

SLOVER & LOFTUS LLP

ATTORNEYS AT LAW

1224 SEVENTEENTH STREET, N.W.
WASHINGTON, D.C. 20036-3003

WILLIAM L. SLOVER
C. MICHAEL LOFTUS
JOHN H. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
FRANK J. PERGOLIZZI
ANDREW B. KOLESAR III
PETER A. PFOHL
DANIEL M. JAFFE
KATHERINE F. WARING
BRADFORD J. KELLEY

TELEPHONE:
(202) 347-7170

242147

FAX:
(202) 347-3619

WRITER'S E-MAIL:

November 29, 2016

ENTERED

Office of Proceedings
November 29, 2016
Part of
Public Record

OF COUNSEL
DONALD G. AVERY
CHRISTOPHER A. MILLS

BY E-FILING

The Honorable Cynthia T. Brown
Chief, Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: *Richard Best Transfer, Inc. v. Union Pacific Railroad Company*,
NOR 42149, Motion for Leave and Surreply to Union Pacific's
Reply to Richard Best Transfer Inc.'s Petition for Preliminary
Injunction

Dear Ms. Brown:

Richard Best Transfer, Inc. ("Richard Best" or "RBT"), respectfully submits this letter as a motion for leave and surreply to the reply of Union Pacific Railroad Company ("UP") filed on November 16, 2016 ("Reply") to RBT's Motion for Preliminary Injunction ("Motion") filed November 3, 2016.

MOTION FOR LEAVE

Good cause exists for accepting RBT's filing. Issuance of the preliminary injunction suspending UP's \$250 per car penalty is essential for continued operations at RBT-Ivory. UP's opposition to RBT's Motion rests on major mischaracterizations, misstatements, and critical omissions of both fact and law, to which RBT seeks leave to respond directly and concisely. Unless leave is granted, the Surface Transportation Board ("Board" or "STB") will be deprived of material information on which to make its decision. Under such circumstances, leave should be granted. *See, e.g., Michigan Air-Line Ry. Co. – Abandonment Exemption – in Oakland Cnty., Mich.*, AB 1053 (Sub-No. 1X) (STB served May 18, 2011) at 1 (surreply accepted where it "addresses allegations first asserted on [] reply, and because it establishes a more complete record").

UP'S FACTUAL MISSTATEMENTS

UP's opposition rests on four factual pillars: (a) the \$250/car penalty does not pose sufficient harm to RBT-Ivory's continued viability sufficient to justify a preliminary injunction; (b) even though the RBT rate parity existed for over five (5) years, UP never made any assurances or promises to RBT regarding non-discrimination, UP regularly discriminates against its short line customers as a customary practice, and any non-discrimination that UP has permitted to enable RBT to invest, grow, and compete arose solely from UP's transportation arrangements with a RBT customer that have since expired; (c) UP's higher rates to RBT-Ivory and other destinations served by the San Joaquin Valley Railroad ("SJVR") are justified by UP's higher costs of service, particularly the fee that UP pays to SJVR; and (d) granting the relief will impose an irreparable harm on UP because it will be unable to recover its higher costs.

As shown below, UP's assertions as to each of those matters are without foundation. Omission of other matters should not be construed as acquiescence in UP's claims.

1. By UP's own standards, the penalty creates an irreparable harm to RBT sufficient to justify granting a preliminary injunction

UP asserts that RBT has not shown that the \$250/car penalty poses an immediate and material harm sufficient to justify granting the requested preliminary injunction. Reply at, *e.g.*, 8. However, UP does not dispute that a previous \$125/car penalty first imposed by UP on shipments to RBT-Conner in 2009, at one-half the level of UP's newly imposed \$250/car penalties, caused regular UP train service to RBT to dry-up, in favor of RBT's immediate competitor on UP's main line. Littlefield V.S. at ¶¶ 36-38. UP's business managers have fully admitted that the design and purpose of these UP prior rate penalties was to protect and provide an advantage to RBT's competitor at the expense of RBT, which initiative was highly successful. *Id.* Further proof of this business killing program is shown in the attached contemporaneous emails from Mr. Littlefield, set forth in Exhibit A.

UP also does not dispute that its new tariff penalties have thwarted RBT's business initiative to develop and expand its operations at RBT-Hollis (Littlefield V.S. at ¶¶ 7, 27, 35). In fact, after RBT filed its Motion, a major customer notified RBT that UP's new tariff penalties made it unlikely that, absent unusual product/capacity shortages, it would be shipping feed ingredients to either the Ivory or Hollis facilities in the normal course of business. Additionally, after 18 months of development, the Hollis project is being suspended by its customer because of the new penalties.

UP's claim of lack of material impact is further thoroughly refuted by its own recent actions in obtaining a preliminary injunction against new hazardous materials fees in California. UP successfully claimed that a \$45/per car fee on train traffic would cause it and its customers irreparable harm. *BNSF Ry. Co., et al. v. California State Bd. of Equalization*, No.16-cv-04311-RS (N.D. Cal. Oct. 28, 2016) ("Order Granting Motion for Preliminary Injunction"). Exhibit B contains a copy of the Court's order as well as excerpts of affidavits from UP officers quantifying the annual impact across hundreds of UP customers at \$218,790 (for approximately 4,862 cars), and claiming likely loss of traffic and material harm to UP's customer relationships. In contrast, RBT faces annual penalties over five times greater for approximately the same quantity of cars (4,600) – an immensely higher impact on a single receiver that faces greater competition and associated risk of diversion.

Having successfully shown irreparable and material harm for loss of traffic due to the imposition of a \$45/car fee on relatively highly-rated traffic such as chlorine, crude oil, and ethanol, UP cannot plausibly assert that a \$250/car penalty on lower-rated traffic targeted at one receiver will not result in severe diversions and related harm. The fact that the diversions may be limited initially is a function of the suddenness of the penalty, delays in making alternate arrangements, and other limitations that are unlikely to persist for the duration of an unreasonable practice case before the Board, especially in the face of a penalty that is severe by UP's own standards.

2. Notwithstanding its denials, UP did assure RBT that it would receive rate parity if it upgraded its facilities at RBT-Ivory

UP asserts that it never gave RBT any assurances or promises that RBT would receive equivalent rates at RBT-Ivory or other locations if it upgraded its facilities. UP should know better. UP completely ignores, and neglects to inform the Board of its actual promises to RBT. Attached as Exhibit C is an email dated August 27, 2010, from Lori A. Loschen, UP's Senior Business Director for Grain Products at the time, to Mr. Littlefield of RBT, and her related letter to Mr. Littlefield dated August 30, 2010. The email, which cc'd a SJVR representative, states: "Once the expansion is complete, then UP will provide competitive unit train rates into Ivory, CA. Again, as soon as Law and Operating approve the email. I will send, so you can get ADM's commitment on capital." The letter is the formal confirmation that UP "will provide ADM and Richard Best Transfer Inc. market based unit train (80 and/or 100) rates to their Ivory, CA facility once this destination facility has invested in private track expansion to receive and unload the entire train which shall include a seamless interchange between SJVR and [UP]."

While UP repeatedly claims that it is now simply seeking "reestablishment of a rate differential" on shipments to RBT and other locations on the SJVR, its Exhibit 2

proof simply contains a *newly added* \$125 spread targeted at Ivory for unit train DDG shipments, effective June 7, 2010, initiated through UP's revised Tariff 4053 (Item 4011-A). Through this action, UP successfully blocked previously established unit train service to RBT-Ivory, at the behest of RBT's competitors. Littlefield V.S. ¶ 12. After UP imposed these *new* discriminatory rates in the summer of 2010, RBT objected and asked UP to *reestablish* non-discriminatory rates. Littlefield V.S. ¶ 12, Exhibit C. As explained above, UP expressly agreed to do so shortly thereafter, once RBT-Ivory became a railroad approved unit train unloading facility. UP's new tariff action reneges on that promise, and UP is wrong when it points to its long abandoned 2010 tariff penalty action as a basis for "reestablishing" discriminatory rates on RBT.¹

UP claims that it "first established unit train rates for movements to RBT-Ivory in June 2010" and that "trainload shipments to RBT-Ivory [were] operationally impractical." However, unit train shipments (80-car trains) of DDGs to RBT-Ivory commenced long before that time in the year 2004, and continued thereafter without any operational or rate spread impediments to RBT's knowledge. UP's claimed suspension of unit train service to Ivory in 2010 as a result of Fresno handling problems associated with three trains is erroneous and makeweight. Contrary to UP's contentions, unit trains have long been regularly interchanged with SJVR in one cut. If any separate train cuts were needed at destination for unloading, as they were for a number of years before RBT-Ivory became a unit train facility, SJVR made the cuts on *its* lines and sidings, not on UP's, and without operational difficulty.

Rather than acknowledge and honor its promises to RBT, UP attempts to excuse its rate penalty action by relying on a confidential 2011 "agreement governing shipments to RBT-Ivory." UP contends that any parity that RBT-Ivory happened to

¹ UP has publicly eschewed practices of grain rate discrimination for shipments to stations in similar geographic regions:

UP generally charges the same rates for shippers within defined geographic groups, so that their shipping costs are the same. This allows the shippers to compete with each other, although UP then has different R/VC ratios for the different movements. Implementation of . . . proposal[s] [to create rate spreads] might leave grain shippers in the same geographic region that otherwise would have paid the same rate to a destination all paying different per car rates, due to their different mileages (and thus different variable costs). In other words, some grain shippers will be at a disadvantage compared with others in the same region.

experience resulted from this transportation contract between UP and a RBT customer that has since expired, thereby allegedly allowing UP to revert to what it depicts as its normal pricing structure. UP Reply at 2, 5-7. That unrelated third party agreement, however, provides no justification for UP's rate discrimination actions against RBT, and is simply a diversionary tactic.

UP made representations and promises directly to RBT in 2010 for the express purpose of inducing major investment and commitment by RBT, and without any term or time limitation, *i.e.*, UP committed to providing rate parity once RBT upgraded its facilities. RBT reasonably relied on UP's promise, and has continued to invest in substantial track and facility improvements that will total \$6.85 million within approximately 5 years. Littlefield V.S. ¶ 14. UP's claim that it never made any commitments directly to RBT for purposes of inducing reliance amounts to a classic bait and switch.

3. UP's analysis of the higher costs of serving RBT-Ivory cannot be credited

UP repeatedly claims that it needs the tariff penalty in order to cover its higher costs of serving RBT-Ivory via the SJVR compared to its costs of serving Western Milling-Goshen directly. UP Reply at 1-2, 6-8, 12, 19, and Exhibit 4. Two observations will suffice. First, at this stage, only UP has access to accurate data concerning its actual costs. Second, UP has manifestly failed to present any such accurate cost data.

UP's Exhibit 4 (as corrected by UP) purports to contrast the costs of two otherwise identical movements, both originating from Cedar Rapids, IA, with the first for termination at Goshen Junction, and the second for delivery to SJVR for eventual termination at Ivory. However, UP provides no authority for using an origin-to-destination URCS variable cost analysis for determining carrier discrimination, likely because there is none. Additionally, UP's analysis is directly contrary to the UP and industry agreed upon AAR-ASLRRRA Railroad Industry Agreement ("RIA") discussed in RBT's Complaint. That agreement specifies that "[t]he Large Railroad shall study its costs . . . on an annual actual total cost basis, from the area requested by the Small Railroad to the first crew change location common for the similar Small Railroad and Large Railroad shipments in question," and that "[t]his study shall include all costs relevant to this segment of the Large Railroad (including any savings attributable to the then present Small Railroad Operations as well as including any applicable handling charges paid by the Large Railroad to the Small railroad as part of the costs incurred by the Large Railroad)." RIA, Exhibit E. Just as movement-specific costs are used for reviewing abandonments; a more precise analysis is required here, as further confirmed by the terms of the RIA.

Even if UP's URCS costing approach had any validity, which RBT disputes, UP inexplicably uses the same distance, 2,065 miles, for both movements. The 2,065 miles presumably represents the distance from Cedar Rapids to the SJVR interchange at UP's Irrigosa siding, north of its Fresno Yard. However, for the Western Milling movement, UP completely neglects to add all pertinent costs to move a train for the rest of the route from Irrigosa to Goshen Junction, including, but not limited to, UP's costs for local crews (from Fresno), locomotive costs, fuel, capital costs, maintenance costs, and yard and line congestion costs. UP has thus greatly skewed its comparison by costing only some of the Goshen movement (as far as Irrigosa) but all of the Ivory movement. UP's cost evidence is worthless.

Even if the mileage were corrected, or the additional Goshen Junction costs were properly considered, UP's analysis would still be flawed. The SJVR payment represents a total cost, not a variable cost. UP appears to be comparing URCS variable costs (apples) to total costs (oranges), and it should be no surprise that the total costs are higher. UP also relies on system-average URCS costs that ignore the specifics of the route, the interchange, the crew changes, yard costs, etc.² Additionally, the SJVR handling line costs have not been verified through any actual payment records on the RBT-Ivory unit train shipments in question. Further, SJVR's actual fee on RBT-Ivory shipments, for example, undoubtedly reflects movement-specific considerations for both UP and SJVR, including movement-specific considerations, such as the location of interchange tracks, use of SJVR locomotives, etc.

Again, UP has access to the data needed to make a meaningful cost comparison, but elected not to utilize it. UP instead submitted a faulty analysis that cannot be credited.

² UP's claims that the RBT trains sit at the Irrigosa siding "for one or two days" is unverified through actual dwell time or similar standard railroad interchange data. UP's claim simply does not square with RBT's experience that most unit trains actually *arrive* at RBT-Ivory well within 12 hours of UP interchange with SJVR, with very few exceptions. Rapid interchange is consistent with standard carrier interchange agreements and AAR Circular OT-10, Rule 7B, requiring the prompt interchange of cars between carriers. UP's further discussion of the delay after SJVR returns the cars (Reply at 6) amounts to self-serving chutzpah since such delay is entirely under UP's own control. UP also neglects to inform the Board that Irrigosa is used for interchange solely for UP's own operational convenience and apparently to avoid UP congestion at the Fresno Yard. Interchanging at Irrigosa saves UP mileage, time, and costs, and UP also has multiple (4) other sidings available for interchange near Irrigosa. Additionally, UP neglects to analyze the costs or delays associated with its changing of crews or storing locomotives in its congested Fresno Yard for the Goshen Junction deliveries.

4. UP has not shown that a preliminary injunction will cause it any harm

RBT explained that because UP earns a greater contribution on the deliveries to SJVR via RBT, diverting traffic from RBT-Ivory to Western Milling would not increase UP's contribution, but would actually reduce it. Accordingly, injunctive relief thus will not cause UP any irreparable or other harm.

In response, UP claims it will be harmed because the penalty is needed to cover its greater costs of serving RBT-Ivory compared to serving Western Milling-Goshen. Reply at 19. However, UP has not established that its costs of serving RBT-Ivory are any greater than those of serving Western Milling-Goshen, as shown above. Because UP's cost analysis is without foundation, its irreparable harm claim is purely speculative and cannot be credited.

In short, none of UP's key factual assertions can be credited.

UP'S LEGAL MISCHARACTERIZATIONS

UP's legal argument is essentially to the effect that RBT has no prospects of success on the merits because: (a) what RBT has actually brought is an unreasonable rate claim; (b) RBT's unreasonable practice case is defective because it relates to rate discrimination; and (c) RBT's unreasonable discrimination case under § 10741 is not viable because the movements involve different destinations and therefore different routes.

UP is wrong on all counts.

1. A rate case is not appropriate or required because RBT is not complaining directly about the level of the rates

RBT is not complaining about the level of the rate *per se*. Instead, RBT has directed its complaint to: (a) the relationship between RBT's rates and those of its competitors; (b) the existence of a disparity that violates UP's prior promises and reasonably relied upon representations; and (c) the absence of a valid cost or other justification for that disparity.

UP's expansive logic, for example, would require the dismissal of a complaint about a deceptive fuel surcharge since the surcharge manifests itself in the rates that are charged. The Board rejected that theory and considered fuel surcharges as an unreasonable practice, not an unreasonable rate. *See, e.g., Rail Fuel Surcharges*, EP 661 (STB served Aug. 3, 2006); *Dairyland Power Coop. v. Union Pac. R.R.*, NOR 42105

(STB served July 29, 2008) at 5. The same analysis should apply here. UP's attempt to recharacterize RBT's complaint is inappropriate and unfounded.

2. RBT's unreasonable practice claim is proper and likely to succeed

For the reasons explained above, RBT's unreasonable practice claim is not an unreasonable rate claim. It is also separate and distinct from, although related to, RBT's unreasonable discrimination claim.

RBT's unreasonable practice claim addresses the existence of a rate disparity that contravenes UP's prior assurances, promises, and inducements. RBT's unreasonable discrimination claim, as explained more fully *infra*, shows how that rate disparity contravenes RBT's statutory obligations to avoid undue rate discrimination. The fact that UP has engaged in conduct that violates both (a) its obligation to engage in reasonable practices, and (b) its obligation to avoid undue discrimination, is no reason to require RBT to proceed with only one theory. To the contrary, the dual violation confirms the seriousness of UP's misconduct.

The need for an expansive application of the Board's unreasonable practice jurisdiction is amplified by the anti-competitive nature and purpose of UP's activities. In particular, RBT has received communications directly from UP and others that confirm UP's long-standing desire to favor Western Milling over RBT and other competitors for reasons that are unrelated to higher costs. *See, e.g.,* Exhibit A (UP manager admits that RBT rate penalties were made at the behest of RBT's direct competitor; UP intentionally engages in rate discrimination practices to dry up RBT shipments, described as "business killing initiatives"). Each of the targeted stations subject to UP's new tariff penalties is a location that directly competes for business with Western Milling for the three major feed ingredients commodities. If that were not enough, when RBT asked UP's executives whether it could develop a unit train corn program that might compete with Western Milling, UP responded unabashedly that any commodity that RBT could develop that might compete with its favored competitor would be subject to a similar rate penalty. Such anti-competitive conduct by a common carrier that is required to engage in reasonable practices must surely be encompassed within the Board's broad unreasonable practice jurisdiction.

Additionally, as explained *supra*, UP's substantive defense to the unreasonable practice claim is that it never made any promises or inducements directly to RBT, as opposed to RBT's customer. That claim is negated by UP's own prior written statements and promises to RBT that it would maintain the rate parity if RBT upgraded its facilities, and RBT's reasonable reliance on UP's representations through the investment of millions of dollars in new track and infrastructure upgrades. UP has not

provided any plausible basis on which to conclude that RBT is unlikely to succeed on the merits of its unreasonable practice claim.

3. RBT's unreasonable discrimination claim is proper and likely to succeed

UP's principal argument against RBT's unreasonable practice claim under § 10741 is that Ivory and Goshen are two different locations with some physical separation and, by that fact alone, the transportation involves two different routes, such that § 10741 cannot possibly apply. UP paints with far too broad a brush.

The House Report for Pub. L. No. 96-448 explained that "[t]he Committee considers 'end points' to mean specific origins and destination *and broad geographic areas encompassing origins and destinations contained within particular or general tariffs.*" *Seaboard Coast Line R.R. v. United States*, 724 F.2d 1482, 1490 n.8 (11th Cir. 1984) (discussing and quoting House Report for Pub. L. No. 96-448) (altered emphasis). Goshen and Ivory are certainly located within the same geographic area. "The reason to except 'rail rates applicable to different routes' is that this contemplates a situation where costs are different." *Id.* at 1490. The costs for transportation to Ivory are not so different from those to Goshen that they cannot be compared, as the routes are largely identical. They just need to be compared appropriately, which UP did not do. Moreover, the two destinations and facilities handle the same products, have comparable train handling facilities, and compete for the same ultimate customers.

UP's reliance on *Rail Exemption Misc. Agricultural Commodities*, 8 I.C.C.2d 674, 686 (1992) ("*Rail Exemption*"), to support its claim that different destinations necessarily entail different routes is particularly far-fetched. The four locations at issue in that case were found to be "separate destinations located on different rail lines," and the "petitioners failed to identify any of their competitors." *Id.* Neither applies to RBT, particularly since SJVR functions as UP's delivering agent and not as an independent an interline carrier, and RBT has plainly identified its relevant competitor. There is more than enough to support RBT's claim under § 10741 and to support a finding that success on the merits is likely enough to warrant the preliminary injunction.

* * * * *

In conclusion, UP has wholly failed to support its factual arguments, particularly those relating to the burden of irreparable harm and the nature of the public interest. UP has also failed to present any legal arguments that undermine RBT's showing of a sufficient likelihood of success. Accordingly, the Board should grant RBT's request and issue the preliminary injunction.

The Honorable Cynthia T. Brown
November 29, 2016
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Respectfully submitted,

/s/ Peter A. Pfohl
Robert D. Rosenberg
Katherine F. Waring

Counsel for Richard Best Transfer, Inc.

Attachments

cc: Service List—w/attachments

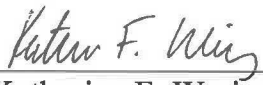
CERTIFICATE OF SERVICE

Pursuant to 49 C.F.R. § 1111.3, I hereby certify, that I have this 29th day of November, 2016, caused to be served copies of this Surreply by email to all parties of record as follows:

Michael L. Rosenthal
Covington & Burling LLP
One CityCenter 850 10th Street, N.W.
Washington DC 20001-4956

With a courtesy copy by email to:

Louise A. Rinn, Esq.
Regulatory Counsel
Union Pacific Railroad Company
1400 Douglas Street
Omaha, NE 68179



Katherine F. Waring
An Attorney for Complainant

VERIFICATION

I, Charles Littlefield, Vice President of Operations of Richard Best Transfer, Inc. ("RBT") declare under penalty of perjury that I have read the foregoing *Surreply on Motion for Preliminary Injunction*, that I know the contents thereof, and that all facts in Paragraphs 1, 2, and 3, are true and correct based on my knowledge, information and belief. Further, I certify that copies of the correspondence and emails included as Exhibits A and C are complete and unedited, and were received or sent by RBT. I also certify that I am qualified and authorized to file this Verification.



Charles Littlefield

Executed on November 28, 2016

EXHIBIT A

Chuck Littlefield

From: Chuck Littlefield <chuck@rbtincca.com>
Sent: Tuesday, August 03, 2010 3:21 PM
To: Sawa, Shawn
Subject: UP/Western Milling Relationship

Importance: High

Shawn,

Western Milling and JDH do not want RBT and ADM to establish a facility in order to protect their franchises. Western Milling called the UP and had them create the Conner group to create price disadvantages. UP responded with rate increases accordingly. They then tried to add Ivory to the SCAL group but I was able to get that stopped.

Richard Best and myself met with the two UP managers that stated, "Western Milling requested us to make the increases. UP responded in order to protect their mainline investments." In fact, the two UP managers went on to say, "Western Milling was upset that it was only \$125 per car and that was not enough seeing as we were still in business."

The two UP managers that told us this are: Daniel J. McGregor
Sr. Business Mgr. - Feed Grains
Marketing & Sales Union Pacific
559-443-2368
djmcgreg@up.com

Matthew G. Bosch
Product Mgr. - Feed Ingredients
Marketing & Sales Union Pacific
402-544-5284
mgbosch@up.com

These two have both maintained that they are just protecting their main line investment because Western Milling has spent millions of dollars in infrastructure and RBT has not and therefore, Western Milling will get precedence until we make infrastructure investments in order to chamber 100 car unit trains with 24 to 48 hour unload times.

The last thing Western Milling wants is a competitor and certainly not a competitor like ADM.

Chuck Littlefield
COO RBT INC
559-994-9784

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Chuck Littlefield

From: DJMCGREG@up.com
Sent: Tuesday, November 24, 2009 11:29 AM
To: Chuck Littlefield
Subject: Re: Equalized Rates

I have our Omaha feed pricing people looking at this, including the director of feed marketing. One of our newer people, Matt Bosch, is now in charge of DDG pricing and he will be visiting in California Dec 8 and 9. We might try to schedule a quick meeting and I plan to show him some of your facilities.

Dan McGregor
Union Pacific Railroad
(O) 559-443-2368
(F) 402-501-2861

"Chuck Littlefield" <chuck@rbtincca.com>

"Chuck Littlefield" <chuck@rbtincca.com>	To: DJMCGREG@up.com
11/24/2009 11:10 AM	cc
Please respond to "Chuck Littlefield" <chuck@rbtincca.com>	Subject: Re: Equalized Rates

Dan,

Any word on the UP rates, especially regarding the Conner group?

Chuck

----- Original Message -----

From: <DJMCGREG@up.com>
To: "Chuck Littlefield" <chuck@rbtincca.com>
Sent: Monday, November 09, 2009 5:10 PM
Subject: Re: Equalized Rates

In Fresno ? There is a Marie Calendars on west Shaw not far from our yard. I assume that's the one you mean ?

Dan McGregor
Union Pacific Railroad
(O) 559-443-2368
(F) 402-501-2861

"Chuck

Littlefield"
<chuck@rbtincca.com>
om>
11/09/2009 05:07 PM
Re: Equalized Rates

To
<DJMCGREG@up.com>
cc
Subject

Please respond to
"Chuck
Littlefield"
<chuck@rbtincca.com>
om>

You bet. How about Marie Calendars on Shaw for lunch?

----- Original Message -----

From: <DJMCGREG@up.com>
To: "Chuck Littlefield" <chuck@rbtincca.com>
Sent: Monday, November 09, 2009 4:48 PM
Subject: Re: Equalized Rates

What time do you want to meet tomorrow and where ? Does lunch work ?

"Chuck
Littlefield"
<chuck@rbtincca.com>
om>
11/06/2009 05:18 PM
Re: Equalized Rates

To
<DJMCGREG@up.com>
cc
"Gomez, Larry \ (RA West\)"
<Larry.Gomez@RailAmerica.com>
Subject

Please respond to
"Chuck
Littlefield"
<chuck@rbtincca.com>
om>

You bet. Looking forward to it. Thanks.

----- Original Message -----

From: <DJMCGREG@up.com>
To: "Chuck Littlefield" <chuck@rbtincca.com>
Cc: "Gomez, Larry (RA West)" <Larry.Gomez@RailAmerica.com>
Sent: Friday, November 06, 2009 4:56 PM
Subject: Re: Equalized Rates

I may be able to meet on Tuesday next week, 11/10. Can you be available

around noon and we can include lunch.

"Chuck
Littlefield"
<chuck@rbtincca.com>
11/06/2009 10:00 AM
Please respond to
"Chuck
Littlefield"
<chuck@rbtincca.com>
om>

To
<DJMCGREG@up.com>
cc
"Gomez, Larry \ (RA West\)"
<Larry.Gomez@RailAmerica.com>
Subject
Re: Equalized Rates

Whatever works best for you Dan? I'll make my schedule fit yours. The earlier the better.

----- Original Message -----

From: <DJMCGREG@up.com>
To: "Chuck Littlefield" <chuck@rbtincca.com>
Cc: "Gomez, Larry (RA West)" <Larry.Gomez@RailAmerica.com>
Sent: Friday, November 06, 2009 9:52 AM
Subject: Re: Equalized Rates

Thanks for the information Chuck.
I would be glad to sit down with you and discuss the grain and grain products business at your facilities and the impact of our rates.
If you have some time early next week I can make time for a meeting.
Let me know.

"Chuck
Littlefield"
<chuck@rbtincca.com>
11/06/2009 07:13 AM
Please respond to
"Chuck
Littlefield"
<chuck@rbtincca.com>
om>

To
<DJMCGREG@up.com>
cc
"Gomez, Larry \ (RA West\)"
<Larry.Gomez@RailAmerica.com>
Subject
Equalized Rates

Dan,

We need some help here!!! Ever since the UP came up with the rate changes on Ag. Commodities in California effective July 1 and then at the request of Western Milling created the Conner Group to lock out their competition (us) our carloads numbers are as follows (2008 to 2009).

2009 - 511 168 car gain	June 2008 - 348	vs. June
2009 - 401 149 car loss	July 2008 - 550	vs. July
2009 - 345 292 car loss	Aug 2008 - 637	vs. Aug
2009 - 265 336 car loss Conner group in effect	Sep 2008 - 601	vs. Sep
2009 - 260 190 car loss	Oct 2008 - 450	vs. Oct

80 percent of our business is UP. After these business killing initiatives, you can see the effects to our business. I need your help and assistance in trying to equalize these rates to our facilities so that we can get things rolling again. Whatever help you can provide will be crucial to our future. Thanks in advance for your consideration.

Sincerely,

Chuck Littlefield, RBT INC.

**

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EXHIBIT B

BENJAMIN J. HORWICH (State Bar No. 249090)
JOHN F. MULLER (State Bar No. 300839)
DAVID J. FEDER (State Bar No. 302112)
MUNGER, TOLLES & OLSON LLP
560 Mission Street, Twenty-Seventh Floor
San Francisco, California 94105
Telephone: (415) 512-4000
Facsimile: (415) 512-4077
ben.horwich@mto.com
Attorneys for Plaintiff BNSF Railway Company

RAYMOND A. ATKINS (*pro hac vice*)
REBECCA K. WOOD (*pro hac vice*)
HANNA M. CHOUEST (*pro hac vice*)
TOBIAS S. LOSS-EATON (*pro hac vice*)
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, D.C. 20005
Telephone: (202) 736-8000
Facsimile: (202) 736-8711
ratkins@sidley.com
Attorneys for Plaintiff Union Pacific Railroad Company

(additional counsel listed on signature page)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BNSF RAILWAY COMPANY and
UNION PACIFIC RAILROAD COMPANY,

Plaintiffs,

vs.

CALIFORNIA STATE BOARD OF
EQUALIZATION, DAVID J. GAU, in his
official capacity as Executive Director of the
California State Board of Equalization;
GEORGE RUNNER, FIONA MA, JEROME
HORTON, DIANE L. HARKEY, BETTY T.
YEE, in their official capacities as Board
Members of the California State Board of
Equalization; KAMALA D. HARRIS, in her
official capacity as Attorney General of
California; CALIFORNIA GOVERNOR'S
OFFICE OF EMERGENCY SERVICES;
MARK GHILARDUCCI, in his official
capacity as Director of the California
Governor's Office of Emergency Services,

Defendants.

Case No. 3:16-cv-04311-RS

ORDER

**[PROPOSED] FORM OF PRELIMINARY
INJUNCTION**

[PROPOSED] FORM OF PRELIMINARY INJUNCTION

This matter came before the Court on Plaintiffs BNSF Railway Company and Union Pacific Railroad Company's Motion for a Preliminary Injunction. Having considered the Motion, the papers submitted in support thereof and in opposition thereto, and the arguments of counsel at the October 13, 2016 motion hearing, the Court issued an Order Granting Motion for Preliminary Injunction on October 28, 2016 (Docket #62) (Order), attached hereto as Exhibit A. For the reasons stated in the Order, Defendants California State Board of Equalization; David J. Gau in his official capacity as Executive Director of the California State Board of Equalization; Fiona Ma, George Runner, Jerome Horton, Diane L. Harkey, and Betty T. Yee, in their official capacities as Board Members of the State Board of Equalization; Kamala D. Harris, in her official capacity as Attorney General of California; California Governor's Office of Emergency Services; and Mark Ghilarducci in his official capacity as Director of the California Governor's Office of Emergency Services; and their officers, agents, servants, employees, attorneys, and other persons who are in active concert or participation with them, are hereby enjoined, until entry of a final judgment resolving this case on the merits, from further implementing or enforcing the hazardous material charge provisions of SB 84, the provisions of the Fee Collections Procedures Law as they relate to SB 84, and SB 84's implementing regulations, including from taking any of the following actions in connection with the transportation of hazardous materials by rail in California:

- Prescribing forms, procedures, and implementing regulations on the part of the Board of Equalization, as provided in Cal. Gov't Code §§ 8574.38 and 8574.42;
- Giving notice to register with the Board of Equalization, as provided in Cal. Gov't Code § 8574.34 and Cal. Code Regs. tit. 19, § 2704(a);
- Imposing the hazardous material charge on the transportation of certain hazardous materials, as provided in Cal. Gov't Code § 8574.32(a)(1) & (b)(1) and Cal. Code Regs. tit. 19, § 2704(b);
- Requiring collection of the hazardous material charge, and remittance of the charges quarterly to the Board of Equalization along with a return, as provided in

1 Cal. Gov't Code §§ 8574.32(b) and 8574.38 and Cal. Code. Regs. tit. 19, §§ 2701,
2 2704; and

- 3 • Bringing any action, or requesting the Attorney General to bring any action under
4 Cal. Rev. & Tax. Code § 55121, to collect a hazardous material charge, or to
5 enforce any recordkeeping or reporting provisions under SB 84 or, as provided in
6 Cal. Gov't Code §§ 8574.36 and 8574.36, the Fee Collection Procedures Law.

7 Having considered the circumstances of this case, and Defendants having indicated that
8 they do not require security in this case, the Court determines that Plaintiffs need not give security
9 in this case.

10 Pursuant to paragraph 3 of the stipulation and order entered by this Court on August 18,
11 2016 (Docket #29), the date for Defendants to answer or otherwise respond to the Complaint is
12 December 7, 2016.

13 IT IS SO ORDERED.

14
15 DATED: November 15, 2016

16
17 By: 
18

Hon. Richard Seeborg

19 UNITED STATES DISTRICT JUDGE
20
21

22 Additional Counsel:

23 CAROL LYNN THOMPSON (State Bar No. 148079)
24 SIDLEY AUSTIN LLP
25 555 California Street
26 Suite 2000
27 San Francisco, California 94104
28 Telephone: (415) 772-1291
Facsimile: (415) 772-7400
cthompson@sidley.com

1 BENJAMIN J. HORWICH (State Bar No. 249090)
MUNGER, TOLLES & OLSON LLP
2 560 Mission Street, Twenty-Seventh Floor
San Francisco, California 94105
3 Telephone: (415) 512-4000
Facsimile: (415) 512-4077
4 ben.horwich@mto.com
Attorneys for Plaintiff BNSF Railway Company

5 RAYMOND A. ATKINS (*pro hac vice*)
6 SIDLEY AUSTIN LLP
1501 K Street, NW
7 Washington, D.C. 20005
Telephone: (202) 736-8000
8 Facsimile: (202) 736-8711
ratkins@sidley.com

9 CAROL LYNN THOMPSON (State Bar No. 148079)
10 SIDLEY AUSTIN LLP
555 California Street, Suite 2000
11 San Francisco, California 94104
Telephone: (415) 772-1291
12 Facsimile: (415) 772-7400
cthompson@sidley.com
13 Attorneys for Plaintiff Union Pacific Railroad Company

14 UNITED STATES DISTRICT COURT

15 NORTHERN DISTRICT OF CALIFORNIA

16 BNSF RAILWAY COMPANY and
17 UNION PACIFIC RAILROAD COMPANY,

18 Plaintiffs,

19 vs.

20 CALIFORNIA STATE BOARD OF
EQUALIZATION, DAVID J. GAU, in his official
21 capacity as Executive Director of the California
State Board of Equalization; GEORGE RUNNER,
FIONA MA, JEROME HORTON, DIANE L.
22 HARKEY, BETTY T. YEE, in their official
capacities as Board Members of the California
23 State Board of Equalization; KAMALA D.
HARRIS, in her official capacity as Attorney
24 General of California; CALIFORNIA
GOVERNOR'S OFFICE OF EMERGENCY
25 SERVICES; MARK GHILARDUCCI, in his
official capacity as Director of the California
26 Governor's Office of Emergency Services,

27 Defendants.
28

Case No. 3:16-cv-04311-JCS

**DECLARATION OF AARON
MEYERLE IN SUPPORT OF
PLAINTIFFS BNSF RAILWAY
COMPANY AND UNION PACIFIC
RAILROAD COMPANY'S MOTION
FOR PRELIMINARY INJUNCTION**

DECLARATION OF AARON MEYERLE

I, Aaron Meyerle, declare as follows:

1. I am the Senior Business Director for Chemicals in the Marketing and Sales Department at Union Pacific Railroad Company ("Union Pacific"). I submit this declaration in support of Plaintiffs BNSF Railway Co. and Union Pacific. Except as noted, I make this declaration based upon my personal knowledge and, if called as a witness, I could and would testify competently to the facts set forth below.

2. I have worked as a Senior Business Director for Chemicals in the Marketing and Sales Department at Union Pacific since May 2016. Prior to that, I worked as a Senior Business Director for Agricultural Products in the Marketing and Sales Department at Union Pacific since April 2014. I am familiar with Union Pacific's crude oil shipments and routes in California.

3. According to Union Pacific records I have reviewed, in 2015, Union Pacific transported in California a total of 6,356 rail cars containing products corresponding to UN codes 1267 and 1270 (which the Emergency Regulations under SB 84 refer to as "Petroleum Crude Oil; also shipped as Petroleum Oil also shipped as Oil, Petroleum"). A \$45 charge imposed on each of these cars would have yielded \$286,020.

4. In the first two quarters of 2016, Union Pacific transported in California a total of 2,431 rail cars containing products corresponding to UN codes 1267 and 1270. If Union Pacific were to transport an equal number of such cars in California in the last two quarters of 2016 as in the first two quarters, a \$45 charge imposed on each of the cars would yield a total of \$ 218,790 in 2016.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 20th day of September, 2016, at Omaha, Nebraska.

By:

AARON MEYERLE

1 BENJAMIN J. HORWICH (State Bar No. 249090)
MUNGER, TOLLES & OLSON LLP
2 560 Mission Street, Twenty-Seventh Floor
San Francisco, California 94105
3 Telephone: (415) 512-4000
Facsimile: (415) 512-4077
4 ben.horwich@mto.com
Attorneys for Plaintiff BNSF Railway Company

5
6 RAYMOND A. ATKINS (*pro hac vice* pending)
SIDLEY AUSTIN LLP
1501 K Street, NW
7 Washington, D.C. 20005
Telephone: (202) 736-8000
8 Facsimile: (202) 736-8711
ratkins@sidley.com

9
10 CAROL LYNN THOMPSON (State Bar No. 148079)
SIDLEY AUSTIN LLP
555 California Street, Suite 2000
11 San Francisco, California 94104
Telephone: (415) 772-1291
12 Facsimile: (415) 772-7400
cthompson@sidley.com
13 Attorneys for Plaintiff Union Pacific Railroad Company

14 UNITED STATES DISTRICT COURT

15 NORTHERN DISTRICT OF CALIFORNIA

16 BNSF RAILWAY COMPANY and
UNION PACIFIC RAILROAD COMPANY,

17 Plaintiffs,

18 vs.

19 CALIFORNIA STATE BOARD OF
20 EQUALIZATION, DAVID J. GAU, in his official
capacity as Executive Director of the California
21 State Board of Equalization; GEORGE RUNNER,
FIONA MA, JEROME HORTON, DIANE L.
22 HARKEY, BETTY T. YEE, in their official
capacities as Board Members of the California
23 State Board of Equalization; KAMALA D.
HARRIS, in her official capacity as Attorney
24 General of California; CALIFORNIA
GOVERNOR'S OFFICE OF EMERGENCY
25 SERVICES; MARK GHILARDUCCI, in his
official capacity as Director of the California
26 Governor's Office of Emergency Services,

27 Defendants.

Case No. 3:16-cv-04311-JCS

**DECLARATION OF MARK T. SIMON
IN SUPPORT OF PLAINTIFFS BNSF
RAILWAY COMPANY AND UNION
PACIFIC RAILROAD COMPANY'S
MOTION FOR PRELIMINARY
INJUNCTION**

28 Case No. 3:16-cv-04311-JCS

DECLARATION OF MARK T. SIMON I/S/O PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

EXHIBIT B

DECLARATION OF MARK T. SIMON

I, Mark T. Simon, declare as follows:

1. I am Assistant Vice President – International Intermodal Marketing & Sales at Union Pacific Railroad Company. I submit this declaration in support of Plaintiffs Union Pacific Railroad Company and BNSF Railway Company’s challenge to the hazardous materials charge imposed by California Senate Bill 84 (“SB 84”). Except as noted, I make this declaration based upon my personal knowledge and, if called as a witness, I could and would testify competently to the facts set forth below.

2. I graduated from the University of Nebraska – Kearney in 1992 with a Bachelor of Science in Business Administration. I have worked at Union Pacific Railroad for over 24 years in Marketing and Sales with experience in multiple commercial business teams. This experience includes working most recently with international intermodal shippers, ocean carriers, and markets to provide rail transportation service as a seamless solution in moving imported and exported products via containerized freight. Prior to working in the international intermodal group, I also worked in Automotive, Automotive Parts, and Industrial Products. I also have worked with many associates and internal business teams in providing logistics services over the last 24 years with the Company.

3. I have reviewed the legislation, SB 84, along with the implementing Emergency Regulations, which impose a new charge on certain owners of hazardous material commodities that are transported by rail in the State of California (the “hazmat charge”).

4. The statute and regulations require the railroad carrying the hazardous materials to collect the hazmat charge from the owner or the person paying the freight charges and remit it quarterly to the California Board of Equalization. Cal. Gov’t Code § 8574.32(b)(2); Cal. Code Regs. tit. 19, §§ 2701, 2704. The hazmat charge is to be imposed at origin, when a rail car is loaded with its cargo (if the trip originates in California), or upon entry into California (if it originates elsewhere). In either case, it is the railroad’s responsibility to collect the charge. Cal. Gov’t Code § 8574.32(b). A railroad must also collect the hazmat charge for intermodal containers

1 transferred to rail from another mode of transportation, if the owner of the freight containing the
2 hazardous material commodity has not already been charged under SB 84. Cal. Code Regs. tit. 19,
3 § 2702.

4 5. The hazmat charge applies to the following materials: acetonitrile, certain alcohols,
5 anhydrous ammonia, ammonium hydroxide, calcium hypochlorite, chlorine, certain corrosive
6 liquids (NOS), diesel fuel, environmentally hazardous substances (liquid, NOS), ethanol, gasoline,
7 hydrogen peroxide, liquefied petroleum gas, liquefied gas, methanol, methyl ethyl ketone, nitric
8 acid, petroleum crude oil, phenol, phosphoric acid, potassium hydroxide, propylene, sodium
9 hydroxide, sulfuric acid, toluene, and vinyl acetate. Cal. Code Regs. tit 19, § 2701(b).

10 6. As part of my duties at Union Pacific, I am familiar with the cargo that Union
11 Pacific carries and the customers with whom Union Pacific does business. Union Pacific
12 transports all 25 of the hazardous materials listed in SB 84's implementing regulations in
13 California.

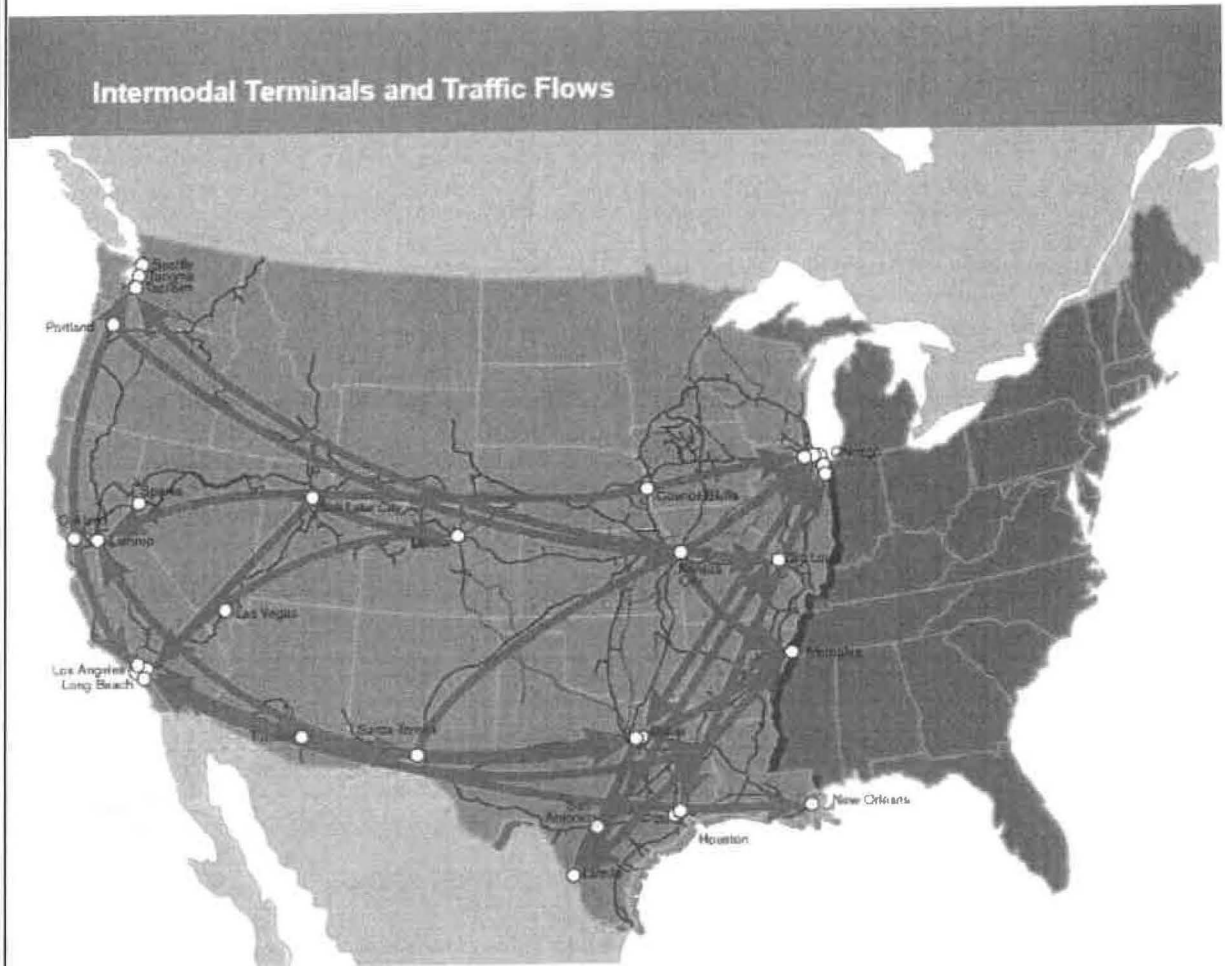
14 7. Common routes for intermodal shipments either originating or terminating in
15 California follow the primary routes to/from Arizona, Nevada, and Oregon. In calendar year 2015,
16 approximately two-thirds of all intermodal container shipments handled by Union Pacific involved
17 a routing—originating, terminating, or within—California. Approximately 67% of the export
18 containers that moved in 2015 and terminated in California originated from five different states;
19 Illinois, Texas, Arkansas, Ohio, and Georgia. These same states also represent 63% of the
20 California originated shipments for imported containerized shipments.

21 8. Based on rail shipments (carload and container) in the 2015 calendar year, there
22 were nearly 200 Union Pacific customers that shipped more than 77,000 units that would have
23 been subject to the hazmat charge based on the commodity definition provided on the rail waybill
24 that correspond to the UN numbers identified in the OES action.

25 9. Union Pacific's intermodal business includes two segments: international and
26 domestic. International business consists of import and export container traffic that primarily
27 passes through West Coast ports served by Union Pacific's extensive terminal network. Domestic
28

1 business includes container and trailer traffic, which is picked up and delivered within North
2 America for intermodal marketing companies (primarily shipper agents and logistics companies),
3 as well as truckload carriers. Less-than-truckload and package carriers with time-sensitive
4 business requirements are also an important part of domestic shipments. Combined, international
5 and domestic intermodal business generated 20 percent of Union Pacific's freight revenue in 2015.

6 10. International traffic primarily moves in 20 or 40-foot shipping containers through
7 ports on the West Coast. Domestic shipments move in 53-foot containers or trailers to and from
8 points within the U.S., Canada, and Mexico. U.S. import volume transloaded into domestic
9 containers at the ports is classified as domestic. Overall, intermodal utilizes just over half of the
10 route miles of the Union Pacific network, routing freight between 32 Union Pacific-owned or
11 operated intermodal terminals, as well as customer-operated, on-dock rail facilities. Union
12 Pacific's network includes several key intermodal lanes. Our east/west lanes connect the West
13 Coast to Chicago and Texas and interchange connections with Eastern U.S. railroads. The north /
14 south intermodal lanes operate between Los Angeles and the Pacific Northwest, as well as
15 between Chicago and the upper Midwest to locations in Texas and Mexico. Union Pacific can also
16 directly access all six major Mexico gateways and serves most of the major metropolitan areas in
17 the Western two-thirds of the United States. Virtually all routes are competitive with other
18 railroads and are comparable to shipping distances on highways. The following figure illustrates
19 the intermodal traffic flows on Union Pacific's network.



18 11. Based on my experience, the SB 84 hazmat charge will, if implemented, harm

19 Union Pacific's customer relationships. This fee will result in Beneficial Cargo Owners (BCOs)

20 evaluating their options within their supply chains. For international intermodal customers, the

21 BCOs will evaluate all routing options that have a strong potential to cause traffic to route via

22 alternate modes such as truck since they are not subject to this fee in California. Other routing

23 options include routing via alternate ports in states or neighboring countries where the BCO is not

24 subject to this fee. Shippers who utilize rail carload transportation are also sensitive to such added

25 costs and will look at all available options to ensure they are able to compete on a delivered cost

26 basis that provides them the most competitive service option.

27

28

1 12. In my experience, shipping customers already have numerous options to meet their
2 shipping needs. For example, many customers have the option of shipping by truck, or, for
3 intermodal customers, can choose an alternative port along the U.S. West, Gulf and East Coasts,
4 or even other North American ports of entry in Canada or Mexico. Further, in my experience,
5 shipping customers, including those who ship hazardous materials, view transportation by
6 different modes as fungible. Shippers are also cost-sensitive and generally will switch to whatever
7 mode of transportation is the most cost-effective. In other words, an increase in cost for one mode
8 of transportation discourages use of that mode, both in single-mode transportation and as a link in
9 intermodal transportation. In turn, a price increase in one mode of transportation incentivizes
10 shippers to shift their business from that mode to another mode, for example from rail to trucking.

11 13. Depending on the destination of the freight, other ports along the U.S. West Coast
12 such as those in Washington state (Tacoma or Seattle) and Ports in Canada or Mexico (Vancouver,
13 B.C., Prince Rupert, B.C., Lazaro Cardenas, MX) would be viable substitute ports for international
14 container shipments with similar transportation offerings. Alternative water routes also provide
15 geographic competition through the use of the Panama Canal or the Suez Canal providing delivery
16 to ports in the Gulf Coast such as Houston, TX, New Orleans, LA, Mobile, AL or East Coast ports
17 such as Miami, FL, Savannah, GA, Norfolk, VA, New Jersey and New York.

18 14. International ports in Canada and Mexico are particularly attractive to customers
19 because U.S. ports already impose a Harbor Maintenance Fee, which amounts to 0.125% of the
20 declared value of the commercial cargo tendered at the port. The current average cost per
21 container is over \$100 per unit. This charge has created an incentive for cargo owners to route
22 their shipments to non-U.S. West Coast ports on this basis alone. Similarly, the California hazmat
23 charge would further increase the cost of doing business at California ports and make them even
24 less competitive with other ports both within the U.S. and internationally.

25 15. Transportation of freight is a highly competitive environment and shippers are very
26 focused on means to reduce their overall supply chain spending. All transportation carriers focus
27 on efficiency in their networks in order to remove waste or extra costs in order to effectively
28

1 compete in this environment. In my role as Assistant Vice President – International Intermodal
2 Marketing & Sales, I have close interactions with shippers and I understand that price sensitivities
3 in their businesses are so high that a price increase of as little as \$1.00/ton will result in freight
4 being shifted to alternative modes or ports. The California hazmat charge could make the
5 difference between shippers routing their shipments through a California port or switching to a
6 viable alternative port as provided above.

7 16. Shippers demonstrate a willingness to pay a premium for faster delivery, greater
8 convenience, and reduced administrative burden. Compared to intermodal rail transport, trucks
9 can have a higher perceived value in these three areas. Therefore, the value proposition for
10 intermodal rail transport lies in high volume, low cost shipments. Because intermodal relies on its
11 cost advantage versus truck, we are very sensitive to slight changes in cost structure to remain
12 competitive with trucking. Accordingly, the introduction of a \$45 charge has a high potential for
13 customers to shift business away from rail.

14 17. Based on this experience, I believe the SB 84 hazmat charge will prompt at least
15 some—and possibly many—of our customers who ship the covered hazardous materials in
16 California to scale back their business with us, either by transferring it to another mode, such as
17 trucking, by reducing their total shipping business, or by utilizing other international ports outside
18 the State. The overall impact on our business in California would be significant.

1 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the
2 United States that the foregoing is true and correct.

3 Executed this 27th day of July, 2016, at Omaha, Nebraska

4
5 By:

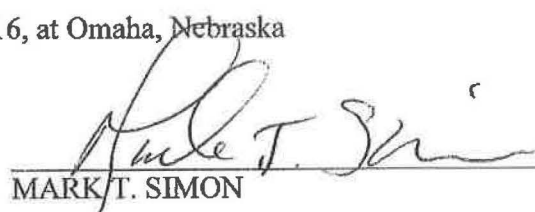

6 MARK T. SIMON
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EXHIBIT C

Chuck Littlefield

From: Lori A. Loschen <LORILOSCHEN@UP.COM>
Sent: Friday, August 27, 2010 11:21 AM
To: Chuck Littlefield
Cc: larry.gomez@railamerica.com; Dan J. McGregor
Subject: Re: Conversation with ADM

Chuck,

Once the expansion is complete, then UP will provide competitive unit train rates into Ivory, CA. Again, as soon as Law and Operating approve the email. I will send, so you can get ADM's commitment on capital.

Let me know if you have any other questions.

Thanks,

Lori Loschen

Sr Business Director
Grain Products
Union Pacific Railroad
Phone: (402) 544 - 4004
Email: loriloschen@up.com

"Chuck Littlefield" <chuck@rbtincca.com>

"Chuck Littlefield"
<chuck@rbtincca.com>

08/26/2010 03:03 PM

To: <larry.gomez@railamerica.com>, "Lori A. Loschen"
<LORILOSCHEN@UP.COM>

cc

Please respond to
"Chuck Littlefield"
<chuck@rbtincca.com>

Subject: Re: Conversation with ADM

Lori,

Yes, I believe Larry and I have had separate conversations with ADM today. Shawn Sawa, ADM West Coast Mgr., is working toward getting the AFE established for the work. He indicated that he would like to have the letter that we discussed yesterday from the UP on becoming a unit train facility as being helpful in securing the AFE with their Decatur offices.

We further discussed providing the UP a letter from ADM on the commitment to this project in order to re-establish at least 80 car unit trains until the project is complete? Is that a possibility?

Larry please weigh in here with your discussions as well.

Chuck

----- Original Message -----

From: [Lori A. Loschen](#)
To: larry.gomez@railamerica.com
Cc: chuck@rbincca.com
Sent: Thursday, August 26, 2010 12:45 PM
Subject: Conversation with ADM

Larry,

I know you were going to speak with ADM today. Did you have that opportunity?

Lori Loschen
Sr Business Director
Grain Products
Union Pacific Railroad
Phone: (402) 544 – 4004
Email: loriloschen@up.com
**

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Marketing & Sales
Agricultural Products

August 30, 2010

Mrs. Lori Loschen
Union Pacific Railroad
1400 Douglas Street
Mail Stop 1310
Omaha, NE 68179

Mr. Chuck Littlefield
Richard Best Transfer Inc.
6801 Avenue 430
Dinuba, CA 93618

Dear Chuck,

Union Pacific Railroad will provide ADM and Richard Best Transfer Inc. market based unit train (80 and/or 100) rates to their Ivory, CA facility once this destination facility has invested in private track expansion to receive and unload the entire train which shall include a seamless interchange between SJVR and Union Pacific Railroad.

Sincerely,


Lori Loschen

CC: Dan McGregor