

COVINGTON & BURLING LLP

225981

1201 PENNSYLVANIA AVENUE NW
WASHINGTON, DC 20004-2401
TEL 202 662 6000
FAX 202 662.6291
WWW.COV.COM

BEIJING
BRUSSELS
LONDON
NEW YORK
SAN DIEGO
SAN FRANCISCO
SILICON VALLEY
WASHINGTON

MICHAEL L. ROSENTHAL
TEL 202.662.5448
FAX 202 778 5448
MROSENTHAL@COV.COM

November 9, 2009

BY HAND

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



ENTERED
Office of Proceedings

NOV - 9 2009

Part of
Public Record

Re: Docket No. 42114, U.S. Magnesium, L.L.C. v. Union Pacific
Railroad Company

Dear Secretary Quinlan:

Enclosed for filing in the above-referenced matter please find the original and ten copies of Union Pacific's Reply to Petition for Reconsideration.

An additional paper copy of Union Pacific's Reply is also enclosed. Please return a date-stamped copy to our messenger.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Michael L. Rosenthal'.

Michael L. Rosenthal

Enclosure

cc: Thomas W. Wilcox

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**ENTERED
Office of Proceedings**

NOV - 9 2009

**Part of
Public Record**

US MAGNESIUM, L.L.C.,
Complainant,
v.
UNION PACIFIC RAILROAD COMPANY,
Defendant.

225981

Docket No. 42114



UNION PACIFIC'S REPLY TO PETITION FOR RECONSIDERATION

Union Pacific Railroad Company ("UP") opposes the request by US Magnesium, LLC ("USM"), filed November 6, 2009, that the Board reconsider its decision to hold oral argument in this case and instead require the parties to submit post-evidentiary briefs.

UP respectfully submits that there would be no benefit from additional briefing. In this proceeding, neither party has departed from the positions staked out in the opening round of written argument and evidence, and thus both parties have had ample opportunity, and have taken advantage of the opportunity, to address the issues in this case exhaustively through three rounds of written argument. As the Board recognized when it scheduled this case for oral argument, there is no need for additional written comments because "extensive written records on the issues to be argued have already been developed in these proceedings." STB Ex Parte No. 693, Decision served Nov. 3, 2009.

UP also respectfully submits that requiring additional briefing would be contrary to the rules established in *Simplified Standards for Rail Rate Cases*, STB Ex Part No. 646 (Sub-No. 1) (STB served Sept. 5, 2007). Unlike the Board's procedural schedule for Simplified-SAC

cases, the Board's procedural schedule for Three-Benchmark cases does not provide for final briefs. *Compare id.* at 23, Table 2, *with id.* at 24, Table 3.

UP further submits that there would be a distinct benefit from oral argument as opposed to additional briefing. Oral argument would provide the Board with an opportunity to engage in focused questioning of counsel regarding the issues the agency views as most critical to its resolution of this case. USM suggests that the Board could obtain the same benefit by asking the parties to focus their briefing on specific questions identified by the Board, but written questions and responses are no substitute for the back-and-forth of oral argument. In fact, in the case that USM cites as support for its briefing proposal, the Board held an oral argument. *See Pub. Serv. Co. of Colo. d/b/a Xcel Energy v. The Burlington N. & Santa Fe Ry.*, STB Docket No. 42057 (STB served Mar. 11, 2004).

Moreover, UP disagrees with USM's claim that this case is not conducive to oral argument because much of the evidence involves highly confidential information. The Board has held public oral arguments in many rate cases, and many other types of cases, that have involved extensive amounts of highly confidential information without revealing any confidential information.¹ UP submits that the issues in this case can also be discussed without revealing any details that might be confidential.

UP recognizes USM's concern about the costs of oral argument. However, USM is apparently willing to develop a fourth round of written argument, which would also be a costly

¹ *See, e.g., Otter Tail Power Co. v. BNSF Ry.*, STB Docket No. 42071 (STB served July 1, 2005) (scheduling oral argument in stand-alone cost case); *Az. Elec. Power Coop. v. The Burlington N. & Santa Fe Ry.*, STB Docket No. 42058 (STB served Oct. 29, 2004) (same); *Az. Pub. Serv. Co. v. The Burlington N. & Santa Fe Ry.*, STB Docket No. 41185 (STB served Sept. 27, 2004) (same); *Carolina Power & Light Co. v. Norfolk S. Ry.*, STB Docket No. 42072 (STB served Oct. 17, 2003) (same); *Duke Energy Corp. v. CSX Transp. Inc.*, STB Docket No. 42070 (STB served Sept. 5, 2003) (same).

exercise, but which would provide far less benefit to the Board than an oral argument. If the choice is between a fourth round of written argument and an oral argument, the Board should proceed with the oral argument. If the Board wishes to accommodate USM's desire to avoid additional costs, it should cancel the oral argument and not require any additional briefing.

Respectfully submitted,



J. MICHAEL HEMMER
LOUISE A. RINN
TONYA W. CONLEY
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
Telephone: (402) 544-3309
Facsimile: (402) 501-0129

LINDA J. MORGAN
MICHAEL L. ROSENTHAL
CHARLES H.P. VANCE
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 662-6000
Facsimile: (202) 662-6291

Attorneys for Union Pacific Railroad Company

November 9, 2009

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that on this 9th day of November, 2009, I caused
a copy of Union Pacific's Reply to Petition for Reconsideration to be served by hand on:

Thomas W. Wilcox
Jason M. Setty
GKG Law, P.C.
Canal Square
1054 31st Street, N.W., Suite 200
Washington, DC 20007



Michael L. Rosenthal