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May 4, 2009

**VIA HAND DELIVERY**

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

225041



ENTERED  
Office of Proceedings  
MAY 4 - 2009  
Part of  
Public Record

**RE: STB Docket No. NOR 42114, U.S. Magnesium L.L.C. v. Union  
Pacific Railroad Company**

Dear Secretary Quinlan:

Enclosed for filing please find the original and ten (10) copies of the Public Version of the Complaint of U.S. Magnesium L.L.C. ("USM"). A check for \$150 is also attached to cover the filing fee required by 49 C.F.R. § 1002.2. An additional copy of the Complaint is included for date-stamping and return to the undersigned via messenger.

All material redacted from the Complaint is already known to the defendant Union Pacific Railroad Company ("UP"), the only other party in this case; consequently, UP is being served with the Confidential Version of the Complaint. Confidential material is contained in brackets [ ] in the Confidential Version, the original and ten (10) copies of which are being filed under seal with the Board today. An additional copy of the Confidential Version is also enclosed for date-stamping and return via our messenger.

Please feel free to contact me if you have any questions.

Very truly yours,

Thomas W. Wilcox

**FILED**

MAY - 4 2009

**SURFACE  
TRANSPORTATION BOARD**

Enclosure

cc: J. Michael Hemmer, Esq.  
Dr. Howard Kaplan

225041

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**



US MAGNESIUM, L.L.C.  
238 North 2200 West  
Salt Lake City, UT 84116-2921

Complainant,

v.

UNION PACIFIC RAILROAD COMPANY  
1400 Douglas Street  
Omaha, NE 68179

Defendant.

Docket No. NOR 42114

**COMPLAINT**

**ENTERED**  
Office of Proceedings

MAY 4 - 2009

Part of  
Public Record

**FEE RECEIVED**  
MAY - 4 2009  
SURFACE  
TRANSPORTATION BOARD

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Dated: May 4, 2009

**FILED**  
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SURFACE  
TRANSPORTATION BOARD

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

US MAGNESIUM, L.L.C.  
238 North 2200 West  
Salt Lake City, UT 84116-2921

Complainant,

v.

UNION PACIFIC RAILROAD COMPANY  
1400 Douglas Street  
Omaha, NE 68179

Defendant.

Docket No. NOR 42114

**COMPLAINT**

COMES NOW Complainant, U.S. Magnesium, L.L.C. (“USM”), and files this Complaint with the Surface Transportation Board (“Board” or “STB”) against Defendant, Union Pacific Railroad Company (“UP”), pursuant to 49 U.S.C. §§ 10701, 10704, 10707, 11701, and 11704, and 49 C.F.R. Part 1111 seeking the establishment of reasonable railroad rates for the transportation of chlorine from Rowley, Utah to Eloy, Arizona and Sahuarita, Arizona. USM also requests that the Board award damages plus interest, to the extent that USM has paid or will pay common carrier rates in excess of reasonable maximum rates for such transportation, for a period of five years beginning on March 3, 2009. As explained in more detail below, USM states that the common carrier transportation rates UP initially established in UP Tariff 4949, Item 1000, and re-published in Item 1000-A, for the issue movements should be evaluated by the Board using the rate standards authorized by 49 U.S.C. § 10701(d)(3) and adopted by the Board in Ex Parte 646 (Sub-No. 1) *Simplified Standards for Rail Rate Cases* (served Sept. 5, 2007)

(“*Simplified Standards*”). USM further requests that the Board evaluate the rates to Eloy and Sahuarita under the Three-Benchmark approach described in *Simplified Standards*.

In support hereof, USM states as follows:

**IDENTITY OF THE PARTIES**

1. USM is a corporation organized under the laws of the State of Delaware with its principal place of business in Salt Lake City, Utah. USM specializes in the manufacture and supply of magnesium ingot products, magnesium recycling services, chemical by-products, and energy. USM is the only producer of primary magnesium in the United States, operating a manufacturing facility at Rowley, Utah on the Great Salt Lake, where magnesium has been produced by USM and its predecessors in interest since 1972. USM’s operations in Rowley began with the 2002 purchase by USM of the assets of Magcorp and the ongoing magnesium business that Magcorp had established there.

2. USM’s magnesium production facility at Rowley also produces a variety of co-products, which include chlorine, calcium chloride, iron chlorides, and hydrochloric acid. The co-product that is the subject of this Complaint is chlorine, which UP transports in rail tank cars supplied by USM. Chlorine is crucial to the health of millions of Americans due to its widespread use in water purification. In addition, chlorine is vital to the U.S. economy because it is used as a building block in many essential and diverse products used throughout the economy from plastics to pharmaceuticals. Chlorine is an essential and vital part of modern life. Chlorine appears in products involving an estimated 40% of the nation’s economy.<sup>1</sup>

3. UP is the nation’s largest railroad, and is a common carrier engaged in the common carriage of freight in interstate commerce under the jurisdiction of the Surface Transportation Board. UP is subject to the Interstate Commerce Commission Termination Act,

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<sup>1</sup> See website of the Chlorine Institute at <http://www.chlorineinstitute.org>.

49 U.S.C. § 10101 *et seq.*, and to the jurisdiction of this Board. UP provides the only feasible means of transporting chlorine from USM's Rowley facility to USM's customers, and exerts sole control over the transportation rates charged to USM for this transportation.

#### DESCRIPTION OF THE ISSUE MOVEMENTS

4. The movements that are the subject of this Complaint originate at the Rowley facility and terminate at the rail facilities of USM customers located in Eloy, AZ, and Sahuarita, AZ, respectively.

5. The transportation to Eloy occurs on lines of railroad owned and/or operated by UP and is transported from origin to destination via single-line service. During 2008, USM tendered [ ] to UP for transportation to Eloy. During 2009, USM expects to tender [ ] for transportation to Eloy. As required by 49 C.F.R. § 1111.1(a), USM provides the following details regarding the Eloy movement:

Carrier identifier	Union Pacific Railroad Company
Type of shipment	UP single-line
One-way distance	1,133 miles
Type of car (URCS code)	Tank (URCS code 15)
Number of cars	One per shipment
Car ownership	Private
Commodity type	Chlorine, STCC 2812815
Weight of the shipment (per car)	90 tons
Type of movement	Single-car load

6. The transportation to Sahuarita also occurs on lines of railroad owned and/or operated by UP and is transported from origin to destination via single-line service. During

2008, USM tendered [ ] to Sahuarita. During 2009, USM expects to tender [ ] to Sahuarita. As required by 49 C.F.R. § 1111.1(a), USM provides the following details regarding the Sahuarita movement:

Carrier identifier	Union Pacific Railroad Company
Type of shipment	UP single-line
One-way distance	1,199.7 miles
Type of car (URCS code)	Tank (URCS code 15)
Number of cars	One per shipment
Car ownership	Private
Commodity type	Chlorine, STCC 2812815
Weight of the shipment (per car)	90 tons
Type of movement	Single-car load

### HISTORY OF THE CHALLENGED RATES

7. Prior to March 3, 2009 chlorine shipments from the Rowley facility to Eloy and Sahuarita were transported by UP pursuant to a rail transportation contract that was originally set to expire at the end of 2008 but was extended by mutual agreement of the parties to March 3, 2009 during the discussions summarized in the following paragraphs 8 and 9.

8. Beginning in early October, 2008 USM sought to engage UP in discussions to enter into a new rail transportation contract to replace the expiring contract. After initially not responding to USM's overtures, UP finally responded in January, 2009 by proposing to significantly increase the expiring contract rates to levels that were unacceptable to USM. UP refused all requests by USM to lower its proposed contract rate levels to Eloy and Sahuarita. Without acceptable contract rates and service terms USM was forced to request common carrier

tariff rates and service terms for rail service to Eloy and Sahuarita which USM did by a request dated January 16, 2009 made pursuant to 49 C.F.R. Part 1300.<sup>2</sup>

9. UP established the requested tariff rates and service terms for shipments of chlorine to Eloy and Sahuarita on January 26, 2009 in UP Tariff 4949, Item 1000. The rates established were \$13,396 per carload for Eloy, and \$10,410 per carload for Sahuarita. The rates went into effect on February 15, 2009, and USM began shipping under them on March 3, 2009. Subsequently, UP re-published these rates to Eloy and Sahuarita without change on March 20, 2009 in UP Tariff 4949, Item 1000-A. *See Exhibit A attached to this Complaint.*

10. The rates in UP Tariff 4949, Item 1000-A for transportation from Rowley to Eloy and Sahuarita are dramatically higher than the contract rates previously paid by USM in 2008 for this transportation, and are unreasonably high in violation of 49 U.S.C. §§10701 and 10704.

#### **UP'S MARKET DOMINANCE OVER THE TRANSPORTATION COVERED BY THE CHALLENGED RATES**

11. There is no feasible transportation alternative to UP rail service for the transportation of chlorine from Rowley to Eloy and Sahuarita. In accordance with 49 C.F.R. § 1111.1(a)(10), USM provides the following narrative describing the lack of feasible transportation alternatives:

12. There is no effective intramodal competition for rail transportation from the Rowley facility to Eloy and Sahuarita because UP is the only railroad with physical access to both the Rowley facility and the Eloy and Sahuarita destinations. More specifically, the Rowley

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<sup>2</sup> The January 16, 2009 request for common carrier rates and service terms also included rates to numerous other destinations, and UP provided rates to most of those destinations in its January 26, 2009 response and UP Tariff 4949, Item 1000. In UP Tariff 4949, Item 1000-A, UP also provided common carrier rates to several other destinations that had been requested by USM on January 16, 2009. USM reserves all rights and remedies concerning any other common carrier rate UP has provided or established in response to USM's January 16, 2009 request, or establishes for the transportation of USM's chlorine in the future.

facility is located on the western shore of the Great Salt Lake at the end of a 14-mile line of rail owned by the UP, which connects to the UP main line running east to west through Salt Lake City into Nevada and on to Northern California. The closest connection to another railroad is to track owned by BNSF Railway Company (“BNSF”) located in Salt Lake City, approximately 60 miles away. BNSF has trackage rights over the UP east-west main line as a result of the Board’s decisions in the UP/ Southern Pacific Lines merger proceeding,<sup>3</sup> but these rights do not include the right to serve the Rowley facility, which was not classified as a “2 to 1” facility under those decisions due to its captivity to UP prior to the merger.<sup>4</sup> But even if BNSF’s trackage rights over the UP main line permitted BNSF to serve the Rowley facility from the UP main line (or even if the rights extended all the way to the plant), this would not result in effective competition with UP for transportation to Eloy and Sahuarita for two critical reasons: (1) BNSF has no direct routes running south from the Salt Lake City area to southern California and Arizona, whereas UP does; and (2) UP is the only railroad with physical access to the destination facilities in Eloy and Sahuarita, the closest BNSF interchange being approximately 65 miles away in Phoenix, AZ. There are thus no railroad alternatives that constrain UP’s pricing power over the movement of chlorine from Rowley to Eloy and/or Sahuarita.

13. There is also no effective intermodal competition for the issue traffic. Intermodal competition with rail transportation from trucks does not exist for chlorine due to chlorine’s status as a toxic by inhalation (“TIH”) chemical, a reality prior litigants before this Board have

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<sup>3</sup> *Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company – Control and Merger – Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corporation, and the Denver and Rio Grande Western Railroad Company*, Docket 32760, 1 STB 233, 562 (1996) (“UP-SP Merger”).

<sup>4</sup> *UP-SP Merger* at 562 (1996).

readily conceded and this Board has rightfully acknowledged.<sup>5</sup> Because rail is the safest mode for transporting chlorine, USM and its predecessors in interest have never shipped chlorine produced at the Rowley facility on their account using truck transportation, let alone shipped any chlorine to Eloy or Sahuarita by truck.<sup>6</sup> USM neither owns nor leases any trucks equipped to transport chlorine, and USM's infrastructure at Rowley is designed to facilitate the loading and movement of rail tank cars of chlorine produced by the plant. In addition to entailing unacceptable additional risk, switching from rail to truck transportation would entail significant capital expenditures, and would cause USM to forgo the benefits of the substantial investment it and its predecessors in interest have made in a rail-oriented plant infrastructure and USM's fleet of specialized chlorine rail tank cars. Lastly, numerous federal regulations affect the transportation of TIH commodities, and USM would have to reassess its operations to ensure compliance if USM were to consider using trucks as an alternative mode of transportation.

14. There is no waterway that could be used for barge transportation between Rowley and the destination facilities in Eloy and Sahuarita. Similarly, there is no chlorine pipeline that could be used as a substitute for rail transportation.

15. Because there is no effective intramodal or intermodal competition for the issue traffic, UP has qualitative market dominance over the transportation of chlorine from Rowley, UT to Eloy and Sahuarita, AZ. 49 U.S.C. § 10707.

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<sup>5</sup> STB docket No. 42100, *E.I. du Pont de Nemours and Company v. CSX Transportation, Inc.* (decision served June 30, 2008), slip op. at 3.

<sup>6</sup> On rare occasions of particular need, one USM customer located in the Salt Lake City, Utah area has dispatched one of its trucks to Rowley to pick up chlorine, but USM discourages this practice for safety and logistics reasons.

**ESTIMATED URCS PHASE III VARIABLE COSTS**

16. The common carrier transportation rates established by UP in Tariff 4949, Item 1000-A for transportation of chlorine from Rowley to Eloy and Sahuarita, respectively, produce revenues substantially in excess of 180% of UP's variable costs of providing the transportation. Therefore, UP has quantitative market dominance over this rail transportation, as described in 49 U.S.C. § 10707(d).

17. Pursuant to *Simplified Standards*, slip op. at 25, and using the URCS inputs listed above in paragraph 5, the following is USM's preliminary estimate of the URCS Phase III variable costs and revenue-to-variable cost ratio for the movement from Rowley to Eloy:

	<b>URCS Phase III variable costs<sup>7</sup></b>	<b>Tariff rate from UP 4949 (per car)</b>	<b>R/VC ratio</b>
<b>Rowley to Eloy</b>	\$2,359	\$13,396	568%

18. Pursuant to *Simplified Standards*, slip op. at 25, and using the URCS inputs listed above in paragraph 6, the following is USM's preliminary estimate of the URCS Phase III variable costs and revenue-to-variable cost ratio for the movement from Rowley to Sahuarita:

	<b>URCS Phase III variable costs<sup>8</sup></b>	<b>Tariff rate from UP 4949 (per car)</b>	<b>R/VC ratio</b>
<b>Rowley to Sahuarita</b>	\$2,466	\$10,410	422%

19. Because UP possesses both qualitative and quantitative market dominance over the transportation of chlorine from Rowley, UT to Eloy and Sahuarita, AZ, the Board has

<sup>7</sup> Variable costs include "make whole" adjustment and are indexed to 2009 Q1 Levels.  
<sup>8</sup> Variable costs include "make whole" adjustment and are indexed to 2009 Q1 Levels.

jurisdiction over the reasonableness of the common carrier rates, rules, and practices established by UP for this transportation. 49 U.S.C. § 10701(d)(1).

### **REQUESTED RELIEF**

20. The common carrier transportation rates established by UP in Tariff 4949, Item 1000-A for transportation of chlorine from Rowley, UT to Eloy and Sahuarita, AZ are unreasonable, unlawful, and each exceeds the maximum reasonable level permitted by 49 U.S.C. §§ 10701, 10702, 10704, and/or 10707.

21. This Complaint encompasses any changes or successors to UP Tariff 4949, and all future iterations, issuances, or forms of common carrier tariffs, price documents, rates, fuel surcharges, charges, rules, and service terms applicable to the transportation by UP of chlorine from Rowley, to Eloy and Sahuarita.

22. Using the Three-Benchmark approach of the *Simplified Standards*, the Board should order UP to establish reasonable rates for transportation of chlorine from Rowley, UT to Eloy and Sahuarita, AZ. 49 U.S.C. § 10704. The Board should also order that reparations be paid, plus interest, for any unlawful charges assessed by UP from and after March 3, 2009. 49 U.S.C. § 11704.

23. USM acknowledges that by electing to bring this Complaint under the Three Benchmark approach adopted in the *Simplified Standards*, its relief under this Complaint shall be capped at \$1 million for a five year period beginning on March 3, 2009.

### **CONCLUSION**

24. USM will participate in the Board's mandatory mediation process for rail rate disputes. *Simplified Standards*, slip op. at 23-24 and 103.

25. USM requests access to the Board's unmasked waybill sample as described in 49 C.F.R. § 1111.9(a)(2) and *Simplified Standards*, slip op. at 23.

26. Neither this proceeding nor the granting of the relief requested will constitute a major federal action significantly affecting the quality of the human environment or the conservation of energy resources.

27. In accordance with 49 C.F.R. § 1111.1(b), USM is making mandatory disclosures to UP concurrently with the filing and service of this Complaint.

WHEREFORE, Complainant USM prays that Defendant Union Pacific Railroad Company be required to answer the charges herein; that this Complaint be assigned for hearing under 49 C.F.R. Part 1111; and that, after due hearing and investigation, this Board:

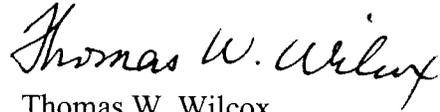
(1) After applying the Three-Benchmark approach of the *Simplified Standards*, find that the common carrier rates UP has established for the transportation by rail of chlorine from Rowley, UT to Eloy and Sahuarita, AZ are unreasonable in violation of 49 U.S.C. §§ 10701(d)(1) and 10702;

(2) issue an order pursuant to 49 U.S.C. § 10704(a)(1) which prescribes just and reasonable rates applicable to UP's rail transportation of USM's chlorine from Rowley, UT to Eloy and Sahuarita, AZ based on the evidence to be submitted in this proceeding;

(3) award USM reparations, plus any applicable interest, as calculated based on the record in this proceeding, in accordance with 49 U.S.C. § 11704, for the unlawful rates assessed by UP from and after March 3, 2009 to the effective date of a decision by the Board prescribing just and reasonable rates; and

(4) grant to USM such other and further relief as the Board may deem proper under the circumstances.

Respectfully submitted,



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Troutman Sanders LLP  
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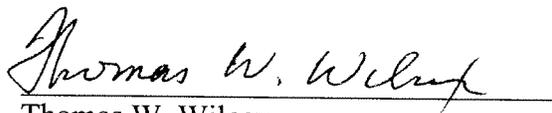
*Attorneys for Complainant US Magnesium L.L.C.*

Dated: May 4, 2009

**CERTIFICATE OF SERVICE**

I hereby certify that on this 4<sup>th</sup> day of May 2009, I served a copy of the foregoing Complaint by express overnight mail, upon the chief legal officer for Defendant at the following address:

General Counsel  
Union Pacific Railroad Company  
1400 Douglas Street  
Omaha, NE 68179

  
Thomas W. Wilcox

# **EXHIBIT A**

	<b>UP 4949</b>	<b>Item: 1000-A</b> <b>CHLORINE</b>
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CHANGE KEY: A-Add; C-Change; D-Decrease; I-Increase; and X-Expire

For billing purposes use the following rate authority: UP 4949-1000-A

STCC/GROUP	STCC	DESCRIPTION
2812815		Chlorine Gas, Liquefied

Prices are subject to Fuel surcharges.

GENERAL APPLICATION RULES FOR ITEM 1000-A	
1.	Price applies in United States funds.
2.	Applies in AAR Car Type T, tank cars.
3.	Mileage allowance payment on private equipment will not apply.
4.	Price is subject to Tariff UP 6007 (series), item 695 (series).
5.	Applies in shipper owned or leased equipment.
6.	Does not apply in equipment owned, controlled or leased by TTX.

APPLICATION AND RATES		
COLUMN	RATE APPLICATION RULES	
1.	Rates are in U.S. dollars Per Car.	
	Col 1 Rate	Route Code/Group
<b>STCC: 2812815 Chlorine Gas, Liquefied</b>		
<b>From: UT, ROWLEY</b>		
<b>To: AZ, ELOY</b>		
AZ, PHOENIX	13396.00	UP
AZ, SAHUARITA	11625.00	UP
CA, COLTON	10410.00	UP
CA, LOS ANGELES	8924.00	UP
CA, MOJAVE	8924.00	UP
CA, ONTARIO	9388.00	UP
CA, PITTSBURG	9394.00	UP
CA, SACRAMENTO	10504.00	UP
CA, SAN JOSE	7341.00	UP
CA, SANTA FE SPRINGS	8855.00	UP
CA, SAUGUS	9073.00	UP
CA, STOCKTON	9531.00	UP
CA, SYLMAR	7679.00	UP
CA, TORRANCE	9459.00	UP
CO, DENVER	9336.00	UP
IA, CAMANCHE	6530.00	UP
IA, CEDAR RAPIDS	10743.00	UP
ID, LEWISTON	12328.00	UP
IL, DUPO	7675.00	UP
	A 9653.00	UP

PUBLIC VERSION

	Col 1 Rate	Route Code/Group
IN, EAST CHICAGO	10565.00	UP
MO, FESTUS	A 10333.00	UP
MO, KANSAS CITY	9432.00	UP
MO, ST LOUIS	11083.00	UP
NE, OMAHA	9428.00	UP
NV, HENDERSON	6423.00	UP
NV, SPARKS	6034.00	UP
OK, NOWATA	12027.00	UP
TN, MEMPHIS	A 11542.00	UP
UT, LITTLE MOUNTAIN	2638.00	UP
UT, SALT LAKE CITY	2579.00	UP

NOTES	DESCRIPTION