

SURFACE TRANSPORTATION BOARD

08/27/98

FD #32760

1-46

UNITED STATES OF AMERICA  
SURFACE TRANSPORTATION BOARD

+ + + + +

DISCOVERY CONFERENCE

-----X  
IN THE MATTER OF: :  
  
UNION PACIFIC CORPORATION, :  
UNION PACIFIC RAILROAD COMPANY, :  
and MISSOURI PACIFIC RAILROAD : Finance Docket  
COMPANY : No. 32760  
: Sub 26  
- CONTROL AND MERGER - :  
:  
SOUTHERN PACIFIC RAIL CORPORATION, :  
SOUTHERN PACIFIC TRANSPORTATION :  
COMPANY, ST. LOUIS, SOUTHWESTERN :  
RAILWAY COMPANY, SPCSL CORP., :  
AND THE DENVER AND RIO GRANDE :  
WESTERN RAILROAD COMPANY. :  
-----X

Thursday  
August 27, 1998

Federal Energy Regulatory  
Commission  
Hearing Room 3  
Second Floor  
888 First Street, N.E.  
Washington, D.C.

The above-entitled matter came on for  
hearing, pursuant to notice, at 10:00 a.m.

BEFORE:

THE HONORABLE STEPHEN L. GROSSMAN  
Administrative Law Judge

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1 P-R-O-C-E-E-D-I-N-G-S

2 (10:05 a.m.)

3 JUDGE GROSSMAN: I guess we'll start by  
4 finding out who is here today. Union Pacific?

5 MR. MEYER: David Meyer, Covington &  
6 Burling.

7 MR. EDWARDS: John Edwards, for TexMex.  
8 With me today is my colleague, Craig Cibak.

9 MS. BROWN: Sandra Brown, for Kansas City  
10 Southern Railroad.

11 MR. STEEL: Andrian Steel, for The  
12 Burlington Northern and Santa Fe Railway Company.

13 JUDGE GROSSMAN: All right. To make this a  
14 little shorter, I have read, obviously, the motion that  
15 underlies this proceeding today. I have also read the  
16 entirety of KCS-2, the evidentiary filing with the  
17 Surface Transportation Board, made July 8, 1998, to  
18 which the motion refers.

19 MR. EDWARDS: We do have one preliminary  
20 matter, Your Honor, before we go too the motion.

21 JUDGE GROSSMAN: Okay.

22 MR. EDWARDS: In general, TexMex has decided

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1 to not address statements made in submissions to Your  
2 Honor with regard to the matters not relevant to  
3 discovery, but there was a couple of items in this  
4 latest motion that we do contend touches close enough to  
5 own that we should address them.

6 There's two matters that appear on page 4 of  
7 the submission, and those are, in particular, the line  
8 that says "If KCS and TexMex do not provide UP with that  
9 additional information concerning these matters in  
10 discovery now, they will necessarily be precluded from  
11 submitting or arguing about in our rebuttal submission".

12 And then further there is a footnote that  
13 says, "Similarly, KCS-TexMex would be precluded from  
14 relying on the mass of Delay Reports they have produced  
15 as evidence of further examples of discrimination prior  
16 to that which is to identify which, if any, alleged  
17 delays were the product of discrimination as opposed to  
18 other causes".

19 Your Honor, with all due respect to Union  
20 Pacific, this is a -- and yourself -- the Surf Board has  
21 delegated to you the power to rule on discovery issues  
22 in the first instance, the matters brought forth to the

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1 extent that this is a request for you to rule on in  
2 these two matters --

3 JUDGE GROSSMAN: I do not take it as a  
4 request for a ruling at all. I think, at best, it is a  
5 preparatory caution from Union UP to TexMex that if  
6 these data are not forthcoming, that UP may raise this  
7 issue before the Surface Transportation Board and --

8 MR. EDWARDS: -- or even if he wants to  
9 raise that as a motion --

10 JUDGE GROSSMAN: I have no authority  
11 whatsoever to deal with that motion, in any event --  
12 that request, if it is a request. It seems to me just  
13 to be a statement by UP.

14 MR. MEYER: Your Honor, it was a statement,  
15 and it certainly is a caution to KCS and TexMex of our  
16 view as to the appropriateness of their reliance on  
17 anything they don't come forward with in response to the  
18 discovery request. But, Your Honor, I am not certain  
19 that it will be outside of your authority to order  
20 discovery and sanctions for failure to comply with  
21 discovery.

22 JUDGE GROSSMAN: I can order discovery and,

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1 if there isn't compliance with my rulings on discovery,  
2 you can go to the Surface Transportation Board for  
3 enforcement or sanctions.

4 MR. MEYER: Very well, Your Honor. I think  
5 Mr. Edwards' comments about these two statements in my  
6 letter seem to indicate to me an intention on their part  
7 to engage in what I would call "sandbagging", and to  
8 come forward later and try and get into the record after  
9 September 18 the examples they refuse to come forward  
10 with now.

11 JUDGE GROSSMAN: For information, Mr. Meyer,  
12 have you sought depositions on any of these matters from  
13 TexMex's witnesses in this case?

14 MR. MEYER: We have not sought depositions  
15 of their witnesses, Your Honor. In our experience,  
16 preparing for depositions and taking depositions  
17 consumes a lot more time than it is often worth, and  
18 that's why we proceeded through written discovery.

19 JUDGE GROSSMAN: Well, let me just tell you  
20 what my understanding of all this is and, if I'm wrong,  
21 you'll tell me. In the evidentiary filing, the  
22 witnesses -- or the Affiants, I guess they are -- for

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1 TexMex stated that there were numerous instances of  
2 discriminatory activity with respect to TexMex train  
3 scheduling by the UP dispatchers, is that correct?

4 MR. EDWARDS: Yes, Your Honor.

5 JUDGE GROSSMAN: And to that extent, in the  
6 verified statements of two of your witnesses, this was  
7 stated by Patrick Watts and by Ronney O. Nichols, is  
8 that correct?

9 MR. EDWARDS: Yes, Your Honor.

10 JUDGE GROSSMAN: And each of them cited  
11 numerous occasions of discrimination or unfair  
12 treatment, and Ronney Nichols -- I don't know whether  
13 that's a he or a she --

14 MR. EDWARDS: It's a he.

15 JUDGE GROSSMAN: Okay -- discussed four such  
16 instances in June 1998, and Mr. Watts discussed three  
17 instances in May 1998, is that correct?

18 MR. EDWARDS: Yes, Your Honor.

19 JUDGE GROSSMAN: And there aren't any others  
20 enumerated.

21 MR. EDWARDS: Specifically enumerated,  
22 however, Your Honor --

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1 JUDGE GROSSMAN: But each of them speaks of  
2 numerous instances of which these are just examples, is  
3 that correct?

4 MR. EDWARDS: Yes, that is true, but we  
5 would also refer Your Honor to the May 30 filing,  
6 evidentiary filing on -- our March 30 filing which  
7 initiated this proceeding, Mr. Watts detailed other  
8 examples, and there have been several other examples  
9 which have been --

10 JUDGE GROSSMAN: Well, I guess the question  
11 is, what do we mean by "numerous" and what do we mean by  
12 "several". I think that since it is the crux, the very  
13 gravamen, of your case of discrimination that numerous  
14 events have happened, the only way UP could conceivably  
15 respond to the allegation of "numerous" other than the  
16 seven that are enumerated here, is to specifically  
17 identify all the others.

18 MR. EDWARDS: Well, Your Honor --

19 JUDGE GROSSMAN: I understand that you gave  
20 them boxes of things called "Delay Reports", which are  
21 filled out every time a train stops, is that correct,  
22 for any reason, whether it stops because it stopped at

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1 a yard, whether it stops because a cow wandered on the  
2 track --

3 MR. EDWARDS: Delays due to congestion.

4 JUDGE GROSSMAN: -- congestion, or operating  
5 conditions, or delays that are intentional. Is there  
6 any way from those Delay Reports for UP to determine  
7 which ones were due to what you would call  
8 discriminatory activities?

9 MR. EDWARDS: My understanding is that there  
10 is, but there is further -- there is a background here,  
11 Your Honor, that I could just briefly address, and I  
12 think Your Honor has gotten to the crux of the issue,  
13 and that is, in our response to these requests, TexMex  
14 and KCS responded that an answer which asks for each and  
15 every instance in the past since October 1996 when these  
16 thousand-some trains actually started running would  
17 require a person knowledgeable in the running of those  
18 trains, most likely Mr. Watts, to go through and go  
19 through all of these records, and to go through the CAD  
20 reports, the Digicon tapes, and the like. These were  
21 the tapes and the information that we requested from UP  
22 back in March, which was the subject of the first

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1 hearing before Your Honor.

2 JUDGE GROSSMAN: I recall that vividly, and  
3 you told me you needed those tapes so that you could  
4 determine the numerous instances of discriminatory  
5 dispatching, and from those tapes you would do that.  
6 Now, either from those tapes you have found these seven  
7 instances that are in the verified statements of these  
8 two witnesses, or you have found more. If you have  
9 found more, you have to tell UP what those more are. It  
10 would be manifestly unfair for you to withhold that at  
11 this point, for UP to make its evidentiary filing on --  
12 what is it, September 8 --

13 MR. MEYER: September 18th.

14 JUDGE GROSSMAN: -- and then for you to  
15 include them in a rebuttal filing later on. This is not  
16 right, and you know that. This is your case. You have  
17 an initial burden. And if your burden is to be met by  
18 reference to seven particular instances, that's fine.  
19 If you are going to refer to more than those seven, UP  
20 has to know now what those are going to be.

21 It seems clear that the tapes which were  
22 from -- what date did we get those tapes?

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1 MR. EDWARDS: We only got 11 days' worth of  
2 tapes, Your Honor. We did not get October 1996 to  
3 present, which is what UP is asking for. In general,  
4 Your Honor --

5 JUDGE GROSSMAN: I understand. October 1996  
6 is --

7 MR. MEYER: It was all the tapes currently  
8 on the Digicon system --

9 JUDGE GROSSMAN: And when does that go back  
10 to? I recall that the Digicon --

11 MR. MEYER: It was a four- to six-week  
12 period of tapes, not just 11 days, Your Honor.

13 MR. EDWARDS: Your Honor, we could produce  
14 all these if we, in response to the request, had access  
15 again to that four-to-six weeks, we'd be happy to do  
16 that.

17 JUDGE GROSSMAN: Well, I assume that your  
18 people that reviewed those four- to six-weeks and came  
19 up with at least these seven instances, which is where  
20 I assume they came from, took some notes while they were  
21 going through those tapes, and -- I'll give you this,  
22 Mr. Edwards, if you don't have anymore than these as

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1 specific instances, you can file something with UP  
2 saying this is all we got.

3 MR. EDWARDS: For the four- to six-week  
4 period of --

5 JUDGE GROSSMAN: For whatever this period is  
6 that we are talking about, this is all we have. We have  
7 these instances that were referred to in KCS-2 -- I  
8 guess it's TM-2/KCS-2 -- and we don't have anymore.

9 MR. EDWARDS: Your Honor, but that's not the  
10 case, that's not --

11 JUDGE GROSSMAN: Do you have more for that  
12 period?

13 MR. EDWARDS: -- the Affiants, the  
14 individuals who submitted verified statements said there  
15 were numerous examples. They would be willing to  
16 testify to that if --

17 JUDGE GROSSMAN: Then they have to provide  
18 that in discovery. There is no such thing as  
19 "testifying". There is no cross-examination here by  
20 which those witnesses' allegations of numerous instances  
21 could be tested. That is part of the problem with paper  
22 hearings.

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1           The answer seems to me to be quite clear  
2           that if you are going to rely on something called  
3           "numerous" instances, that you've got to provide UP with  
4           the information defining what those numerous instances  
5           are.

6           MR. EDWARDS: Your Honor, the burden of  
7           going through a thousand-some trains --

8           JUDGE GROSSMAN: It's your complaint, Mr.  
9           Edwards. It's not UP's. UP would have to sit there and  
10          go through to prove the negative. I'm not sure how they  
11          would do that.

12          MR. EDWARDS: Your Honor, we asked for the  
13          information which would have been -- would have provided  
14          our operating people with the tools to answer this  
15          question. Six months ago, UP's response was it was too  
16          burdensome --

17          JUDGE GROSSMAN: Mr. Edwards, what did your  
18          witnesses rely on for their statement of numerous  
19          instances?

20          MR. EDWARDS: Their general experience and,  
21          if placed in deposition which we are willing to offer,  
22          they would explain that further, and they would explain

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1 their statements further, but the burden of -- we simply  
2 cannot meet the burden that you are apparently thinking  
3 of placing on us, by going through a thousand-some --

4 JUDGE GROSSMAN: I am not thinking in terms  
5 of 1996 forward, I'm thinking in terms of something much  
6 less than that, similar to what UP provided to you.

7 MR. EDWARDS: The four- to six-week period  
8 that was covered by --

9 JUDGE GROSSMAN: Yes.

10 MR. MEYER: Your Honor, what is essential  
11 here, and I think Your Honor has stated it well, is not  
12 any particular period, it is essentially the question --  
13 a contention interrogatory -- what examples do you  
14 intend to rely upon to show that there were numerous  
15 examples of discrimination, whatever it is, during  
16 whatever period. If they don't have anything, we're  
17 happy to hear that. But whatever they are or for  
18 whatever period, if they know what these examples are  
19 and they intend to rely upon them in this proceeding,  
20 now we're up to September 18, we need to know it now so  
21 we can address them, that's the simple fact. There's no  
22 other time for us to do it.

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1 MR. EDWARDS: If it's restricted to the  
2 four- to six-week period of time --

3 JUDGE GROSSMAN: It is restricted to the  
4 time that the witnesses have in mind, that they are  
5 responding to. And I think -- am I correct, if I can  
6 paraphrase essentially, or rephrase what Mr. Meyer is  
7 asking for in discovery -- what he is asking for is from  
8 these two Affiants, or any others that you may rely on  
9 in further pleadings, further filings, or submissions to  
10 the Surface Transportation Board, he wants to know  
11 specifically what it is, what delays they have in mind,  
12 what, to the extent they know or would rely on other  
13 documents, upon what are they relying, and what would  
14 they cite in support of their statements of numerous  
15 delays other than the ones that are specifically  
16 enumerated in the two verified statements. Is that  
17 correct, Mr. Meyer?

18 MR. MEYER: That is correct.

19 JUDGE GROSSMAN: Would that satisfy your  
20 request?

21 MR. MEYER: I believe it would, Your Honor.  
22 Let me try --

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1 JUDGE GROSSMAN: It could be done  
2 narratively by the two Affiants.

3 MR. MEYER: Let me touch on one specific  
4 point, however, and that is these Delay Reports. If  
5 what we get in response to this is "See the three boxes  
6 of Delay Reports that were produced", that would clearly  
7 be inadequate.

8 I have here an example of a Delay Report,  
9 and there are hundreds and hundreds of these, as I  
10 mentioned. Every TexMex train crew bill in Houston or  
11 in the Houston area, bills went out and they've been  
12 supplied to us. What they say is things like this:

13 - Chason Yard cause of delay, receive  
14 orders, cars had wrong placarding, permission to depart.

15 - Place: Dawes - red signal behind three  
16 trains.

17 - CP256 - red signal behind several trains.

18 - South End Basin - red signal, one dead  
19 ahead.

20 - West Junction - run train around Spence  
21 cutoff.

22 Now, that says whatever the engineer

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1 observed when there was a delay to the train, and there  
2 was, again, hundreds and hundreds of these pages. Well,  
3 we have no idea from these documents what, if any, of  
4 these delays TexMex asserts were caused by  
5 discrimination as opposed to congestion, or the day-to-  
6 day vagaries of train operation.

7 JUDGE GROSSMAN: I think that's what I just  
8 said, to the extent the Affiants for TexMex and KCS  
9 intend to rely on these reports to demonstrate any type  
10 of discriminatory or improper activity by UP dispatchers  
11 or schedulers or anyone else at UP, that has to be  
12 disclosed. If you don't intend to rely on them for  
13 that, tell that to UP, but don't tell them "here are  
14 thousands of Delay Reports that may or may not show what  
15 our witnesses are saying". You can't have it both ways.  
16 Either the witnesses are going to rely on those Delay  
17 Reports or they are not.

18 It does not seem to me that it would be at  
19 all helpful to the STB to have an allegation that here  
20 we have 17,000 Delay Reports, or whatever number it is  
21 -- some huge number of Delay Reports -- and I'm not even  
22 sure that each instance on a single piece of paper is a

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1 separate report or not, I'm not sure how you would count  
2 those -- and some of them are a result of discrimination  
3 and others are a result of other factors. I don't think  
4 that the STB can make anything of it, it's up to you to  
5 determine what use you want to make of those reports if  
6 you intend to cite them. Now, if you don't intend to  
7 cite them, that's fine, tell UP that. But UP is  
8 entitled to know upon what basis do your witnesses  
9 believe that numerous occasions, in addition to the  
10 seven that are identified, to which UP at least has the  
11 ability to attempt a response, exists so that UP can  
12 frame its response of testimony.

13 MR. EDWARDS: Your Honor, three brief  
14 matters. First, UP has requested each and every  
15 instance, and for us to be able to do that, we would  
16 have to go through --

17 JUDGE GROSSMAN: I understand each and every  
18 instance. We'll figure out first what our time frame is  
19 going to be.

20 MR. EDWARDS: The second matter that I would  
21 like to put before Your Honor is that, in essence, UP is  
22 asking for us to make a decision as to what would be in

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1 our rebuttal filing before it is due.

2 And the third matter is that, Your Honor, we  
3 have offered our witnesses for deposition for them to  
4 explain their statements, and that is the, we believe,  
5 "proper" way of getting at exactly what they meant.

6 JUDGE GROSSMAN: Well, if your witnesses are  
7 going to be offered for deposition, the witnesses have  
8 to be offered with all documentation that they would  
9 rely upon in answering those questions, not just that  
10 they would show up and give some general answers to UP.  
11 UP asks a specific question: Tell me about the numerous  
12 delays you. Do you contend happened in the month of May  
13 1998? Yes. Tell me what they were. Well, I'll tell  
14 you one. That's not a response that's helpful.

15 Either your witnesses are prepared at  
16 deposition -- and I don't even know if you want to  
17 depose them, but I suggest that since there is no cross-  
18 examination possible in these cases, that a deposition  
19 might be appropriate, at least for these two and any  
20 other intended witness, as long as they have the  
21 documentation that they would rely on for their answers  
22 and can support them because an unsupported answer in a

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1 deposition is useless.

2 MR. EDWARDS: Your Honor, I can say  
3 categorically that our witnesses and our Railroad would  
4 be physically unable to respond to the requests that are  
5 being put to them. They are a small railroad. It's  
6 impossible, and particularly impossible given the fact  
7 that we ask for the tool six months ago to be able to  
8 produce this kind of information, and UP said it was too  
9 burdensome to produce.

10 JUDGE GROSSMAN: Mr. Edwards, you got  
11 exactly what you wanted for a -- what was it -- six-week  
12 period. Why don't we just limit it to that six-week  
13 period for all of the asserted delays? Are there more?  
14 There were three cited for May and four cited for June.  
15 Are there more for either of those months, May or June?

16 MR. MEYER: Your Honor, let me address that.

17 JUDGE GROSSMAN: I mean, just start with  
18 that. Are there others?

19 MR. EDWARDS: I would have to ask Pat Watts,  
20 who is in Laredo --

21 JUDGE GROSSMAN: Well, see, part of the  
22 problem is this, Mr. Edwards. It's sort of like a

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1 litigant going to court and telling the Judge that they  
2 have \$6 million worth of damages. And the Judge said,  
3 "Where did they come from?" "Well, they came from a lot  
4 of things, but we're not going to be specific because it  
5 would be very burdensome to be specific and tell you  
6 where all the \$6 million came from, but we really ask  
7 that you require the Defendant to give us that money".

8 It's the same kind of thing here. It's your  
9 case. Your witnesses are making allegations that seem  
10 to be supported by seven specific instances and no more.  
11 And you're expecting UP to be able to respond to the  
12 vague allegations and for, somehow or other, UP to read  
13 the minds of your witnesses on what is discriminatory  
14 activity and what isn't. You can't have it that way. It  
15 can't be done. I mean, the Surface Transportation Board  
16 may think of some way of doing it, I can't, and I have  
17 to look at the Discovery Request in that light. Mr.  
18 Meyer.

19 MR. MEYER: Your Honor, two things. First,  
20 I really think it's vitally important that there not be  
21 an artificial limit on the time period, and the reason  
22 is this. What we're asking for is what examples do they

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1 have, what are their contentions? And that means any  
2 period during which they will then come back after  
3 September 18 and say, "Oh, well, we responded to the  
4 discovery for the period of these six weeks, but we have  
5 these other examples that we didn't tell you about for  
6 these other periods", or "I have later gone and studied  
7 the records that I didn't bother to study before the  
8 discovery deadline was up, and now I see these  
9 additional 20 examples, or five examples, or whatever".

10 So, in responding to this discovery, there  
11 can't be an artificial limit on the period within which  
12 they must disclose their allegations.

13 JUDGE GROSSMAN: Can we agree on this, that  
14 in UP's answer or responsive testimony, the most that UP  
15 can do at this point is to parse the seven instances  
16 that are cited by your witnesses, and explain, or  
17 attempt to explain, that these were not uiscriminatory  
18 conduct, that it was something totally different. There  
19 is nothing more that UP knows of in terms of specific  
20 instances than that, is that correct? Do you accept  
21 that, Mr. Edwards?

22 MR. EDWARDS: No, Your Honor, I do not.

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1 JUDGE GROSSMAN: What would you have them  
2 respond to in terms of numerous instances? How would  
3 they go about attempting to show the STB that numerous  
4 instances didn't occur? If they can successfully rebut  
5 your witnesses with respect to these seven and explain  
6 them in some manner to show -- I have no idea whether  
7 they can or not, but just assuming they can -- if they  
8 can show that these were not discriminatory at all, that  
9 these were caused by factors completely beyond their  
10 control or factors that, in fact, were in TexMex's  
11 control or KCS' control, or shipper's control even, that  
12 it had nothing to do with discriminatory activities,  
13 what else could they respond to in the testimony other  
14 than to say these seven didn't occur?

15 MR. EDWARDS: The several instances that  
16 have been submitted to the Board in public filings and  
17 to Union Pacific by both TexMex, KCS, and Burlington  
18 Northern-Santa Fe, in the oversight proceeding.

19 JUDGE GROSSMAN: Are you willing to limit  
20 then your reliance with respect to these instances to  
21 what's in here, and the specific instances that are  
22 disclosed in the other filings, instead of -- I'm asking

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1 about the specifics, not the general comments, the  
2 general impression -- I believe that innumerable events  
3 occurred, the specifics. How many specifics were there  
4 in the March filing?

5 MR. EDWARDS: Your Honor, I --

6 JUDGE GROSSMAN: As I recall, there weren't  
7 many, were there, Mr. Meyer?

8 MR. MEYER: Your Honor, we basically have --

9 MR. EDWARDS: -- what was in that, what's in  
10 the 1518 proceeding, all the numerous discussions of  
11 discriminatory treatment in the -- there is the UP --  
12 the 1518 proceeding, the Sub 21 proceeding -- there have  
13 been -- this is in the context of the oversight  
14 proceeding and the congestion in the West. There have  
15 been --

16 JUDGE GROSSMAN: Why weren't they included  
17 here?

18 MR. EDWARDS: Because they have been already  
19 submitted to the Board in the oversight proceeding and  
20 in the 1518 proceeding, and it's duplicative and  
21 redundant --

22 JUDGE GROSSMAN: But doesn't this proceeding

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1 stand on its own record? Doesn't this proceeding stand  
2 on its own record before the Board in the Sub 26  
3 proceeding?

4 MR. EDWARDS: Until the Decision, number  
5 one, in this proceeding, the March 30 filing which did  
6 list other instances, for example, of discrimination,  
7 what's in the general oversight proceeding. So, the  
8 evidentiary record in there, I think, does --

9 MR. MEYER: Your Honor, if I may, we would  
10 be happy to include the specific examples in the March  
11 30 filing, which we take to be in the record of the Sub  
12 No. 26 proceeding. With regard to whatever Mr. Edwards  
13 is referring to in the service order proceeding, or the  
14 congestion in the West proceeding, or any other  
15 proceeding, I don't think that's in the record in this  
16 case, and I'm not sure what he's referring to, frankly.  
17 There have been assertions about congestion, certainly,  
18 and about difficulty operating, but in terms of  
19 discrimination, which is the nub of their complaint  
20 here. I'm not certain whether there were any specifics.  
21 That's one point, Your Honor.

22 Mr. Edwards also referred more generally to

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1 examples provided to UP previously, and I'm not sure  
2 whether he means in formal Board filings in this  
3 proceeding, or whether he is referring now to assertions  
4 that they make about complaints that they've repeatedly  
5 made to us about delays to their trains and/or  
6 discrimination. That's a subject of other requests at  
7 issue here today, Your Honor, I would like a chance to  
8 address those when the appropriate time comes.

9 I don't know if it's appropriate now to also  
10 mention on the deposition point, if we have the witness  
11 sitting at a deposition table for a day and ask the  
12 witness, "Okay, in May, what specific examples do you  
13 have? In April, what specific examples do you have?",  
14 and that witness undoubtedly -- if my experience in  
15 depositions is any guide -- will say, "Well, here's one.  
16 I don't remember the others, but there have been  
17 others", that's inadequate, clearly, as Your Honor  
18 indicated.

19 In addition, if we can spend a day  
20 interviewing their witness to get the specific examples  
21 that are in the witness' head that are not recited in  
22 the filing, they certainly can do the same. And so

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1 there really is no benefit to us --

2 JUDGE GROSSMAN: All right, here's what  
3 we're going to do -- I've heard enough on this. Since  
4 you obviously have to have data for the preparation of  
5 your filing not later than, say, September 11 --

6 MR. MEYER: Your Honor, we've given that  
7 careful thought, and even if we received full and  
8 complete responses by next Wednesday, we'd be hard-  
9 pressed to deal with it in the two-week period between  
10 then and our September 18 filing.

11 JUDGE GROSSMAN: That's going to be a  
12 problem.

13 MR. MEYER: End of next week is really very  
14 close to an absolute limit.

15 JUDGE GROSSMAN: End of next week is --  
16 well, let's see, the 7th is Labor Day, so this is  
17 Wednesday, the week after.

18 MR. STEEL: Friday is the 4th.

19 JUDGE GROSSMAN: So Friday is the 11th also  
20 -- Wednesday the 9th -- by the way, I'm going to be away  
21 the week of the 13th of September, I think I told you  
22 that before, but I don't think you'll need anything then

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1 because if you don't have it by then, it's going to be  
2 too late to try to get it.

3 All right. Here's what you're going to do.  
4 Your two witnesses, and any others that may be  
5 contemplated for filing similar testimony in your later  
6 filing, will, in at least narrative form, state not  
7 later than September 9 to UP, any other specific  
8 instances that they may rely upon in support of their  
9 filed statements, without limit to time.

10 MS. BROWN: Without any limit to time?

11 JUDGE GROSSMAN: Without any limit to time.

12 If the witnesses are going to rely on something, they  
13 are going to disclose what they are going to rely on.  
14 If the witnesses believe that something happened in  
15 October 1996 that was discriminatory, they will have to  
16 tell UP what that is and provide any documentation they  
17 have or reasonably can come up with to support that.

18 MS. BROWN: So we have to have our rebuttal  
19 done by September 9?

20 JUDGE GROSSMAN: It is not a matter of  
21 rebuttal at this point, Ms. Brown, it is a matter of  
22 your direct case. If this exists, you should have known

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1 it by now. Your witnesses certainly should know it by  
2 now if they cite it. It is not a matter of rebuttal.  
3 The only thing UP now has to rebut is seven instances.  
4 If you are going to rely on other than those seven, you  
5 must disclose it now because it is manifestly improper  
6 to withhold all of those data and supply them in  
7 rebuttal when UP has absolutely no chance to respond to  
8 it. This is your direct case. Your direct case is  
9 numerous instances. And what I am saying is to the  
10 extent there are more than these seven instances that  
11 the witnesses rely on or will rely on specifically, as  
12 specifically stated instances, they must have some sort  
13 of documentation that they will go to to find out about  
14 it.

15 Now, you've told me that it's impossible to  
16 go through the boxes and boxes of delay reports, so I  
17 assume that it's just as impossible for your witnesses  
18 to do that very thing as well. If UP can't do it and UP  
19 doesn't even know what it's looking for and it's too  
20 cumbersome and burdensome for you to provide it to UP,  
21 it's too burdensome for you to get it for yourselves, I  
22 assume.

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1           Now, this is what it's going to be. To the  
2 extent your witnesses have in mind, rely on other  
3 specific instances other than the seven that are  
4 mentioned in their verified statements, or to the extent  
5 you intend to rely on other witnesses who will file  
6 verified statements, who will amplify or supplement  
7 these statements with respect to numerous delays, you  
8 will provide to UP by the 9th of September a statement  
9 of exactly what it is they believe occurred on  
10 particular days, and provide any documentation they may  
11 have to support that.

12           MR. EDWARDS: Your Honor, a clarification,  
13 if I may. Is it our role to permit TexMex officials who  
14 will be explaining and describing these instances,  
15 access to the dispatching records and the tapes and any  
16 other matters that would be required, including Digicon,  
17 that would be required to respond to UP's request --

18           JUDGE GROSSMAN: Mr. Edwards, your witnesses  
19 are the ones that made these statements. They've got to  
20 have something that they based it on.

21           MR. EDWARDS: Based on their experience,  
22 Your Honor, yes.

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1 JUDGE GROSSMAN: Then that's fine.

2 MR. EDWARDS: So that's what --

3 JUDGE GROSSMAN: No. Their answer is,  
4 "based on experience, there are numerous occasions, none  
5 of which I can document".

6 MS. BROWN: Because they hold the documents  
7 --

8 JUDGE GROSSMAN: Well, you had access to  
9 these documents. You had access to records. I assume  
10 TexMex and KCS keep their own records, Mr. Edwards.  
11 Your witnesses made these statements. This is your  
12 case. If they made them without underlying  
13 documentation, without underlying factual support,  
14 that's not anybody's problem but yours.

15 The witnesses can testify that we are aware  
16 that numerous occasions occurred, but we don't have any  
17 documents to support it. Now, if that's what your case  
18 is, that's fine. Is that understood.

19 MR. EDWARDS: It is understood. Your order  
20 is understood, Your Honor, and just very short, the  
21 reason why if we are unable to provide some of these  
22 documents and the computer records is because these are

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1 run out of the Harriman Center, the dispatching center,  
2 and we were denied access to those records.

3 JUDGE GROSSMAN: Then you're certainly not  
4 going to have them for your rebuttal testimony either.

5 MR. EDWARDS: Yes, that's true.

6 JUDGE GROSSMAN: And I'm saying that  
7 anything that you are going to rely on, that you have  
8 relied on, that you will rely on, that you have in your  
9 possession, that the witnesses have that they relied on,  
10 will be disclosed, as well as their narrative.

11 Now, when was this essentially complaint  
12 filed?

13 MR. EDWARDS: That document was filed on  
14 July 8, Your Honor.

15 JUDGE GROSSMAN: July 8, 1997.

16 MR. EDWARDS: 1998.

17 JUDGE GROSSMAN: Not this. When did this  
18 proceeding start, TexMex and KCS asked for these  
19 conditions because of discriminatory activity on what  
20 date?

21 MR. EDWARDS: That's a very hard question to  
22 answer, Your Honor, but there was a March 30 filing

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1 which asked for additional remedial conditions. There  
2 was a service order request back in October of 1997, by  
3 several shippers, in which --

4 JUDGE GROSSMAN: I'm talking about when did  
5 TexMex and KCS first bring to the --

6 MS. BROWN: March 30.

7 JUDGE GROSSMAN: That's when you first  
8 brought to the Commission's attention your belief that  
9 there were discriminatory practices.

10 MS. BROWN: In this proceeding.

11 JUDGE GROSSMAN: In any proceeding. In any  
12 proceeding. I would assume from the time you brought  
13 this to the Surface Transportation Board's attention,  
14 that you maintained records to be used in case this came  
15 up for hearing.

16 MS. BROWN: Well, the proceeding started not  
17 from something we requested, the proceeding started from  
18 really the Board realizing there was a service crisis in  
19 the West. They instituted this proceeding and said  
20 everyone can file and let us know what conditions might  
21 remedy the situation.

22 MR. EDWARDS: But, Your Honor, there have

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1 been discussions of other discriminatory treatment that  
2 we believe -- where we have asked for oversight.

3 JUDGE GROSSMAN: All right. To the extent  
4 that your witnesses are going to rely on anything to  
5 support more than these seven instances of asserted  
6 discriminatory treatment, that will be made known to UP,  
7 together with any underlying documentation that is  
8 within the possession of TexMex and KCS. All right? To  
9 the extent you don't have it and you think that UP has  
10 it, you're still not going to get it for your rebuttal  
11 testimony, so that's not going to matter very much.

12 MS. BROWN: But we don't even have a Digicon  
13 screen yet.

14 JUDGE GROSSMAN: Pardon?

15 MS. BROWN: We don't even have a Digicon  
16 screen yet.

17 JUDGE GROSSMAN: But you were given access  
18 to a Digicon screen at my direction, to view and get the  
19 data that you needed at the time, is that correct?

20 MR. EDWARDS: With regard to a period of  
21 time.

22 JUDGE GROSSMAN: Right. And that was the

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1 period of time for which the Digicon tapes existed.

2 MR. EDWARDS: My belief is that --

3 JUDGE GROSSMAN: At least in the form that  
4 could be extracted without going back to the archives,  
5 I do remember that part of it, and we agreed that it  
6 would take an incredible amount of time to extract the  
7 archived Digicon tapes which were combined for all of  
8 the switching areas and dispatching areas of the country  
9 for UP. All right. So that's what UP is going to get  
10 from this.

11 Next? What else do we have, anything else?

12 MR. MEYER: Yes, Your Honor. First, I want  
13 to say I'm obliged just to state for the record,  
14 although it does bear on the next topic, that Mr.  
15 Edwards' assertion that TexMex is incapable of  
16 investigating their beliefs, if they are true beliefs --  
17 and we question that -- of discrimination against their  
18 trains, they have every contractual right one might  
19 imagine to investigate, to make complaints, to ask for  
20 information -- they have access to our dispatching  
21 centers. I just want -- the record needs to be clear --

22 JUDGE GROSSMAN: I understand, I read what

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1 they claim that access grants them to, and there seems  
2 to be a dispute about that.

3 MR. MEYER: Yes, Your Honor.

4 JUDGE GROSSMAN: And I don't need briefs  
5 filed before me at this point on these issues.

6 MR. MEYER: That's fine, Your Honor. Now,  
7 turning to the next subject, in addition to making  
8 allegations of specific examples of discrimination,  
9 their witnesses assert that they have on innumerable  
10 occasions made complaints to us and sought to exercise  
11 the contractual rights to which I just referred. They  
12 give no specifics.

13 The only examples given in response to the  
14 discovery requests are a handful of meetings of the  
15 Joint Service Committee, which is a committee that  
16 exists between TexMex and Union Pacific, to address  
17 service issues and issues arising under TexMex' trackage  
18 rights. And yet there is no delineation of what  
19 specific complaints, if any, were made about asserted  
20 discrimination or mishandling of our trains.

21 Now, we have been doing everything we can to  
22 understand what, if any, complaints were made, and we've

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1 asked them to please tell us what specifically you have  
2 in mind and are asserting were complaints that you made  
3 to us that we failed to respond to. Again, we need to  
4 respond to these kinds of allegations by the 18th, and  
5 I believe that they ought to be obligated to come  
6 forward with whatever they have in that area as well.

7 JUDGE GROSSMAN: I assume your response is  
8 that to the extent complaints were made, UP has those  
9 complaints in its files and can jolly well go look them  
10 up, is that correct?

11 MR. EDWARDS: In fact, in the June 1 hearing  
12 before the Board, Mr. Roach described several of those  
13 as well. So, they do know these. They have explained  
14 them even before Your Honor, and the documents that --

15 JUDGE GROSSMAN: I recall that some of them  
16 were explained in rather general terms, that it was also  
17 -- we also discussed the fact that numerous complaints  
18 and papers were sent to -- by TexMex -- to UP, some of  
19 which were complaints, others weren't. Some were  
20 complaints about discrimination, some were complaints  
21 about other things. And unless the word  
22 "discrimination" appears in any of those documents, is

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1     there any way that UP could figure out which ones are  
2     believed by TexMex and KCS to be discrimination  
3     complaints as opposed to, say, general congestion  
4     complaints?

5             MR. MEYER: Your Honor, my understanding --  
6     there was a person who was made a day-to-day liaison  
7     with TexMex, Mr. Williams, who has had numerous  
8     conversations with Pat Watts over the time period of  
9     TexMex' trackage rights, where Pat Watts would call up  
10    to say, "Did you find out what happened to TexMex train  
11    such-and-such on such-and-such a day?" There would be  
12    an investigation. Okay, it was held at this red signal  
13    because of such-and-such, or whatever the cause was, and  
14    nothing ever arose from that. To our knowledge, that  
15    wasn't -- Pat Watts may have -- may have -- on some of  
16    those occasions been complaining that his trains weren't  
17    treated appropriately, or weren't given the expedition  
18    that they deserve, or whatever, but that was sort of the  
19    end of it.

20            Now, presumably, if TexMex is relying on the  
21    fact that they have vigorously exercised their rights to  
22    make complaints and failed to get any satisfaction, they

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1 would have records of some kind that indicate that they  
2 tried to get relief on these occasions, but we refused,  
3 or there was some failure on our part to do something  
4 that they say they are entitled to. We don't believe  
5 that occurred, Your Honor, but if they have anything  
6 that suggests that it did, we need to have it now so  
7 that we can address it.

8 JUDGE GROSSMAN: That seems reasonable. You  
9 will provide it if you have it, if you don't you will  
10 tell Mr. Meyer that you don't have it. All right.

11 MR. EDWARDS: That's your order. We believe  
12 that the burden is still on TexMex for the previous, but  
13 we understand your order.

14 JUDGE GROSSMAN: To the extent you have any  
15 documentation of dissatisfaction of UP's response or  
16 belief that UP discriminated in some manner, in these  
17 complaint files, if there are such things, you will  
18 provide them.

19 MR. EDWARDS: If I understand Your Honor's  
20 order, this is -- now, again, this encompasses the  
21 entire period of --

22 JUDGE GROSSMAN: Covers the entire period,

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1 yes.

2 MR. MEYER: So, Your Honor, I believe that  
3 together those two rulings cover our request at issue,  
4 but just to review, our Request 1 addressed  
5 circumstances surrounding alleged discriminatory or  
6 preferential treatment, that's clearly covered by your  
7 prior statements.

8 JUDGE GROSSMAN: And that can be done in  
9 narrative form also, by Messrs. Nichols and Watts, and  
10 by any other people who may be relied upon to supplement  
11 that.

12 MR. EDWARDS: In our rebuttal filing?

13 JUDGE GROSSMAN: Yes, who you intend at  
14 least to rely upon, if there are others. I would assume  
15 that the two who filed affidavits in the July 8 filing  
16 are going to be the ones who you are primarily relying  
17 on, since they are the ones who say they have the  
18 knowledge of this.

19 MR. EDWARDS: And once again, Your Honor, we  
20 recognize your order. We believe that it similarly  
21 requires us to put our rebuttal case --

22 JUDGE GROSSMAN: Oh, it certainly does not.

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1 What it requires you to do is provide the details of  
2 your direct case, not your rebuttal case. If UP states  
3 that we have evaluated these seven instances and the  
4 four others that were disclosed to us, or whatever  
5 number were disclosed to them in discovery, and this is  
6 what we find, that this occurred because of the  
7 following reasons, you can always rebut that. But what  
8 you can't do no rebuttal is bring in entirely new  
9 evidence on matters that were not disclosed previously.

10 MR. EDWARDS: We also believe that these  
11 orders are for us to be able to comply with the request  
12 -- that is, each and every instance would be -- it will  
13 be a burden that we will be unable to

14 JUDGE GROSSMAN: It is, Mr. Edwards, each  
15 and every instance that your witnesses have relied upon  
16 or intend to rely upon specifically. If they are merely  
17 going to say, "We know of lots of others but we don't  
18 have any documentation of it and we have nothing further  
19 in the way of evidence other than our general belief",  
20 that's fine, then say that in the response.

21 MR. EDWARDS: We're unlikely to say that  
22 because of the one clause that you place in there that

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1 says "and we have no documentation of that". What your  
2 order requires us to do is to go back through all the  
3 documentation for 1500 trains --

4 JUDGE GROSSMAN: Well, whatever your  
5 witnesses are going to rely on or have relied on, that's  
6 all.

7 MR. EDWARDS: The box that is being placed  
8 around us, Your Honor, is that UP will be able to say,  
9 "We asked for each and every case, they came up with  
10 five in the short period of time that we provided them  
11 with, we believe that we have defended those five. There  
12 are no more because they produced no more, and so the  
13 case is closed".

14 JUDGE GROSSMAN: Well, frankly, if you were  
15 practicing before this Commission rather than the STB,  
16 you would be precluded from raising in rebuttal anything  
17 factually that had not been disclosed in your direct.  
18 And in most courts, that's the case. I'm not sure what  
19 would be permitted by the STB in terms of your  
20 supplementing your filing subsequent to UP's response.  
21 I don't think the STB has ever had to deal with that  
22 before.

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1 But what we have is a method that -- we're  
2 trying to come up with some methodology that will  
3 compensate for the fact that there is no such thing as  
4 cross-examination. If your witness was on the stand  
5 based upon what is filed here in this verified  
6 statement, and said, "Oh, I have hundreds of others,  
7 hundreds of other instances", and the question is, "Tell  
8 me about one of them" -- "Well, I can't because there  
9 are so many of them, I just know it of my general  
10 knowledge" -- that's not going to carry a lot of weight.

11 MR. EDWARDS: That goes to the weight --

12 JUDGE GROSSMAN: I understand. It also goes  
13 to -- well, it goes to a number of factors -- which we  
14 don't have to get into here because the Surface  
15 Transportation Board will at some point, I assume -- but  
16 all I'm saying is that you have to disclose that which  
17 your witnesses will rely on, and whether you intend to  
18 supplement on rebuttal testimony or not, UP is entitled  
19 to know what that's going to be, at least as to the  
20 specifics, so they have an opportunity to respond or to  
21 deal with it.

22 MR. EDWARDS: Yes, Your Honor.

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1 JUDGE GROSSMAN: All right.

2 MR. MEYER: Your Honor, let me be clear on  
3 your schedule. You mentioned you would be away the week  
4 of September 13. Your Honor, I guess that does raise a  
5 question of how we will deal with any failure to comply  
6 with --

7 JUDGE GROSSMAN: Well, if they don't, it's  
8 going to be too late to do you any good.

9 MR. MEYER: I understand that, Your Honor.

10 JUDGE GROSSMAN: And you will deal with that  
11 before the Surface Transportation Board in terms of  
12 request for sanctions, if you should make such a  
13 request.

14 MR. MEYER: Very well, Your Honor.

15 JUDGE GROSSMAN: But if they don't respond  
16 by the 9th, and your testimony is due Friday, week after  
17 that, there's not much that anybody can do --

18 MR. MEYER: That's correct, Your Honor.

19 JUDGE GROSSMAN: -- other than your noting  
20 in your filing that you asked for this and it was not  
21 forthcoming, but I am sure that it will be because you  
22 are going to be very cooperative.

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1 MR. MEYER: I think it's clear from the  
2 record, but I want to make sure that it is clear so that  
3 we don't have any misunderstanding on the 9th, that they  
4 are also to supply us with whatever identification or  
5 documentation they have concerning complaints to us  
6 about discrimination or other efforts that they made to  
7 have discrimination addressed by us or remedied by us.

8 JUDGE GROSSMAN: These are only with respect  
9 to discrimination, not with respect to any other  
10 complaints such as congestion or misconstruing of  
11 agreements or whatever. I'm sure there are lots of  
12 complaints, but the only ones we are concerned with are  
13 the complaints about discrimination, is that correct?

14 MR. MEYER: Thank you, Your Honor.

15 JUDGE GROSSMAN: All right. We understand  
16 that?

17 MR. EDWARDS: Yes, Your Honor.

18 JUDGE GROSSMAN: Okay. Is there anything  
19 else? I hope not.

20 MR. MEYER: Not at this time.

21 JUDGE GROSSMAN: My file grows by leaps and  
22 bounds and drawers, from all these filings I'm getting

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1 from you and apparently everybody else in the case.

2 MR. EDWARDS: Your Honor is on the official  
3 service list, everybody is required to --

4 JUDGE GROSSMAN: Oh, how fortunate I am. I  
5 notice that the Department of Transportation has just  
6 indicated an interest in this case, too. So, I do read  
7 all this stuff that comes through, most of which I have  
8 absolutely no concern with, so I just give it to my  
9 Legal Technician to file for me. Okay, that's it. The  
10 conference is concluded, and thank you.

11 (Whereupon, at 11:00 a.m., the discovery  
12 conference in the above-entitled matter was concluded.)  
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