

TABLE OF CONTENTS

	<u>Page</u>
I. BACKGROUND	4
II. ARGUMENT	8
A. RBT Fails To Show That It Is Likely To Succeed On The Merits.	9
1. RBT’s “Unreasonable Practice” claim has no likelihood of success.....	10
2. RBT’s “Unreasonable Discrimination” claim has no likelihood of success.	12
B. RBT Fails To Show That It Will Be Irreparably Harmed In The Absence Of An Injunction.	15
C. RBT Fails To Show That Issuance Of An Injunction Will Not Harm Union Pacific.	18
D. RBT Fails To Show That Issuance Of An Injunction Would Be In The Public Interest.	19
III. CONCLUSION.....	21

VERIFICATIONS

Verification of Daniel C. McLaughlin

Verification of Gregory Thompson

Verification of Mark J. Draper

EXHIBITS

Exhibit 1: Map of California Grain and Grain Products Facilities

Exhibit 2: Tariff UP 4053-C, Item 4011-A (Effective June 7, 2010)

Exhibit 3: Tariff UP 4053 Rate Adjustment Announcement (Sept. 22, 2016)

Exhibit 4: Costs to Serve WM-Goshen Versus RBT-Ivory

RICHARD BEST TRANSFER INC.,
Complainant,
v.
UNION PACIFIC RAILROAD COMPANY,
Defendant.

The Board should deny the petition for preliminary injunction filed by Richard Best Transfer Inc. (“RBT”). RBT complains about a \$250 per car differential between Union Pacific’s rates to RBT at Ivory, California (“RBT-Ivory”) and its rates to Western Milling at Goshen Junction, California (“WM-Goshen”). But RBT has no cause to complain. As RBT acknowledges in its complaint:

In fact, Union Pacific currently must pay the San Joaquin Valley Railroad (“SJVR”) { }¹ per car to handle cars from an interchange near Fresno, California, to RBT-Ivory. Our { } the \$250 per car rate differential on shipments to RBT-Ivory.

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Union Pacific's additional { } per car cost is not offset by savings from SJVR's delivery of cars to RBT-Ivory. Indeed, serving RBT-Ivory is actually more disruptive to our rail operations than serving WM-Goshen, even though we must move traffic farther to serve WM-Goshen. To serve WM-Goshen, Union Pacific pulls directly into the facility and leaves the cars on tracks owned by Western Milling. To serve RBT-Ivory, we leave the cars for SJVR on our Irrigosa Siding, north of Fresno. *See* Exhibit 1. RBT's cars often block the siding for one or two days until SJVR sends a crew and locomotives to move the cars to Ivory. The cars block the siding for one or two days again when they are returned empty. The blocked siding requires trains moving towards Fresno to stop 20 miles north of Fresno and wait for trains to pass, which creates delays and increases operating costs on our Fresno Subdivision.

For many years, Union Pacific's higher costs of serving RBT-Ivory were not reflected in our rates. In 2011, Union Pacific agreed with {

}³ The agreement { } which left Union Pacific free to reestablish rates reflecting the higher costs of the different route and different service provided for traffic moving to RBT-Ivory.

Even if Union Pacific's \$250 per car rate differential were not so plainly justified, RBT would not be entitled to an injunction. An injunction is an extraordinary remedy. A party seeking to prohibit a railroad from exercising its statutory right to establish rail rates in the first instance

² DDGS, or distiller's dried grains with solubles, and gluten feed are co-products of ethanol production and corn processing that are used as feed ingredients.

³

Union Pacific submitted a motion for a protective order along with this reply.

must present a particularly strong showing that it is entitled to an injunction. RBT does not come close to making the necessary showing here. *First*, RBT has not shown it is likely to succeed on the merits. Board precedent precludes RBT's effort to recast a complaint about rate levels as an unreasonable practice complaint, and statutory antidiscrimination rules expressly allow rail carriers to establish *different* rates for *different* routes and *different* services. *Second*, RBT has not shown it will suffer irreparable harm. RBT provided no evidence to support the conclusory claims of its witness. *Third*, RBT has failed to carry its burden to show an injunction will not harm other parties, including Union Pacific. To the contrary, RBT concedes that Union Pacific could never recover the higher rates it seeks to enjoin us from collecting. *Fourth*, RBT ignores that granting an injunction would be contrary to the strong public interest in avoiding regulatory interference in markets and pricing decisions, as reflected in Congress's decision to restrict sharply the Board's ability to enjoin rail rate adjustments.

In Part I of this reply, Union Pacific addresses facts relating to RBT's claims that RBT does not discuss or gets wrong in its petition. RBT is presumably unaware of certain aspects of pertinent confidential agreements, and it does not understand our train operations. The facts set forth in Part I are verified by Daniel McLaughlin, Assistant Vice President – Grain and Grain Products for Union Pacific, with just two exceptions. First, Gregory Thompson, a Manager of Train Operations for Union Pacific's Western Region, provided information regarding Union Pacific's train operations to RBT-Ivory and WM-Goshen. Second, Mark Draper, Manager – Economic Research & Analysis for Union Pacific, performed the analysis of Union Pacific's costs to serve RBT-Ivory and WM-Goshen.⁴

⁴ The Board ordered Union Pacific to respond to RBT's petition on an expedited basis, so we are not attempting to address all of RBT's allegations. Union Pacific intends to answer RBT's underlying complaint on November 23, 2016.

In Part II of this reply, Union Pacific demonstrates that RBT has not made the showings required to obtain the extraordinary remedy of a preliminary injunction under 49 U.S.C. § 1321(b)(4).⁵

I. BACKGROUND

Union Pacific and BNSF currently move unit trains of grain and grain products used to feed livestock to more than a dozen destinations in Central California. *See* Exhibit 1. Grain products include DDGS, gluten feed, and canola meal. DDGS and gluten feed are co-products of ethanol production and corn processing. They can be used in animal feed in place of more traditional sources of energy (*e.g.*, corn) and protein (*e.g.*, soybean meal, canola meal).

Union Pacific first established unit train rates for movements to RBT-Ivory in June 2010. Union Pacific's rate for movements of DDGS from Grand Jct., Iowa, to RBT-Ivory was \$4535 per car. The RBT-Ivory rate was \$125 per car more than the rate for movements to destinations on our main line at Goshen, Pixley, and Famoso. *See* Exhibit 2. RBT witness Littlefield is wrong when he claims that RBT-Ivory had the same rates as these other locations prior to 2011. *See* Littlefield VS ¶ 29.

RBT does not pay the freight on traffic moving to RBT-Ivory. Rather, it provides transloading service to other customers who pay the freight.⁶ When Union Pacific first established a unit train rate for shipments to RBT-Ivory, RBT did not actually have facilities capable of receiving a unit train. We planned to hold the trains in our Fresno Yard while SJVR moved cuts of cars to and from RBT-Ivory. After three trainload shipments to RBT-Ivory, we

⁵ RBT states that it is seeking injunctive relief pursuant to § 721(b)(4), but that provision was renumbered by the Surface Transportation Board Reauthorization Act of 2015, Pub. L. No. 114-110, § 3(a)(5), 129 Stat. 2228.

⁶ RBT refers to Western Milling as another transloading facility. *See* Pet. at 4. However, Western Milling is a much more vertically integrated feed producer.

concluded that the arrangement was operationally impractical. The cars could not be delivered and returned quickly enough, so the operation consumed too much capacity in our yard. We informed RBT and { } that we could not continue providing unit train service to RBT-Ivory until the facility met our unit train facility requirements.

Union Pacific sometimes enters into arrangements with { } We did not enter into such an arrangement with RBT. However, we understand that RBT and { } Union Pacific, in turn, { }

In July 2011, as RBT was completing its upgrades, Union Pacific { } agreement governing shipments to RBT-Ivory. In exchange for { } Union Pacific agreed to { }

{ } Our agreement { } However, we did not immediately reestablish a rate differential.

On September 22, 2016, Union Pacific announced that it was adjusting rates for DDGS, gluten feed, and canola meal moving to destinations served by SJVR by \$250. *See* Exhibit 3. Union Pacific's announcement came well before the adjustments took effect on November 1, 2016.

Union Pacific's ability to discuss our rate adjustment with RBT has been severely constrained by the confidential nature of our current arrangement with SJVR and our { }

RBT’s petition also expresses concern that RBT is being treated differently than other shippers on short lines. Of course, Union Pacific’s rate adjustment would apply to any shippers of DDGS, gluten feed, and canola meal at the named stations on SJVR. This includes George Verhoeven Grain’s facility at Hanford, California, and Quality Grain’s facility at Conner, California (though neither facility currently has unit train rates in place for these commodities).

In addition, RBT apparently does not realize that our tariff governing DDGS and gluten feed *does* contain rate differentials that apply to other facilities on short lines.⁹ Union Pacific has consistently had higher rates for DDGS and gluten feed moving to “Modesto” than to Goshen or Pixley or Famoso, even though our route to Modesto is shorter. *See* Exhibits 1 & 2. The higher rates apply to movements to one customer, Central Valley Ag Group (“CVAG”), which is located on a short line, the Modesto and Empire Traction Company (“MET”), that we must pay to deliver cars to CVAG, not unlike the short line, SJVR, we must pay to deliver cars to RBT-Ivory.

RBT’s petition also expresses concern that Union Pacific is not being sufficiently mindful of RBT’s investments at RBT-Ivory. *See* Littlefield VS ¶¶ 13-14. As discussed above, our agreement {

} not RBT, and we do not know the terms of RBT’s {

} However, if RBT receives 4,600 carloads a year (*see id.* at ¶ 5), then the absence of a \$250 differential during the term of our agreement was worth { }—more than the \$3 million that Mr. Littlefield says RBT spent to become a unit train facility. Moreover, we did not

⁹ This will not always be the case. Use of rate differentials varies based on local market conditions, and it is not always consistent given the exceedingly large number of tariff rates in existence { }

reestablish a rate differential until { } The delay was worth another { } the \$1.85 million in subsequent and ongoing investments that Mr. Littlefield describes. In fact, because the \$250 differential is { }

RBT witness Littlefield claims that the reestablishment of a rate differential spells doom for RBT-Ivory. *See, e.g., Littlefield VS ¶ 41*. As discussed above, RBT does not pay the freight on shipments to RBT-Ivory. RBT transloads products that our customers ship, and it collects a throughput fee from them. Thus, Mr. Littlefield is merely speculating that Union Pacific's customers will reduce shipments to RBT-Ivory. In fact, we have seen no evidence that our reestablishment of a rate differential is having an impact on RBT-Ivory. We announced the rate adjustment on September 22, more than a month before the rates took effect on November 1. We have continued to move unit trains to RBT-Ivory under the new rates. So far this month, we have moved {

} This volume of traffic is consistent with the volume we moved before our rate adjustment.

II. ARGUMENT

RBT has not shown that it is entitled to a preliminary injunction. An injunction is “an extraordinary remedy.” *Am. Chem. Council v. Ala. Gulf Coast Ry.*, NOR 42129, slip op. at 4 (STB served May 4, 2012). “To obtain an injunction, the party seeking it must show that: (1) it is likely to succeed on the merits; (2) it will be irreparably harmed in the absence of the requested relief; (3) issuance of the injunction will not substantially harm other parties; and (4) granting the injunction is in the public interest.” *BP Amoco Chem. Co. v. Norfolk S. Ry.*, NOR 42093, slip op. at 4 (STB served June 6, 2005) (citing *Wash. Metro. Area Transit Comm’n v. Holiday Tours*,

Inc., 559 F.2d 841, 843 (D.C. Cir. 1977)). The movant “‘carries the burden of persuasion on all of the elements required for [such] extraordinary relief.’” *Id.* (quoting *San Joaquin Valley R.R. – Abandonment Exemption – In Tulare & Kern Counties, CA*, AB-398 (Sub-No. 5X), slip op. at 4 (STB served Apr. 3, 1998)); accord *PCI Transp., Inc. v. Ft. Worth & W.R.R.*, 418 F.3d 535, 545 (5th Cir. 2005) (“[A] preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has ‘clearly carried the burden of persuasion’ on all four requirements.” (internal quotation omitted)).

A party seeking to enjoin a rate increase must make a particularly strong showing that an injunction is warranted, because railroads have a statutory right to establish rail rates in the first instance. *See, e.g., Seminole Elec. Coop., Inc. v. CSX Transp., Inc.*, NOR 42110, slip op. at 3 (STB served Dec. 22, 2008) (“When a party asks the Board to suspend a rate increase for the duration of a rate complaint, it must present a strong case that an injunction is warranted, as broad policy concerns counsel against granting this kind of relief.”).

RBT fails to establish *any* of the four elements required to justify injunctive relief. Its petition must, therefore, be denied.

A. RBT Fails To Show That It Is Likely To Succeed On The Merits.

RBT fails to show that it is likely to succeed on the merits of its claims. RBT’s complaint contains two Counts. Count I claims that Union Pacific’s \$250 rate differential for traffic moving to RBT-Ivory and other SJVR-delivered traffic constitutes an “unreasonable practice” under 49 U.S.C. § 10702. *See* Compl. ¶¶ 54-74; Pet. at 14-17. Count II claims that same rate differential constitutes “unreasonable discrimination” under § 10701(b) and § 10741(a)(1). *See* Compl. ¶¶ 75-84; Pet. at 17-19. Neither claim is likely to succeed.

1. RBT’s “Unreasonable Practice” claim has no likelihood of success.

Section 10702(1) provides that a rail carrier subject to the Board’s jurisdiction shall establish reasonable “rates, to the extent required by section 10707, divisions of joint rates, and classifications for transportation and service it may provide under this part.” Section 10702(2) provides that a rail carrier subject to the Board’s jurisdiction shall establish reasonable “rules and practices on matters related to that transportation or service.” RBT claims that Union Pacific’s \$250 rate differential for traffic moving to RBT-Ivory and other SJVR-delivered traffic is an “unreasonable classification and unreasonable practice” because Union Pacific is charging different rates for traffic that is “otherwise identical.” Pet. at 14.

RBT’s § 10702 claim is not likely to succeed because it improperly attempts to recast a challenge to Union Pacific’s rate levels as an unreasonable practice challenge. That stratagem is foreclosed by the D.C. Circuit Court of Appeals’ decision in *Union Pacific Railroad Co. v. ICC*, 867 F.2d 646 (D.C. Cir. 1989), which established that an “unreasonable practice” challenge will not lie where “the so-called ‘practice’ is manifested *exclusively* in the level of rates that customers are charged.” *Id.* at 649 (emphasis in original).

RBT asks the Board to follow a path expressly forbidden by *Union Pacific*. It wants the Board to use its jurisdiction over railroad practices to determine whether the \$250 rate differential reasonably reflects the added costs Union Pacific incurs when SJVR delivers traffic. RBT’s argument focuses on the reasonableness of Union Pacific’s *rates* in light of its speculation about Union Pacific’s *costs*. See Pet. at 15-17. This is one of the hallmarks of a “rate proceeding” masquerading as an “unreasonable practice” challenge: the argument “largely focuse[s] on the reasonableness of the added costs on which the railroads’ rates are predicated.” *Union Pac.*, 867 F.2d at 649. Labels notwithstanding, RBT’s real complaint is about rates. Union Pacific’s “so-called ‘practice’” of charging higher rates for traffic moving to RBT-Ivory and other SJVR-

served destinations plainly “is manifested *exclusively* in the level of rates that customers are charged.” *Id.* at 649.

RBT’s repeated references to the term “classifications” in § 10702(1) does not change the analysis under *Union Pacific*. It also reflects a misunderstanding of the statute. RBT assumes that the term “classifications” refers to the classification of “destinations.” Compl. ¶ 56. However, the term refers to groupings of commodities, not groupings of customer locations. The reference to “classifications” in § 10702(1) has its origins in former 49 U.S.C. § 1(6), entitled “Classifications of property for transportation; regulations and practices; demurrage charges,” which made it “the duty of all common carriers subject to the provisions of this chapter to establish, observe, and enforce just and reasonable classifications of property for transportation” and declared “every unjust and unreasonable classification . . . to be unlawful.” This provision became what is now § 10702 as part of the 1978 recodification and revision of the Interstate Commerce Act. *See* Pub. L. No. 95-473, 92 Stat. 1337; *see also Dir. Gen. of R.R.s v. Viscose Co.*, 254 U.S. 498, 503 (1921) (“Classification in carrier rate-making practice is grouping—the associating in a designated list, commodities, which, because of their inherent quality or value, or of the risks involved in shipment, or because of the manner or volume in which they are shipped or loaded, and the like, may justly and conveniently be given similar rates.”); *Durbin Paper Stock Co. v. ICC*, 585 F.2d 543, 544-45 (D.C. Cir. 1978) (discussing whether “waste woodpulp” is properly “classified” as “woodpulp” or “scrap or waste paper”).

RBT’s attempt to invoke § 10702 is also improper because, to the extent RBT’s claims do not involve merely the level of rates charged by Union Pacific, the statute contains other provisions that more specifically govern the conduct in question; namely, the antidiscrimination provisions in § 10701(b) and § 10741. Indeed, the Board has explained that “a complainant may

not argue that discrimination by a carrier constitutes an unreasonable practice under section 10702, as our statute has specific provisions governing discrimination claims.” *Entergy Ark., Inc. v. Union Pac. R.R.*, NOR 42104, slip op. at 10 (STB served June 26, 2009).¹⁰ Using § 10702 to circumvent the result from applying a statute more directly on point would be futile. As the Board noted in the *Entergy* case, “the Supreme Court has struck down an attempt by [the Board’s] predecessor, the ICC, to use the unreasonable practice provision to prescribe conduct specifically contemplated elsewhere in the statute.” *Id.* (citing *Maislin Indus. U.S. v. Primary Steel, Inc.*, 497 U.S. 116 (1990)).¹¹

In sum, RBT has not shown that its unreasonable practice claim is likely to succeed. In fact, the claim would likely be dismissed. Notably, RBT cites no precedent for challenging a rate differential as an unreasonable practice. And, even if the Board were to address the merits of RBT’s complaint in terms of “unreasonable practices,” Union Pacific’s \$250 rate differential would be found reasonable. As shown above, our cost per car to serve RBT-Ivory is {

}

2. RBT’s “Unreasonable Discrimination” claim has no likelihood of success.

RBT cites two statutory provisions as the basis for its unreasonable discrimination claim, § 10741 and § 10701(b). Neither statute furnishes a basis upon which RBT can prevail.

¹⁰ In *Entergy*, the Board applied this principle by requiring Entergy to pursue its challenge to a short line’s refusal to interchange Entergy’s traffic with a carrier other than Union Pacific under § 10705, which addresses rights and obligations of railroads to interchange traffic with other carriers, rather than the unreasonable practice provisions of § 10702. *See id.* at 10-11.

¹¹ In *Maislin*, the Supreme Court criticized the ICC for labeling a carrier’s conduct as an “unreasonable practice” to justify achieving a result that was “flatly inconsistent with the statutory scheme as a whole.” *Maislin*, 497 U.S. at 131.

Section 10741 provides that “a rail carrier engages in unreasonable discrimination when it charges or receives from a person a different compensation for a service rendered, or to be rendered, in transportation the rail carrier may perform under this part than it charges or receives from another person for performing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances.” 49 U.S.C. § 10741(a)(2). “A party alleging discrimination must demonstrate that *each* of these elements is satisfied, and that the rate disparity causes it to suffer a competitive disadvantage.” *Mr. Sprout, Inc. v. United States*, 8 F.3d 118, 125 (2d Cir. 1993) (emphasis added). “[A] challenging party must rebut any showing by the carrier that the disparity is occasioned by differences in transportation conditions, including the cost of providing service.” *Id.*

Section 10741 also establishes an analytical shortcut that is dispositive here. Section 10741(b)(2) states that prohibitions against discrimination shall not apply to “rail rates applicable to different routes.” This provision categorically forecloses RBT’s § 10741 claim. “Rail movements to [WM-Goshen and RBT-Ivory] are movements to different destinations, and thus, are movements over ‘different routes.’” *Rail Exemption Misc. Agricultural Commodities*, 8 I.C.C.2d 674, 686 (1992), *rev’d on other grounds sub nom. Mr. Sprout*, 8 F.3d at 126 (“[T]he Commission properly found that the petitioners did not meet the ‘same route’ requirement”). Section 10741(b)(2) embodies Congress’s intent in the Staggers Act “to sharply limit rate equalization” requirements. *Ariz. Pub. Serv. Co. v. The Burlington N. & Santa Fe Ry.*, 7 S.T.B. 76, 81 (2003); *see also Mr. Sprout*, 8 F.3d at 126 (citing legislative history of the “different routes” provision). Railroads can no longer be required to charge the same rates on movements to different destinations. *See Consol. Rail Corp. v. United States*, 896 F.2d 574, 576 (D.C. Cir. 1990) (noting that the Staggers Act “placed certain limitations upon the scope of actionable

discrimination by a railroad” by providing *inter alia* that prohibitions against discrimination “shall not apply to . . . rail rates applicable to different routes.” (quoting predecessor to § 10741(b)(2)).

Even absent § 10741(b)(2), RBT would not prevail because it cannot show that Union Pacific provides service to WM-Goshen and RBT-Ivory “under substantially similar circumstances.” 49 U.S.C. § 10741(a)(2). Union Pacific serves WM-Goshen directly, but it must interchange RBT-Ivory traffic with SJVR. That difference in circumstances alone creates significant operational consequences for Union Pacific. It also creates significant cost consequences for Union Pacific, which must pay SJVR { } per car to deliver traffic to RBT-Ivory.

Moreover, RBT does not even attempt to show that the rate disparity is causing it “to suffer a competitive disadvantage.” *Mr. Sprout*, 8 F.3d at 125. Mr. Littlefield asserts that RBT is disadvantaged relative to WM-Goshen, but he does not produce any evidence that RBT has lost any business to WM-Goshen or any other destination as a result of the rate differential, which RBT and its customers have known about since September.¹²

¹² None of the four cases RBT cites in addressing discrimination actually supports its claim. *See* Pet. at 17 n.56. *Mr. Sprout* affirmed the ICC’s conclusion in *Rail Exemption* that movements to different destinations are “movements over different routes.” 8 F.3d at 126. The three other cases were decided under pre-Staggers Act law, and thus they do not address the dispositive “different routes” provision in current § 10741(b)(2). (The Staggers Act changes to the law did not apply to cases that were docketed at the ICC before the Act’s effective date. *See* Staggers Rail Act of 1980, Pub. L. No. 96-448, § 706, 94 Stat. 1965.) In any event, the cases provide no support for RBT’s claims here. In *Dresser Industries, Inc. v. ICC*, the court affirmed the ICC’s conclusion that a rate differential applicable to different routes was reasonable under the circumstances. *See* 714 F.2d 588, 597-600 (5th Cir. 1983). In *Nueces County Navigation District No. 1 v. ICC*, the sole issue was the definition of “‘common source’ of both prejudicial and preferential rates” in rate-discrimination cases. 674 F.2d 1055, 1060 (5th Cir. 1982). And *Harborlite Corp. v. ICC* dealt with whether the ICC’s “articulated a reasoned basis for its decision and . . . adequately addressed the evidence and arguments presented by the complainant.” 613 F.2d 1088, 1090 (D.C. Cir. 1979); *see id.* at 1099 (“We express no view on the merit of [complainant’s] theory”).

RBT is even less likely to prevail on its discrimination claim under § 10701(b).

Section 10701(b) provides that a railroad “may not discriminate in its rates against a connecting line of another rail carrier providing transportation subject to the jurisdiction of the Board under this part or unreasonably discriminate against that line in the distribution of traffic that is not routed specifically by the shipper.”

Section 10701(b) simply does not apply here. As the Supreme Court has explained, the “manifest purpose” of this provision is “to deprive railroads of discretion to apportion economic advantage among competitors at a common interchange.” *W. Pac. R.R. v. United States*, 382 U.S. 237, 244 (1965); *see also Bangor & Aroostook R.R. v. ICC*, 574 F.2d 1096, 1104 (1st Cir. 1978) (“The provision seems obviously meant to avert the anti-competitive effects of a powerful or well-positioned carrier using its influence and position in favor of one connecting line over another, and thus skewing the market as that market is structured under the Act.”).

Union Pacific is not apportioning economic advantage among competitors here. There is no “common interchange” where Union Pacific is favoring an SJVR competitor over SJVR with regard to traffic moving to RBT-Ivory (or another destination). RBT does not cite a single case to explain how § 10701(b) could possibly be relevant here.¹³

B. RBT Fails To Show That It Will Be Irreparably Harmed In The Absence Of An Injunction.

RBT also fails to show that it will be irreparably harmed in the absence of an injunction. For a harm to be “irreparable,” the injury must be “certain,” “great,” and “actual.” *Wis. Gas Co.*

¹³ The statute would not prohibit Union Pacific from favoring its own route to RBT-Ivory over a joint UP-SJVR route. *Cf. Cent. Power & Light Co. v. S. Pac. Transp. Co.*, 1 S.T.B. 1059, 1066 (1996) (explaining that “carriers may generally protect their single-line or existing through routes”). But that is not even happening here—Union Pacific does not have a separate, direct route to RBT-Ivory.

v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). A harm “merely feared as liable to occur at some indefinite time” is not sufficient. *Id.* (quoting *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931)). Rather, the party seeking the injunction must show that “the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm.” *Id.* (brackets, emphasis, and internal quotation marks omitted). Moreover, “economic loss does not, in and of itself, constitute irreparable harm.” *Id.* ““Mere injuries, however substantial, in terms of money . . . are not enough”” where—as is the case here—““compensatory or other corrective relief will be available at a later date.”” *Id.* (quoting *Va. Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

RBT claims that Union Pacific’s \$250 rate differential constitutes an “immediate threat to RBT’s continued existence.” Pet. at 3. Courts recognize that “[r]ecoverable monetary loss *may* constitute irreparable harm,” *if* “the loss threatens the very existence of the movant’s business.” *Wis. Gas*, 758 F.2d at 764 (emphasis added). However, “[b]are allegations of what is likely to occur are of no value.” *Id.* Rather, the movant “must provide proof” that harm is “certain to occur in the near future.” *Id.*

Here, RBT does not support its bare allegations with any proof of an imminent threat to RBT’s very survival. RBT’s petition uses strong language in making conclusory claims about RBT’s future business prospects. However, RBT fails to back up that strong language with equally strong evidence. The only evidence that RBT identifies are portions of a self-serving statement from its own vice president of operations, Mr. Littlefield. *See* Pet. at 20 nn.62-63 (citing Littlefield VS ¶¶ 27-28; 39-41). Mr. Littlefield’s claims, however, are not supported by documentation or data; they are just as conclusory as those made by RBT’s lawyers:

- In paragraph 27, Littlefield merely asserts that he “informed [Union Pacific]” that the rate differential would “destroy the use of RBT’s substantial facility investments.”

- In paragraph 28, Littlefield tries to shift the burden of proof to Union Pacific, asserting that Union Pacific has “not disputed that its tariff action will likely destroy RBT.”
- In paragraph 39, Littlefield states that without DDGS, canola, and corn gluten “RBT would lose 90 percent of its business,” but he provides no evidence that the rate differential will actually eliminate RBT’s trade in those commodities.
- In paragraph 40, Littlefield avers that Union Pacific’s action “will ultimately put us out-of-business,” but he provides no timeframe that suggests an injunction is necessary, and he provides no evidence supporting his claim.
- In paragraph 41, Littlefield avers that Union Pacific “put RBT in significant and immediate business peril,” but he does not claim this “peril” constitutes an imminent threat to RBT’s very existence, and again he provides no evidence supporting his claim.

Mr. Littlefield’s statements—only one of which even asserts any “immediate” harm—do not approach the threshold for showing a likelihood of an imminent threat to the very existence of RBT’s business. He describes harm “merely feared as liable to occur at some indefinite time.” *Wisc. Gas*, 758 F.2d at 764. Moreover, his “bald assertions . . . simply do not suffice to prove irreparable injury.” *Int’l Internships Programs v. Napolitano*, 798 F. Supp. 2d 92, 100 (D.D.C. 2011), *appeal from denial of preliminary injunction dismissed as moot*, 463 F. App’x 2 (D.C. Cir. 2012). RBT does not provide a single “bill, financial statement, past budget, current budget, or financial projection . . . to support the harm it alleges.” *Id.* This is a classic case in which a movant’s “doom-and-gloom prediction that without an injunction it [will] . . . be forced out of business” is “not borne out by the record.” *PCI Transp.*, 418 F.3d at 545; *accord Seminole Elec.*, slip op. at 4 (declining to enjoin rate increase where complainant “provided no evidence that the harm it faces, if any, is more than monetary”); *BP Amoco*, slip op. at 4 (“Although BP states that it cannot absorb the subject rate increase indefinitely, such a statement is inadequate by itself to persuade the Board that BP will suffer irreparable injury.”).

Although Union Pacific does not bear the burden of persuasion here, we note two facts that affirmatively counter RBT’s claim of irreparable harm. First, unit train traffic has continued moving to RBT-Ivory. As discussed above, {

} As we explained above, RBT does not make decisions about shipping products to RBT-Ivory—it simply collects a throughput fee from the shipper who do; thus, it can only speculate about whether the differential might cause shippers to reduce their shipments to RBT-Ivory.

Second, other similarly situated facilities have remained in business despite similar rate differentials. As discussed above, Union Pacific’s rates for shipments to CVAG, a grain-products customer in Modesto, which is in the same general area as RBT-Ivory, contain a differential reflecting the fact that CVAG is served directly by MET.¹⁴

In sum, RBT has not shown it is likely to suffer irreparable harm.¹⁵

C. RBT Fails To Show That Issuance Of An Injunction Will Not Harm Union Pacific.

RBT fails to show that issuance of an injunction will not harm Union Pacific. In fact, if the Board enjoins Union Pacific from charging a higher rate but later resolves this case in our favor, we can never be made whole. That is, we will suffer not just harm, but irreparable harm, from an improvident preliminary injunction. As the Board has explained:

Ordinarily, where there is a dispute about the appropriate rate, the equities favor allowing the carrier’s rate to control pending our resolution of the dispute. Under the statute, the shipper may receive reparations for overpayments, but a carrier is not generally

¹⁴ RBT’s petition makes certain allegations relating to rates to a facility in Conner, California. With the short time available to respond to the petition, we have not been able to complete our investigation of those allegations. However, we note that, even according to Mr. Littlefield, the facility at Conner did not close because of a rate differential—RBT sold the facility to Quality Grain. *See* Littlefield VS ¶ 38. Quality Grain continues to operate the facility. *See* Map A.

¹⁵ RBT cites only one case in support of its “irreparable harm” allegation, *Railroad Salvage & Restoration, Inc. – Petition for Investigation for Emergency Relief*, NOR 42107 (STB served June 30, 2008). That case is inapposite. In *Railroad Salvage*, the movants faced a threatened loss of rail service from the defendant. *See id.*, slip op. at 4. Moreover, according to the Board, the defendant did not dispute that the movants were “completely dependent on rail service from [the defendant] and would be irreparably harmed by the loss of business that would result from a loss of rail service.” *Id.* Here, RBT is not being threatened with a loss of rail service, and Union Pacific strongly disputes RBT’s claim that it will suffer irreparable harm.

entitled to further compensation if we find that there has been an underpayment.

Ariz. Pub. Serv. Co. v. The Burlington N. & Santa Fe Ry., NOR 41185, slip op. at 6 (served May 12, 2003); *see also Burlington N. Inc. v. United States*, 459 U.S. 131, 141-42 (1982) (“[W]here there is a dispute about the appropriate rate, the equities favor allowing the carrier’s rate to control pending decision by the Commission, since under the Act, the shipper may receive reparations for overpayment while the carrier can never be made whole after underpayment.”).

RBT acknowledges this harm to Union Pacific, but seeks to minimize it by referring to a potential loss of \$1.15 million on an annual basis as “a mere pittance” when compared to Union Pacific’s reported net income. Pet. at 21-22. Notably, RBT does not reveal its own financial data or offer to make Union Pacific whole.

RBT goes on to argue that Union Pacific “will not [be] caused[d] . . . any actual harm” because Union Pacific “will continue to receive the same revenues on traffic moving to RBT-Ivory as it receives on traffic moving to destinations it serves directly.” *Id.* at 22. However, that claim is contrary to the facts. If the Board issues an injunction, Union Pacific’s contribution per carload on shipments to RBT-Ivory will be { } less than on shipments to WM-Goshen. *See* Exhibit 4.¹⁶

D. RBT Fails To Show That Issuance Of An Injunction Would Be In The Public Interest.

RBT fails to show that entry of a preliminary injunction would be in the public interest. “When a party asks the Board to suspend a rate increase for the duration of a rate complaint, . . . broad policy concerns counsel against granting this kind of relief.” *Seminole Elec.*, slip op. at 3.

¹⁶ { } is the difference between Union Pacific’s cost to move traffic to RBT-Ivory via our interchange with SJVR, plus our payment to SJVR, which totals { }, and our cost of to move traffic directly to WM-Goshen, which is { } *See id.*, Line 16.

“First, the statute already provides for reparations with interest to compensate the shipper if the new rate is found to be unreasonably high.” *Id.* “Second, in the ICC Termination Act of 1995, Congress sought to facilitate railroads’ rate-making initiative by repealing the rate suspension procedures under which rate adjustments could be prohibited from taking effect without first being investigated, even without a showing of irreparable harm.” *Id.* (citation omitted). “Third, rail rates are significant components of the prices of many goods and services offered throughout the economy, so that any action the Board may take in a particular rate case may have effects elsewhere, and the Board cannot address all of the potential ripple effects when it considers the reasonableness of a rate charged by a railroad.” *Id.*

The same “broad policy concerns” that arise in rate reasonableness cases apply here as well. First, RBT can pursue damages if the rate differential is found unlawful, but Union Pacific will never recover the loss of revenue if an injunction issues. Second, Congress’s repeal of the ICC’s former rate-suspension power signals a clear policy of non-interference with the railroads’ rate making initiative absent truly extraordinary circumstances that is not limited to rate cases. *See* H.R. Conf. Rep. 104-422, § 10701 (1995). Finally, public policy counsels strongly against interfering with rail rates because of the unpredictable ripple effects of intruding into the rate-setting realm. RBT says that an injunction would protect competition (Pet. at 22), but there is no evidence of a shortage of competitors in Central California. *See* Exhibit 1. Moreover, the Board should be extremely wary of requests “to place its thumb on the competitive scales.” *Seminole Elec.*, slip op. at 4; *see also id.* (“Holding the transportation rates artificially low . . . could give [complainant] a competitive advantage over other electric utility companies in the region.”); *Ariz. Pub. Serv.*, 7 S.T.B. at 80 (“Indeed, Peabody’s objective is to shift Arizona’s coal purchases

to Lee Ranch, which would mean steering those purchases away from other mines. Thus, it could result in market disadvantages to other potential suppliers of coal to Cholla.”).

In sum, RBT has not carried its heavy burden of showing that entry of a preliminary injunction would be in the public interest. Denial of RBT’s petition fits firmly in the fundamental premise of the post-1995 congressional framework: other than in the most exceptional circumstances, the Board will not suspend a challenged rate during the pendency of the challenge.

III. CONCLUSION

A preliminary injunction is an extraordinary remedy. Here, RBT fails to satisfy any of the four factors necessary to grant injunctive relief. The Board should therefore deny RBT’s petition for a preliminary injunction.

Respectfully submitted,

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Attorneys for Union Pacific Railroad Company

November 16, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2016, I caused a copy of the foregoing document to be served by electronic mail and by hand and on all parties of record in Docket No. 42149.

/s/ Michael L. Rosenthal

VERIFICATION

I, Daniel C. McLaughlin, Assistant Vice President – Grain and Grain Products for Union Pacific Railroad Company, declare under penalty of perjury that I have reviewed the foregoing Reply to Richard Best Transfer Inc.'s Petition for Preliminary Injunction and that the factual information presented therein, with the exception of the information relating to Union Pacific's train operations and costing calculations, which I have not been asked to review and verify, is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on November 16, 2016.

/s/ Daniel C. McLaughlin

VERIFICATION

I, Gregory Thompson, Manager Train Operations for the Western Region of Union Pacific Railroad Company, declare under penalty of perjury that I have reviewed the foregoing Reply to Richard Best Transfer Inc.'s Petition for Preliminary Injunction and that the factual information presented therein regarding Union Pacific's train operations to the Richard Best Transfer facility at Ivory, California, and the Western Milling facility at Goshen Junction, California, is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on November 16, 2016.

/s/ Gregory Thompson

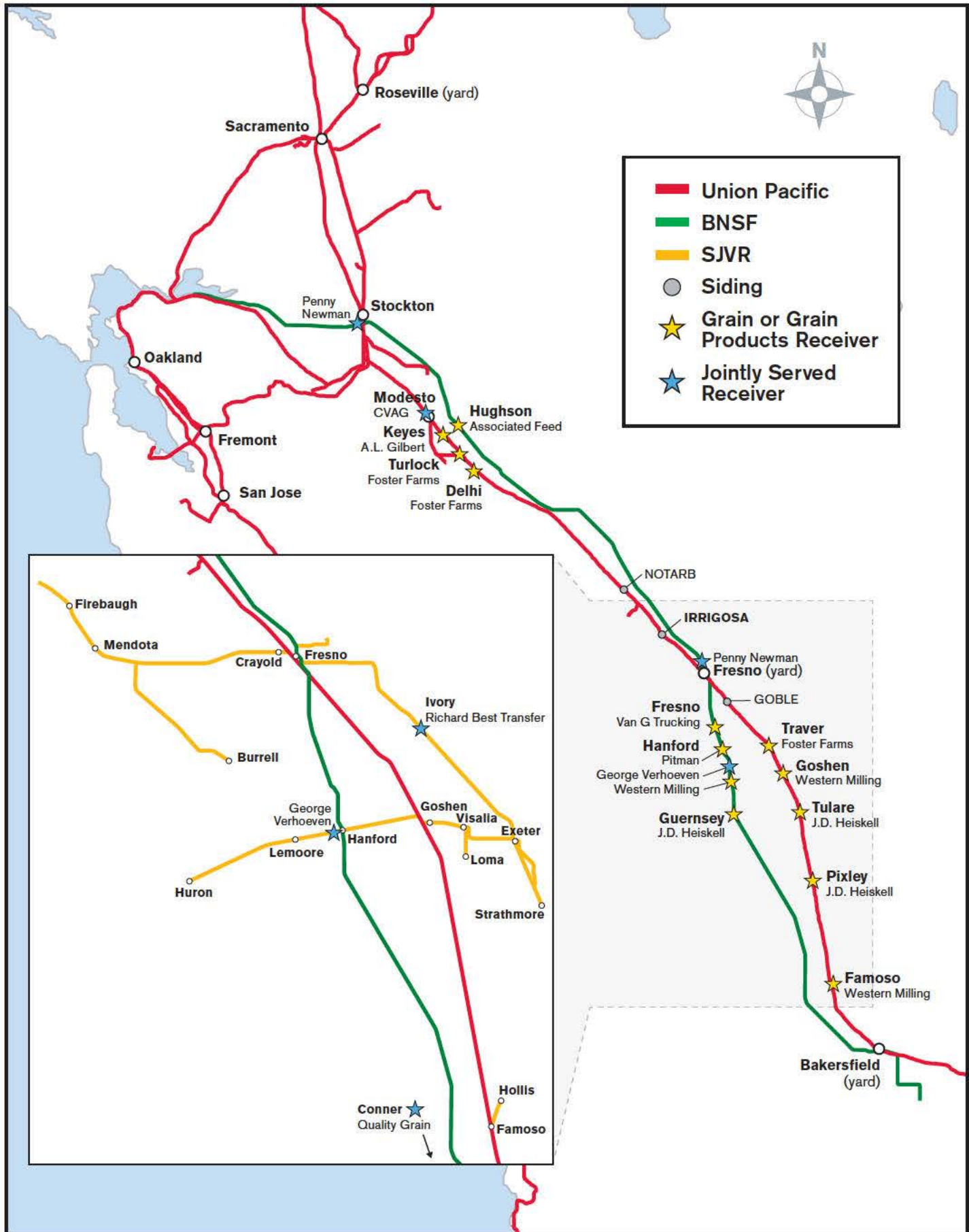
VERIFICATION

I, Mark J. Draper, Manager – Economic Research and Analysis for Union Pacific Railroad Company, declare under penalty of perjury that I have reviewed the foregoing Reply to Richard Best Transfer Inc.'s Petition for Preliminary Injunction and that the factual information presented therein regarding Union Pacific's costs to serve the Richard Best Transfer facility at Ivory, California, and the Western Milling facility at Goshen Junction, California, is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on November 16, 2016.

/s/ Mark J. Draper

Central California Grain and Grain Products Facilities





UP 4053-C

Item: 4011-A
DDG - 1 TO 1 UNIT TRAIN RATES

DDG - 1 TO 1 UNIT TRAIN RATES

For billing purposes use the following rate authority: UP 4053-C-4011-A

STCC/GROUP	STCC	DESCRIPTION
DDG	20823	Malt Extracts Or Brewers Spent Grains
	20859	By-Products Of Liquor Distilling

Prices are subject to Fuel surcharges.

GENERAL RULE ITEM 11
UNIT TRAIN

Unit trains must be loaded by one consignor, at one location, at one facility. The origin facility must have sufficient privately held track to receive, and load the entire unit train, not to exceed one switch/trip for placement.

Shipments must be billed to one destination. Destination facility must have privately held trackage of sufficient capacity on which to receive and unload the entire train.

Billing instructions must be furnished to the Union Pacific through Electronic Data Interchange ("EDI") or through Union Pacific's web site. A complete tariff authority, including item number, is also required.

Failure to issue billing in accordance with the provisions of this item will result in the assessment of the single car rate.

General Application Rules for Item 4011-A

1. Mileage allowance payment on private equipment will not apply.
2. Applies in Customer/Shipper-owned or -leased equipment bearing private (non-railcarrier) reporting marks.
3. Switching charges at both origin and destination will be absorbed up to \$160.00.
4. Price is subject to Tariff UP 6007 (series) , item 695 (series).

APPLICATION AND RATES				
COLUMN	RATE APPLICATION RULES			
1.	Rates are in U.S. dollars Per Car. Applies if minimum tender per shipment is 80 Car(s) and maximum not greater than 84 Car(s).			
2.	Rates are in U.S. dollars Per Car. Applies if minimum tender per shipment is 96 Car(s) and maximum not greater than 105 Car(s).			
		86-99 CARS	100-110 CARS	Route Code / Group
STCC Group:	DDG GROUP			
From:	IA, ALBERT CITY			
To:	CA, FAMOSO	4696.00		UP
	CA, MODESTO	4827.00	4577.00	UP
	CA, PIXLEY	4696.00		UP
	ID, BLISS	4437.00		UP
	TX, LAREDO GROUP	4444.00	4194.00	UP
From:	IA, COUNCIL BLUFFS			
To:	CA, FAMOSO	4522.00		UP
	CA, MODESTO	4609.00	4359.00	UP
	CA, PIXLEY	4522.00		UP
	ID, BLISS	4263.00		UP
	TX, LAREDO GROUP	4268.00	4018.00	UP
From:	IA, DES MOINES			
To:	TX, LAREDO GROUP	4272.00	4022.00	UP
From:	IA, FT DODGE GROUP			
To:	CA, FAMOSO	4609.00		UP
	CA, MODESTO	4740.00	4490.00	UP
	CA, PIXLEY	4609.00		UP
	ID, BLISS	4350.00		UP
	WA, LONGVIEW	4887.00	4637.00	UP
From:	IA, GRAND JCT			
To:	CA, FAMOSO	4410.00		UP
	CA, GOSHEN GROUP	4410.00		UP
	CA, IVORY	^A 4535.00		UP
	CA, MODESTO	4541.00	4291.00	UP
	CA, PIXLEY	4410.00		UP
	ID, BLISS	4154.00		UP
	IL, EAST ST LOUIS	2401.00		UP
	TX, LAREDO GROUP	4146.00	3896.00	UP
From:	IA, IOWA FALLS			
To:	CA, FAMOSO	4609.00		UP
	CA, MODESTO	4740.00		UP
	CA, PIXLEY	4609.00		UP
From:	IA, MANLY GROUP			
To:	CA, CONNER	4799.00		UP
	CA, FAMOSO	4674.00		UP
	CA, GOSHEN GROUP	4674.00		UP
	CA, MODESTO	4805.00	4555.00	UP
	CA, PIXLEY	4674.00		UP
	ID, BLISS	4415.00		UP
	IL, EAST ST LOUIS	2472.00		UP
	TX, LAREDO GROUP	4422.00	4172.00	UP
From:	IA, NEVADA			
To:	CA, PIXLEY	4565.00		UP
From:	MN, MANKATO			
To:	CA, FAMOSO	4871.00		UP
	CA, MODESTO	5002.00	4752.00	UP
Issued: June 7, 2010 Effective: June 7, 2010 Expiration: December 31, 2100 UP 4053-C Page: 2 of 3 Item: 4011-A Continued on next page				

ORIGIN AND DESTINATION GROUPS

GROUP NAME LOCATIONS

CA, GOSHEN GROUP
CA, GOSHEN
CA, GOSHEN JCT

IA, FT DODGE GROUP
IA, FT DODGE
IA, TARA

IA, MANLY GROUP
IA, MANLY
IA, MASON CITY

TX, LAREDO GROUP
TX, BROWNSVILLE
TX, EAGLE PASS
TX, LAREDO

Issued: June 7, 2010
Effective: June 7, 2010
Expiration: December 31, 2100

UP 4053-C

Appendix A Page: 1 of 1
Item: 4011-A



BUILDING AMERICA®

UP 4053 - Feed Ingredients Adjustment

Announcement Number: AG2016-50

Categories: Livestock and Feed, Meals and Oils

Posted Date: September 22, 2016

Dear Union Pacific Customers,

Effective **November 1, 2016**, Union Pacific will be adjusting tariff **UP 4053** by **\$250/car** to the destinations listed below. Commodities impacted will be DDGS (STCC 20859 and 20823), Canola Meal (STCC 20939), and Gluten Feed (2042175).

Ivory, CA
Dinuba, CA
Conner, CA
Bakersfield, CA
Hanford, CA

If you have any questions please contact your Union Pacific representative.

Costs to Serve WM-Goshen Versus RBT-Ivory

Line	Description	Source	Cedar Rapids to WM-Goshen	Cedar Rapids to RBT-Ivory (SJVR Interchange + SJVR Payment)
1	Railroad		UP	UP
2	Distance in Miles		2065	2065
3	Shipment Type		O/D	O/T
4	Freight Car Number		100	100
5	Freight Car Type		Covered Hopper	Covered Hopper
6	Freight Car Ownership		Private	Private
7	Tons Per Car		103	103
8	Commodity		2041928	2041928
9	Type of Train		Unit	Unit
10	Phase III Variable Cost @ 2014 Cost Level	Phase III Costing Program	\$312,297.46	\$304,833.62
11	Freight Car Number	Line 4	100	100
12	Variable Cost Per Car @ 2014 Cost Level	Line 10/Line 11	\$3,122.99	\$3,048.34
13	Composite Index 2014 to 3Q16	Composite Index	0.90191130	0.90191130
14	Variable Cost Per Car @ 3Q16 Cost Level	Line 12 * Line 13	\$2816.65	\$2,749.33
15	Per Car Payment to SJVR		-	{ }
16	Total Variable Cost Per Car @ 3Q16 Cost Level	Line 14 + Line 15	\$2816.65	{ }