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August 1, 2016

Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20423-0001

**Re: Docket No. EP 733, Expediting Rate Cases**

Dear Ms. Brown:

Union Pacific submits the attached comments in response to the Board's Advanced Notice of Proposed Rulemaking in the above-referenced docket. Please contact me if you have any questions.

Thank you for your assistance

Sincerely,

A handwritten signature in blue ink that reads "Louise A. Rinn".

Louise A. Rinn

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Ex Parte No. 733

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EXPEDITING RATE CASES

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**COMMENTS OF UNION PACIFIC RAILROAD COMPANY**

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August 1, 2016

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Ex Parte No. 733

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EXPEDITING RATE CASES

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**COMMENTS OF UNION PACIFIC RAILROAD COMPANY**

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Union Pacific Railroad Company submits these comments in response to the Advanced Notice of Proposed Rulemaking (“ANPRM”) served on June 15, 2016. Union Pacific supports the Board’s efforts to develop procedures to expedite stand-alone cost (“SAC”) rate cases, so long as any new procedures do not compromise parties’ due process rights.<sup>1</sup> In our experience, however, most complications and delays that unnecessarily consume time and resources in SAC cases arise from litigation choices made by complainants, presumably on the advice of their counsel and consultants on how to maximize their chances of winning a rate prescription or the lowest possible rate prescription. Accordingly, we are very interested in suggestions that shippers will offer in their opening comments. Nonetheless, we offer recommendations that we believe would simplify and expedite discovery in SAC cases.

Clear rules regarding the scope of discovery can reduce the time and resources consumed in the discovery process by both complainants and defendants. We propose rules limiting the number of discovery requests and standardizing cut-off dates for requests that seek historical cost and

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<sup>1</sup> We join in the AAR comments filed today.

operating data. We also describe some of the problems with proposals that the Board collect data that could be used in rate cases.<sup>2</sup>

### ***Limiting the Number of Discovery Requests***

We recommend that the Board limit complainants to 100 document requests, 10 interrogatories, and five requests for admissions related to stand-alone costs. If a complaint in a SAC case addresses other issues (e.g., other rate constraints, unreasonable practice claims), parties would be free to negotiate increased limits, but they would have to notify the Board of their agreement. Complainants would also be allowed to ask the Board to increase the limits for good cause. Whether by notice of the agreement or the motion for additional discovery, the Board would have early warning that the proceeding presents additional or unusual issues. With such notice, the Board and the parties could utilize other tools to expedite the case, such as technical conferences.

Our proposed limits on discovery should be adequate to accommodate the range of information required in a SAC case. In NOR 42127, *Intermountain Power Agency v. Union Pacific R.R. Co.*<sup>3</sup>, the complainant, IPA, served 106 document requests, eight interrogatories, and five requests for admissions. The number and content of IPA's discovery requests were consistent with those we have received in prior SAC cases. NOR 42127 involved a relatively small stand-alone railroad ("SARR") for coal movements within Utah, but in our experience, the size and scope of the SARR does not make a material difference in the number and content of a complainant's discovery requests aimed at stand-alone costs, only in the scope of responsive information that we produce. The discovery served on us in NOR 42127 was similar to that served on us NOR 42113 *Arizona Electric Power Cooperative, Inc. v. BNSF Railway Co. and Union Pacific R.R. Co.*, which involved two defendant railroads moving coal from origins in Wyoming and New Mexico to a single destination

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<sup>2</sup> Because shippers pursue more discovery of railroads than railroads do of shippers in rate cases, Union Pacific will respond in its reply comments to suggestions shipper parties have, if any, on standardizing discovery requests.

<sup>3</sup> That is most recent SAC case in which Union Pacific faced complete discovery. IPA voluntarily dismissed their original complaint, after realizing its original SARR had fatal flaws. When IPA filed a new complaint in NOR 42136 for fewer complaint origins, IPA and UP agreed to "recycle" discovery from the prior proceeding and perform limited updating.

in Arizona.<sup>4</sup> Union Pacific is not opposed in theory to setting a similar limit on the number of discovery requests by defendants, but the scope of market dominance discovery that may be appropriate will vary with the number of origin/destination pairs and commodities included in the complaint. Establishing a standard limit on total stand-alone cost requests directed at railroad defendants, however, would help ensure that discovery remains properly focused and does not spiral out of control.

### ***Standardized Discovery Cut-off Dates***

Parties responding to discovery can do so most efficiently if they know the earliest date and the latest date (i.e., cut-off dates) of the information or materials to be produced. To begin a document search or computer inquiry before cut-off dates are established virtually guarantees duplicating search efforts or generating overlapping data, which leads to confusion and additional costs. Moreover, discovery requests for production of all information and documents “to the present” can never be complied with as a practical matter, because information and documents are continually created in the normal course of business. Accordingly, Union Pacific typically will not begin searching for or producing responsive information and documents until the cut-off dates are settled.<sup>5</sup> In our experience, discovery has often been delayed during unnecessarily protracted negotiations over cut-off dates.

We propose that the Board adopt rules for cut-off dates that would apply to SAC cases. If discovery requests remain within those rules and the discovery requests are served with the complaint, then discovery will be expedited. If a party wants to seek different cut-off dates, then it can either try to reach agreement with the other party or seek a Board order to adopt different cut-

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<sup>4</sup> In NOR 42113, the complainant served 100 document requests (some were directed to only one defendant), nine interrogatories, and three requests for admissions.

<sup>5</sup> This does not apply to the relatively few requests directed to information that may be updated only periodically. For example, the most recent version of track profiles will include historical information on when tracks were built and components updated or replaced. Consequently, only the current version needs to be produced.

off dates. Again, such variation from the standard cut-off dates would provide the Board with notice that the case is unusual and may require special attention.

As an example of discovery cut-offs, we suggest the following:

| <b>Information Requested</b>  | <b>Period</b> | <b>End Date</b>  |
|---|---------------|--|
| Traffic information for SARR including car movement and train movement, delay data  | 24 months     | End of last calendar quarter before complaint filed                            |
| Engineering unit costs, including AFE's and invoices, price lists, joint facility invoices paid and payments received     | 36 months     | End of last calendar quarter before complaint filed                            |
| Equipment costs, including AFE's, mechanical costs  | 36 months     | End of last calendar quarter before complaint filed                            |
| Wage & labor forms (quarterly & annual), pay scales, training, fuel consumption   | 24 months     | End of last calendar quarter before complaint filed or last two annual reports |
| Operating costs including fuel  | 24 months     | End of last calendar quarter before complaint filed                            |
| Track profiles, valuation maps, bridge inventory, crossing inventory, location of fueling stations, organizational charts | Current       | NA   |

***Disclosures of SARR Information Through Board-Collected Data***

In the ANPRM, the Board expressed concern about suggestions that it collect the data required for SAC cases and then make such data available to the complainants after a complaint is filed and a protective order is entered. *See* ANPRM at 4. We believe those concerns are well-founded. *First*, the burden on the Board and the railroads of requiring each Class I railroad to produce system-wide data every year is dramatically disproportionate to the need for the data. Several Class I railroads have never had a SAC case filed against them. Even Class I railroads that have been defendants in SAC cases have not had complaints filed against them every year. In the eight years since 2008, five different complainants have filed SAC complaints against four railroads. Consequently, if the Board had been collecting system-wide traffic and movement data for each

Class I railroad for that period, it would have collected 56 railroad years' worth of data, but only 10 to 15 years' worth of data would have been relevant.

*Second*, only a portion of a defendant railroad's traffic data is relevant for any SAC case. For example, in NOR 42127, Union Pacific produced to IPA detailed information about all traffic that moved over its lines in Utah (including events for cross-over traffic such as intermodal shipments between Los Angeles and Chicago), but we did not provide movement information on traffic that flowed over our Southern Corridor or between Mexican gateways and the Midwest because such traffic never touched the lines IPA chose for its railroad. Likewise, IPA did not request and we did not produce grade or curve data, detailed track maintenance or fuel consumption information for operations in the Gulf Coast, Plains States, or Chicago. Even in the *FMC* rate case,<sup>6</sup> in which the SARR stretched from Portland, Oregon to Chicago and Kansas City, there were substantial parts of our network that had no information relevant to the SARR.

*Third*, compiling the relevant information into a useable format requires substantial efforts on the part of railroad employees, consultants, or both who are familiar with the data. To produce the extensive data typically requested in a SAC case, data must be extracted from several different databases and linked together using procedures that are not performed in the ordinary course of business. Because the data are not compiled or produced in the ordinary course of business, substantial quality control efforts are required to ensure that the production is correct and complete. Even so, there are many follow-up questions about the data after its production. There would be tremendous waste involved if railroads were required to produce data on a system-wide basis, and produce the data for years in which they are not involved in a SAC case. There is no value-added in having the Board act as a data warehouse, and perhaps take on responsibility for ensuring that the data are accurate and complete, even if the Board had the resources to perform that function.

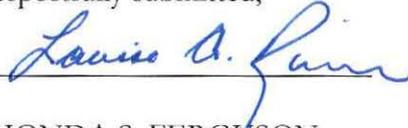
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<sup>6</sup> *FMC Wyo. Corp. and FMC Corp. v. Union Pacific R.R. Co.*, STB Docket No. 42022, 4 STB 699 (2000).

## Conclusion

Union Pacific has offered constructive suggestions to expedite discovery in SAC cases. We believe that the Board's collection of massive amounts of railroad data will neither simplify nor expedite discovery. We look forward to seeing suggestions from other parties to expedite SAC cases.

Respectfully submitted,



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