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SEC

SERVICE DATE – JULY 7, 2009

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42114

US MAGNESIUM, L.L.C.

v.

UNION PACIFIC RAILROAD COMPANY

Decided: July 7, 2009

This decision grants a motion to strike variable cost data submitted by Union Pacific Railroad Company (UP) without prejudice to refile at the appropriate time. Similarly, this decision strikes, without prejudice, the evidence submitted by US Magnesium, L.L.C. (USM) with its motion to strike.

BACKGROUND

By a complaint filed on May 8, 2009, USM challenges the reasonableness of rates charged by UP for the movement of chlorine by tank car from: (1) Rowley, UT, to Eloy, AZ; and (2) Rowley to Sahuarita, AZ. USM seeks relief pursuant to the simplified procedures set forth in Simplified Standards for Rail Rate Cases, STB Ex Parte No. 646 (Sub-No. 1) (STB served Sept. 5, 2007) (Simplified Standards), aff'd sub nom. CSX Transportation, Inc. v. STB, No. 07-1369 (D.C. Cir. June 22, 2009). USM has elected to utilize the Three-Benchmark method, under which the total available rate relief is limited to \$1 million over a 5-year period. UP filed an answer to the complaint on May 26, 2009.

POSITIONS OF THE PARTIES

On June 15, 2009, USM filed a motion to strike certain variable cost evidence filed by UP with its answer. USM argues that UP may submit its preliminary estimates of the variable costs for the issue movements, but that UP violated the applicable rules for the Three-Benchmark cases because UP included the documents relied upon to determine the inputs it used in developing its variable cost estimate. USM argues that under Simplified Standards this information is to be exchanged only between parties at the early stages of a Three-Benchmark case and, according to 49 CFR 1111.9(a)(2), should not be submitted to the Board until the parties submit their opening evidence, 90 days after the complaint is filed. USM argues UP has caused and addressed an evidentiary dispute ahead of the procedural schedule established by the Board. USM asks the Board to strike the extraneous information in UP's answer without prejudice to refile later.

On June 16, 2009, UP filed a reply to USM's motion to strike. UP argues that it complied with the letter and spirit of the Board's rules and precedent when it filed its answer. UP states that it followed the same approach taken, without objection, in E.I. DuPont de Nemours & Co. v. CSX Transportation, Inc., STB Docket Nos. 42099, 42100, and 42101 (STB served June 30, 2008) (DuPont cases). UP argues that the evidentiary dispute that USM complains of exists because of UP's and USM's conflicting cost estimates, and not because UP filed supporting documentation. UP claims that it has complied with the Board's rules and precedent.

DISCUSSION AND CONCLUSION

In Simplified Standards, the Board established a specific procedural schedule for Three-Benchmark cases, including details about the contents of filings to the Board and disclosures between the parties. There is a clear demarcation between what defendant provides to the Board with its answer, and what defendant provides simultaneously to complainant with its initial disclosure. In its answer, defendant is directed to file *with the Board* its preliminary estimate of the variable cost.¹ In the initial disclosure *to complainant*, defendant is required to provide all documents that it relied upon to determine the inputs used to develop the estimate.² To argue that the Board's rules allow for the filing of evidence on variable cost inputs with the answer ignores the clear distinction between the Board's requirements for the answer and the initial disclosure.

The Board provided a framework in which the parties exchange information at the outset of a proceeding before filing evidence on the record. There are several practical reasons that the Board has established this procedural schedule. For example, there are intermediary steps that could result in the Board no longer needing for the information, or the party modifying the evidence. The parties could reach an agreement through mediation that would terminate the proceeding, eliminating any need for the evidence. Alternatively, a party may change the evidence it relies upon based on facts it learns during discovery.³ In the interest of efficiency, the Board does not want undeveloped, extraneous evidence filed at the outset of cases.

Furthermore, the purpose of the complaint and answer is to establish the bounds of a case and what issues will be argued during the proceeding, not to substantively argue the merits of the issues. As discovery progresses, the parties will develop and refine the evidence that they plan to present to the Board in support of their arguments. Were the Board to consider UP's evidence at this point in the case, future complainants would likely file evidence with their complaints to promote their own arguments, before they are fully prepared to do so.

¹ See Simplified Standards at 25; 49 CFR 1111.4(a).

² See Simplified Standards at 25; 49 CFR 1111.4(b).

³ See 49 CFR 1111.9(a)(2).

UP's reliance on the DuPont cases is misplaced. There, the filing made by CSX Transportation, Inc., the defendant carrier, was not objected to by the complainant. Therefore, the Board did not address the issue raised here.

The Board will strike the variable cost data submitted by UP without prejudice. The Board will also strike from the record the verified statement of Kim N. Hillenbrand that was filed with USM's motion to strike. Mr. Hillenbrand's statement contests a UP calculation provided in the initial disclosure. For the reasons discussed above, the Board will not review variable cost evidence, or disputes, until the proper time on the procedural schedule. Both parties will be permitted to file evidence supporting their variable cost calculations at the appropriate time.⁴

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The variable cost evidence submitted by UP is struck from the record without prejudice to refiling with its opening evidence.
2. The verified statement of Kim N. Hillenbrand is struck from the record without prejudice to refiling with its opening evidence.
3. This decision is effective on the date of service.

By the Board, Anne K. Quinlan, Acting Secretary.

Anne K. Quinlan
Acting Secretary

⁴ While the Board reaches this decision based on the merits of the arguments of the parties, any dispute over the variable costs of the issue movements appears to be superfluous. The sole purpose of calculating these costs is to determine whether the rates at issue generate revenues that exceed 180% of variable costs establishing the Board's jurisdiction to hear the rate challenge. See 49 U.S.C. 10707(d)(1)(A). USM alleges, and UP concedes, that this jurisdictional standard is satisfied. See UP's answer at 4. Each party's estimate of revenues to variable costs, while differing, exceeds 180%.