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June 16, 2009

BY HAND

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

ENTERED
Office of Proceedings
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Part of
Public Record

Re: STB Docket No. 42114, *US Magnesium, L.L.C. v. Union Pacific Railroad Company*

Dear Secretary Quinlan:

Enclosed please find the original and ten copies of Union Pacific Railroad Company's Response to U.S. Magnesium's Motion to Strike.

We have also enclosed an additional copy of the filing to be date-stamped and returned to our messenger.

Thank you for your attention to this matter.

Sincerely,

Michael L. Rosenthal

cc: Thomas W. Wilcox, Esq.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



U.S. MAGNESIUM, L.L.C.,)
)
Complainant,)
)
v.)
)
UNION PACIFIC RAILROAD COMPANY)
)
Defendant.)

Docket No. 42114

UNION PACIFIC’S RESPONSE TO USM’S MOTION TO STRIKE

UP believes it complied with the letter and spirit of Board’s rules and precedent when it averred in its Answer that USM’s preliminary variable cost calculations were incorrect, and when it filed the documents it relied upon to determine the inputs used in the URCS Phase III program along with its Answer. The Board’s rules required the Answer to be “responsive to the complaint” and to “include the defendant’s preliminary estimate of the variable costs of each challenged movement using the unadjusted figures produced by the URCS Phase III program.” 49 C.F.R. § 1111.4. In fact, UP followed the same approach that was taken, apparently without objection, in *E.I. DuPont de Nemours & Co. v. CSX Transportation Inc.*, STB Docket Nos. 42099, 42100 & 42101.¹

¹ See Letter from Paul A. Hemmersbaugh to Vernon A. Williams, dated Nov. 19, 2007 (“We have also enclosed, on separate compact discs for each docket, CSXT’s preliminary estimate of the variable costs of each challenged movement in these cases”); see also, e.g., CSXT’s Answer, Docket No. 42009 (filed Nov. 19, 2007) ¶ 12 (“CSXT denies the allegations of Paragraph 12 of the First Amended Complaint. CSXT responds that DuPont’s estimates of the variable costs and the revenue to variable cost (‘R/VC’) ratio for the issue movements are incorrect, and CSXT submits accurate estimates with this Answer.”).

Moreover, USM makes no sense when it argues that UP created an evidentiary dispute by filing the documents upon which it relied in performing its variable cost calculations. USM Motion, p. 3.² The same dispute would exist if UP had included conflicting cost estimates in its Answer but had not filed the documents upon which it relied to develop those estimates.

UP complied with the Board's rules and precedent, and USM can identify no harm. Accordingly, the Board should deny USM's Motion to Strike.

Respectfully submitted,



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June 16, 2009

² UP filed only (i) a list of Phase III inputs and the output of its Phase III cost calculations; and (ii) documents supporting the mileages used as Phase III inputs, which included a one-page summary of the trains used to transport the complaint movements and pertinent pages of UP's timetables and track charts. (UP considers its timetables and track charts to be confidential, so the materials were filed under seal.) As USM's witness recognized, UP's filing consisted of nothing more than "workpapers" supporting the inputs to UP's Phase III cost calculations. Hillenbrand V.S., p. 2.

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that on this 16th day of June, 2009, I caused copies of Union Pacific's Response to USM's Motion to Strike to be served by first-class mail and by e-mail on:

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