

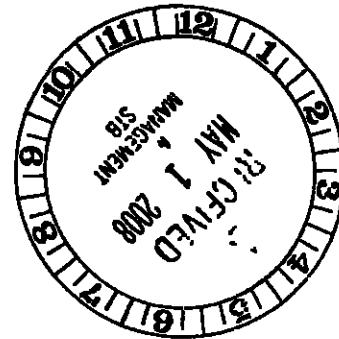
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May 1, 2008



BY HAND

Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-00001

Re Docket No 42104, *Entergy Arkansas, Inc and Entergy Services, Inc*
v Union Pacific Railroad Company and Missouri & Northern Arkansas
Railroad Company, Inc
Finance Docket No 32187, *Missouri & Northern Arkansas Railroad*
Company, Inc – Lease, Acquisition and Operation Exemption – Missouri
Pacific Railroad Company and Burlington Northern Railroad Company

222244
222245

Dear Acting Secretary Quinlan

Enclosed for filing in the above-referenced dockets, please find an original and ten copies of Union Pacific's Reply to Entergy's Motion to Compel

An additional paper copy of this reply is also enclosed. Please return a date-stamped copy to our messenger.

Thank you for your attention to this matter.

Sincerely,

Michael I. Rosenthal

ENTERED
Office of Proceedings

MAY 01 2008

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Public Record

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

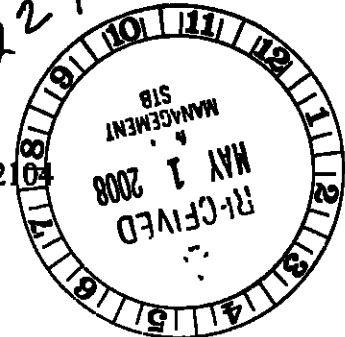
ENTERGY ARKANSAS, INC and
ENTERGY SERVICES, INC., Complainants,

v

UNION PACIFIC RAILROAD COMPANY and
MISSOURI & NORTHERN ARKANSAS
RAILROAD COMPANY, INC , Defendants

MISSOURI & NORTHERN ARKANSAS R R –
LEASE, ACQUISITION AND OPERATION
EXEMPTION – MISSOURI PACIFIC R R
and BURLINGTON NORTHERN R R

Docket No 421



Finance Docket No 32187

222245
**ENTERED
Office of Proceedings**

MAY 01 2008

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Public Record

UNION PACIFIC'S REPLY TO ENTERGY'S MOTION TO COMPEL

The Board should deny the motion to compel filed by Entergy Arkansas, Inc. and Entergy Services, Inc. (collectively, "Entergy") on April 29, 2008. with respect to Requests for Production Nos 6, 9(t), 11, and 12 of Entergy's first set of discovery requests to Union Pacific Railroad Company ("UP").

Entergy's Requests Nos 6 and 9(t)

UP has already agreed to produce the information that Entergy seeks in Requests Nos. 6 and 9(t). In those requests, Entergy seeks documents (No 6) and computerized data (No. 9(t)) showing fees paid to M&NA by UP for moving freight for each of the years from 1992 to the present To avoid discovery disputes, and without conceding that the information is relevant, UP told Entergy that it would undertake the burdensome, costly, and time-consuming task of producing fifteen years of computerized data, showing each movement UP interchanged to or

received from M&NA from 1993 through 2007, in response to Entergy's Request No. 9.¹ UP also told Entergy it would produce the UP/M&NA Lease and other documents that establish the fees UP pays M&NA for moving freight. Together, this information is sufficient for Entergy to determine the fees UP paid to M&NA for handling each carload of traffic over the past fifteen years, as well as the number of carloads, the commodity, and the origin and destination of the freight – in other words, the information that Entergy seeks in Requests Nos. 6 and 9(t).

UP was genuinely surprised that Entergy moved to compel a response to Requests Nos. 6 and 9(t). When counsel for UP and Entergy conferred about discovery, Entergy's counsel appeared to accept UP's agreement to produce the information described above as satisfactory. Entergy's counsel never told UP's counsel that UP's agreement would be insufficient to meet Entergy's perceived need for data regarding the fees UP paid to M&NA, and Entergy never explains to the Board why the information UP has already agreed to produce is insufficient.

UP is disappointed by Entergy's suggestion that it is acting unreasonably because it cannot produce information "in the form requested by Entergy." (Motion at 7). UP has agreed to produce the requested information in the best form that is reasonably available. UP has agreed to produce computerized data regarding the fees UP paid to M&NA for moving freight for time periods in which the data are reasonably available, and other computerized data and documents that would allow Entergy to derive the requested information for all other periods. UP may not

¹ See Email from Michael Rosenthal to Michael Loftus and Andrew Kolcsar, dated April 28, 2008, attached hereto as Exhibit A. Curiously, Entergy never tells the Board that UP agreed to produce these fifteen years of movement-specific traffic data. (Entergy's counsel agreed that it would be sufficient for UP to produce data beginning in 1993.)

be producing the requested information “in the form requested by Energy,” but it has responded to Entergy’s requests in good faith ²

Entergy’s Requests Nos 11 and 12

In Requests Nos 11 and 12, Entergy seeks information about any “contribution and/or profitability index calculated by UP” for transportation of coal (No 11) and UP studies comparing the “profitability” of coal movements to destinations served by a single rail carrier with the “profitability” of coal movements to destinations served by more than one rail carrier (No. 12) The Board should not compel UP to produce the requested information for several reasons

First, Entergy is seeking information related to UP’s highly proprietary, internal management costing system.³ The Board has consistently refused to compel carriers to produce information relating to their internal management costing systems, and it should refuse here. *See Kansas City Power & Light Co v Union Pacific R R*, STB Docket No 42095 (STB served Feb 15, 2006), *Potomac Electric Power Co v CSX Transp, Inc*, 2 S T B 290 (1997), *Arizona Pub Serv Co v The Atchison, Topeka & Santa Fe Ry*, 2 S.T.B. 367 (1997), *Minnesota Power, Inc v Duluth, Missabe & Iron Range Ry*, STB Docket No 42038 (STB served July 8, 1999), *Texas Mun Power Agency v The Burlington Northern & Santa Fe Ry*, STB Docket No 42056 (STB served Feb 9, 2001) (“*TMPA*”), *Northern States Power Co v Union Pacific R R*, STB Docket

² Cf *Sierra Pacific Power Co v Union Pacific R R*, STB Docket No 42012 (STB served Apr 16, 1998) at 6 (“We cannot require UP to provide information that it does not have, and parties in litigation are not required to conduct burdensome special studies to produce information in the form requested by complainants.”).

³ Entergy cannot claim to be seeking information regarding UP “contribution” or “profitability” based on UP’s URCS costs. If Entergy had wanted to make calculations based on UP’s URCS costs for coal movements, it would have asked UP to produce the same type of movement-specific data identified in Entergy’s Request No 9

No 42059 (STB served May 24, 2002). Moreover, UP represents that it will not be making any arguments in this case based on its internal management costing data. In *Kansas City Power & Light*, the Board rejected a similar discovery request for studies related to the profitability of UP coal traffic in light of a similar representation and because “it is contrary to Board precedent to require a party to produce internal management costing information.” *Kansas City Power & Light* at 2. The Board should follow that precedent in this case.

Second, Entergy’s justification for its requests does not withstand scrutiny. Instead, it appears to be a pretext for obtaining UP’s highly proprietary, internal management costing information regarding coal movements. Entergy says it needs the requested information to quantify UP’s past and future benefits from the interchange commitment in the UP/M&NA Lease (Motion at 8). However, Requests Nos. 11 and 12 seek information about coal traffic only, even though a substantial amount of non-coal traffic moves under the UP/M&NA Lease. Moreover, unlike Entergy’s requests for revenue data (discussed above), the disputed requests seek information dating back to 2000 only. Entergy never explains these disconnects. Entergy appears to be engaged in a poorly disguised fishing expedition, and the Board should adhere to its precedent and not facilitate the fishing expedition by providing access to highly confidential and commercially sensitive data. See, e.g., *Duke Entergy Corp. v. Norfolk Southern Ry.*, STB Docket No. 42069 (STB served July 26, 2002) at 4; *Sierra Pacific Power Co. v. Union Pacific R.R.*, STB Docket No. 42012 (STB served Apr. 16, 1998) at 4; *CSX Corp. & CSX Transp., Inc., Norfolk Southern Corp. & Norfolk Southern Ry. – Control & Operating Leases/Agreements – Conrail Inc. & Consolidated Rail Corp.*, STB Fin. Docket No. 33388 (STB served Oct. 3, 1997) at 8 (“We cannot allow discovery of extraordinarily sensitive information simply to permit movants the ability to conduct what amounts to a ‘fishing expedition.’”)

Third, even with respect to coal movements, the information Entergy seeks is irrelevant because it would not allow Entergy to quantify UP's past and future benefits from the interchange commitment in the UP/M&NA Lease. Entergy apparently plans to compare UP's actual rates for coal moving under the UP/M&NA Lease with hypothetical rates that UP would charge in a hypothetical world in which UP leased its lines to M&NA without an interchange commitment, so that M&NA could interchange coal traffic with another rail carrier without compensating UP. Entergy apparently plans to develop those hypothetical rates based on comparisons drawn from UP's other PRB coal traffic. However, the Board has previously recognized that such comparisons would not be sufficiently probative to justify the discovery burdens and loss of confidentiality associated with UP's disclosure of the requested information. As the Board explained when it denied a motion to compel similar discovery in *Sierra Pacific Power*, "the rate comparisons that complainants want to make against other coal movements to other shippers at other destinations would inherently involve different costs, different lengths of haul, [and] different competitive circumstances." *Sierra Pacific Power* at 4. Any comparisons would also be invalid because the rates were negotiated at different times, under different market circumstances, and reflect different contractual provisions that affect the price term. Moreover, UP's rates with several coal shippers, including Entergy, are the result of litigation settlements – yet another reason why any attempt to develop rate comparisons would be futile and why the information Entergy seeks is irrelevant.

Finally, the Board's October 30, 2007 decision in Ex Parte No. 575 does not support Entergy's claim that hypothetical UP rates in a hypothetical world in which UP leased its lines to M&NA without an interchange commitment have any relevance to this proceeding. To

the contrary, the Board explained that the relevant issue is how the world actually looked before and after the parties entered into the interchange commitment See Decision at 9-11

In sum, Entergy's Requests Nos 11 and 12 would require UP to engage in the burdensome exercise of collecting data regarding all its PRB coal movements since January 1, 2000 and also require it to produce highly proprietary, highly confidential, internal management costing data regarding PRB coal movements Economic consultants could bill their clients for hundreds of hours of work to analyze these data, but as the Board has already recognized, the results would be neither probative nor relevant

For all the reasons stated above, the Board should deny Entergy's motion to compel discovery

Respectfully submitted,



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Attorneys for Union Pacific Railroad Company

May 1, 2008

EXHIBIT A

Rosenthal, Michael

From: Rosenthal, Michael
Sent: Monday, April 28, 2008 3:31 PM
To: 'Andrew B. Kolesar III'; 'Michael Loftus'
Cc: Morgan, Linda
Subject: Entergy Discovery requests to UP

Dear Mike and Andy,

This email confirms the information I conveyed by telephone earlier today regarding Union Pacific's responses to Entergy's First Set of Discovery Requests, namely, that in addition to the material Union Pacific has already agreed to produce

- In response to RFP No. 2, Union Pacific will produce copies of all agreements between UP and M&NA that Union Pacific can locate in a reasonable search, not just agreements granting M&NA trackage rights or haulage rights over UP lines
- In response to RFP No. 6, we believe Union Pacific's response to RFPs No. 1, 2, and 9 will provide most of the information Entergy is seeking, and Union Pacific will also produce certain additional documents that we can locate in a reasonable search — such as "speedsheets" — that should help Entergy calculate fees UP paid to M&NA for moving freight
- In response to RFP No. 7, Union Pacific does not believe there are any such payments, but if you identify lease provisions that you believe would result in such payments, we will explore the issue further
- In response to RFP No. 8, Union Pacific will produce the information requested in subparts (a) through (c), if such information can be located in a reasonable search
- In response to RFP No. 9, Union Pacific will produce responsive information from 1993 through 2007 with regard to subparts (a)-(c), (e)-(i), (l)-(r), (s) for UP only, (u)-(x), (dd)-(ff), and (hh). We believe that this is even more data than Union Pacific would be required to produce under STB procedures for calculating UP's costs in rate proceedings. With regard to subpart (t), Union Pacific believes it will be able to produce at least several months of data from its computerized systems, and that Entergy should be able to calculate the fees UP paid to M&NA for other periods using the traffic data, speedsheets, the M&NA lease and other agreements that will be produced
- In response to RFP No. 10, Union Pacific will produce material necessary to identify and understand the data produced in response to RFP No. 9

As we discussed, we understand your view that the Board's rules may require Entergy to file a motion to compel today, and thus, despite our obligations in connection with last week's hearing in EP 677, we have tried to address your concerns as quickly as possible to avoid unnecessary motions. As we also discussed, in light of the timing issues, UP would not object to the timing of a motion to compel if you wanted to take a day to digest the information we discussed before you decide whether it is necessary to file a motion to compel.

Regards,

Mike

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that on this 1st day of May, 2008, I caused a copy of Union Pacific's Reply to Entergy's Motion to Compel to be served electronically and by first class mail postage prepaid on counsel for Entergy Arkansas, Inc. and Entergy Services, Inc , and counsel for Missouri & Northern Arkansas Railroad Company, Inc

A handwritten signature in black ink, appearing to read "Michael L. Rosenthal", written over a horizontal line.

Michael L. Rosenthal