

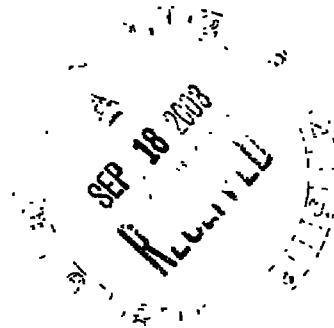
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September 18, 2008



BY HAND

Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-00001

223627

Re: Docket No. 42105, Dairyland Power Cooperative v. Union Pacific Railroad Company

Dear Secretary Quinlan:

Enclosed for filing are an original and ten copies of Union Pacific's Reply to Dairyland's Motion to Compel.

An additional paper copy of this filing is also enclosed. Please return a date-stamped copy to our messenger.

Thank you for your attention to this matter.

Sincerely,

Michael L. Rosenthal

Enclosure

cc: Counsel for Dairyland

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**



DAIRYLAND POWER COOPERATIVE,)

Complainant,)

v.)

UNION PACIFIC RAILROAD COMPANY,)

Defendant.)

Docket No. 42105

UNION PACIFIC'S REPLY TO DAIRYLAND'S MOTION TO COMPEL

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September 18, 2008

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DAIRYLAND POWER COOPERATIVE.	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. 42105
	)	
UNION PACIFIC RAILROAD COMPANY,	)	
	)	
Defendant.	)	
	)	

UNION PACIFIC’S REPLY TO DAIRYLAND’S MOTION TO COMPEL

The Board should deny Dairyland’s motion to compel discovery filed on August 28, 2008. Dairyland’s motion seeks to relitigate an issue that the Board resolved in its decision served July 25, 2008: namely, that Dairyland may not base an unreasonable practice case on arguments that the fuel surcharge payments that UP has collected from Dairyland exceed the incremental fuel cost increases UP has actually incurred in handling Dairyland’s traffic. *See July 25 Decision* at 5.

In response to Dairyland’s discovery requests, UP objected to producing documents that would be relevant only to Dairyland’s discredited approach to this case – that is, requests seeking information about UP’s incremental fuel costs for coal traffic moving to Dairyland. At the same time, UP agreed to produce non-privileged information relevant to the matters that the Board permitted Dairyland to pursue: namely, whether UP’s “general formula used to calculate fuel surcharges bears no reasonable nexus to the fuel consumption for the traffic to which the surcharge is applied.” *Id.* at 6.

Most of the disagreements between UP and Dairyland about the appropriate scope of discovery stem from their differing interpretations of the *July 25 Decision*. However, UP also objected to many Dairyland requests because they seek documents that would be irrelevant under *any* view of that decision, they are fishing expeditions, or they are duplicative or vague. For example, UP objected to producing documents relating to its rate-based fuel surcharge program because the *July 25 Decision* precluded Dairyland from challenging UP's use of a rate-based fuel surcharge as an unreasonable practice, and Dairyland has never alleged that UP ever engaged in any specific unreasonable practice (such as "double dipping") that would justify the extensive discovery sought by Dairyland.

This proceeding should not entail substantial discovery. UP's rate-based fuel surcharge program is a straightforward effort to allocate UP's incremental fuel costs on a mileage basis. *See* UP Motion to Dismiss at 5; UP Answer ¶ 9. UP has already produced documents that show how it calculates its incremental fuel costs and how it allocates those costs to PRB coal traffic and other traffic. Dairyland therefore already has all the information it needs to address whether UP's "general formula used to calculate fuel surcharges bears [a] reasonable nexus to the fuel consumption for the traffic to which the surcharge is applied." *July 25 Decision* at 6.

The Argument sections below discuss in detail UP's objections and responses to Dairyland's discovery requests.

I. BACKGROUND

On March 5, 2008, Dairyland filed a Complaint alleging that UP had engaged in an unreasonable practice because fuel surcharge payments that UP had collected from Dairyland "exceed the incremental fuel cost increases that UP has actually incurred in handling Dairyland's traffic since January 1, 2006." Compl. ¶ 9. Dairyland's Complaint alleged no other reason why UP's fuel surcharge programs might constitute unreasonable practices. UP filed a motion to

dismiss the Complaint on March 31. On April 3, Dairyland served UP with discovery requests designed to obtain information relevant to its unreasonable practice claim. (*See* Attachment 1 hereto.) On April 29, the Board granted UP's motion for a protective order that stayed discovery until it could rule on UP's motion to dismiss Dairyland's Complaint. In granting UP's motion, the Board observed that UP's motion to dismiss raised issues that could affect the scope of discovery. *April 29 Decision* at 2.

On July 25, 2008, the Board denied UP's motion to dismiss; however, it also ruled that Dairyland could not pursue its claim that UP's fuel surcharge programs "constitute unreasonable practices because they resulted in fuel surcharge revenues charged to Dairyland that exceed UP's incremental fuel cost increases incurred in providing rail service to Dairyland." *July 25 Decision* at 5. The Board explained that challenges to "practices" that were "'manifested *exclusively* in the level of rates'" had to be brought "under the Board's jurisdiction over unreasonable rates." *Id.* (quoting *Union Pacific R.R. v. ICC*, 867 F.2d 646, 649 (D.C. Cir. 1989)).

The Board then set forth the showing a shipper must make to challenge a carrier's fuel surcharge program as an unreasonable practice: "[W]hen a complainant challenges a carrier's fuel surcharge program as an unreasonable practice, it must show that the general formula used to calculate fuel surcharges bears no reasonable nexus to the fuel consumption for the traffic to which the surcharge is applied." *Id.* at 6. Thus, for example, "a complainant might challenge the factors used to calculate the surcharge on the ground that they are not attributes of a movement that directly affect the amount of fuel consumed" or "the weights given to those factors." *Id.*

The Board also clarified that, although it had specifically declined to make its findings with respect to rate-based fuel surcharges retroactive in *Rail Fuel Surcharges*, STB Ex Parte No. 661 (STB served Jan. 26, 2007), Dairyland might still challenge UP's rate-based fuel surcharge

program on other grounds, such as “if UP had engaged in ‘double dipping’ – by both imposing a rate-based fuel surcharge and raising the base rate by an index that incorporated changes in fuel costs.” *July 25 Decision* at 6.

After providing this guidance, the Board allowed Dairyland to proceed with its case, but cautioned Dairyland “that it may only ‘obtain discovery . . . regarding any matter, not privileged, which is relevant to the subject matter’ involved in this proceeding, as clarified here.” *Id.* (quoting 49 C.F.R. § 1114.21).

Dairyland did not respond to the *July 25 Decision* by amending its Complaint or otherwise identifying a new basis for its claim that UP’s fuel surcharge programs constituted unreasonable practices. Instead, it flouted the Board’s decision and the Board’s direction to limit discovery to relevant matters. It made no effort to modify its first set of discovery requests in light of the Board’s decision, and in fact served a second set of discovery requests that again focused on UP’s incremental costs of providing service to Dairyland. (*See Attachment 2 hereto.*)

UP objected to many of Dairyland’s discovery requests, including each request of Dairyland’s second set of discovery, based on its understanding that Dairyland was seeking information that was not relevant to the subject matter involved in this proceeding as clarified by the *July 25 Decision*. However, even though Dairyland never offered any new basis for pursuing claims that UP’s fuel surcharge programs constituted unreasonable practices, UP agreed to produce documents that would address the issues the Board identified in the *July 25 Decision* and that were arguable encompassed by Dairyland’s Complaint – that is, documents sufficient to show how UP developed its mileage-based fuel surcharge program. UP did not agree to produce any documents relating to its rate-based fuel surcharge because there is no question about how that surcharge was constructed. In addition, although the *July 25 Decision* mentioned the

possibility of “double dipping” claims against railroads charging rate-based fuel surcharges, Dairyland has never alleged that UP engaged in “double dipping.” Moreover, Dairyland could not possibly allege a valid claim that UP has engaged in “double dipping”: the UP tariff item applicable to Dairyland shows on its face that Dairyland’s rates are not subject to increases based on “an index that incorporated changes in fuel costs.” *July 25 Decision* at 6.

In its motion to compel, Dairyland states that its counsel contacted UP’s counsel to inquire whether any discovery issues could be resolved by the parties, but that “matters have quickly reached an impasse.” Motion to Compel at 3 n.5. Dairyland’s statement is not entirely accurate. On August 20, 2008, Dairyland’s counsel contacted UP’s counsel seeking clarification regarding four topics: (i) UP’s objection to producing documents from before 2005; (ii) UP’s objections to producing documents relating to its rate-based fuel surcharge; (iii) when UP would respond to Dairyland’s interrogatory requests; and (iv) whether UP was planning to respond separately to Dairyland’s offer to withdraw certain discovery requests in exchange for UP’s stipulation that it would not use any of the requested information in its own filings.

UP’s counsel stated that UP’s position regarding the first two topics reflected UP’s understanding that Dairyland had not asserted a viable claim against the rate-based fuel surcharge. On the third point, UP’s counsel said that UP was in the process of compiling the information requested in the interrogatories and would produce the information as soon as it was finalized. On the last point, UP’s counsel said that the discovery requests at issue did not appear to seek relevant information, but UP was not prepared to stipulate in advance that it would not use the requested information because it could not know whether Dairyland might present arguments that would make the information relevant.

At the call's conclusion, Dairyland's counsel said that it did not appear to be worthwhile to meet and confer about UP's objections in more detail. UP's counsel responded that a meeting might be productive – that UP would reevaluate its objections if Dairyland could explain why the information it sought was relevant. Dairyland never requested a meeting, which would have allowed the parties to address UP's objections in detail. There were no further discovery-related discussions between Dairyland's counsel and UP's counsel before Dairyland filed its motion to compel.

II. ARGUMENT

UP and Dairyland fundamentally disagree about the meaning of the *July 25 Decision*. As a result, Dairyland apparently concluded that a meet-and-confer session was not worthwhile. UP respectfully suggests that, after the Board resolves this disagreement, it should require the parties to meet and confer in a genuine effort to resolve any remaining discovery issues. *See CF Indus., Inc. v. Kaneb Pipe Line Partners, L.P.*, STB Docket No. 42084 (STB served Nov. 23, 2004) at 2 (“As a general rule, the Board expects parties to try to resolve their differences on their own before involving the Board.”).

However, UP recognizes that the Board may wish to resolve any remaining discovery issues in response to Dairyland's motion to compel, and thus UP sets forth the reasons for its objections to Dairyland's discovery requests in the sections below.

A. “Issue Traffic Cost Analyses” (RFP Nos. 3, 6, 18, 19, 20, 21, 22, 23, and 24)

Dairyland's requests relating to “issue traffic cost analyses” seek documents that are not relevant to the subject matter involved in this proceeding – at least under UP's understanding of the *July 25 Decision*. Dairyland admits that it promulgated these requests to obtain information that would show UP “is collecting fuel surcharges that exceed incremental fuel cost increases.” Motion to Compel at 7. Dairyland never claims that the requested information is relevant to the

question of whether UP's "general formula used to calculate the fuel surcharges bears no reasonable nexus to the fuel consumption for the traffic to which the surcharge is applied." *July 25 Decision* at 6. UP thus submits that these requests seek information that is not "'relevant to the subject matter' involved in this proceeding." *Id.* (quoting 49 C.F.R. § 1114.21).

UP and Dairyland plainly have very different interpretations of the *July 25 Decision*. In that decision, the Board stated that the issue with respect to UP's mileage-based fuel surcharge is whether "the general formula" UP uses to calculate the surcharge "bears no reasonable nexus to the fuel consumption for the traffic to which the surcharge is applied." *Id.* In moving to dismiss Dairyland's Complaint, UP explained that the surcharge is reasonable because it was designed so that no PRB customer would pay more than its mileage-based share of UP's incremental fuel costs. UP explained that it developed the surcharge levels for various ranges of fuel prices by calculating the number of cents per mile per car such that, if UP could charge every one of its PRB coal customers that amount for each of their shipments, UP would recover the incremental fuel costs associated with all of its PRB coal traffic. *See* UP Motion to Dismiss at 5.

UP understands that the Board rejected its motion so Dairyland could test UP's assertion that its mileage-based fuel surcharge formula bears a reasonable nexus to fuel consumption with respect to PRB coal traffic. UP has agreed to produce documents relevant to that issue. UP does not believe, however, that the *July 25 Decision* allows Dairyland to seek discovery to determine whether the surcharge amounts UP collected from Dairyland precisely reflect UP's incremental fuel costs for providing service to Dairyland. The Board's decision rejected Dairyland's effort to pursue such a theory. Accordingly, UP has objected to producing documents related to its total costs, or its fuel costs, for serving *Dairyland's traffic* because such information is not "'relevant

to the subject matter' involved in this proceeding, as clarified" by the Board's decision. *July 25 Decision* at 6 (quoting 49 C.F.R. § 1114.21).

1. Dairyland's "Issue Traffic Cost Analyses" RFPs Seek Information That Is Irrelevant And Duplicative, And They Are Vague.

Even if Dairyland's interpretation of the *July 25 Decision* were correct, only one of its discovery requests related to "issue traffic cost analyses" would be relevant. The others would be irrelevant, and in many cases duplicative and impenetrably vague (that is to say, UP simply does not understand what documents Dairyland is seeking).

Dairyland's request for production ("RFP") No. 6(b) seeks all the information that would be relevant even under Dairyland's interpretation of the *July 25 Decision* – i.e., that Dairyland must show that its fuel surcharge payments have exceeded UP's incremental fuel costs for providing service to Dairyland. *Dairyland's RFP No. 6(b)* states:

"Produce all documents containing any analyses showing . . .
(b) the incremental fuel cost UP has incurred between January 1, 2006 to the present in providing service to Dairyland under Item 6630-E [the Item that applies to Dairyland] of UP Circular 111."

Dairyland's other requests relating to "issue traffic cost analyses" seek information that would be irrelevant even under Dairyland's view of the law.

Dairyland's RFP No. 6(a) goes beyond the issue of incremental costs and seeks analyses more generally showing "fuel costs included in the rates set forth in Item 6630-E of UP Circular 111." However, Dairyland is wrong when it argues that it must establish the level of fuel costs included in its "base" rates to show that its surcharge payments exceeded UP's incremental fuel

cost increases. Motion to Compel at 7-8.¹ The issue in this case is whether UP constructed an unreasonable fuel surcharge program – that is, a program in which “the general formula used to calculate the fuel surcharge bears no reasonable nexus to fuel consumption.” *July 25 Decision* at 6. If Dairyland believes UP is earning more revenue than it can justify on a cost basis, Dairyland must pursue such claims under the Board’s rate reasonableness jurisdiction. *See id.* (citing *Union Pacific*, 867 F.2d at 649).

Moreover, even under Dairyland’s erroneous view of the *July 25 Decision*, Dairyland would not need discovery regarding UP’s fuel costs or other costs associated with its base rates to address the relationship between its fuel surcharge payments and UP’s incremental fuel costs. Dairyland would need only information about (i) the fuel surcharge payments it has made (which it presumably has in its possession) and (ii) the incremental fuel costs that UP has incurred in providing service to Dairyland (which is already the subject of RFP No. 6(b)). Thus, RFP No. 6(a) seeks information that is irrelevant.

Dairyland’s RFP No. 3 goes beyond the issue of fuel costs and incremental fuel costs to cover *all* tariff terms. The request demands “all documents comprised of, or relating to, cost analyses, contribution analyses, or other analyses relating to the rates and other terms set forth in Item 6630-E of UP Circular 111.” It seeks information that is plainly irrelevant, except to the extent it overlaps with RFP No. 6(b). For example, it would require UP to produce cost analyses that do not involve fuel costs. It also would require UP to search for and produce any analyses of Dairyland’s volumes, cycle times, equipment requirements, and/or damage claims because those

¹ As discussed in section II.A.2., it would be impossible in any event to attribute any portion of UP’s revenue from Dairyland’s base rates to any specific component of the cost of providing service to Dairyland.

subjects are also addressed in the referenced tariff. Dairyland never claims that these matters are relevant to this case. Indeed, Dairyland has conceded with respect to other discovery requests that it would be appropriate to limit its requests to documents that address fuel costs. *See* Motion to Compel at 12. Thus, RFP No. 3 plainly seeks information that is irrelevant.

Dairyland's RFP No. 18 seeks information that, to all appearances, merely duplicates the information requested in RFP No. 6. It thus seeks information that would be irrelevant, even under Dairyland's view of the law, except to the extent it relates to incremental fuel costs (in which case, it would already be covered by RFP No. 6(b)). The request states:

"To the extent not already produced in response to Dairyland's prior Requests, produce all documents that summarize and quantify the fuel portion of variable costs of providing service to Dairyland under Item 6630-E of UP Circular 111."

If RFP No. 18 seeks anything beyond what Dairyland seeks in RFP No. 6, UP cannot determine what that might be.

Dairyland's RFP No. 19 seeks information that, to all appearances, merely duplicates the information requested in RFP No. 3. It thus seeks information that would be irrelevant, even under Dairyland's view of the law, except to the extent it relates to incremental fuel costs (in which case, it would already be covered by RFP No. 6(b)). The request states:

"To the extent not otherwise produced in response to Dairyland's First Requests, produce all cost of service analyses used or considered by UP in setting the rates identified in all iterations of Item 6630 in UP Circular 111."

If RFP No. 19 seeks anything beyond what Dairyland seeks in RFP No. 3, UP cannot determine what that might be.

Dairyland's RFP Nos. 20 and 21 are impenetrably vague to the extent they do not simply duplicate RFP No. 19 (which in turn duplicates RFP No. 3).² The analyses Dairyland seeks either include information about fuel costs or they do not. UP is under no obligation to create new documents that provide the information requested by Dairyland, which is what Dairyland appears to be requesting in RFP Nos. 20 and 21. *See, e.g., Canadian Nat'l Ry. & Grand Trunk Corp. Control – EJ&E W. Co.*, STB Finance Docket No. 35087 (STB served Sept. 11, 2008) at 2 (“A party cannot be required to prepare new documents solely for their production.”).³

Dairyland's RFP Nos. 22, 23, and 24 essentially repeat RFP Nos. 19, 20, and 21, except they substitute the term “profitability” for “cost of service analysis.” They are equally vague and confusing. To the extent UP understands the requests, they are not only duplicative, but also irrelevant – even under Dairyland’s interpretation of the *July 25 Decision* – because they seek information about profitability rather than incremental costs. Dairyland never explains how information about the profitability of its rates is relevant to the subject matter involved in this proceeding.

Dairyland attempts to excuse its multiple, overlapping, and vague requests by asserting that it tried to “cover all potential linguistic bases” as an intentional response to UP’s actions in

² RFP No. 20 states: “For each cost of service analyses UP used or considered in setting the rates identified in all iterations of Item 6630 in UP Circular 111, produce documents showing the fuel costs included in the cost of service and the factors used to calculate the fuel cost component of the cost of service (i.e., service units, unit costs, base period, current period and fuel indexes used from base to current period).”

RFP No. 21 states: “For each of the cost factors shown in the documents produced in response to Request for Production No. 20, produce the data relied upon by UP in developing the factors.”

³ Another possible reading of RFP Nos. 20 and 21 is that Dairyland seeks information about UP’s proprietary internal costing methodology – perhaps to challenge the accuracy of that methodology. We explain in Section II.A.3 why the Board should not compel UP to produce such information.

other cases. Motion to Compel at 7 n.9. Dairyland's unsupported claims of past misconduct are baseless. By Dairyland's own admission, its discovery requests are overlapping, duplicative, and linguistically complex. UP should not be required to work its way through the confusion at its own peril, potentially subjecting itself to later accusations that it has not properly responded to Dairyland's requests. Under the Board's rules, the party "filing a document production request" must "'set forth the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity.'" *Scio Pottery Co. v. Consol. Rail Corp.*, ICC Docket No. 40330 (ICC served Feb. 6, 1990) at 3 (quoting 49 C.F.R. § 1114.30(b)).

2. Dairyland Has No Valid "Double Dipping" Claim.

In its motion to compel, Dairyland also offers a new explanation for its discovery requests relating to "issue traffic cost analyses": it now claims that they "are also relevant to the issue of double recovery of fuel costs." Motion to Compel at 8. However, the Complaint does not allege "double dipping" by UP. Dairyland's new explanation is nothing more than an after-the-fact attempt to rationalize irrelevant requests.

Dairyland cannot assert a valid claim that UP has engaged in "double dipping" because the Dairyland tariff item establishes on its face that there has been no "double dipping." As the Board has explained, "double dipping" occurs when a railroad engages in the practice of "both imposing a rate-based fuel surcharge and raising the base rate by an index that incorporated changes in fuel costs." *July 25 Decision* at 6. The Dairyland tariff item shows that Dairyland's rates are not now, and have never been, subject to both a rate-based fuel surcharge and increases based on an index that incorporates changes in fuel costs. Dairyland does not, and cannot, allege otherwise.

Instead, Dairyland says that shippers in the *Rail Fuel Surcharges* proceeding pointed to "other forms of double-dipping," such as "setting base rates that included recovery of current

fuel costs at the time the rate was set, and then applying a fuel surcharge that had a different, lower fuel cost base.” Motion to Compel at 8. However, the Board did not adopt such a broad definition of “double dipping.” The Board’s prohibition against “double dipping” involves a specific practice – a railroad’s application of a fuel surcharge to a shipper’s base rate when the base rate is also being increased by an index that incorporated changes in fuel costs. *See Rail Fuel Surcharges* at 11 (“[W]e find that application of both an index that includes a fuel component and a fuel surcharge for the same movement to cover the same time period is an unreasonable practice.”).

Dairyland’s new “double dipping” argument is an effort to pursue an unreasonable rate case in the guise of an unreasonable practice case – which the Board rejected in the *July 25 Decision* and which the D.C. Circuit rejected in *Union Pacific*. Dairyland’s “double dipping” theory rests on the faulty premises that it would be (i) possible to attribute revenue that UP receives from its base rates to the various costs that it incurs, and thus to identify the “base” revenue associated with fuel costs; and (ii) permissible to condemn UP for charging too much for fuel when a fuel surcharge is added to its base rates. However, railroads are not expected to set their rates just to cover their costs, or to use any other type of cost-plus approach to ratemaking.⁴ Thus, as this agency has recognized in other settings, any attempt to attribute revenue to specific costs would necessarily be arbitrary. *See Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520, 526 (1985); *see also San Antonio, Texas v. United States*, 631 F.2d 831 (D.C. Cir. 1980) (rejecting formula for setting maximum rates in proportion to fully allocated costs).

⁴ Indeed, a rail rate must exceed the movement’s variable costs if there is to be any contribution towards fixed costs.

In other words, the Board has no way to determine whether a railroad's revenue from a fuel surcharge, when added to revenue from the railroad's base rates, results in revenue levels that are "unreasonably high" in relation to the railroad's incremental fuel costs. And, even if the Board could somehow make that determination, a challenge to the level of a railroad's revenues could be made only when a shipper invokes the Board's jurisdiction over unreasonable rates. *See July 25 Decision* at 5 (citing *Union Pacific*, 867 F.2d at 649).

In short, Dairyland's claim that UP's fuel surcharge, when added to UP's base rate levels, allows UP to over-recover its incremental fuel costs bears no relationship to the practice of "double dipping" that the Board condemned as unreasonable in *Rail Fuel Surcharges* – that is, escalating a shipper's base rates using two indices that both contain a component designed to recover increased fuel costs.

Finally, even if the Board were to allow Dairyland to pursue discovery under this new theory of liability, Dairyland still would not be entitled to more information than it has requested in RFP No. 6 for the reasons discussed in Sections II.A.1 and II.A.3.

3. UP Asserted Valid Objections To The Disclosure Of Its Proprietary, Internal Costing Information.

UP does not dispute that it must disclose certain proprietary, internal costing information to the extent that such information is central to the issues presented and a protective order is in place to maintain the confidentiality of the information produced. UP in fact used information from its internal costing system to develop its mileage-based fuel surcharge, and it has already disclosed that information to Dairyland in response to RFP Nos. 4, 8, 9, 10, and 25.

However, UP has objected to disclosing proprietary internal costing information when Dairyland has requested (or seems to be requesting) this extraordinarily sensitive information in contexts that are irrelevant to this proceeding. UP thus objected to producing such information

in response to each of Dairyland's requests relating to "issue traffic cost analyses," which are irrelevant for the reasons discussed in Sections II.A.1 and II.A.2.

a) Board Precedent Recognizes The Extraordinarily Sensitive Nature Of Information About Carriers' Internal Costing Systems And Protects That Information From Discovery.

Information regarding UP's internal costing system is highly sensitive. The Board has consistently recognized the extraordinarily sensitive nature of a carrier's internal costing systems and has repeatedly refused to compel carriers to produce information relating to those systems. *See Entergy Arkansas, Inc. v. Union Pacific R.R.*, STB Docket No. 42104 (STB served May 7, 2008); *Kansas City Power & Light Co. v. Union Pacific R.R.*, STB Docket No. 42095 (STB served Feb. 15, 2006); *Potomac Electric Power Co. v. CSX Transp., Inc.*, 2 S.T.B. 290 (1997); *Arizona Pub. Serv. Co. v. The Atchison, Topeka & Santa Fe Ry.*, 2 S.T.B. 367 (1997); *Minnesota Power, Inc. v. Duluth, Missabe & Iron Range Ry.*, STB Docket No. 42038 (STB served July 8, 1999); *Texas Mun. Power Agency v. The Burlington Northern & Santa Fe Ry.*, STB Docket No. 42056 (STB served Feb. 9, 2001); *Northern States Power Co. v. Union Pacific R.R.*, STB Docket No. 42059 (STB served May 24, 2002).

b) UP Should Not Be Required To Produce More Information About Its Internal Costing System Than Is Needed To Show How It Developed Its Mileage-Based Fuel Surcharge Program.

UP used internal costing information to develop its fuel surcharge programs, and thus it cannot withhold relevant data regarding internal costing, but the Board should not require UP to disclose more information about its internal costing system than is necessary to show how it developed the challenged mileage-based fuel surcharge program. For example, UP used its internal cost system to determine the number of car miles attributable to PRB coal traffic and the percentage of total fuel costs attributable to PRB coal traffic. UP has produced that aggregated information to Dairyland. However, the Board should not require UP to produce any *Dairyland-*

specific cost information – that is, any internal calculations regarding Dairyland’s fuel costs – because this proceeding is about the reasonableness of UP’s mileage-based fuel surcharge program, not the relationship between UP’s revenues and costs with regard to Dairyland’s traffic. *July 25 Decision* at 6. UP certainly should not be required to produce its internal calculations regarding Dairyland’s *non-fuel* costs. As discussed above, such information plainly is not relevant under the *July 25 Decision*. See *Entergy Arkansas* at 4 (“Given the agency’s precedent and the highly sensitive nature of the information sought, Entergy has not established that its broad request for profitability data is relevant to the facts of this case.”).

c) The Board Should Not Require UP To Reveal Its Internal Costing Methodology.

In addition, the Board should not require UP to produce documents that would reveal its internal costing methodology. Although Dairyland’s requests are far from clear, Dairyland may be seeking such information in RFP Nos. 20, 21, 23, and 24. Again, UP understands that it must reveal certain aggregated data from its internal costing system that it used to develop its mileage-based fuel surcharge – in this case, data showing that its internal costing system determined that its fuel costs for PRB traffic constituted X% of its total fuel costs, or \$Y million.⁵ However, the Board should not allow discovery into *how* UP’s internal costing system calculated the figures that UP used to develop its fuel surcharge program – that is, the formulas, assumptions, and inputs that were used. This proceeding is about the reasonableness of UP’s “general formula” for recovering fuel costs; it is not about whether UP’s internal costing system calculated those costs correctly.

⁵ The actual figures are Highly Confidential.

Indeed, even if Dairyland had advanced some theory under which UP's actual costs of serving Dairyland were relevant to an unreasonable practice case, Dairyland still would not be entitled to information about UP's internal costing methodology. *See PEPCO*, 2 S.T.B. at 293-94 (complainant "[did] not require access to the railroads' costing models, but rather information on actual costs and traffic data"); *see also Duke Energy Corp. v. Norfolk Southern Ry.*, STB Docket No. 42069 (STB served July 26, 2002) at 5 ("Indeed, given the business interests of both railroads and shippers in much of the information involved here, [both parties] should have just as much incentive . . . to independently develop their own assessments as to these matters.").⁶

In short, to the extent that Dairyland's requests for documents showing "the factors used to calculate the fuel cost component of the cost of service" (RFP Nos. 20 and 23) and "the data relied upon by UP in developing [those] factors" (RFP Nos. 21 and 24) would require UP to reveal the methodology used in its internal costing system, the Board should deny Dairyland's motion to compel because that highly sensitive, proprietary information is not relevant to the matters at issue in this proceeding. *See Entergy Arkansas* at 4.

4. UP Asserted Valid Overbreadth And Burden Objections.

Dairyland incorrectly asserts that UP did not establish a proper basis for its objections to certain of Dairyland's requests related to "issue traffic cost analyses" as "overbroad" or "unduly burdensome." Motion to Compel at 11. Contrary to Dairyland's claims, UP did not make "boilerplate" objections; UP's objections addressed specific, objectionable aspects of Dairyland's discovery requests.

⁶ To be clear, UP does not believe that its costs for specific movements would be relevant under any unreasonable practice theory.

UP objected to RFP Nos. 3, 6(a), 19, 22, 23, and 24 as “overbroad” because, even under Dairyland’s interpretation of the *July 25 Decision*, these requests sought information above and beyond information relating to the incremental fuel costs UP has incurred in providing service to Dairyland.

UP objected to RFP No. 18 as “unduly burdensome” because the request was duplicative of requests that were, in and of themselves, overbroad. UP objected to RFP Nos. 20, 21, 22, 23, and 24 as “unduly burdensome” because, as discussed above, UP was unable to determine what information Dairyland was seeking and wanted to preserve its objections. UP also objected to those requests as “unduly burdensome” because, to the extent Dairyland was seeking information about the formulas, assumptions, and inputs utilized by UP’s internal costing system at the times it performed various cost analyses relating to Dairyland traffic over the past several years, the burden of reconstructing those data would be unduly high (if such a thing were even possible).

Dairyland incorrectly claims that UP would be “sandbagging” if it offered reasons for its overbreadth and undue burden objections after Dairyland filed its motion to compel. Motion to Compel at 11. If any party is “sandbagging,” it is Dairyland. Dairyland did not challenge any of these objections when its counsel spoke with UP’s counsel before Dairyland filed its motion to compel. Moreover, UP suggested that the parties might benefit from a meet-and-confer session to address discovery issues, but Dairyland filed its motion to compel without trying to schedule such a conference.

B. “Other Issue Traffic Documents” (RFP Nos. 1 and 2)

By offering to revise its original requests, Dairyland concedes that its requests relating to “other issue traffic documents” are flawed. Motion to Compel at 12. Even as revised, however, these requests still seek information that is irrelevant to the subject matter involved in this proceeding.

Dairyland's RFP No. 1 seeks “all documents related to UP’s development of the terms set forth in Item 6630-E of UP Circular 111.” *Dairyland's RFP No. 2* seeks “all documents relating to UP’s communications with Dairyland in 2004 and 2005 concerning UP’s provision of service to Dairyland on and after January 1, 2006.” In its motion, Dairyland stated that it would revise these requests and limit them to documents “that address UP’s recovery of its fuel costs.” Motion to Compel at 12.

However, Dairyland never explains how the requested information, even as limited by its motion, would be relevant to the matters at issue in this proceeding. Dairyland says the requests are relevant to the “factual circumstances giving rise to its Complaint,” and more particularly, the fact that “UP disputes some of [Dairyland’s] contentions.” *Id.* Dairyland refers specifically to UP’s disagreement with its averments that “Prior to the expiration of [its contract with UP], Dairyland sought to extend the contract, or to negotiate a new contract, for its post-2005 PRB shipments on UP,” and that “UP refused to agree to continue to provide the contract service.” *See* Complaint ¶ 4; *see also* Motion to Compel at 12 (citing UP Answer ¶ 4).

UP’s Answer did dispute Dairyland’s version of the facts in order to set the record straight, but Dairyland never explains why the dispute is relevant. It never explains why the existence or failure of the parties’ contract negotiations “‘is relevant to the subject matter’ involved in this proceeding” – that is, whether “the general formula used to calculate fuel surcharges bears [a] reasonable nexus to the fuel consumption for the traffic to which the surcharge is applied.” *July 25 Decision* at 6 (quoting 49 C.F.R. § 1114.21). Accordingly, Dairyland has not shown that the requested discovery is relevant.

In addition, as UP understands RFP Nos. 1 and 2, the requests seek documents reflecting communications between UP and Dairyland about rates and terms that would apply to Dairyland

under Circular 111, and all such communications should be in Dairyland's possession. However, to the extent these requests could be interpreted to extend more broadly, they would be subject to the same objections that apply to Dairyland's requests for documents relating to "issue traffic cost analyses," which are discussed above in Section II.A.

C. "Fuel Surcharge Program Information" (RFP Nos. 4, 5, 7, 8, 9, 10, and 17)

Dairyland is wrong when it claims that UP presented "boilerplate objections" to each of Dairyland's requests for "fuel surcharge program information." Motion to Compel at 13. UP's objections addressed specific, objectionable aspects of Dairyland's requests. Moreover, UP has agreed to produce documents regarding the development of its mileage-based fuel surcharge program. The information UP has produced and is producing will allow the parties and the Board to address fully the only issue in this proceeding: whether "the general formula used to calculate fuel surcharges bears [a] reasonable nexus to the fuel consumption for the traffic to which the surcharge is applied." *July 25 Decision* at 6.

1. UP Has Agreed To Produce Documents Regarding The Development Of Its Mileage-Based Fuel Surcharge Program.

Dairyland is wrong to claim that UP has refused to produce information regarding its mileage-based fuel surcharge program for PRB coal traffic, which is set forth in Item 694 of UP Circular 6603. Motion to Compel at 12. UP responded to Dairyland's requests for documents relating to that fuel surcharge program by stating that it would produce documents "sufficient to show how UP developed the fuel surcharge mechanism set forth in Item 694 of UP Circular 6603." (*See* Attachment 3 hereto, UP Responses to RFP Nos. 4, 8, 9, and 10.) UP has also agreed to produce workpapers relating to the development of its mileage-based fuel surcharge program for PRB coal traffic. (*See* Attachment 4 hereto, UP Responses to RFP No. 25.)

UP's objections to Dairyland's specific requests were legitimate efforts to address Dairyland's multiple, overlapping, and overbroad requests. For example, *Dairyland's RFP No. 4* is exceptionally broad. It seeks "all documents relating to the development of the fuel surcharge mechanisms set forth in (a) Item 690 of Circular 6603 [UP's rate-based surcharge] and (b) Item 694 of UP Circular 6630 [UP's mileage-based surcharge]." Most of Dairyland's other requests in this set either duplicate or substantially overlap RFP No. 4. For example, *Dairyland's RFP No. 5* seeks "all documents containing cost analyses, contribution analyses, or other analyses relating to [UP's] fuel surcharge mechanisms." *Dairyland's RFP No. 8* seeks "all documents" supporting UP's description in its Answer of how it calculated the mileage-based surcharge amounts, "including, but not limited to documents discussing the methodology used to make the calculations and all source data used to develop the calculations." *Dairyland's RFP Nos. 9 and 10* seek documents relating to UP's description of the mileage-based surcharge from filings in other proceedings.

In light of UP's agreement to produce documents sufficient to show how UP developed its mileage-based fuel surcharge program, including workpapers, it is incumbent on Dairyland to justify the need to impose additional burdens on UP. As the Board is certainly aware, with the proliferation of email and other electronic means of transmitting and storing data, requests for "all documents" relating to broad topics – such as "the development of [UP's] fuel surcharge mechanisms" – impose substantial burdens on the party that must comply with such requests. "In an age of discovery run riot, the [Board is] simply not required to allow a dragnet, expensive exercise of discovery . . . when that discovery [is] seen by the agency as most unlikely to affect its decision." *Trailways Lines, Inc. v. ICC*, 766 F.2d 1537, 1546 (D.C. Cir. 1985). Under the Board's rules, "discovery may be denied if it would be unduly burdensome in relation to the

likely value of the information sought.” *Canadian Pacific Ry. -- Control – Dakota, Minnesota & Eastern R.R.*, STB Finance Docket No. 35081 (STB served Mar. 27, 2008) at 1.

UP’s responses to Dairyland’s discovery requests reflect a good-faith effort to minimize the burdens of discovery while producing relevant documents and complying with the procedural schedule imposed by the Board. If UP were required to scour its email and other electronic files for “all documents relating to the development of [its] fuel surcharge mechanisms,” as requested in RFP No. 4 and other overlapping requests, the effort would consume an extraordinary amount of resources while producing no discernible discovery benefits. UP’s production of documents sufficient to show how UP developed its mileage-based fuel surcharge program, along with workpapers, “should satisfy [Dairyland’s] needs.” *Canadian Pacific* at 4.

2. UP Asserted Valid Relevance Objections To Producing Documents Relating To The Incremental Fuel Costs Of Providing Service To Dairyland Or Other Specific Shippers.

Dairyland is also wrong when it asserts that UP is refusing to allow Dairyland to conduct discovery on issues that UP “present[ed] . . . to the Board.” Motion to Compel at 14. Dairyland filed the complaint in this proceeding, not UP. UP was required to answer the allegations in the Complaint, and it did so. UP is not responsible for the content of Dairyland’s Complaint.

Moreover, the *July 25 Decision*, not UP’s Answer, establishes the relevant issues in this proceeding. UP filed its Answer before the Board clarified the arguments that Dairyland would be allowed to pursue. Dairyland initially alleged a theory that involved UP’s incremental fuel costs for handling Dairyland’s traffic, and UP responded to that theory. However, the *July 25 Decision* rejected that theory, and UP is not obligated to produce discovery merely because it addressed Dairyland’s discredited theory in its Answer.

UP’s production of documents sufficient to show how it developed its mileage-based fuel surcharge will provide Dairyland with the documents it needs to address the issue identified in

the *July 25 Decision*: whether “the general formula” UP is using “bears [a] reasonable nexus to the fuel consumption for the traffic to which the surcharge is applied.” *July 25 Decision* at 6.

3. UP Asserted Valid Objections To The Disclosure Of Its Proprietary, Internal Costing Information.

Dairyland has no valid complaint that UP has refused to disclose its proprietary internal costing information. As discussed above, UP used certain information from its internal costing system to develop its mileage-based fuel surcharge program, and it has begun disclosing that information in response to RFP Nos. 4, 8, 9, 10, and 25. *See* Section II.A.3, *supra*. UP objected to the disclosure of its internal costing data only to the extent that the requested data would not be relevant to the issues in this proceeding and to the extent that Dairyland’s broadly phrased requests might be interpreted as seeking discovery about *how* UP’s internal costing system calculated the figures that UP used to develop its mileage-based fuel surcharge. *See* Section II.A.3, *supra*.

4. UP Asserted Valid Objections To Producing Documents Regarding Its Former Rate-Based Fuel Surcharge Program.

UP objected to Dairyland’s requests for “fuel surcharge program information” insofar as they seek information about UP’s rate-based fuel surcharge program because such information is not “relevant to the subject matter” involved in this proceeding, as clarified” by the Board’s *July 25 Decision*. *July 25 Decision* at 6 (quoting 49 C.F.R. § 1114.21).⁷ Dairyland has not alleged a valid basis for challenging UP’s rate-based fuel surcharge. The Board rejected Dairyland’s “incremental cost” theory in the *July 25 Decision*, and Dairyland has not alleged, and could not allege, a valid claim for “double dipping.” *See* Section II.A.2, *supra*.

⁷ In addition, UP objected to certain of Dairyland requests as “overbroad” because the requests sought documents relating not only to UP’s mileage-based surcharge, but also to UP’s rate-based surcharge.

Dairyland's requests for discovery relating to UP's rate-based fuel surcharge program amount to a fishing expedition. Dairyland says that the *July 25 Decision* did not preclude all challenges to UP's rate-based fuel surcharge and that it "intends on presenting such a challenge and seeks documents in support of this challenge." Motion to Compel at 15. However, the *July 25 Decision* did not authorize Dairyland to engage in discovery to search for a viable claim. To obtain discovery, Dairyland first must set forth a valid basis for challenging UP's rate-based surcharge. (In fact, until Dairyland sets forth a claim, the Board cannot even begin to judge whether Dairyland's discovery requests seek information that would be relevant to its claim.) Dairyland may not seek discovery in the hope of uncovering a viable claim. Board precedent expressly precludes such fishing expeditions. *See, e.g., Duke Energy* at 4 ("[D]iscovery requests must be narrowly drawn, directed toward a relevant issue, and not used for a general fishing expedition."); *Buffalo & Pittsburgh R.R. – Exemption – Acquisition & Operation of Lines in NY & PA*, ICC Finance Docket No. 31116 (ICC served Nov. 7, 1988) at 2 ("Requiring the production . . . without further information on relevance, would constitute the type of 'fishing expedition' we have refused to countenance."). General fishing expeditions are particularly inappropriate when the requested discovery involves extraordinarily sensitive carrier information, as it does here. *See CSX Corp. & CSX Transp., Inc., Norfolk Southern Corp. & Norfolk Southern Ry. – Control & Operating Leases/Agreements – Conrail Inc. & Consol. Rail Corp.*, STB Finance Docket No. 33388 (STB served Oct. 3, 1997) at 8 ("We cannot allow discovery of extraordinarily sensitive information simply to permit movants the ability to conduct what amounts to a 'fishing expedition.'").

5. UP Asserted A Valid Relevance Objection To Dairyland's Request For Documents Produced In Response To A Grand Jury Subpoena.

UP also objected to *Dairyland's RFP No. 7* because that request is a fishing expedition.

The request demands that UP

“Produce all documents UP has provided in response to the grand jury subpoena issued to UP by an ‘Attorney General of a state outside our service territory . . . pertaining to our fuel surcharge program’ as described in UP’s Form 10-K Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, for the fiscal year ended Dec. 31, 2007, at 15.”

Dairyland never attempts to explain why the requested information would be relevant to its case.

In its motion, Dairyland merely recites that RFP No. 7 relates to “a grand jury subpoena that UP stated ‘pertain[ed] to our fuel surcharge program.’” Motion to Compel at 13. This is a blatant fishing expedition into confidential grand jury documents. Allowing Dairyland to obtain the requested documents would violate the fundamental principle that discovery “should be confined to developing facts underlying a plaintiff’s claim or claims and not used as a ‘fishing expedition’ to discover what else may be amiss or to develop wholly new claims unrelated to what is averred in the complaint.” *Edwards v. Gordon & Co.*, 94 F.R.D. 584, 586 (D.D.C. 1982).⁸

D. “Other Requests” (RFP Nos. 11, 12, 13, 14, 15, and 16)

Dairyland is wrong when it argues that UP’s objections to *Dairyland’s RFP Nos. 11, 12, 13, 14, 15, and 16* preclude UP from offering evidence that would have been responsive to those requests. Under Dairyland’s view, complainants can serve discovery requests that are seemingly irrelevant, overbroad, and/or burdensome, and then, rather than justify those requests in a meet-and-confer session or a motion to compel, preclude defendants from using information that turns

⁸ As Union Pacific Corporation reported in its Form 10Q filed July 24, 2008, the Attorney General’s office that issued the subpoena has advised the company that it is not moving forward with the investigation at this time.

out to be relevant. This would be unfair because complainants can decide which arguments to pursue, and thus they are uniquely positioned to influence what information may become relevant.

UP objected to RFP Nos. 11, 12, 13, 14, 15, and 16 because it did not see how the requested documents could be relevant. UP also objected to the requests because the burden of producing the documents was excessive given their lack of any apparent relevance, and because it would require special studies to provide the information in the form requested by Dairyland. Dairyland has not responded to those objections. However, UP cannot predict with certainty what arguments Dairyland might make in this case. If Dairyland's arguments make the requested information relevant, UP should not be precluded from using this information simply because Dairyland decided to set such a trap rather than explain the basis for its requests.

Fortunately, the Board's rules do not allow complainants to set such discovery traps. When a party's discovery requests are challenged, the party promulgating the requests has the burden of explaining why they are relevant. *See, e.g., CSX Corp. & CSX Transp., Inc., Norfolk Southern Corp. & Norfolk Southern Ry. -- Control & Operating Leases/Agreements - Conrail Inc. & Consol. Rail Corp.*, STB Finance Docket No. 33388 (STB served Nov. 30, 2006) at 3 (denying discovery when petitioners "fail[ed] to demonstrate the relevance of the information they request to the issues before the Board in this case"). Dairyland has not even tried to explain why the documents requested in RFP Nos. 11, 12, 13, 14, 15, and 16 are relevant. Dairyland has thus effectively withdrawn those requests.⁹

⁹ The two cases Dairyland cites in its motion do not support Dairyland's position – that is, they did not arise in circumstances in which the party promulgating the discovery requests had never explained their (potential) relevance. *See* Motion to Compel at 15 n.20. In *PEPCO*, CSX was precluded from using data regarding refund payments for traffic in the issue traffic group – (continued...)

E. UP's Interrogatory Responses

Dairyland's discovery requests include interrogatories asking UP to identify employees who participated in the development and any cost analyses of UP rates applicable to Dairyland's traffic and the UP rate-based and mileage-based fuel surcharge programs. UP agreed to identify the employees principally involved, except with respect to its rate-based fuel surcharge program.

Dairyland is wrong when it complains that UP's promise to identify employees, rather than provide names along with its written objections, was a "delaying tactic." Motion to Compel at 16. As UP's counsel explained to Dairyland's counsel, Dairyland was asking for information about events that occurred many years ago, several of the individuals involved in those events have moved on to different positions, and UP was diligently seeking to provide accurate responses.

UP had no reason to delay its production of information. Dairyland says it is seeking these names to identify potential deponents, but as Dairyland admits, it will not be prepared to conduct depositions "until it receives and reviews UP's document production." *Id.* Indeed, Dairyland "does not request that the Board take any action at this time." *Id.*

Dairyland does ask the Board to order UP to produce the names of the UP employees that were involved in the development and any cost analyses of UP's rate-based fuel surcharge. *See*

data that were plainly relevant to the issue of stand-alone revenue – because CSX had represented that the data were not available or would be too "burdensome" or "oppressive" to produce. *Potomac Elec. Power Co. v. CSX Transp., Inc.*, STB Docket No. 41989 (STB served Nov. 24, 1997) at 6-8.

In *FMC Wyoming*, UP was precluded from challenging FMC's use of the mileage-block prorate method of allocating revenue from cross-over traffic using its "division sheets" to show "actual divisions" because the division sheets were "only applicable in [certain] (relatively infrequent) situation[s]" and because UP had refused FMC's request for "actual division data" and disputed FMC's assertion that actual division data could be relevant. *FMC Wyo. Corp. v. Union Pacific R.R.*, 4 S.T.B. 699, 729 & n.71. In this case, Dairyland has never explained to UP or the Board why it thinks the requested information is relevant to the issues in this case.

id. at 17. However, this information is irrelevant for the same reasons that Dairyland's document requests relating to UP's rate-based fuel surcharge program are irrelevant. *See* Sections II.A.2 & II.C.4. *supra*.

F. UP's "General Objections"

Dairyland complains about three general objections that UP raised with respect to all of Dairyland's discovery requests, but each of UP's objections is justified under the circumstances of this case.

First, UP objected to producing documents or information prior to January 2005. UP did not introduce its mileage-based fuel surcharge program until 2007, and documents unrelated to that particular fuel surcharge program, such as documents relating to Dairyland's base rate or UP's rate-based surcharge program, are not relevant for the reasons discussed above. Thus, UP does not expect to have any relevant documents from before January 2007. UP selected the earlier date simply to avoid allegations that it was trying to hide information relating to its mileage-based fuel surcharge program based on the date restriction.

Second, UP raised a general objection to Dairyland's many requests for "all documents" regarding an evidentiary point when the information needed could be obtained through a request for documents "'sufficient to show' that evidentiary point." Particularly in data-intensive matters, parties engaged in discovery often voluntarily limit their requests in this way to avoid imposing undue burdens on each other and to avoid obtaining large amounts of repetitive or marginally relevant data. UP has described several situations in which it responded to Dairyland's requests by objecting to the unduly burdensome nature of Dairyland's requests but agreeing to produce documents "sufficient to show" the relevant point – how UP developed its mileage-based fuel surcharge program. *See* Section II.C.1, *supra*. In those situations, Dairyland

will have the opportunity to review UP's production and request reasonable follow-up as necessary.

The Board should reject Dairyland's argument that it should disregard the burdens on UP and order UP to produce "all documents" because Dairyland "is willing to work with UP" to minimize the burdens of production. Motion to Compel at 18. Dairyland demonstrated its lack of willingness to work with UP when it filed its motion to compel without engaging in the meet-and-confer process. *See* pp. 5-6, *supra*.

Finally, Dairyland complains about UP's standard discovery response that documents will be made available for inspection at its counsel's office and that copies would be provided upon payment of the costs to UP of providing the copies. UP has followed this approach in cases like this one – where a party's discovery requests would potentially require UP to produce significant amounts of documents that appear irrelevant or only marginally relevant, and where the parties' duplicating costs would not be offsetting because UP has not served comparably broad requests on that party. (In this case, UP has not served any discovery on Dairyland.) In cases governed by the Federal Rules of Civil Procedure, document production costs are often shifted. *See, e.g., Spears v. City of Indianapolis*, 74 F.3d 153, 158 (7th Cir. 1996) (explaining that the Federal Rules give courts "considerable discretion" in ordering "expense-shifting in discovery production"); *Clever View Invs., Ltd. v. Oshatz*, 233 F.R.D. 393, 394 (S.D.N.Y. 2006) (explaining that federal law requires only that a party "make requested documents available for inspection and copying; it need not pay copying costs") (internal quotation marks omitted).

Contrary to Dairyland's claim, UP is not asking Dairyland to pay its "litigation costs" – UP is not seeking to recover for the time and effort of its counsel and employees in responding to Dairyland's discovery requests and searching for and preparing documents for production. UP

simply is asking Dairyland to pay the costs it incurs to duplicate documents that are physically provided to Dairyland.

By offering to make available the documents for inspection before incurring duplicating costs, UP is allowing Dairyland to avoid paying for documents it decides it does not want. UP is willing to provide all documents directly to Dairyland (and it already has provided documents directly to Dairyland) as long as Dairyland is willing to pay the duplicating costs.

III. UP'S VAGUENESS OBJECTIONS

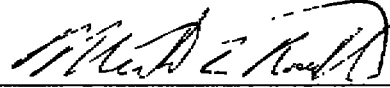
UP objected to *Dairyland's RFP Nos. 3 and 5* because they used the vague term "other analyses." UP objected to *Dairyland's RFP No. 19* because it used the vague term "cost of service analyses." Dairyland did not clarify those terms in its motion to compel. Thus, the Board should uphold UP's objections and not require UP to respond to those requests to the extent they seek documents related to "other analyses" or "cost of service analyses." *See* 49 C.F.R. § 1114.30(b) (document production requests "should . . . describe each item . . . with reasonable particularity").

UP also objected to *Dairyland's RFP Nos. 20, 21, 22, 23, and 24* as vague. As discussed above, these requests appeared to be overlapping and duplicative of other requests, and if they were not merely duplicative, UP does not understand what additional information Dairyland is seeking. *See* Section II.A.1, *supra*. Dairyland concedes that these requests are duplicative. *See* Motion to Compel at 7 n.9. Accordingly, the Board should uphold UP's objections and not require UP to respond to these requests. *See* 49 C.F.R. § 1114.30(b).

IV. CONCLUSION

For the reasons discussed above, the Board should deny Dairyland's Motion to Compel in its entirety.

Respectfully submitted,



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September 18, 2008

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that on this 18th day of September, 2008, I caused a copy of Union Pacific's Reply to Dairyland's Motion to Compel to be served on counsel for Dairyland by hand delivery.

A handwritten signature in black ink, appearing to read "Michael L. Rosenthal", written over a horizontal line.

Michael L. Rosenthal

ATTACHMENT 1

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DAIRYLAND POWER COOPERATIVE	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. 42105
	)	
UNION PACIFIC RAILROAD COMPANY	)	
	)	
Defendant.	)	
	)	

**COMPLAINANT'S INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS**

Pursuant to 49 C.F.R. §§ 1114.26 and 1114.30, Complainant Dairyland Power Cooperative ("Dairyland"), submits the following Interrogatories and Requests for Production of Documents to Defendant Union Pacific Railroad Company ("UP").

Dairyland requests that UP's written objections, and UP's written responses to Interrogatories, be served by April 18, 2008. Dairyland also requests that copies of all responsive documents be produced and delivered to the offices of Slover & Loftus, 1224 Seventeenth Street, N.W., Washington, D.C. 20036 on a rolling basis, with full production to be completed by May 5, 2008. Dairyland is prepared to cooperate with UP to facilitate the expeditious production of documents with the minimum practicable burden.

I.

DEFINITIONS

The following defined terms are used herein:

1. "And," "or," and/or "each" shall be construed in the disjunctive or conjunctive as necessary in order to bring within the scope of each Interrogatory or Request all responsive information or documents which otherwise might be construed as outside the scope of the Interrogatory or Request.
2. "Dairyland" means Dairyland Power Cooperative.
3. "Dairyland route(s)" means the railroad line segments over which UP moves loaded and empty coal trains between Origins and Destinations.
4. "Dairyland service" or "service to Dairyland" means all of the services provided by UP in connection with the transportation of coal in Dairyland trains between Origins and Destinations.
5. "Dairyland train(s)" means the trains containing loaded or empty coal cars moving to and from Destinations over the Dairyland route(s).
6. "Dairyland train movement(s)" means the trains containing loaded or empty coal cars moving to and from Destinations.
7. "Destination(s)" means the Cahokia and Cora terminals (for movement beyond by barge to Dairyland's Alma and Genoa generating stations).

8. "Document(s)" means all writings or visual displays of any kind, whether generated by hand or mechanical means, including, without limitation, photographs, lists, memoranda, reports, notes, letters, phone logs, e-mails, contracts, drafts, workpapers, computer printouts, computer tapes, telecopies, telegrams, newsletters, notations, books, affidavits, statements (whether or not verified), speeches, summaries, opinions, studies, analyses, evaluations, statistical records, proposals, treatments, outlines, any electronic or mechanical records, data or representations (including physical things such as, but not limited to, computer disks), and all other materials of any tangible medium or expression, in UP's current or prior possession, custody or control. A draft or non-identical copy is a separate document within the meaning of this term.

9. "Identify," when referring to a document, means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s) or recipient(s).

10. "Identify," when referring to information, means to list or produce documents containing the specified information.

11. "Origin(s)" means the UP-served coal mines in Campbell and Converse Counties, Wyoming.

12. "Person" means natural persons, corporations, institutions, partnerships, firms, joint ventures, associations, political subdivisions or other legal entities, as the case may be.

13. "Related," "related to," and "relating to" mean and include making a statement discussing, describing, referring to, reflecting, explaining, analyzing, or in any way pertaining to, in whole or in part, the subject matter of the Interrogatory or Request.

14. "UP" means Union Pacific Railroad Company, its present or former employees, agents, counsel, officers, directors, advisors, consultants, divisions, departments, predecessors, parent and/or holding companies, subsidiaries, or any of them, and all other persons acting (or who have acted) on its behalf.

15. "UP Circular 111" means all issues of the document entitled "UP Circular 111."

16. "UP Circular 6603" means all issues of the document entitled "UP Circular 6603."

II.

INSTRUCTIONS

UP is requested to conform to the following instructions in responding to these Interrogatories and Requests.

1. Each paragraph below shall operate and be construed independently. Unless otherwise indicated, no paragraph limits the scope of any other paragraph.

2. Where these discovery requests seek data in a computer-readable or machine-readable format, for each computer file supplied provide:

- a. The name and description of the source database or other file from which the records in the computer file were selected;
- b. A description of how the records in the file produced were selected
- c. The name, title and location of the individual (or contractor) responsible for developing the data responsive to the request; and
- d. Each computer program (in native software and text file) and intermediate file used in deriving the files produced; and for each field in each computer file provide:
 - 1) The name of the field;
 - 2) The starting and ending positions of the field;
 - 3) A detailed definition of the field;
 - 4) A detailed description of the data in the field, including an explanation of the purpose for which they are used;
 - 5) The type of data in the field, i.e., whether numeric, character, alphanumeric, number of digits, number of significant digits, whether signed or unsigned (i.e., negatives allowed);
 - 6) If the values in a field are terms or abbreviations, a list of all terms or abbreviations used with detailed definitions of each;
 - 7) An indication of whether the data in the field are packed or compressed; and
 - 8) If the data in the field are packed or compressed, the type of packing or compression:
 - a) Zoned with low-order sign;
 - b) Binary with LSB first;

- c) Binary with MSB first;
- d) Packed with high-order sign;
- e) Packed with low-order sign;
- f) Packed with no sign; and
- g) Other (specify and provide detailed instructions for unpacking).

3. If an answer or the production of any responsive document is withheld under 49 C.F.R. §1114.26(a) or §1114.30(a)(1) on the basis of a claimed privilege or attorney work product, then for each such answer or document, provide the following information: its date, type (e.g., letter, meeting, notes, memo, etc.), author (note if author is an attorney), addressee(s)/recipient(s) (note if addressee(s) or recipient(s) is an attorney), general subject matter, and basis for withholding the information.

4. If the production of any requested document or answer to any interrogatory is withheld for claimed grounds other than privilege or attorney work product, state with specificity the basis for such withholding.

5. UP is requested to supplement its responses to these Interrogatories and Document Production Requests and produce responsive information or documents obtained or created at any time and is further requested to supplement its responses in the manner provided in 49 C.F.R. § 1114.29.

6. If a responsive document was, but is no longer, in UP's possession, custody or control, describe what disposition was made of it.

7. Please organize the documents produced in such a manner that Dairyland may readily determine which documents are being produced by UP in response to each specific Document Production Request. If no document is produced in response to any specific Request, please so indicate in the response.

8. In the event UP objects to producing any documents on grounds that UP does not maintain the information described in the form or format requested by Dairyland, please produce the documents which contain such information in whatever form or format UP does maintain such information.

9. Dairyland reserves the right to file supplemental and/or follow-up Interrogatories, Document Production Requests, and other discovery, as necessary or appropriate.

III.

INTERROGATORIES

Interrogatory No. 1:

Identify the person(s) at UP who participated in the development of the terms set forth in Item 6630-E of UP Circular 111.

Interrogatory No. 2:

Identify the person(s) at UP who prepared any cost analyses, contribution analyses, or other analyses relating to the rates, fuel surcharges, or other terms set forth in Item 6630-E of UP Circular 111.

Interrogatory No. 3:

Identify the person(s) at UP who participated in the development of the fuel surcharge mechanisms set forth in (a) Item 690 of UP Circular 6603 and (b) Item 694 of UP Circular 6603.

Interrogatory No. 4:

Identify the person(s) at UP who have performed any cost analysis, contribution analysis or other analysis relating to the fuel surcharge mechanisms set forth in (a) Item 690 of UP Circular 6603 and (b) Item 694 of UP Circular 6603.

IV.

DOCUMENT PRODUCTION REQUESTS

Request for Production No. 1:

Produce all documents related to UP's development of the terms set forth in Item 6630-E of UP Circular 111.

Request for Production No. 2:

Produce all documents relating to UP's communications with Dairyland in 2004 and 2005 concerning UP's provision of service to Dairyland on and after January 1, 2006.

Request for Production No. 3:

Produce all documents comprised of, or relating to, cost analyses, contribution analyses, or other analyses relating to the rates and other terms set forth in Item 6630-E of UP Circular 111.

Request for Production No. 4:

Produce all documents relating to the development of the fuel surcharge mechanisms set forth in (a) Item 690 of UP Circular 6603 and (b) Item 694 of UP Circular 6603.

Request for Production No. 5:

Produce all documents containing cost analyses, contribution analyses, or other analyses relating to the fuel surcharge mechanisms set forth in (a) Item 690 of Circular 6603 and (b) Item 694 of UP Circular 6603.

Request for Production No. 6:

Produce all documents containing any analyses showing the (a) fuel costs included in the rates set forth in Item 6630-E of UP Circular 111 and/or (b) the incremental fuel costs UP has incurred between January 1, 2006 to present in providing service to Dairyland under Item 6630-E of UP Circular 111.

Request for Production No. 7:

Produce all documents UP has provided in response to the grand jury subpoena issued to UP by an "Attorney General of a state outside our service territory...

pertaining to our fuel surcharge program” as described in UP’s Form 10-K Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, for the fiscal year ended Dec. 31, 2007, at 15.

Request for Production No. 8:

Produce all documents supporting the allegation contained in Paragraph 9 of UP’s March 25, 2008 Answer “that beginning April 26, 2007, UP applied a mileage-based fuel surcharge to the line-haul freight charges paid by Dairyland under Item 6630-E, calculated based on the number of miles and number of cars used to handle traffic for Dairyland and the number of cents per mile per car that, if the same surcharge were paid by every one of UP’s PRB coal customers, would allow UP to recover the incremental fuel costs associated with all of its PRB coal traffic,” including, but not limited to documents discussing the methodology used to make the calculations and all source data used to develop the calculations.

Request for Production No. 9:

Produce all documents supporting the statement by UP in the Petition of Union Pacific Railroad Company for a Declaratory Order, STB Finance Docket No. 35021 (filed Apr. 26, 2007) at 5 (“UP Declaratory Order Petition”), that the UP fuel surcharge program implemented in response to the Board’s Ex Parte No. 661 decision is “designed to produce the same level of fuel cost recovery on average as UP’s prior, rate-based programs.”

Request for Production No. 10:

Produce all documents containing studies, and/or other analyses related to UP's assertions in UP's Declaratory Order Petition at 15, that "[s]ome customers may pay more than the actual incremental cost of fuel we use to handle their particular shipments."

Request for Production No. 11:

Produce documents, in a computer-readable format to the extent available, which provide the following information for each Dairyland train movement for each year or partial year from January 1, 2006 to the present: (a) each crew district through which Dairyland trains pass identified by "from" and "to" stations; (b) the route miles in each such crew district; (c) the route(s) used; (d) the loaded train miles over the route(s); (e) the empty train miles over the route(s); (f) the number of diesel units per train by the unit measure of rail line (e.g. crew district or line segment) for the loaded route(s); (g) the number of diesel units per train by the unit measure of rail line for the empty route(s); (h) the number of cars per train by the unit measure of rail line for the loaded route(s); (i) the number of cars per train by the unit measure of rail line for the empty route(s); (j) the trailing weight of each train (cars and contents) by the unit measure of rail line for the empty route(s); (k) the average net load (tons per car) of each car; and (l) the tare weight of each car.

Request for Production No. 12:

Produce all documents which contain actual cycle time data for the Dairyland trains for each year or partial year January 1, 2006 to the present. Data is requested that shows the components of such cycle time in total and in its component pieces, including, but not limited to, transit, loading, staging and unloading times. If such documents do not exist, please provide such documents that do exist, in hard copy and computer-readable format to the extent available, including all necessary documentation, from which the cycle times for the Dairyland trains for each year or partial year January 1, 2006 to the present can be derived.

Request for Production No. 13:

Produce documents, in a computer-readable format to the extent available, which provide the following information for each locomotive used by UP in Dairyland service from January 1 2006 to present: (a) locomotive initial number; (b) model of type (e.g. SD70-MAC); (c) horsepower; (d) capacity of its fuel tanks (gallons); (e) weight; and (f) the diesel unit-miles traveled each year or partial year from 2006 to the present.

Request for Production No. 14:

Produce documents sufficient to show the following: (a) the location(s) where the locomotives handling the Dairyland trains are fueled; (b) the actual amount of fuel consumed by the locomotives used by UP in Dairyland service, either by individual locomotive, or collectively, for the most recent 12 months or calendar year; (c) the total

number of diesel unit miles generated by the locomotives for which fuel consumption data was provided in response to (b) above during the same time period used in response to (b) above; (d) the method by which UP accounts for or records fuel usage for the locomotives used for the Dairyland trains; and (e) computer-readable versions (both compiled and non-compiled), including supporting databases and necessary documentation, of any and all computer programs in UP's possession used to measure or estimate the fuel usage of locomotives moving Dairyland trains.

Request for Production No. 15:

Identify all locations in the States of Wyoming, Nebraska, Kansas, Missouri and Illinois where UP has performed fueling of locomotives used in Dairyland service from January 1, 2006 to present and produce documents sufficient to show the following information with respect to locomotive fueling at each such location: (a) the source of the fuel, including the name and location of the vendor(s) who provide the fuel to UP and the refinery(ies) or other location from which the fuel is obtained; and (b) the method and cost of transporting and dispensing the fuel from the refinery(ies) or other locations from which the fuel is obtained to the location where the fueling of locomotives is performed (this request includes but is not limited to the database maintained in the ordinary course of business by UP).

Request for Production No. 16:

Produce copies of all contracts/agreements between UP and third parties in effect on and after January 1, 2006 to present related to the performance of locomotive fueling functions on Dairyland trains.

Request for Production No. 17:

Produce all studies, analyses, or other documents (including summaries and supporting data), prepared on and after January 1, 2000, in a computer-readable format to the extent available, pertaining to the amount of fuel consumed by locomotives used on Dairyland trains or any other unit coal trains moving over all or a portion of the Dairyland route(s).

Request for Production No. 18:

To the extent not already produced in response to Dairyland's prior Requests, produce all documents that summarize and quantify the fuel portion of variable costs of providing service to Dairyland under Item 6630-E of UP Circular 111.

Respectfully submitted,

DAIRYLAND POWER COOPERATIVE

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: April 3, 2008

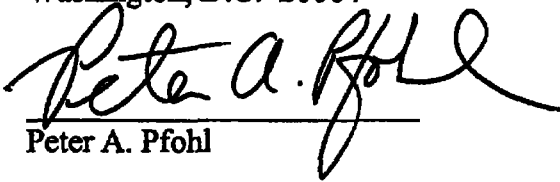
By: John H. LeSeur 
Frank J. Pergolizzi
Peter A. Pfohl
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for Complainant

CERTIFICATE OF SERVICE

I hereby certify, that I have this 3rd day of April, 2008 caused to be served copies of the above discovery requests by hand delivery upon outside counsel for Defendant Union Pacific Railroad Company, as follows:

Linda J. Morgan
Michael L. Rosenthal
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004



Peter A. Pfohl

ATTACHMENT 2

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DAIRYLAND POWER COOPERATIVE	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. 42105
	)	
UNION PACIFIC RAILROAD COMPANY	)	
	)	
Defendant.	)	
	)	

**COMPLAINANT'S SECOND SET OF
REQUESTS FOR PRODUCTION OF DOCUMENTS**

Pursuant to 49 C.F.R. §§ 1114.30, Complainant Dairyland Power Cooperative ("Dairyland"), submits the following Second Set of Requests for Production of Documents to Defendant Union Pacific Railroad Company ("UP").

Dairyland requests that UP's written objections be served by August 19, 2008. Dairyland also requests that copies of all responsive documents be produced and delivered to the offices of Slover & Loftus, 1224 Seventeenth Street, N.W., Washington, D.C. 20036 on a rolling basis, with full production to be completed by September 4, 2008. Dairyland is prepared to cooperate with UP to facilitate the expeditious production of documents with the minimum practicable burden.

I.

DEFINITIONS AND INSTRUCTIONS

Dairyland hereby incorporates by reference, as if fully stated herein, the Definitions and Instructions contained in Complainant's Interrogatories and Requests for Production of Documents, served on April 3, 2008 in this proceeding (the "First Requests").

II.

DOCUMENT PRODUCTION REQUESTS

Request for Production No. 19:

To the extent not otherwise produced in response to Dairyland's First Requests produce all cost of service analyses used or considered by UP in setting the rates identified in all iterations of Item 6630 in UP Circular 111.

Request for Production No. 20:

For each cost of service analyses UP used or considered in setting the rates identified in all iterations of Item 6630 in UP Circular 111, produce documents showing the fuel costs included in the cost of service and the factors used to calculate the fuel cost component of the cost of service (*i.e.*, service units, unit costs, base period, current period and fuel indexes used from base to current period).

Request for Production No. 21:

For each of the cost factors shown in the documents produced in response to Request for Production No. 20, produce the data relied upon by UP in developing the factors.

Request for Production No. 22:

To the extent not otherwise produced in response to Dairyland's First Requests, produce all analyses used or considered by UP in evaluating the profitability of the rates set forth in all iterations of Item 6630 in UP Circular 111.

Request for Production No. 23:

For each profitability analysis UP used or considered in evaluating the profitability of the rates set forth in all iterations of Item 6630 in UP Circular 111, produce documents showing the fuel costs included in the cost of service analysis used to evaluate the profitability of the rates and the factors used to calculate the fuel cost component of the cost of service (*i.e.*, service units, unit costs, base period, current period and fuel indexes used from base to current period).

Request for Production No. 24:

For each of the cost factors shown in the documents produced in response to Request for Production No. 23, produce the data relied upon by UP in developing the component cost factors.

Respectfully submitted,

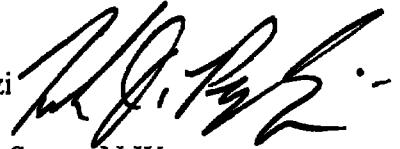
DAIRYLAND POWER COOPERATIVE

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: August 5, 2008

By: John H. LeSeur
Frank J. Pergolizzi
Peter A. Pfohl
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

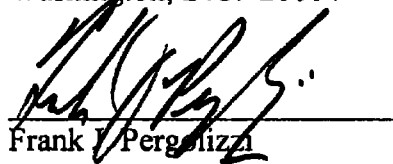
A handwritten signature in black ink, appearing to read "P. A. Pfohl", is written over the printed name of Peter A. Pfohl.

Attorneys for Complainant

CERTIFICATE OF SERVICE

I hereby certify, that I have this 5th day of August, 2008 caused to be served copies of the above discovery requests by hand delivery upon outside counsel for Defendant Union Pacific Railroad Company, as follows:

Linda J. Morgan
Michael L. Rosenthal
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004



Frank J. Pergolizzi

ATTACHMENT 3

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DAIRYLAND POWER COOPERATIVE,	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. 42105
	)	
UNION PACIFIC RAILROAD COMPANY,	)	
	)	
Defendant.	)	
	)	

**UNION PACIFIC'S OBJECTIONS AND RESPONSES TO
DAIRYLAND'S FIRST AND SECOND SETS OF DISCOVERY REQUESTS**

Union Pacific Railroad Company ("UP") hereby responds to the First Set of Interrogatories and Requests for Production of Documents and the Second Set of Requests for Production of Documents, served by Dairyland Power Cooperative ("Dairyland"), as follows:

GENERAL RESPONSES

The following General Responses apply to each of Dairyland's interrogatories and requests for production of documents ("discovery requests"):

1. UP is conducting a reasonable search for information and documents responsive to the discovery requests. Subject to the specific and general objections that follow, responsive documents are being made available, or will as soon as practicable be made available, for inspection and copying at the office of Covington & Burling LLP in Washington, D.C., unless otherwise noted. Copies of documents will be supplied upon payment of duplicating costs (including, in the case of computer tapes, costs for programming, tapes, and processing time).

2. Production of information or documents does not necessarily imply that they are relevant to or admissible in this proceeding and is not to be construed as waiving any objections stated herein.

3. In line with past practice in cases of this nature, UP has not secured verifications of the answers to interrogatories herein. UP is prepared to discuss this matter with Dairyland if this is of concern with respect to any particular answer.

GENERAL OBJECTIONS

UP makes the following General Objections with respect to all of the discovery requests. Any additional specific objections are stated at the beginning of the response to each request.

1. UP objects to the discovery requests insofar as they seek information or documents subject to the attorney-client privilege, work-product doctrine, joint defense privilege or any other applicable privilege or protection. Any production of privileged documents or information is inadvertent and should not be deemed a waiver of any privilege.

2. UP objects to the discovery requests to the extent they purport to require UP to produce information or documents that are not within its possession, custody, or control.

3. UP objects to the production of documents that constitute or disclose confidential, proprietary, or sensitive nonpublic information. Subject to and without waiving this objection, UP will produce such information, if not otherwise objectionable, under the terms of the protective order adopted by the Surface Transportation Board in its July 29 decision in this case. UP reserves the right to seek additional protection as needed.

4. UP objects to the discovery requests to the extent they would require UP to disclose proprietary internal costing information.

5. UP objects on the grounds of burden and relevance to producing documents or information from prior to January 2005 and to the extent that the requests seek information or documents “to the present.” UP will only provide relevant, responsive, non-privileged information and documents covering the time period ending March 5, 2008. Any production by UP of information or documents from earlier or later periods shall not be considered a waiver of this objection.

6. UP objects to production of documents prepared in connection with, or information relating to, possible settlement of this or any proceeding.

7. UP objects to the discovery requests to the extent that they call for the preparation of compilations, documents, summaries, analyses, or other special studies of any sort not already in existence, and UP by its responses does not, unless otherwise noted, undertake to prepare or produce any special studies. Any production by UP of information or documents in this category shall not be considered a waiver of this objection.

8. UP objects to the definition of “related,” “related to,” and “relating to” as unduly vague and overbroad insofar as it encompasses information and documents “in any way pertaining to” the subject matter.

9. UP objects to Instruction Nos. 2, 4, 5, 6, and 7 as unduly burdensome and to the extent that these Instructions seek to impose obligations on UP beyond those in the Board’s rules.

10. UP objects on the grounds of burden to the extent that discovery requests seek the production of “all documents” regarding an evidentiary point when the information necessary for complainants’ evidentiary submissions could be obtained through a request for documents “sufficient to show” that evidentiary point.

11. UP expressly reserves the right to supplement these responses.

12. UP hereby incorporates each and every General Objection in its specific objections and responses below.

INTERROGATORIES

Interrogatory No. 1

Identify the person(s) at UP who participated in the development of the terms set forth in Item 6630-E of UP Circular 111.

UP Response:

UP objects to this interrogatory on the grounds that it is overbroad and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. UP further objects to this interrogatory on the ground that the term “participated in” is vague.

Subject to and without waiving its objections, UP will identify the persons principally involved in developing the terms set forth in Item 6630-E of UP Circular 111.

Interrogatory No. 2

Identify the person(s) at UP who prepared any cost analyses, contribution analyses, or other analyses relating to the rates, fuel surcharges, or other terms set forth in Item 6630-E of UP Circular 111.

UP Response:

UP objects to this interrogatory on the grounds that it is overbroad and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. UP further objects to this interrogatory on the ground that the term “other analyses” is vague.

Subject to and without waiving its objections, UP will identify the persons principally involved in preparing cost or contribution analyses.

Interrogatory No. 3

Identify the person(s) at UP who participated in the development of the fuel surcharge mechanisms set forth in (a) Item 690 of UP Circular 6603 and (b) Item 694 of UP Circular 6603.

UP Response:

UP objects to this interrogatory on the ground that it is overbroad, in that information relating to Item 690 of UP Circular 6603 is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. UP further objects to this interrogatory on the ground that the term "participated in" is vague.

Subject to and without waiving its objections, UP will identify the persons principally involved in developing the fuel surcharge mechanism set forth in Item 694 of UP Circular 6603.

Interrogatory No. 4

Identify the person(s) at UP who have performed any cost analysis, contribution analysis or other analysis relating to the fuel surcharge mechanisms set forth in (a) Item 690 of UP Circular 6603 and (b) Item 694 of UP Circular 6603.

UP Response:

UP objects to this interrogatory on the grounds that it is overbroad to the extent it requests information relating to Item 690 of UP Circular 6603 and that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. UP further objects to this interrogatory on the ground that the term "other analyses" is vague.

Subject to and without waiving its objections, UP will identify the persons principally involved in preparing cost or contribution analyses with respect to Item 694 of UP Circular 6603, to the extent any such analyses were prepared.

DOCUMENT PRODUCTION REQUESTS

Request for Production No. 1

Produce all documents related to UP's development of the terms set forth in Item 6630-E of UP Circular 111.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Request for Production No. 2

Produce all documents relating to UP's communications with Dairyland in 2004 and 2005 concerning UP's provision of service to Dairyland on and after January 1, 2006.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Request for Production No. 3

Produce all documents comprised of, or relating to, cost analyses, contribution analyses, or other analyses relating to the rates and other terms set forth in Item 6630-E of UP Circular 111.

UP Response:

UP objects to this request on the grounds that it is overbroad and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. UP further objects to this request on the ground that it seeks information that would require UP to disclose proprietary internal costing information and on the ground that the term "other analyses" is vague.

Request for Production No. 4

Produce all documents relating to the development of the fuel surcharge mechanisms set forth in (a) Item 690 of UP Circular 6603 and (b) Item 694 of UP Circular 6603.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. UP further objects to this request on the ground that it seeks information that would require UP to disclose proprietary internal costing information.

Subject to and without waiving its objections, UP will produce documents, to the extent reasonably available, sufficient to show how UP developed the fuel surcharge mechanism set forth in Item 694 of UP Circular 6603.

Request for Production No. 5

Produce all documents containing cost analyses, contribution analyses, or other analyses relating to the fuel surcharge mechanisms set forth in (a) Item 690 of Circular 6603 and (b) Item 694 of UP Circular 6603.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. UP further objects to this request on the ground that it seeks information that would require UP to disclose proprietary internal costing information and on the ground that the term “other analyses” is vague.

Request for Production No. 6

Produce all documents containing any analyses showing the (a) fuel costs included in the rates set forth in Item 6630-E of UP Circular 111 and/or (b) the incremental fuel costs UP has incurred between January 1, 2006 to present in providing service to Dairyland under Item 6630-E of UP Circular 111.

UP Response:

UP objects to this request on the grounds that it is overbroad and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. UP further objects to this request on the ground that it seeks information that would require UP to disclose proprietary internal costing information.

Request for Production No. 7

Produce all documents UP has provided in response to the grand jury subpoena issued to UP by an "Attorney General of a state outside our service territory...pertaining to our fuel surcharge program" as described in UP's Form 10-K Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, for the fiscal year ended Dec. 31, 2007, at 15.

UP Response:

UP objects to this request on the grounds that it is overbroad and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Request for Production No. 8

Produce all documents supporting the allegation contained in Paragraph 9 of UP's March 25, 2008 Answer "that beginning April 26, 2007, UP applied a mileage-based fuel surcharge to the line-haul freight charges paid by Dairyland under Item 6630-E, calculated based on the number of miles and number of cars used to handle traffic for Dairyland and the number of cents per mile per car that, if the same surcharge were paid by every one of UP's PRB coal customers, would allow UP to recover the incremental fuel costs associated with all of its PRB coal traffic," including, but not limited to documents discussing the methodology used to make the calculations and all source data used to develop the calculations.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome and is overbroad. UP further objects to this request on the ground that it seeks information that would require UP to disclose proprietary internal costing information.

Subject to and without waiving its objections, UP will produce documents, to the extent reasonably available, sufficient to show how UP developed the mileage-based fuel surcharge mechanism that has been applied to Dairyland.

Request for Production No. 9

Produce all documents supporting the statement by UP in the Petition of Union Pacific Railroad Company for a Declaratory Order, STB Finance Docket No. 35021 (filed Apr. 26, 2007) at 5 (“UP Declaratory Order Petition”), that the UP fuel surcharge program implemented in response to the Board’s Ex Parte No. 661 decision is “designed to produce the same level of fuel cost recovery on average as UP’s prior, rate-based programs.”

UP Response:

UP objects to this request on the grounds that it is overbroad and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. UP further objects to this request on the ground that it seeks information that would require UP to disclose proprietary internal costing information.

Subject to and without waiving its objections, UP will produce documents, to the extent reasonably available, sufficient to show how UP developed the mileage-based fuel surcharge mechanism that has been applied to Dairyland.

Request for Production No. 10

Produce all documents containing studies, and/or other analyses related to UP’s assertions in UP’s Declaratory Order Petition at 15, that “[s]ome customers may pay more than the actual incremental cost of fuel we use to handle their particular shipments.”

UP Response:

UP objects to this request on the ground that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving its objections, UP will produce documents, to the extent reasonably available, sufficient to show how UP developed the mileage-based fuel surcharge mechanism that has been applied to Dairyland.

Request for Production No. 11

Produce documents, in a computer-readable format to the extent available, which provide the following information for each Dairyland train movement for each year or partial year from January 1, 2006 to the present: (a) each crew district through which Dairyland trains pass identified by "from" and "to" stations; (b) the route miles in each such crew district; (c) the route(s) used; (d) the loaded train miles over the route(s); (e) the empty train miles over the route(s); (f) the number of diesel units per train by the unit measure of rail line (e.g. crew district or line segment) for the loaded route(s); (g) the number of diesel units per train by the unit measure of rail line for the empty route(s); (h) the number of cars per train by the unit measure of rail line for the loaded route(s); (i) the number of cars per train by the unit measure of rail line for the empty route(s); (j) the trailing weight of each train (cars and contents) by the unit measure of rail line for the empty route(s); (k) the average net load (tons per car) of each car; and (l) the tare weight of each car.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. UP further objects to this request on the ground that development of the data needed to respond to the request would require a special study.

Request for Production No. 12

Produce all documents which contain actual cycle time data for the Dairyland trains for each year or partial year January 1, 2006 to the present. Data is requested that shows the components of such cycle time in total and in its component pieces, including, but not limited to, transit, loading, staging and unloading times. If such documents do not exist, please provide such documents that do exist, in hard copy and computer-readable format to the extent available, including all necessary documentation, from which the cycle times for the Dairyland trains for each year or partial year January 1, 2006 to the present can be derived.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Request for Production No. 13

Produce documents, in a computer-readable format to the extent available, which provide the following information for each locomotive used by UP in Dairyland service from January 1, 2006 to present: (a) locomotive initial number; (b) model of type (e.g. SD70-MAC); (c) horsepower; (d) capacity of its fuel tanks (gallons); (e) weight; and (f) the diesel unit-miles traveled each year or partial year from 2006 to the present.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. UP further objects to this request on the ground that development of the data needed to respond to this request would require a special study.

Request for Production No. 14

Produce documents sufficient to show the following: (a) the location(s) where the locomotives handling the Dairyland trains are fueled; (b) the actual amount of fuel consumed by the locomotives used by UP in Dairyland service, either by individual locomotive, or collectively, for the most recent 12 months or calendar year; (c) the total number of diesel unit miles generated by the locomotives for which fuel consumption data was provided in response to (b) above during the same time period used in response to (b) above; (d) the method by which UP accounts for or records fuel usage for the locomotives used for the Dairyland trains; and (e) computer-readable versions (both compiled and non-compiled), including supporting databases and necessary documentation, of any and all computer programs in UP's possession used to measure or estimate the fuel usage of locomotives moving Dairyland trains.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the

discovery of admissible evidence. UP further objects to this request on the ground that development of the data needed to respond to this request would require a special study.

Request for Production No. 15

Identify all locations in the States of Wyoming, Nebraska, Kansas, Missouri and Illinois where UP has performed fueling of locomotives used in Dairyland service from January 1, 2006 to present and produce documents sufficient to show the following information with respect to locomotive fueling at each such location: (a) the source of the fuel, including the name and location of the vendor(s) who provide the fuel to UP and the refinery(ies) or other location from which the fuel is obtained; and (b) the method and cost of transporting and dispensing the fuel from the refinery(ies) or other locations from which the fuel is obtained to the location where the fueling of locomotives is performed (this request includes but is not limited to the database maintained in the ordinary course of business by UP).

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. UP further objects to this request on the ground that development of the data needed to respond to this request would require a special study.

Request for Production No. 16

Produce copies of all contracts/agreements between UP and third parties in effect on and after January 1, 2006 to present related to the performance of locomotive fueling functions on Dairyland trains.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. UP further objects to this request on the ground that development of the data needed to respond to this request would require a special study.

Request for Production No. 17

Produce all studies, analyses, or other documents (including summaries and supporting data), prepared on and after January 1, 2000, in a computer-readable format to the

extent available, pertaining to the amount of fuel consumed by locomotives used on Dairyland trains or any other unit coal trains moving over all or a portion of the Dairyland route(s).

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. UP further objects to this request to the extent it seeks the production of evidence submitted under a protective order in other proceedings.

Request for Production No. 18

To the extent not already produced in response to Dairyland's prior Requests, produce all documents that summarize and quantify the fuel portion of variable costs of providing service to Dairyland under Item 6630-E of UP Circular 111.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. UP further objects to this request on the ground that it seeks information that would require UP to disclose proprietary internal costing information.

Request for Production No. 19

To the extent not otherwise produced in response to Dairyland's First Requests produce all cost of service analyses used or considered by UP in setting the rates identified in all iterations of Item 6630 in UP Circular 111.

UP Response:

UP objects to this request on the grounds that it is overbroad and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. UP further objects to this request on the ground that it seeks information that would require UP to disclose proprietary internal costing information and on the ground that the term "cost of service analyses" is vague.

Request for Production No. 20

For each cost of service analyses UP used or considered in setting the rates identified in all iterations of Item 6630 in UP Circular 111, produce documents showing the fuel costs included in the cost of service and the factors used to calculate the fuel cost component of the cost of service (*i.e.*, service units, unit costs, base period, current period and fuel indexes used from base to current period).

UP Response:

UP objects to this request on the grounds that it is vague, is unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. UP further objects to this request on the ground that it seeks information that would require UP to disclose proprietary internal costing information.

Request for Production No. 21

For each of the cost factors shown in the documents produced in response to Request for Production No. 20, produce the data relied upon by UP in developing the factors.

UP Response:

UP objects to this request on the grounds that it is vague, is unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. UP further objects to this request on the ground that it seeks information that would require UP to disclose proprietary internal costing information.

Request for Production No. 22

To the extent not otherwise produced in response to Dairyland's First Requests, produce all analyses used or considered by UP in evaluating the profitability of the rates set forth in all iterations of Item 6630 in UP Circular 111.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the

discovery of admissible evidence. UP further objects to this request on the ground that it seeks information that would require UP to disclose proprietary internal costing information.

Request for Production No. 23

For each profitability analysis UP used or considered in evaluating the profitability of the rates set forth in all iterations of Item 6630 in UP Circular 111, produce documents showing the fuel costs included in the cost of service analysis used to evaluate the profitability of the rates and the factors used to calculate the fuel cost component of the cost of service (*i.e.*, service units, unit costs, base period, current period and fuel indexes used from base to current period).

UP Response:

UP objects to this request on the grounds that it is vague, is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. UP further objects to this request on the ground that it seeks information that would require UP to disclose proprietary internal costing information.

Request for Production No. 24

For each of the cost factors shown in the documents produced in response to Request for Production No. 23, produce the data relied upon by UP in developing the component cost factors.

UP Response:

UP objects to this request on the grounds that it is vague, is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. UP further objects to this request on the ground that it seeks information that would require UP to disclose proprietary internal costing information.

Respectfully submitted,



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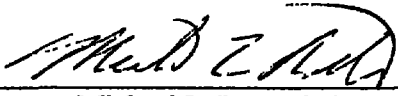
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Attorneys for Union Pacific Railroad Company

August 19, 2008

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that on this 19th day of August, 2008, I caused a copy of Union Pacific's Objections and Responses to Dairyland's First and Second Sets of Discovery Requests to be served electronically and by first class mail, postage prepaid, on counsel for Dairyland Power Cooperative.



Michael L. Rosenthal

ATTACHMENT 4

DAIRYLAND POWER COOPERATIVE,	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. 42105
	)	
UNION PACIFIC RAILROAD COMPANY,	)	
	)	
Defendant.	)	
	)	

Union Pacific Railroad Company (“UP”) hereby responds to the Third Set of Requests for Production of Documents served by Dairyland Power Cooperative (“Dairyland”), as follows:

UP hereby incorporates by reference the General Responses and General Objections contained in Union Pacific's Objections and Responses to Dairyland's First and Second Sets of Discovery Requests, served on August 19, 2008.

Produce all workpapers supporting the analyses described by UP in its Motion to Dismiss (filed Apr. 26, 2007) at 5 where UP stated that it “developed the surcharge levels for various ranges of fuel prices by calculating the number of cents per mile per car such that, if UP could charge every one of its PRB coal customers that amount for each of their shipments, UP would recover the incremental fuel costs associated with all of its PRB coal traffic.”

UP Response:

Subject to and without waiving its objections, UP will produce the requested workpapers, to the extent reasonably available.

Request for Production No. 26

Produce all analysis underlying UP's development of its redesigned fuel surcharge implemented on March 21, 2007 applicable to the transportation of non-Circular 111 coal (See "www.uprr.com/customers/updates/2007/0321.shtml"), including, but not limited to, analyses related to: (a) the development of a revised strike price; (b) the relationship between the change with HDF price per gallon and the fuel surcharge per car-mile; (c) the application of the revised procedures to PRB coal traffic; (d) UP's decision to choose \$2.30 per gallon as the redesigned base price; (e) any alternative base prices per gallon evaluated; and (f) the correlation of the \$2.30 per gallon base price to UP's actual cost per gallon.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. UP further objects to this request on the ground that it seeks information that would require UP to disclose proprietary internal costing information.

Subject to and without waiving its objections, UP will produce documents, to the extent reasonably available, sufficient to show how UP developed the redesigned fuel surcharge implemented on March 21, 2007.

Request for Production No. 27

To the extent not otherwise produced in response to Dairyland's First or Second Requests, produce the original version of UP Circular 111 as implemented, including all exhibits, items, and attachments thereto, and each amended or revised version of UP Circular 111 implemented by UP since UP Circular 111 was originally implemented, including all exhibits, items, and attachments thereto.

UP Response:

UP objects to this request on the grounds that it is overbroad and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving its objections, UP will produce the requested information.

Respectfully submitted,



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Attorneys for Union Pacific Railroad Company

September 4, 2008

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that on this 4th day of September, 2008, I caused a copy of Union Pacific's Objections and Responses to Dairyland's Third Set of Requests for Production of Documents to be served electronically and by first class mail, postage prepaid, on counsel for Dairyland Power Cooperative.

A handwritten signature in black ink, appearing to read "Michael L. Rosenthal", is written over a horizontal line.

Michael L. Rosenthal