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May 13, 2008

BY HAND

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

ENTERED
Office of Proceedings

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Part of
Public Record

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*

Dear Secretary Quinlan:

Enclosed for filing in the above-referenced dockets, please find an original and ten copies of the "Public" version of Union Pacific's Reply to Entergy's Second Motion to Compel UP is separately filing a "Highly Confidential" version under seal

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 L Rosenthal

Enclosure

information that is the subject of its present motion long ago. Moreover, UP would have no objection to legitimate “follow up” requests, even if they arise after the discovery period ends. See UP’s Reply to Entergy’s Motion to Extend Procedural Schedule, dated May 12, 2008, p. 5 & nn. 5 & 6.

The real question for the Board is whether UP should be required to bear the cost and burden of searching for and producing fifteen-year-old information, and providing witnesses to discuss fifteen-year-old information, regarding UP’s pre-transaction *expectations* for the UP/M&NA Lease when it has already produced fifteen years of data regarding the transaction’s *actual consequences*.

Entergy’s new discovery requests expand upon and, in some cases, merely repeat, Entergy’s Document Request No. 5. That request sought “any study, analysis or estimate of the expected reduction in cost, cost, income, benefit, margin or return on investment that UP anticipated from entering into the Lease Agreement with M&NA.”

Entergy recites the Board’s rule that discovery is allowed into matters that are relevant, but it never actually explains why it needs the information it seeks – that is, why “the information might be able to affect the outcome of [the] proceeding.” *Waterloo Ry. – Adverse Abandonment – Lines of Bangor & Aroostook R.R. & Van Buren Bridge Co. in Aroostook County, ME*, STB Docket No. AB-124 (Sub-No. 2) (SIB served May 6, 2003) at 3. Entergy quotes the Board’s observation in *Review of Rail Access and Competition* that when a carrier enters into a line sale or lease, “[t]he revenue stream resulting from that agreement should be no more than what the carrier would have received had it not divested or leased the rail facilities in question, or had it demanded more in the sale price or rental fee.” (Mot. at 10-11, quoting *Review of Rail Access and Competition Issues – Renewed Petition of the Western Coal Traffic*

League, STB Ex Parte No 575 (STB served Oct 30, 2007), at 10) However, as the Board explained when Entergy relied on the same language in its first motion to compel, that passage simply “explained why, when a sale or lease is first executed, the agency would not presume that a transaction overcompensated the vendor or lessor carrier solely because an interchange commitment lasts longer than 5 years ” Decision served May 7, 2008, at 4

Moreover, UP has already produced data that show the actual revenue stream resulting from the agreement in question: it has produced fifteen years of traffic and revenue data regarding the traffic interchanged with M&NA Entergy never explains why it needs more information about UP’s pre-transaction expectations when UP has already produced fifteen years of data regarding the actual consequence of the UP/M&NA Lease *See, e.g., Waterloo Ry* at 4 (denying motion to compel discovery of communications regarding the value of certain rights when the value of those rights had been established in market transactions)

In the absence of any legitimate justification for its late, additional discovery requests, Entergy engages in a lengthy and misleading discussion of the documents that UP has produced in response to Entergy’s Request No 5 – UP’s “Approval for Line Disposition” and accompanying analyses UP does not believe that a motion to compel is the proper context in which to argue the merits of this case, but it will offer two basic points in response to Entergy’s discussion in Part A of this reply before addressing Entergy’s specific discovery requests in Part B

A. UP’s “Approval for Line Disposition” Undermines Entergy’s Case.

Entergy’s discussion of UP’s Approval for Line Disposition is deeply flawed If Entergy presents a similar discussion in its evidentiary filings in this proceeding, UP will provide

a full reply For now, UP urges the Board not to accept Entergy's claims at face value, and it offers the following two preliminary points to help place those claims in context

First, UP has repeatedly told the Board that it never would have entered into the UP/M&NA Lease without the ability to retain the Entergy coal traffic and other on-line traffic See UP Reply Comments, *Review of Rail Access and Competition Issues*, STB Ex Parte No 575 at 3, *id*, Reply Statement of Warren C Wilson at 7 The documents confirm those statements. They show that UP's expected value from the lease and associated line sale, as compared to its expected value from retaining the leased lines and abandoning the lines it sold to M&NA, was about { }, assuming that UP maintained the same level of revenue from on-line traffic. (Mot , Ex 1, UP-HC-0000304) The documents also show that the UP revenue at issue was { } (*Id*) The documents thus make clear that UP never would have leased its lines to M&NA if it could not have preserved the revenues associated with providing service to Entergy and the other on-line shippers

Second, lacking better arguments, Entergy attempts to make something out of the fact that the Approval for Line Disposition and accompanying analyses show that UP expected to "obtain more value under the M&NA transaction than UP would have obtained by retaining the line itself" (Mot at 11) However, UP could hardly be expected to enter into a transaction that would have left it worse off, or no better off, than had it not entered into the transaction No lease or line sale that a rational business would enter into could ever be approved under the standard suggested by Entergy

B. The Board Should Not Compel UP to Provide Additional Discovery.

In its reply to Entergy's motion to extend the procedural schedule, UP explained why the Board should not extend the schedule to allow Entergy to serve new discovery requests. In the first portion of this reply, UP explained why Entergy's requests do not meet the Board's basic relevance standard. In this section, UP replies briefly to each of Entergy's specific requests.

1. Supporting workpapers for UP's Approval for Line Disposition

Entergy's first request is for "supporting workpapers, spreadsheets, or databases" for the figures in UP's Approval for Line Disposition and the accompanying analyses. (Mot. at 13.) Entergy claims that the information is "highly relevant to the issues in dispute in this case" because it will help the parties and the Board "to better understand the assumptions that UP made in evaluating the proposed transaction." (*Id.*) However, as discussed above, Entergy does not explain why additional discovery into UP's assumptions is warranted, particularly in light of UP's production of data regarding the actual consequences of the UP/M&NA Lease. See *Waterloo Ry.* at 4.

Moreover, Entergy never offers support even for its vague assertion of relevance. It does not identify any "assumptions" that it needs to "better understand," and it never attempts to explain why the documents that UP has already produced are insufficient for Entergy to understand UP's "assumptions." In short, Entergy never explains why it needs additional discovery to prepare its evidentiary filings.

Finally, UP is uncertain whether all of the documents Entergy is seeking have been preserved, and there would be significant costs and burdens associated with searching for those documents. The Board should be mindful of the fact that these would be workpapers that

were created to analyze a business transaction that was consummated fifteen years ago, they are, not documents that were created for the purpose of a legal proceeding in which discovery of workpapers would be required. The burdens associated with searching for and producing the requested documents would outweigh their relevance.¹

2. Documents regarding UP's statement that the analyses supporting UP's Approval for Line Disposition do not include Entergy traffic

In a letter accompanying UP's production of the Approval for Line Disposition and accompanying analyses, UP reported that it was producing those documents, but that it "had not located any documents that reflect the final lease terms, particularly with respect to M&NA's handling of Entergy coal traffic" (Mot., Ex. 4, Letter from Michael L. Rosenthal to Andrew B. Kolesar III, dated May 2, 2008, p. 1.)

Entergy argues that it needs additional discovery to "evaluate UP's claim" that the analyses that UP produced do not reflect M&NA's handling of Entergy's traffic. (Mot. at 13.) However, Entergy does not need additional discovery to evaluate that statement: the documents state on their face that {

} (Mot., Ex. 1, UP-HC-0000303 & UP-IIC-000304²) In addition,

the traffic data UP has produced to Entergy from that time period confirm {

¹ If the Board does order UP to search for and produce the requested documents, or any of the information at issue in Entergy's motion to compel, UP urges the Board to make clear that UP is only required to engage in a *reasonable* search – that is, a search of on-site files maintained by those employees who are likely to have retained the requested information, and not a search of off-site or archived records or a search for any scrap of information that someone might have retained somewhere in their files from fifteen years ago.

² The documents refer to this traffic as "AP&L" traffic rather than "Entergy" traffic because the Independence plant was previously operated by Arkansas Power & Light Company.

}

Moreover, Entergy does not explain how reviewing drafts of the UP/M&NA Lease and correspondence regarding the drafts would provide any more information about the contents of UP's analyses than a review of the analyses themselves. UP should not be required to bear the burdens and costs associated with searching for and producing fifteen-year old drafts and correspondence when Entergy has not established any need for such documents.

Finally, with respect to Entergy's request for "any subsequent analyses" that would include the Entergy traffic, in response to Entergy's motion, UP conducted an additional search for pre-transaction studies and analyses responsive to Entergy's Request No. 5, including in particular any analyses subsequent to those associated with the Approval for Line Disposition that included Entergy's coal traffic. UP has identified one additional document analyzing labor cost issues associated with having M&NA handle Entergy coal trains that appears responsive to Request No. 5, and it will produce that document to Entergy.

3. Pre-transaction analyses that relate to M&NA's handling of Entergy coal traffic or other traffic not reflected in UP's Approval for Line Disposition and accompanying analyses

Entergy asks UP to "confirm that additional documents do not exist that are responsive to Entergy's Request No. 5." (Mot. at 15.) As already discussed, UP has conducted an additional search and will produce the additional responsive document it identified to Entergy.

4. Documents regarding UP's labor-related cost savings

Entergy's fourth request asks UP to produce {

}

Entergy plainly does not need the requested data to prepare its evidence in this proceeding. As Entergy explains, it plans to “determine the costs that UP avoided through the M&NA transaction using an URCS Phase III analysis.” (*Id.*) Presumably, that is why Entergy asked for fifteen years of detailed data regarding traffic interchanged between UP and M&NA, and UP has produced those traffic data to Entergy.

Entergy does not need the additional data it is now seeking to conduct an URCS Phase III analysis. In fact, Entergy says that it “deliberately excluded requests from its discovery that would seek broad categories of information regarding crew costs.” (*Id.*) In short, Entergy recognized that it could have asked for the data, but decided that they were unnecessary.

Entergy now says it wants more “insight into {

}

However, the burden on UP of providing this “insight” would far outweigh its value to Entergy.

Even assuming that UP has retained sufficient records to track {

} compiling that information for Entergy would

likely require a time-consuming special study.³ The Board’s discovery rules do not require

parties to perform such special studies. *See, e.g., Waterloo Ry.* at 5.

³ UP has not had sufficient time to determine whether it would even have sufficient records to respond to Entergy’s request.

5. Pre-transaction analyses reflecting M&NA's potential interchange of traffic with a carrier other than UP.

Entergy's fifth request, like Entergy's second and third requests, seeks additional documents that would be responsive to Entergy's Request No 5 (Mot at 17) As already discussed, UP has conducted an additional search and will produce the additional responsive document it identified to Entergy

6. Depositions

Finally, Entergy seeks to compel UP to produce one or more employees for depositions on issues relating to UP's Approval for Line Disposition and the accompanying analyses, other analyses that are responsive to Entergy's Request No 5, and UP's anticipated labor-related cost savings from the UP/M&NA Lease (Mot at 18)

For the reasons discussed above with respect to Entergy's requests for additional document discovery, Entergy has not justified its need for depositions, and requiring UP to permit depositions on these topics would impose burdens on UP that would outweigh any potential relevance the information would have to this proceeding

C. Conclusion

For the reasons discussed above, the Board should deny Entergy's motion to compel.

Respectfully submitted,



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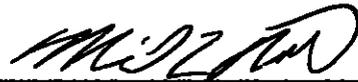
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May 13, 2008

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that on this 13th day of May, 2008, I caused a copy of Union Pacific's Reply to Entergy's Second 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



Michael L. Rosenthal