

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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INTERMOUNTAIN POWER AGENCY)
)
 Complainant,)
)
 v.)
)
 UNION PACIFIC RAILROAD COMPANY)
)
 Defendant.)

Docket No. 42136

REPLY TO MOTION TO HOLD IN ABEYANCE

INTERMOUNTAIN POWER AGENCY

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REPLY TO MOTION TO HOLD IN ABEYANCE

Complainant Intermountain Power Agency (“IPA”) hereby replies in opposition to the Motion to Hold Proceeding in Abeyance (“Motion”) that Defendant Union Pacific Railroad Company (“UP”) filed on August 14, 2012.

INTRODUCTION AND SUMMARY

In its Motion, UP argues that the parties’ and the Board’s interests in achieving a “fair and efficient” resolution of Docket No. 42136 would be best served by suspending the procedural schedule so that the stand-alone cost (“SAC”) evidence in the case will be based upon any new and “improved” rules that the Board adopts in *Rate Regulation Reforms*, STB Ex Parte No. 715 (STB served July 25, 2012) (“*Rate Regulation Reforms*” or “Ex Parte No. 715”). UP’s “fairness” argument is blatantly incorrect and UP’s claim that uncertainty exists regarding the applicability of any new SAC rules to pending cases is directly contrary to the Board’s own holdings in Ex Parte

No. 715. With the experience of the eight-year *Western Fuels* proceeding¹ fresh in its memory, the Board correctly found that it would be improper to apply any new SAC rules to pending cases. *See Rate Regulation Reforms* at 17 n.11 and 18. The Board should reject UP's effort to undermine that determination through its Motion.

Contrary to UP's arguments, holding the instant case in abeyance would be profoundly unfair and extremely prejudicial to IPA. As the Board recognized in its decision in Ex Parte No. 715, there is nothing "fair" or appropriate about changing the SAC rules that are applicable to pending cases, particularly to the extent that the Board's proposed limitations on cross-over traffic have never been suggested previously and would fundamentally alter the nearly 20-year history of parties in SAC cases relying on cross-over traffic as a simplifying device.² Applying these proposed changes to pending cases would contravene the legitimate expectations of the parties and would create unnecessary and unreasonable uncertainty in the Board's process for seeking maximum rate relief. If UP were correct that the only fair approach to making modifications to existing SAC rules is to hold all pending cases in abeyance (for an undetermined length of time), then neither shippers nor carriers who are engaged in rate negotiations would have any measure of certainty regarding the nature or potential outcome of the Board's rate regulatory constraint that would apply in the absence of a rail transportation contract.

¹ *See Western Fuels Ass'n, Inc. and Basin Elec. Power Coop. v. BNSF Ry.*, STB Docket No. 42088 (STB served June 15, 2012) ("*Western Fuels*").

² As described in greater detail below, the Board's proposed limitations and restrictions regarding cross-over traffic would have a significant – and likely highly prejudicial – impact on IPA's stand-alone railroad ("SARR") presentation.

At all relevant times during its rate dispute with UP, which began in late 2010, IPA has proceeded on the basis of its understanding and its considered analysis of the Board's existing SAC rules. IPA presumes that UP's actions were undertaken with the benefit of its own understanding and analysis of those rules, as well. Allowing UP to circumvent the Board's finding that any new SAC restrictions would not apply to pending cases would constitute retroactive rulemaking and would unfairly punish IPA for its reasonable reliance on the Board's existing rules.³

As described in greater detail below, UP bases its argument in favor of holding this case in abeyance upon a transparent mischaracterization of the Board's decision in Ex Parte No. 715. The Board clearly held in *Rate Regulation Reforms* that it would not apply new SAC rules to pending cases. *See* Ex Parte No. 715 at 17 n.11; *id.* at 18. UP argues in its Motion, however, that the Board did not "resolve" this question, but instead, recognized that it would be required to address the issue of applicability to pending cases in a subsequent rulemaking decision. *See* UP Motion at 3-4. UP's characterization of the Board's holding is decidedly incorrect.

UP is attempting to gain a substantive advantage by forcing IPA to litigate its case under proposed rules (particularly the proposed cross-over traffic limitations) that, if adopted, would force IPA to undertake, at great additional litigation expense, major changes to its SAC analysis with unknown, but likely highly prejudicial, effects.

³ After electing to seek STB relief from UP's rate demands, IPA has paid for coal transportation service on the basis of UP's disputed rates for over twenty (20) months. During that time, IPA has spent millions of dollars on legal and consulting fees in order to demonstrate that UP's rates exceed a reasonable maximum as determined under the Board's existing SAC rules and procedures.

The Board should not permit UP to obtain this litigation windfall by changing the established rules of the exercise in the midst of a pending case. Under these circumstances, the Board certainly was correct in finding that any new SAC rules adopted through Ex Parte No. 715 should not apply to pending cases. In light of that finding, UP's Motion effectively would require the Board to grant reconsideration of its initial decision in Ex Parte No. 715 without any showing of changed circumstances, new evidence, or material error. *See* 49 C.F.R. § 1115.3(b). No such showing would be possible because the Board's "fairness" evaluation was unquestionably correct.

UP's request to hold the case in abeyance also is improper because UP agreed to the schedule in effect in this case even after learning that the Board would institute a new SAC-related rulemaking proceeding. Having agreed to the present schedule with the knowledge that the Board would begin such a proceeding, UP should not now be heard to demand a suspension of that schedule simply because the Board has issued its anticipated rulemaking decision.

BACKGROUND

The rate dispute between IPA and UP has a lengthy and complex history. As the Board is aware, IPA moved to dismiss its original Complaint proceeding against UP after the Board declined IPA's request to correct an error through the filing of supplemental opening evidence. IPA elected to proceed with a new case on the basis of the existing SAC rules and its expectation that IPA could litigate a new, truncated case in a much more limited and cost-effective fashion, already having engaged in discovery and

the preparation of opening evidence that encompassed all of the SARR system that IPA expects to rely on in this new case.

If the Board were to reverse its prior ruling and apply new SAC procedures to the pending IPA case, IPA would suffer extreme prejudice.

A. Contract Negotiations and Docket No. 42127

In early 2009, IPA attempted to initiate discussions with UP regarding the replacement of the parties' then-existing rail transportation contracts for service to the Intermountain Generating Station ("IGS"). *See* IPA Op. Ev., Docket No. 42127, Verified Statement of John L. Aguilar at 2. Eventually, UP provided IPA a contract proposal in September of 2010. *Id.*

After unsuccessful contract negotiations in which IPA sought to obtain less onerous rate levels for the subject service, on October 29, 2010, IPA made a written request to UP for common carrier rates to be effective on January 1, 2011. *Id.* at 3-4. UP eventually provided the rates IPA had requested on December 1, 2010. *Id.* IPA evaluated these rates, with the assistance of consultants, applying the Board's SAC methodology (including the handling of cross-over traffic) as defined by the Board through all pertinent decisions extant at that time.

On December 22, 2010, IPA filed a Complaint against UP in Docket No. 42127 challenging its rates as exceeding maximum reasonable rate levels determined under the Board's SAC constraint and seeking the prescription of maximum reasonable rates for the transportation of coal in unit train service from one Utah coal loadout (the

Savage Coal Terminal (“Savage”), one Utah mine (the Skyline Mine (“Skyline”)), and one point of interchange with URC (Provo, Utah) to IGS.

IPA filed Opening Evidence in support of its Complaint on August 10, 2011. IPA’s Opening Evidence relied upon a SARR configuration that could provide the subject service for each of the challenged rates (*i.e.*, the bottleneck Provo rate and the single-line rates from Skyline and Savage to the plant). The total system included 278.67 route miles, extending between Price, Utah on the east and Milford, Utah on the west. The traffic group for IPA’s Stand-Alone Railroad included substantial volumes of cross-over traffic which the SARR was to handle as a bridge carrier.

UP filed Reply Evidence on November 10, 2011. Therein, UP argued that IPA had failed to demonstrate that the challenged rates were unreasonable. In the course of its Reply, UP noted, amongst several purported infirmities, that when IPA had attempted to calculate the ratio of the IRR’s variable and fixed costs to the total variable and fixed costs for each movement for purposes of calculating ATC divisions, “IPA inadvertently excluded IRR’s variable costs from the denominator.” UP Reply at III.A-24. The effect of IPA’s error (of which IPA was unaware until UP filed its Reply Evidence) was to overstate the share of cross-over movement revenues available to the SARR.

On December 8, 2011, after evaluating the impact of correcting its SAC analysis (again based upon the Board’s existing SAC methodologies, including those involving cross-over traffic), IPA filed a Petition (“IPA Petition”) seeking leave to supplement the record by substantially simplifying its SARR system. In particular, IPA

requested permission to submit supplemental opening evidence based on a truncated version of its SARR that would replicate only the Provo to Milford portion of UP's system. *See* IPA Petition at 1-2. IPA explained that as a result of this change in its SARR, it would only challenge UP's Provo rates. *Id.* at 2. UP replied in opposition to IPA's Petition to supplement on December 28, 2011, and the Board denied IPA's Petition to supplement the record on April 4, 2012.

On May 2, 2012, IPA filed a motion for leave to withdraw its Complaint in Docket No. 42127 and a request for dismissal of that proceeding. UP filed its reply to IPA's motion on May 22, 2012 ("UP May 2012 Reply"). In its Reply, UP acknowledged that IPA was entitled to file a new complaint, but UP insisted that reparations in the new case should not be available for rates paid prior to the date of dismissal of Docket No. 42127. *See* UP May 2012 Reply at 2.

B. Docket No. 42136

IPA filed its Complaint initiating the instant case on May 30, 2012. IPA based its decision to file the new case on its analysis of the relief available under the Board's existing SAC rules. IPA's new Complaint seeks the establishment of reasonable rates and other terms for unit train coal transportation by UP from the point of interchange with URC at Provo, Utah to the IGS facility. As before, the traffic group that IPA anticipates that it will develop for its Docket No. 42136 SARR will include substantial volumes of crossover traffic that the SARR would handle in bridge service.

After the filing of IPA's new Complaint, the parties engaged in discussions regarding the procedural schedule and protective order for the case, and on June 12,

2012, IPA served its First Interrogatories and Requests for Production of Documents on UP. IPA's Requests were a combination of requests to update UP's production from Docket No. 42127 and a small number of new requests. IPA and UP agreed that in the new case, the parties each would have access to all discovery and filings from the prior proceeding in the expectation that this agreement would reduce the expense of litigating the new case.⁴

C. *Western Fuels*

In its June 15, 2012 decision in *Western Fuels*, the Board stated that it would “begin a rulemaking proceeding to consider whether a methodology similar to BNSF’s alternative ATC” might better accommodate the competing principles at issue when the Board calculates revenue divisions for cross-over traffic. *Western Fuels* at 12. Notwithstanding the arguments set forth in Commissioner Begeman’s separate dissenting “expression,” the Board found that it would be inappropriate to hold *Western Fuels* in abeyance pending the conclusion of the anticipated ATC rulemaking. *Id.* at 12-13.

In reaching that determination, the Board emphasized its consideration of administrative finality and the danger that changes in ATC methodology might “lead to still more litigation.” *Id.* The Board also commented on the possibility that applying the results of the new rulemaking to *Western Fuels* could encourage future litigants to “try out new theories at late stages in the process” and the Board ultimately held that “[l]itigation must come to an end at some point” *Id.*

⁴ UP filed its Answer to IPA’s Complaint on June 19, 2012.

D. The Agreed-Upon Schedule in Docket No. 42136

In the days following the *Western Fuels* decision, IPA and UP conferred regarding the procedural schedule in the instant case, and on June 27, 2012 (*i.e.*, twelve days after the Board's service of *Western Fuels*), the parties submitted a joint Report on Conference to the Board. Therein, the parties requested that the Board issue a schedule requiring the filing of opening evidence on December 17, 2012, reply evidence on April 12, 2013, and rebuttal evidence on July 3, 2013.

The parties identified a single qualification on this schedule in their request; namely, that it was their assumption that the Board would "issue a decision in Docket No. 42127 on the question of the scope of reparations in this case a reasonable time in advance of the due date for Opening Evidence." Report on Conference at 2. The parties explained that "[t]he Board's resolution of that issue will impact the starting date for the operations of the stand-alone railroad in this case." *Id.* Significantly, the parties' scheduling request did not include any qualification with regard to the anticipated rulemaking that the Board had discussed in its *Western Fuels* decision.

The Board's Office of Proceedings approved the parties' proposed schedule on July 12, 2012.

E. Ex Parte No. 715

On July 25, 2012, approximately two weeks after the Board approved the current schedule in Docket No. 42136, the Board issued its Decision in Ex Parte No. 715. Therein, the Board proposed, *inter alia*, to modify its SAC case rules in two significant respects. *See* Ex Parte No. 715 at 15-18.

The first SAC-related change that the Board proposed in *Rate Regulation Reforms* was to: “(1) restrict[] the use of cross-over traffic to movements for which the SARR would either originate or terminate the rail portion of the movement; or (2) restrict[] the use of cross-over traffic to movements where the entire service provided by the defendant railroad in the real world is in trainload service.” *Id.* at 16-17. Significantly, the Board confirmed in this portion of its decision that “any” change it might adopt would not impact pending cases:

We do not propose to apply *any* new limitation retroactively to existing rate prescriptions that were premised on the use of cross-over traffic *or to any pending rate dispute that was filed with the agency before this decision was served.* We do not believe it would be fair to those complainants, who relied on our prior precedent in litigating those cases.

Id. at 17 n.11 (emphasis added).

The Board also proposed to adjust its current ATC methodology to incorporate a two-step approach to calculating cross-over revenue divisions. *Id.* at 17-18. When describing this second change to the SAC ratemaking process, the Board emphasized the fact that it would impact only “future” cases, explicitly seeking comment on “whether we should adopt this modification to ATC for use in all *future* SAC and Simplified-SAC proceedings and whether it provides a more suitable methodology that would better accommodate the two competing principles than the current ATC approach.” *Id.* at 18 (emphasis added).

All three Board members joined in the decision in *Rate Regulation Reforms*, and no Board member issued a separate dissenting opinion.

F. UP's Motion to Hold in Abeyance

On the due date for petitions for reconsideration of the Board's decision in Ex Parte No. 715 (*i.e.*, twenty days after July 25, 2012), UP filed its Motion to hold the instant case in abeyance. Notably, however, neither UP nor any other entity actually sought reconsideration of the Board's decision in Ex Parte No. 715. *See* 49 C.F.R. § 1115.3 ("A discretionary appeal of an entire Board action is permitted. Such an appeal should be designated a 'petition for reconsideration.'"); *id.* at § 1115.3(b) (the Board will grant a petition for reconsideration only upon a showing that "[t]he prior action will be affected materially because of new evidence or changed circumstances" or that "[t]he prior action involves material error.").

While UP does not even acknowledge, let alone seek to meet, the Board's standard for obtaining reconsideration, UP hopes to obtain effectively the same result through its motion to hold in abeyance. In particular, UP ultimately seeks a determination that whatever changes the Board may adopt in *Rate Regulations Reforms* should apply to the IPA case.

ARGUMENT

In *Rate Regulation Reforms*, the Board explained, without dissent, that it did not propose to apply any new cross-over traffic rules promulgated as a result of the Ex Parte No. 715 proceedings to pending SAC cases and that a new ATC methodology likewise would apply only to future cases. *See Rate Regulation Reforms* at 17 n.11 (finding that it would not be "fair" to apply new cross-over traffic limitations to pending

cases); *id.* at 18 (seeking comment on the Board’s proposal to modify the ATC methodology for use in future cases).

Notwithstanding those determinations, UP seeks to manipulate the schedule of the present case in order to bolster its chances of ultimately persuading the Board to reverse its decision and to apply any newly adopted SAC rules to the present case. In that regard, UP advises the Board that it intends to deviate from the Board’s current methodology in filing its own evidence (*see* UP Motion at 5) and UP threatens the Board with an appeal in the event that the Board relies upon existing SAC methodology in Docket No. 42136. *Id.* at 5 n.5 (“UP would certainly appeal any decision not to apply meaningful improvements to the SAC process to this case.”).

UP’s Motion seeks relief that would be extremely prejudicial to IPA and runs counter to UP’s prior agreement to the present schedule (even with the knowledge that the Board would institute a new SAC rulemaking). For the reasons described below, the Board should deny UP’s request to hold the case in abeyance.

A. Granting UP’s Request Would be Unfair and Highly Prejudicial

UP is manifestly incorrect in arguing that fairness requires the Board to hold the case in abeyance pending the outcome of Ex Parte No. 715. Such relief is decidedly unfair and would be highly prejudicial to IPA.

Effectively, UP’s Motion amounts to the argument that once the Board initiates the process of considering changes to its SAC methodology, the only “fair” approach is to halt all pending cases and to rule that those cases will be subject to whatever new methodologies, if any, result from the rulemaking (and any associated

judicial review proceeding). While it is correct that the Board followed such an approach in *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1) (STB served Feb. 27, 2006) (“*Major Issues*”), the Board need not – and as it recognized – should not, proceed in the same manner here.⁵

Indeed, the experience of the complaining shipper in *Western Fuels* regarding *Major Issues* militates strongly *against* following the same approach here, and presumably played a role in the Board’s decision here not to apply any resulting new rules to pending cases. The proceedings in STB Docket No. 42088, *Western Fuels Ass’n. v. BNSF Railway Company*, have consumed approximately eight years, with multiple evidentiary filings on the merits, largely as a result of the Board’s decision to apply its new *Major Issues* rules in that case.

Regardless of whether the Board should have stayed pending cases in *Major Issues*, it is evident that the Board acted correctly in ruling that it would not apply the results of Ex Parte No. 715 to pending cases. The Board’s proposed restrictions on cross-over traffic in Ex Parte No. 715 represent far more of an unanticipated departure from settled SAC principles than any of the changes that the Board proposed in *Major Issues*. The broad availability of cross-over traffic has been an “established legal regime” under the STB’s SAC jurisprudence and the Board’s newly proposed changes, if adopted, would constitute an abrupt departure from that well-established practice. *See, e.g., BNSF*

⁵ Despite the repeated references to *Major Issues* in its Motion, UP never argues that the Board’s procedural approach in *Major Issues* (or any other factor) formally *requires* the Board to hold IPA’s complaint case in abeyance.

Ry. v. STB, 526 F.3d 770, 784 (D.C. Cir. 2008).⁶ Accordingly, holding the instant case in abeyance in order to apply future rules to IPA would be unfair and extremely prejudicial.

1. Application of the Proposed New Cross-Over Traffic Rules Would Substantially Prejudice IPA

In Docket No. 42127, IPA presented evidence based upon a fairly simple and straightforward SARR design. The SARR system (the “IRR”) consisted of 278.67 route miles, and extended from IPA’s coal origins in the east to a point southwest of the IGS facility (*i.e.*, Milford, Utah). The traffic for the IRR included coal, automotive, agricultural, intermodal, and other non-coal traffic. Most of the IRR’s traffic was cross-over traffic because the IRR originated or terminated only coal shipments, and the IRR served only one power plant (IGS) that receives coal. The non-coal traffic moving over the IRR was principally traffic that UP handles between Southern California and Chicago or between Southern California and Denver. *See* UP Reply Ev. at III.C-1. The IRR handled that traffic as an overhead or bridge carrier.

In Docket No. 42136, IPA expects to substantially simplify its SARR. IPA anticipates that this new SARR will extend only from Provo, Utah (*i.e.*, UP’s interchange point with the URC) to Milford, Utah (*i.e.*, the southwestern end of UP’s Sharp Subdivision). The SARR will no longer replicate the portion of UP’s system between

⁶ *See also Clark-Cowlitz Joint Op. Agency v. FERC*, 826 F.2d 1074, 1082 (D.C. Cir. 1987) (drawing a distinction between the retroactive effect of agency adjudication as opposed to agency rulemaking); *accord Consol. Edison Co. v. FERC*, 315 F.3d 316, 323 (D.C. Cir. 2003); *Power Co. of Am., L.P. v. FERC*, 245 F.3d 839, 847 n.7 (D.C. Cir. 2001).

Provo and Price, Utah. The new IPA SARR is likely to once again handle a substantial volume of cross-over traffic as a bridge carrier.

The inclusion of cross-over traffic in a SARR system is entirely consistent with longstanding agency precedent. As the ICC recognized in *Nevada Power II* and repeatedly thereafter, the use of cross-over traffic greatly simplifies the stand-alone analysis by allowing the shipper to take into account the economies of scale, scope, and density that the defendant enjoys over the routes replicated without unduly complicating the analysis. See, e.g., *Bituminous Coal – Hiawatha, UT to Moapa, NV*, 10 I.C.C.2d 259, 265-68 (1994) (“*Nevada Power II*”); *Otter Tail Power Co. v. BNSF Ry.*, STB Docket No. 42071, at 12 (STB served Jan. 27, 2006) (“The modeling device of cross-over traffic has become an indispensable part of administering a workable test.”); *Pub. Serv. Co. of Colo. d/b/a Xcel Energy v. The Burlington N. and S.F. Ry.*, 7 S.T.B. 589, 600-603 (2004) (“*Xcel*”) (“Creating a SARR to serve the same traffic group without using the cross-over traffic device would dramatically enlarge the geographic scope of a SARR.”); *AEP Tex. N. Co. v. BNSF Ry.*, STB Docket No. 41191 (Sub-No. 1), at 18 (STB served Sept. 10, 2007) (“The use of cross-over traffic to simplify a SAC presentation is a well-established practice.”). Absent the availability of cross-over traffic, the shipper would bear the burden of constructing the entire length of the lines that are used by the defendant to serve the subject traffic.⁷ As a practical matter, if complaining shippers are denied

⁷ The configuration of the IRR used in IPA’s original opening evidence replicated certain sections of UP track which the *Nevada Power* SARR also replicated. In other words, IPA’s SARR will operate over some of the same track as the SARR that led to the use of cross-over traffic in SAC cases.

reasonable access to revenues from cross-over traffic, the Board's already dauntingly complicated, drawn out, and expensive SAC methodology would become completely unworkable in all but a very few unusual situations.

The Board's Ex Parte No. 715 decision, however, raises a number of criticisms regarding cross-over traffic, and for the first time, proposes either to categorically prevent shippers from including certain cross-over traffic in their systems or to require shippers to build SARR systems sufficiently large to reach the origin and/or destination of at least certain of their system's cross-over traffic. *See* Ex Parte No. 715 at 16-17. Application of these proposals to the instant case would have a significantly adverse and unanticipated impact on IPA.

If the Board's proposed rules were applied to Docket No. 42136, IPA could suffer the loss of a significant share of its SARR's traffic group or be required to expand its system beyond recognition. In the first instance, IPA's very modest and simple SARR could be required to construct a new western portion of its system that extends from Milford, Utah west to Southern California in order to originate or terminate the cross-over traffic that moves over the Milford to Lynndyl, Utah portion of the SARR. Such an addition alone would be several multiples of the length of the entire current system. Constructing such a system would require additional discovery from UP on each of the subjects that impact a SARR system, such as traffic and revenue data, car and train movement data, forecasts, crew district data, intermodal facility cost data, track charts, timetables, fueling location and cost data, land acquisition and construction records, etc. *See, e.g., Otter Tail* at 12 ("Without cross-over traffic, the SARR would replicate the

entire service provided by the defendant railroad for all of the traffic included in the SAC analysis, so that all capital and operating costs associated with serving the traffic group would be included in the SAC analysis”); *id.* (“We must guard against the SAC process becoming so complex and expensive as to deny captive shippers meaningful access to the rate review provided for under *Guidelines.*”).⁸

Next, after identifying the traffic that would move over this major California-to-Milford, Utah extension of the SARR, IPA then would be required to consider whether it should (or must) construct any additional lines needed to serve the origin or destination of any traffic that: (i) UP moves over some portion of this extended line; but (ii) does not utilize any of the “core” SARR facilities used by the Provo to IGS issue traffic. *See, e.g., Xcel* at 602 (discussing the “cascading” implications of BNSF’s arguments against cross-over traffic and explaining that “the geographic scope of the expanded SARR might not end there. . . . The cascading analysis could result eventually in a complainant having to replicate almost all of BNSF’s system The scope and complexity of the proceeding would expand exponentially.”); *Otter Tail* at 10 (recognizing that it is permissible under SAC theory to include so-called “Shipper 3” traffic that “uses only the [SARR’s] secondary facilities and does not use the core facilities” used to serve the issue traffic). Additional questions undoubtedly would be

⁸ In its Motion, UP acknowledges that a new discovery period would be required if the Board were to grant UP’s Motion. *See* UP Motion at 6 n.6 (“Because discovery is not complete, if this case is held in abeyance, the parties will have the opportunity to seek additional discovery, if they believe that additional discovery is necessary, once this proceeding resumes.”).

raised regarding the application of the Board's *PPL Montana*⁹ and *Otter Tail* cross-subsidy analyses, and IPA would be required to spend considerably more time and money on legal and consulting efforts in order to prepare and defend its evidence regarding this enormous SARR.¹⁰

Accordingly, it is evident that if the Board were to adopt its proposed SAC rules and then apply them to the IPA case, IPA would suffer significant prejudice. At no time during the years in which IPA has been seeking to resolve the question of its rail transportation rates has IPA previously faced the possibility that it would be required to create a "mega-SARR" in order to contest the level of bottleneck rail rates. IPA did not consider that possibility – and could not have been expected to consider that possibility – in 2010 when first considering whether to seek relief from the Board, in late 2011 when IPA evaluated the effect of submitting evidence based on a truncated version of its SARR, or earlier this year when it made its decision to proceed with a new rate case.¹¹

⁹ See *PPL Montana, LLC v. The Burlington N. and S.F. Ry.*, 6 S.T.B. 286, 295-95 (2002) ("*PPL Montana*").

¹⁰ Ironically, if IPA were forced to construct a much larger SAC system, application of the Board's proposed cross-over traffic rules to the present case presumably would substantially *increase* the share of SARR revenue derived from cross-over traffic because the SARR would perform a much greater percentage of each cross-over movement (and would receive much greater revenues) than would be the case absent the proposed new restrictions.

¹¹ While clearly less revolutionary than the proposed cross-over traffic restrictions, the Board's proposed change to its current "Modified ATC" methodology likewise represents a potential source of prejudice to IPA. IPA respectfully submits that the Board was correct in finding that it should only apply a new ATC methodology to future cases.

2. UP's Arguments Regarding Supposed Harm are Misdirected and Improper

In its Motion, UP relies upon notions of efficiency and the avoidance of waste in arguing in support of a delay in the present case. Significantly, however, the supposedly wasteful expenditures of time and money that UP seeks to avoid through its Motion (*e.g.*, having to re-submit SAC evidence on the basis of new SAC procedures) are all based on the assumption that the Board ultimately will contradict its holdings in *Rate Regulation Reforms* and will impose any new SAC rules on pending cases. Absent such a change of approach from the Board, the potential burdens that UP identifies will not materialize.

In particular, UP claims that litigating Docket No. 42136 on the basis of the current schedule will be difficult (and therefore inappropriate) because UP itself intends to complicate the case by: (i) raising arguments regarding desired changes in STB SAC policy; (ii) submitting evidence based on a new divisions methodology; and (iii) seeking appellate relief if the Board declines to accede to UP's demands. IPA respectfully submits that the Board already resolved the question of "fairness" in *Rate Regulation Reforms* and that a defendant carrier should not be permitted to unilaterally dictate agency policy by threatening to refrain from complying with an agency determination that newly proposed rules will, to the extent adopted, not apply to pending cases.

There is no basis for UP's argument that holding the case in abeyance is necessary to prevent the duplication of effort. Instead, it is evident that UP seeks to gain either a procedural or substantive advantage through the possible application of the newly

proposed rules to the IPA case, and UP constructs an argument in favor of delay in the hope that the Board eventually will allow UP to apply any new SAC rules to the present case.

B. UP Relies Upon a Mischaracterization of Ex Parte No. 715

The linchpin of UP's argument that holding the case in abeyance is appropriate is UP's faulty claim that, in Ex Parte No. 715, the Board deferred resolution of the question of whether the Board's proposed SAC changes should be applied to pending cases. Specifically, UP wrongly insists that, in issuing its rulemaking decision, the Board "recognized" that a future STB decision would be needed to address the applicability of any new rules to pending cases and that the Board had declined to "resolve" or "address" that question in its July 25 decision:

The Board *recognized* [in *Rate Regulation Reforms*] that any decision adopting new rules would have to address their application to pending cases: it said that it was not proposing to apply any new limitation on cross-over traffic to pending cases, *but it did not purport to resolve the issue or address the application of its other proposed changes to pending cases.*

UP Motion at 3-4 (citing *Rate Regulation Reforms* at 17 n.11) (emphasis added). UP's argument is untenable.

First, with regard to the claim that the Board recognized that any decision adopting new rules would have to address their application to pending cases, UP's perception of such an agency "recognition" is entirely lacking of any support from the language of the decision. UP only cites footnote 11 on page 17 of *Rate Regulation Reforms* in support of this observation. There is nothing whatsoever in footnote 11 to

support UP's claim that the Board supposedly recognized a need to address at some later time the application of any new rules to pending cases.

Second, with regard to the application of the cross-over traffic limitations, UP correctly acknowledges the Board's statement that it was "not proposing" to apply such limitations to pending cases. UP is wrong, however, to infer that the Board chose this specific "not proposing" formulation to indicate that it intended to consider applying such new limitations to pending cases at some later juncture. *Cf.* UP Motion at 4 (the Board "did not purport to resolve the issue"). In fact, the balance of the language in the Board's footnote 11 confirms that the Board already has determined that applying such limitations to pending cases would be unfair. *See Rate Regulation Reforms* at 17 n.11 ("We do not believe [applying any new cross-over traffic limitation to any pending rate dispute] would be fair to those complainants, who relied on our prior precedent in litigating those cases."). Accordingly, UP is wrong to claim that the Board's use of the "[w]e do not propose" language somehow was intended to achieve the very opposite result of what the Board actually describes. Stated differently, UP's request to hold the case in abeyance because the issue of cross-over traffic limitations is "in flux" (*see* UP Motion at 2) amounts to the assertion that the Board should proceed in a manner that it already has found to be unfair to complainants.¹²

¹² Notably, while UP initially contends that the Board did not "resolve" the question of whether the cross-over traffic limitation would apply to pending cases, UP elsewhere appears to concede that the Board actually has made such a determination: "UP disagrees with the Board's view that it would be unfair to IPA to apply in this case any new rules the Board adopts in *Rate Regulation Reforms* to limit use of cross-over traffic" UP Motion at 5 n.5 (citing *Rate Regulation Reforms* at 17 n.11).

Third, with regard to the suggestion that the Board “did not address” whether other SAC-related changes (*e.g.*, modification of ATC) would apply to pending cases, UP is similarly mistaken. Specifically, the Board stated in *Rate Regulation Reforms* that it was seeking public comment “on whether we should adopt this modification to ATC for use in all *future* SAC and Simplified-SAC proceedings” *Id.* at 18 (emphasis added). Accordingly, it is evident that the Board did “purport to . . . address the application” of other SAC-related changes to pending cases. The Board addressed this question and concluded that a revised ATC methodology would not apply. UP’s effort to suggest that there is ambiguity in *Rate Regulation Reforms* as to the impact of any modification of the ATC methodology on pending cases does not support UP’s request that the Board hold Docket No. 42136 in abeyance.¹³

C. UP Agreed to the Present Schedule After Learning of the Board’s Plan to Institute a New Rulemaking

Finally, UP’s Motion also is inappropriate because UP agreed to the dates set forth in the present schedule twelve days *after* the Board disclosed that it would initiate a rulemaking to consider changes to its ATC methodology. *See* June 27, 2012 Report on Conference at 2 & App. A; *Western Fuels* at 12 (STB served June 15, 2012). Having agreed to the present dates even after learning that the Board would engage in

¹³ The only SAC-related proposal from *Rate Regulation Reforms* that the Board did not specifically preclude from impacting pending cases was the proposed change in the interest rate on rate overcharges. In its discussion of that issue, the Board stated only that “we proposed to change the interest rate to the U.S. Prime Rate” *Rate Regulation Reforms* at 18.

such a rulemaking, UP should not be heard now to argue that the Board must hold this case in abeyance pending the completion of that rulemaking.

Similarly, the Board itself was presumably well aware of the fact that it would shortly begin a rulemaking at the time that the Office of Proceedings approved the current schedule (*i.e.*, July 12, 2012), having issued the June 15, 2012 *Western Fuels* decision nearly one month before approving the parties' agreed-upon schedule.

CONCLUSION

For the foregoing reasons, the Board should deny UP's request to hold this case in abeyance and should allow this case to continue under the schedule approved by the Board on July 12, 2012.

Respectfully submitted,

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Dated: September 4, 2012

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CERTIFICATE OF SERVICE

I hereby certify that this 4th day of September, 2012, I caused copies of the foregoing to be served upon counsel for Defendant Union Pacific Railroad Company via email and by first-class mail, postage prepaid at the following addresses:

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