to uncover anomalies in the most current year's operations, e.g., cycle times that are significantly longer than those during the prior year. The Shippers concur with UP's proposal that qualitative market dominance discovery should reach back to one year prior to the effective date of the most recent expired contract covering the complaint traffic (or for a period of five years prior to the filing of the complaint if there was no prior contract covering the movement).

**REVISED STANDARD DISCOVERY INFORMATION TO
BE PROVIDED BY COMPLAINANTS IN SAC CASES**

This exhibit revises Exhibit No. 1 to the Shippers' Joint Opening Comments submitted on June 9, 2003 in Ex Parte No. 638 to incorporate certain proposals made by UP and BNSF in their June 9 comments. Only non-privileged/non-work product documents are to be produced.

1. **Freight Bills** – The Complainant must produce freight bills or other documents showing the number of tons and carloads of complaint traffic moved. If reparations for periods prior to the filing of the complaint are sought, the documents must be sufficient to show the freight charges actually paid by the complainant. **[Similar to UP Item 1. To be provided for the two calendar years and any current-year quarters prior to the filing of the complaint.]**
2. **Cycle Times** – The complainant must produce documents, if available, showing cycle times for trains containing the complaint traffic if the complainant provides cars for the movement. **[Similar to UP Item 2. To be provided for the two calendar years and any current-year quarters prior to the filing of the complaint.]**
3. **Allowances** – The complainant must produce documents showing the amounts the complainant received in allowances (e.g., mileage, switching) from defendant(s) for the complaint traffic. **[Similar to UP Item 3. To be provided for the two calendar years and any current-year quarters prior to the filing of the complaint.]**
4. **Track layout** – The complainant must produce a description of the track layout at origin (if complainant is the shipper) or destination (if complainant is the receiver) **[Similar to UP Item 4. Description of present layout to be provided together with any changes going back for two calendar years preceding the filing of the complaint.]**
5. **Rate History** – The complainant must produce documents showing the rate history for the complaint traffic, including terms and conditions (e.g. weight limits, volume commitments, equipment). **[Similar to UP Item 5. To be provided for the two calendar year years and any current-year quarters prior to the filing of the complaint.]**

6. **Contract/Rate requests** -- The complainant must produce all correspondence relating to, and all studies, analyses or memoranda regarding, the rates charged for the complaint traffic, including negotiations for the most recent contract (if any) that expired prior to the filing of the complaint, any amendments or modifications thereto, and negotiation of or request for rates to replace the expired contract. **[Similar to UP Items 6 and 7. Time period varies with term of expired contract and goes back five years if there was no prior contract.]**
7. **Transportation Alternatives** --The complainant must provide copies of all correspondence relating to, and all studies, analyses or reports regarding, transportation alternatives for the complaint traffic, including the feasibility of transporting the traffic subject to the complaint between the origin(s) and destinations via a mode or carrier other than the Defendant and the feasibility of a build-in or build-out to the shipper's facilities. **[Combines Shipper Items 1 and 2, UP Item 8, and BNSF Items 5 and 7. Time period is same as for Item 6.]**
8. **Traffic Forecasts** -- The Complainant must provide all forecasts, prepared in the ordinary course of business, of future volumes of the traffic subject to the Complaint that are expected to be transported to the destination, together with an identification of the origin(s) expected to be used and any underlying assumptions. **[Combines Shipper Item 3 and UP Item 9. To be provided for the two calendar years and any current-year quarters prior to the filing of the complaint.]**
9. **Commodity Forecasts** -- The Complainant must provide all forecasts, prepared in the ordinary course of business, of future volumes of the commodity comprising the traffic subject to the Complaint that are expected to be transported to its other facilities using the route of the Complainant's proposed stand-alone railroad in whole or in part, together with an identification of the origin(s) expected to be used and the destination(s) to which the commodity is expected to be transported. **[Similar to Shipper Item 4. To be provided for the two calendar years and any current-year quarters prior to the filing of the complaint.]**
10. **Cost Projections** -- The Complainant must provide all estimates and/or forecasts of the cost of transporting the traffic subject to the Complaint between the origin(s) and destination(s), for each time period available. **[Shipper Item 5; replaces UP Item 10 and BNSF Item 8. To be provided for a period of one year prior to the filing of the complaint.]**

11. **Commodity Supply Agreements** -- The Complainant must provide copies of all contracts (including amendments and supplements), quotations or other documents that memorialize the terms on which the traffic subject to the Complaint that is transported between the origin(s) and destination(s) is purchased by or for the Complainant. **[Shipper Item 6. Only the current contracts (including amendments) need to be provided.]**

**PROPOSALS FOR STANDARD DISCOVERY
FROM RAILROADS IN SAC RATE CASES**

The Shippers and UP have each proposed that the railroad defendants in SAC rate cases be required to produce certain “standard” variable cost and SAC information to the complainant at an early stage of the discovery process. BNSF proposes the production of a limited amount of standard information on variable costs issues, but opposes mandatory initial disclosures from a defendant on most SAC issues¹ and expresses the view that “most discovery on SAC issues needs to be carried out on the basis of specific requests for information submitted by complaints” that seek “narrowly tailored” information on SAC issues. BNSF Comments at 3, 6. However, BNSF has submitted a list of 19 “areas in which the complainant would be entitled to discovery” through particularized discovery requests. *Id.* at 6 and Exhibit C. The “areas” of discovery listed by BNSF overlap to a large degree the “standard” discovery items that UP proposes be routinely produced by defendants in SAC cases. The Shippers note that there is a divergence between the railroads on the matter of standard SAC discovery. Because UP is the only railroad that has presented a detailed proposal on this issue, and because the Shippers strongly agree with the Board that timely production of a reasonable set of standard SAC information would go far to achieve the goal of expediting rate cases, the Shippers here compare and address the differences between their proposals and those of UP.

1. Comparison of Shipper and UP proposals

The Shippers’ proposal for the production of standard variable cost and SAC information is set forth in Exhibit No. 2 to their Opening Comments. The proposal lists six categories of variable-cost information and eight categories of SAC information that is needed for a complainant to prepare and present its opening evidence on the merits of its complaint. There is some overlap between the Shippers’ proposals and UP’s, but not much. UP’s proposal, set forth as Attachment 2 to its Initial Comments, lists many specific variable and stand-alone cost items that are needed by a shipper to prosecute a rate case, but fails to cover some of the most important categories of information needed at an early stage of the proceeding.

¹ CSXT/NS also oppose the production of standard SAC information.

Variable cost information. UP's variable-cost proposal omits information categories 1, 2 and 6 of the Shippers' proposal. All of these categories of information are needed to make movement-specific cost adjustments of the kind routinely made in rail rate cases until recently. The Shippers recognize that a railroad may not maintain all of the requested information in the ordinary course of business, so each category obviously is subject to an "if available" caveat. To the extent a defendant does maintain the requested information it is extremely important that the information provided include the necessary "ties" between movement-specific information and the dollars and statistics in the railroad's Annual Report Form R-1.

Stand-alone costs. The eight categories of data described in Part B of Exhibit No. 2 to the Shippers' Opening Comments constitute the information that drives the results of a complainant's SAC analysis. Without it, a shipper cannot develop a precise traffic group (with revenues) for its SARR, nor can it identify the trains and cars the SARR will transport and tie the SARR's revenues to specific movements. Without this information the complainant cannot design and configure a SARR that has enough (but not too much) capacity to handle its projected traffic, which in turn are important elements in determining road property investment cost and annual SARR operating expenses.

It should be kept in mind that the information requested in the Shippers' standard SAC discovery requests is not to be provided in a vacuum. Under the Shippers' proposal the complaint is to be accompanied by a scope notice, which must describe the geographic area and lines of the incumbent that the complainant expects its SARR to cover. The scope notice, which will refer to specific states and/or rail lines within a part of a state, provides the defendant with notice of the traffic and revenue data, train/car movement data, transportation contracts, commodity or regional forecasts, joint facility data, and land valuation data that needs to be covered by its "standard" discovery responses.²

All of the other specific SAC information listed by UP in Attachment 2 to its Initial Comments is needed by the complainant to complete its SAC analysis. The Shippers certainly welcome UP's proposal to make this information part of a defendant's "standard" data production, but the Board should understand that it is secondary to the data listed in Exhibit No. 2 to the Shippers' Opening Comments. For this reason, the

² As indicated in the Shippers' Opening Comments, the scope of the SARR may need to be adjusted based on the traffic, revenue and train movement data received as part of the defendants' standard discovery production.

Shippers have not attempted to prepare an expanded or “combined” list of standard SAC data to be produced by defendants.³

Timing of production. All of the “standard” information listed by both the Shippers and UP to be provided by the defendant in a SAC case is needed at an early stage of the proceeding. UP’s proposal, however, is extremely vague in terms of the timing of the standard data production by the defendant. UP objects to a defendant’s having to produce most information at the time it files and serves its answer to the complaint, as the Shippers proposed in their Opening Comments, but it does not specify a proposed alternative due date.⁴ The Shippers are willing to compromise on the due date for the production of standard data by deferring it to 10 days after the filing of the defendant’s answer (or 30 days after the filing of the complaint). This should give a defendant railroad time to assemble the needed data while at the same time ensuring that the complainant gets it in time to complete its SAC analysis on schedule. In recent SAC rate cases the defendants have “dumped” most of the SAC data requested in discovery at or close to the discovery cut-off date. The result has been to extend, rather than expedite, the processing of SAC rate cases. It is very important that the Board enforce whatever production due date it decides to adopt.

2. Critique of Specific UP standard production proposals

As previously indicated, all of the information listed in Attachment 2 to UP’s Initial Comments is needed by the complainant to prepare its case, and the Shippers believe UP’s proposal to include this information with a defendant’s standard discovery production is constructive (provided the Board also accepts the Shippers’ standard discovery list set forth in Exhibit No. 2 to their Opening Comments). However, the Shippers do have some specific comments with respect to many of the UP Attachment 2 items.

First, as a general matter, UP has included a column entitled “AEPCO Request” which indicates which interrogatory or document production request (“RFP”) in

³ The Shippers do provide below a critique of many of the specific items listed by UP, particularly in terms of the proposed scope of production and time periods covered.

⁴ BNSF, on the other hand, proposed that any “standard” data be produced 10 days after the close of the 60-day mediation period, which leaves only five days until the end of the standard 75-day discovery period. This allows no opportunity to review and analyse the materials produced and engage in appropriate follow-up discovery.

AEPCO's amended discovery requests in Docket No. 42058⁵ covers the subject matter of each item (excluding the qualitative market dominance materials listed on the first page of Attachment 2). The Shippers are not exactly certain what purpose is served by this, except perhaps to show generally that all of the variable cost and SAC items listed are covered by a complainant's discovery requests. Certainly, if the Board adopts the Shippers' and UP's standard lists of discovery information to be provided by defendants, and with the qualifications noted below, there would be no need for detailed initial discovery requests such as those served in the AEPCO case (nor would any supplemental or follow-up discovery requests need to be so extensive or detailed).

Items 1-4 (market dominance): The Shippers have no comments on these items and agree that the specified time limits are appropriate. In the latter regard the Shippers assume that the reference "Five years prior to complaint" for Item 3 relates only to the second sentence of the description of the materials to be provided.

Item 6 (operating timetables): UP proposes to provide operating timetables only for the "complaint route and reasonably adjacent lines." As suggested in connection with Item 7 below, at a minimum the geographic coverage should be redefined as "for complaint route and any other lines or areas included in complainant's scope notice."⁶ In addition, in prior rate cases complainants have requested, and defendants have routinely and without objection provided, operating timetables for their entire system. Having system-wide timetables facilitates a complainant's ability to finalize the scope of its SARR after receipt of other essential discovery materials. Since providing systemwide timetables has not been a problem in the past, the Shippers propose that this practice be incorporated into the standard production list.

Item 7 (crew districts and associated train statistics): For this and several other SAC items,⁷ UP proposes that the geographic coverage of the discovery materials to be provided be limited to the "complaint route" or "the complaint route and reasonably

⁵ "AEPCO" refers to Arizona Electric Power Cooperative, Inc., the complainant in Docket No. 42058 which is a SAC rate case presently pending before the Board. A copy of AEPCO's amended discovery requests with UP's responses thereto is set forth in Attachment 3 to UP's Initial Comments.

⁶ The "scope notice is the complainant's notice of the initial geographic scope proposed for its SARR, which the Shippers propose be provided simultaneously with the filing of the complaint.

⁷ Items 15, 26, 30, 33-36, 38, 40-42, 45 and 46.

adjacent lines.” The latter phrase is unnecessarily vague, and appears designed to allow the defendant to decide unilaterally what is a “reasonably adjacent line.” The Shippers propose that the geographic coverage for these items be redefined as “for complaint route and any other lines or areas included in complainant’s scope notice.”

Item 9 (cycle time data for complaint traffic): The Shippers believe this data should be provided quarterly for a period going back two calendar years prior to the filing of the complaint so that any cycle-time anomalies can be identified and addressed. The Shippers also note that this item is similar to Item 46, which covers the same data for SAC purposes and extends back for two years prior to the complaint. The Shippers suggest that these two items be combined, with two years of data to be provided, and the geographic coverage be changed to “for complaint route and any other areas or lines included in complainant’s scope notice.”

Item 10 (delay reports for complaint traffic): The term “delay reports,” as used by UP, refers to information related to crew wage data for train or locomotive movements, including work performed en route or at the initial or final terminal, entered by the conductor on what historically have been referred to as “conductor’s wheel reports” or “movement reports.” The Shippers suggest that this item be incorporated into Item 28, and that the description be expanded to “crew wages for trains with complaint traffic, including information of crew activities of the kind customarily entered on conductor’s wheel reports, movement reports, or delay reports.”

Item 12 (switching studies for complaint traffic): The comment accompanying this item states: “Only the description of switching activities would be produced. Any internal costs would be redacted.” This is unduly restrictive; the service units associated with each switching activity (i.e., switching minutes) need to be included for the information to be useful. In other words, the inputs used to develop costs, whether “internal” or otherwise, should be provided (but not the actual results of any cost studies relying on internal movement costs).

Item 15 (joint facilities): The description of this item indicates that it is limited to joint facilities used by the complaint traffic⁸ and applicable agreements and bills. Information concerning payments made or received by the incumbent under the joint facility agreements, and the service units involved should also be provided. For example, if a particular joint facility agreement calls for payment by the tenant of a fee of 3.2 mills per gross ton-mile, the number of gross ton-miles need to be provided so the

⁸ The geographic scope for this item should be changed as indicated for Item 7 above.

payment data can be tied back to the monies and service units in the carrier's Annual Report Form R-1.

Items 16 through 24 (locomotives, railcars, end-of-train devices): These equipment items are all related. The time period covered by all of them should be two calendar years prior to the filing of the complaint. With respect to locomotives, the defendant should identify the individual locomotives used for the complaint traffic and the pool of locomotives from which they are drawn as lease information for the pool is relevant for calculating SAC locomotive capital costs. The procedure used in several recent rate cases is that the defendant provides a list of all locomotive lease and maintenance agreements, the complainant designates the ones it wants made available for inspection at the location where they are kept in the ordinary course of business, and following the inspection the complainant designates the agreements it desires to be copied and furnished. The Board should adopt this as the standard selection procedure rather than "Parties should negotiate a reasonable selection of leases" (Item 19) or Reasonable selection to be negotiated" (Item 21).

It is also extremely important that the defendant provide the payments made under locomotive and car leases and maintenance agreements, and the service units associated with the payments, together with an explanation of where they appear in the carrier's Annual Report Form R-1.⁹ This is necessary to enable them to be tied to the service units and moneys reflected in the carrier's Annual Report Form R-1.

Item 23 (car inspection): In addition to describing the car-inspection locations and procedures, etc., the defendant should also provide information concerning the number of cars inspected per shift and how these numbers relate to the service units and monies related to car inspections in its R-1. (Note: "car inspection" is now referred to as "train inspection" in Schedule 410 of the R-1.)

Item 28 (crew wages): See the discussion under Item 10 above.

Item 29 (traffic data): Traffic and revenue data should be provided for the complaint route and any other lines or areas included in complainant's scope notice – not just for "lines reasonably adjacent to complaint route." This subject is covered in Item 1 of the Shippers' standard SAC discovery list (see Part B of Exhibit No. 2 attached to their

⁹ For example, locomotive lease payments could appear on Line 207 or Line 208 in Schedule 410 to a carrier's R-1, or on Lines 1 through 4, Col. Col. f of Schedule 415. The related locomotive unit miles associated with these payments could appear on Lines 8 through 10 of Schedule 755.

Opening Comments). As indicated there, it is extremely important that the traffic and revenue data include the operating characteristics of the trains that handle each movement covered by the traffic and revenue data. If the necessary linking information is contained in different databases, such as traffic files and train movement files, the information from the databases can be combined in a format that ties the traffic and train movement records for particular movements together. This should not be a difficult task given the railroads' modern data processing capabilities and their ability to easily revise or modify computer program instructions to cause data to be reported in a particular desired format.¹⁰

Item 32 (cost of track materials, etc.): The comment for this item states: "Related transportation costs to be negotiated." The Shippers submit that if transportation costs for track materials are available (such as in a tariff), they should be provided as a matter of course. Accordingly, the description for this item should be revised to read: "Cost of track materials, including rail, lubricators, ties, OTM, track geometry car, signs, and any transportation cost factors for each item."

Item 39 (facilities): Construction unit costs should be provided to the extent available to make this information meaningful. Thus, the description for this item should be revised to read: "Facilities: locations, description of components, and construction costs per unit of measure if available."

Item 46 (historical cycle time data): See the discussion under Item 9 above.

Item 47 (car movement records): This information is closely related to the carrier's traffic and train movement data. See the discussion under Item 29 above.

¹⁰ UP itself has indicated elsewhere that it has considerable electronic data manipulation capabilities. See the October 25, 2002 presentation by Rick Holmes, UP's Director of Information Systems Auditing, to the Computer Science Engineering CSE 291 class at Michigan State University, the powerpoint version of which is available at http://web.cse.msu.edu/~cse291/Speakers_files/holmes291.pdf.

CERTIFICATE OF SERVICE

I hereby certify that I served copies of the foregoing Joint Reply Comments upon the following parties of record by United States First Class Mail, postage prepaid.

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