

Relevant Facts

USM filed its Complaint in this Three-Benchmark case on May 10, 2009. USM included in its Complaint USM's estimates of the URCS Phase III variable costs for the issue movements, and, in accordance with the Board's instructions in STB Ex Parte No. 646 (Sub-No.1), *Simplified Standards for Rail Rate Cases* (served September 5, 2007) ("Simplified Standards") and 49 CFR §1111.1(b), "provide[d] to defendant all documents relied upon in formulating its assessment of a feasible transportation alternative and all documents relied upon to determine the inputs URCS Phase III program." The material disclosed to UP was not also filed with the Board since the rules and the relevant discussion in *Simplified Standards* clearly state that such information is to be exchanged only between the parties at this early stage of the case.

On May 26, 2009, UP filed its Answer to USM's Complaint, and in accordance with 49 CFR §1111.4(b) and *Simplified Standards*, disclosed to USM the documents UP relied upon to determine the inputs for its estimates using the URCS Phase III program, and UP's preliminary estimate of the variable costs for each movement. *See Simplified Standards* at 25 ("The railroad will likewise be required to provide initial disclosures to the complainant concurrent with filing its answer. Like the shipper, the railroad shall produce its preliminary estimate of the variable costs of each challenged movement . . . and the documents that it relied upon to determine the inputs used in the URCS Phase III program."). However, UP took two further steps that USM believe violate the letter and spirit of the Board's procedural rules for Three-Benchmark cases, to the detriment of USM. First, UP, instead of including its estimates of the URCS Phase III costs for the issue movements in its Answer as required by 49 CFR §1111.4(a), averred in its Answer that USM's variable cost calculations in its Complaint were "incorrect," and asserted that "UP submits more accurate estimates with this Answer," which estimates UP filed under seal with the

Board in the form of a CD. See UP's Answer to USM's Complaint, at paragraphs 17 and 18, and cover letter of counsel. Second, UP accompanied the filing of its variable cost estimates with the filing – also under seal - of the documents UP relied upon to determine the inputs UP used in the URCS Phase III program, which all told comprise several hundred pages of material.

Argument

The variable cost evidence UP filed with the Board with its Answer should be stricken from the record. The rules clearly state that at this early juncture of the case such information, apart from including variable cost estimates in the complaint and answer, is to be disclosed by the parties to each other, not filed with the STB. In addition to the plain language of 49 CFR §1111.1 and §1111.4 and the Board's discussion of the complainant's and defendant's respective disclosure requirements in *Simplified Standards*, the *Simplified Standards* include a procedural schedule that does not call for the filing of any evidence by the parties until 90 days after the complaint is filed. 49 CFR §1111.9(a)(2). UP's actions cannot be categorized as an alternative means of complying with §1114.4(a), which states that in response to a complaint filed under the Simplified Standards "the answer must include the defendant's preliminary estimate of the variable costs of each challenged movement" First, this regulation requires that the preliminary estimate is to be included within the answer. Second, even if the Board would permit a railroad defendant to comply with §1114.4(a) by filing its URCS Phase III variable cost estimates separately under seal, §1114(b) clearly states that the data used by the defendant to develop the nine URCS Phase III inputs is to be provided only to the complainant at this stage of the case. The reason for such a rule seems clear: to avoid evidentiary disputes and filings at the very outset of a Three Benchmark case. UP has created such a dispute. The filing of UP's variable cost data with the STB was accompanied by an affirmative allegation in UP's Answer

that USM's variable cost calculations were "inaccurate" and that UP was submitting "more accurate" estimates to the STB "with this Answer." Answer at Paragraphs 17 and 18. This goes beyond simply including variable cost estimates in an answer, and if the URCS input evidence filed by UP is allowed to remain in the record and UP's allegations were to be unrebutted by USM, this could lead to the Board concluding, well before the parties submit their evidence in this proceeding, that USM concurs with UP's allegations and that USM's variable cost estimates are indeed inaccurate. This is not the case. Accompanying this Motion is the verified statement of Mr. Kim N. Hillebrand, Senior Analyst of Snavely, King, Majoros O'Connell & Bedell, Inc., who USM asked to review the UP variable cost data. Mr. Hillebrand points out that his initial review of UP's data reveals that UP made at least one significant error in its variable cost calculations that resulted in the revenue to variable cost ratios calculated by UP for the issue movements to be measurably lower than a correct application of the Board's procedures would have produced. USM maintains its variable cost estimates are accurate and will demonstrate this fact (and point out any additional errors in UP's calculations) at the appropriate time in this proceeding.

In conclusion, the express requirements of the Board's rules and principles of fairness dictate that the Board strike from the record in this proceeding the variable cost evidence filed by UP separately with the Board when UP filed its Answer on May 26, 2009, without prejudice to

UP to resubmit such evidence at the appropriate time in this proceeding in accordance with the Board's rules and/or as otherwise directed by the Board.

Respectfully submitted,



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Attorneys for Complainant US Magnesium L.L.C.

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STB Docket No. 42114

U.S. Magnesium L.L.C v. Union Pacific Railroad Company

Verified Statement

Of

Kim N. Hillenbrand

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My name is Kim N. Hillenbrand. I am a Senior Analyst at the economic consulting firm of Snavelly King Majoros O'Connor & Bedell, Inc. ("Snavelly King"). My business address is 1111 14th Street, N.W., Suite 300, Washington, D.C. 20005. Snavelly King, formerly Snavelly, King, & Associates, Inc., was founded in 1970 to conduct research on a consulting basis into the rates, revenues, costs, and economic performance of regulated firms and industries. Snavelly King is an economic and management consulting company focusing on transportation and utilities. Snavelly King has been in business for more than 39 years, serving transportation clients including railroads, shippers and government agencies, in the United States, Canada and Europe.

On May 26, 2009 the Union Pacific Railroad Company ("UP") filed its answer to US Magnesium's ("USM") rate complaint in STB Docket No. 42114, *U.S. Magnesium L.L.C v. Union Pacific Railroad Company*. Accompanying that answer was UP's initial disclosures of URCS Phase III variable cost information to USM in accordance with the Board's rules, which UP also filed with the Surface Transportation Board. UP's initial disclosures included workpapers relied on to determine the nine (9) inputs¹ used in the variable cost calculation as required by 49 C.F.R § 1111.4 and a preliminary estimate of the variable costs of the challenged movements.

USM asked Snavelly King to review UP's variable cost calculations and the inputs UP provided in its initial disclosure. In this Verified Statement I summarize one significant error in UP's calculations that I discovered while conducting this review.

¹ The nine URCS inputs are (1) the railroad; (2) loaded miles (which should include loop track miles); (3) shipment type (originated and terminated (local), originated and delivered, received and delivered (bridge), received and terminated); (4) number of freight cars; (5) tons per car; (6) commodity; (7) type of movement (single, multiple car, unit train); (8) car ownership (railroad or private); and (9) type of car.

The Surface Transportation Board requires that unadjusted URCS be used to calculate variable cost to compute the jurisdictional threshold.² The parties are required to determine and use the nine inputs of operating characteristics to calculate the variable costs using the URCS Phase III Model. The STB states that only the following adjustments can be applied to the URCS Phase III model:

The only adjustments allowed to the URCS Phase III program would be those adopted in Ex Parte No. 431 (Sub-No 2). See Review of the General Purpose Costing System, 2 S.T.B. 754 (1997); Review of the General Purpose Costing System, 2 S.T.B. 659 (1997). Those adjustments include the so-called “270” volume shipment adjustments, the make-whole adjustments, TOFC/COFC adjustments, and RoadRailer adjustments. In addition, the circuitry factor is always set to one when actual miles are used to calculate the variable costs.³

In accordance with the Simplified Standards the parties disclose to each other the nine operating characteristics used to determine the variable costs of the issue movements. Upon review of UP’s variable cost calculations and data, I found a procedural error. [

] which in turn overstated the variable costs for the issue movements and lowered the resulting estimated Revenue to Variable cost Ratio (“R/VC”) for each movement.

² 49 U.S.C. 10707(d)(1)(B); Ex Parte 657 (Sub-No.1), Major Issues in Rail Rate Cases, Served October 30, 2006 at 60 (“Major Issues”); Ex Parte 646 (Sub-No.1), Simplified Standards for Rail Rate Cases, STB Served September 5, 2007 at 26 (“Simplified Standards”)

³ Major Issues footnote 202; Simplified Standards at 26; STB Docket 42095, Kansas City Power & Light v. Union Pacific Railroad Company, STB Served May 19, 2008 at 7-8 and footnote 17

Kim Hillenbrand

Experience

Snively King Majoros O'Connor & Bedell Washington, DC

Senior Analyst, Transportation (2003 to Present)

Mr. Hillenbrand provides analytical support to SK clients and principals. His responsibilities include economics and cost modeling, operations simulation, financial analysis and reporting, database management and research.

Mr. Hillenbrand's work has primarily been in SK's Transportation group. His projects have included extensive cost and revenue analyses of rail freight logistics, along with preparation of databases for use in rate negotiations with railroads. He has conducted benchmark and market analysis of rail transportation for over 50 different companies.

Mr. Hillenbrand has also evaluated litigation options involving many of the STB rate reasonableness methodologies. He has performed rail feasibility studies for a coal fired utility plant; analyzed railroad abandonment filings; developed cost of capital and return on investment analyses; performed fuel surcharge analyses in both the trucking and rail industries. Mr. Hillenbrand has prepared action plans and presentations for clients on projects including merger analyses, plant site locations, and logistics issues. Additionally, he conducts research in the chemical, petroleum and transportation industries.

Mr. Hillenbrand has assisted in the preparation of client presentations and has prepared testimony for submission to the Surface Transportation Board and State Courts. For a state court proceeding he developed a cost model simulating costs of movements of Medicaid service vans, which was key to the successful outcome in the case.

His telecommunications and public utility experience includes preparation of complex regulatory reports for submission to state and federal regulatory agencies. Mr. Hillenbrand also supports other company witnesses and prepares exhibits for use in the depreciation aspects of regulatory proceedings. These exhibits range from a comparison of depreciation reserves for various accounts to the generation of life curves using in-house developed software, and development of cost of removal estimates. In addition, Mr. Hillenbrand has assisted in preparing testimony involving issues including rate of return, rate design, and cost allocation studies. For a major government agency, Mr. Hillenbrand led a

review and development of recommendations resulting in a 20 percent reduction in costs for wireless devices.

Acsys, Inc (2002-2003) Law Resources (2001-2003) Washington DC

Mr. Hillenbrand provided short and long term contract work for law, financial, and real-estate firms. Mr. Hillenbrand assisted in the migration of a client's patent and trademark portfolio from in house counsel outside counsel. Mr. Hillenbrand managed the distribution of incoming documents including EEO and FCC filings from clients and assisted in all aspects of the firms broadcasting, media, and satellite practices. Mr. Hillenbrand coordinated a 750,000 page document production and privilege log for a Department of Justice antitrust filing. He also compiled and managed privilege logs and prepared document productions on behalf of clients for SEC investigations. Mr. Hillenbrand conducted first review of client documents for SEC and Congressional investigations.

He assisted state security regulators in the first settlement between New York State and Merrill Lynch regarding conflict of interest between their research groups and investment banking groups. Mr. Hillenbrand conducted verification and complaint checks of stockbrokers and Certified Financial Advisors for investors and answered questions regarding the Series 6 and 63 Exams.

RVC (formerly Reuters Venture Capital) London, England (2000)

Analyst, Intern

Mr. Hillenbrand assisted on a survey of Asia venture capital markets in preparation for future venture capital and fund of fund investments in the region. The survey included analysis of sources of capital, major investors, and destinations of capital in Asia.

Education

Connecticut College, 2001

B.A. Economics & International Relations

Georgetown University, Summer 1999
Course Work

Citizenship

United States
United Kingdom

Kim Hillenbrand

Professional Organizations

Association of Transportation Law Professionals
Transportation Research Forum

Testimony and Expert Reports

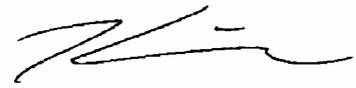
Surface Transportation Board

<i>April 27, 2006</i>	Ex Parte 661, Rail Fuel Surcharges
<i>May 1, 2006</i>	Ex Parte 657 (Sub-No.1), Major Issues in Rail Rate Cases
<i>October 2, 2006</i>	Ex Parte 661, Rail Fuel Surcharges
<i>October 24, 2006</i>	Ex Parte 646 (Sub-No.1), Simplified Standards for Rail Rate Cases
<i>November 22, 2006</i>	NOR 42098, Williams Olefins LLC v Grand Trunk Corporation
<i>November 30, 2006</i>	Ex Parte 646 (Sub-No.1), Simplified Standards for Rail Rate Cases
<i>January 11, 2007</i>	Ex Parte 646 (Sub-No.1), Simplified Standards for Rail Rate Cases
<i>February 26, 2007</i>	Ex Parte 646 (Sub-No.1), Simplified Standards for Rail Rate Cases
<i>April 2, 2007</i>	Ex Parte 661 (Sub-No.1), Rail Fuel Surcharges

Verification

I declare under penalty of perjury that the foregoing is true and correct. I further certify that I am qualified and authorized to sponsor and file this testimony.

Executed on June 10, 2009

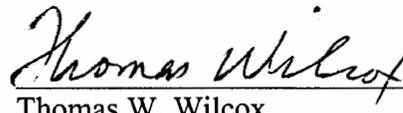
A handwritten signature in black ink, appearing to read 'Kim N. Hillenbrand', written over a horizontal line.

Kim N. Hillenbrand

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June 2009, I served a copy of the foregoing Motion to Strike by email and regular mail, upon the following counsel for Defendant:

Michael Rosenthal, Esq.
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Thomas W. Wilcox