

**EXPEDITED CONSIDERATION REQUESTED**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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

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**MOTION TO COMPEL DISCOVERY**

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Dated: August 29, 2008

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### ATTACHMENTS

Attachment 1 (Dairyland's initial set of discovery requests. dated Apr. 3, 2008)

Attachment 2 (Dairyland's August 5, 2008 letter)

Attachment 3 (Dairyland's second set of discovery requests. dated Aug. 5, 2008)

Attachment 4 (UP's responses to Dairyland's discovery requests, dated Aug. 19, 2008)

### CERTIFICATE OF SERVICE

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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

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**MOTION TO COMPEL DISCOVERY**

Pursuant to 49 C.F.R. §1114.31. Complainant Dairyland Power Cooperative (“Dairyland”) files this Motion to Compel Discovery. Dairyland asks the Board to direct Defendant Union Pacific Railroad Company (“UP”) to promptly produce withheld documents and to respond to unanswered interrogatories. In support of this motion, Dairyland states as follows:

**BACKGROUND**

Dairyland’s Complaint, filed on March 5, 2008, asks the Board to find that UP is engaged in an unreasonable practice by collecting rail fuel surcharges on the issue traffic that substantially exceed the incremental fuel cost increases UP has actually incurred in handling this traffic. Both this Board, and Members of Congress, have roundly condemned such practices since they mislead the public and turn what is labeled a cost recovery mechanism into something else – a profit center.<sup>1</sup> As Senators have

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<sup>1</sup> See Rail Fuel Surcharges, STB Ex Parte No. 661 (STB served Mar. 14, 2006) at 2 (“Rail Fuel Surcharges I”); id. (STB served Aug. 3, 2006) at 3-5 (“Rail Fuel Surcharges II”); id. (STB served Jan. 26, 2007) (“Rail Fuel Surcharges III”) at 6-10 (collectively, “Rail Fuel Surcharges”); Hearing on Economics, Service, and Capacity in the Freight

admonished:

[I]f I find any evidence that the railroads are using fuel surcharges as a way to make a little extra money, there's going to be a real problem and I've made that clear privately and I'm making it clear publicly now because that just cannot be what happens . . . . We've got enough of a problem in this country now with ridiculous fuel costs and charges. And we can't have people . . . taking advantage of the opportunity to make even more money under difficult circumstances.<sup>2</sup>

UP's responsive strategy in this case is clear – UP wants to prevent the Board from investigating Dairyland's Complaint. UP initially sought to block the Board's inquiry into Dairyland's Complaint by filing a motion to dismiss the Complaint. The Board denied UP's motion in its Decision served on July 29, 2008 ("July Decision"). In its July Decision, the Board also provided some "clarifications" concerning the type of proof that Dairyland would have to present in order to prevail on its Complaint: lifted the stay it had placed on discovery; entered a protective order; and issued a procedural schedule.

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Railroad Industry Before the S. Subcomm. on Surface Transportation and Merchant Marine Infrastructure, Safety, and Security of the Comm. on Commerce, Science & Transportation, 109<sup>th</sup> Cong. (June 21, 2006) (opening statement of Subcommittee Chairman Trent Lott expressing concerns about possible railroad profiteering on fuel surcharges) ("Senate Freight Railroad Hearing"); Hearing on the Surface Transportation Board and Regulation Related to Railroads Before the S. Subcomm. on Surface Transportation and Merchant Marine Infrastructure, Safety, and Security of the Comm. on Commerce, Science and Transportation, 110<sup>th</sup> Cong. webcast excerpt (1:43.24) (Oct. 23, 2007) (statement of Senator Rockefeller expressing similar concerns).

<sup>2</sup> Senate Freight Railroad Hearing (opening statement of Subcommittee Chairman Trent Lott).

As called for under the procedural schedule, Dairyland restarted discovery on August 5, 2008. On that date, Dairyland requested that UP respond to the initial discovery requests that Dairyland had served in this proceeding on April 3, 2008. A copy of the requests is appended in Attachment 1.<sup>3</sup> These requests consisted of four interrogatories and eighteen document production requests (“RFPs”). Dairyland offered to withdraw six of these RFPs if UP agreed not to use the requested information in this proceeding. Aug. 5, 2008 letter at 1. Dairyland also served its second set of discovery requests, which consisted of six additional RFPs. A copy of these requests is appended in Attachment 3.<sup>4</sup>

UP tendered its initial responses to Dairyland’s discovery requests on August 19, 2008. A copy of UP’s responses is appended in Attachment 4 (“Response”). Therein, UP objects to all of Dairyland’s discovery requests and refuses to provide the information Dairyland has requested. Id. Having lost its motion to dismiss, UP now seeks to block the Board from investigating Dairyland’s Complaint by refusing to engage in discovery. UP’s tactics of obstruction leave Dairyland no choice but to file this motion to compel.<sup>5</sup>

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<sup>3</sup> A copy of Dairyland’s August 5, 2008 letter is appended in Attachment 2.

<sup>4</sup> Dairyland also tendered three additional document production requests to UP on August 21, 2008. UP has not yet responded to these requests.

<sup>5</sup> Counsel for Dairyland have contacted counsel for UP in order to see if any of the discovery issues may be resolved by the parties; however, given UP counsel’s steadfast position that none of Dairyland’s discovery requests are relevant, matters have quickly reached an impasse and therefore must be resolved by the Board.

Dairyland is not a large utility but a small, non-profit cooperative. It presented its Complaint to the Board after the Board's Chairman represented to Congress that the Board would carefully consider individual complaints challenging unlawful rail surcharge practices.<sup>6</sup> Dairyland has filed such a complaint and UP's tactics are slowing down the process and driving up Dairyland's litigation costs. These tactics are clearly intentional on UP's part. Dairyland looks to the Board for prompt assistance in the form of an order directing UP to provide Dairyland's requested discovery in a timely manner.

### **ARGUMENT**

The Board's July Decision states that Dairyland may obtain discovery in accordance with the Board's discovery rules and the Board's "clarif[ying]" instructions. Id. at 6. The Board's discovery rules accord Dairyland the right to "obtain discovery . . . regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding." 49 C.F.R. §1114.21(a)(1). The Board's discovery rules, which follow standards established in the Federal Rules of Civil Procedure,<sup>7</sup> accord complainants "broad" discovery rights.<sup>8</sup>

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<sup>6</sup> See, e.g., Hearing on Rail Competition and Service Before the House Committee on Transportation and Infrastructure, H.R. Rep. No. 110-70, at 23 (2007) (testimony of Chairman Nottingham) ("[t]he Board will aggressively use the authority granted to us by statute to stop unreasonable [fuel surcharge] practices, thereby protecting shippers and advancing the public interest" and "[w]e will remain vigilant on this issue and will expeditiously review any formal complaints related to fuel surcharges").

<sup>7</sup> See, e.g., Simplified Standards for Rail Rate Cases, STB Ex Parte No. 646 (Sub-No. 1) (STB served Sept. 5, 2007) at 68-69 ("[o]ur discovery rules . . . follow generally those in the Federal Rules of Civil Procedure").

<sup>8</sup> Id. at 69. See, also, Ocean Logistics Mgmt., Inc. v. NPR, Inc., and Holt Cargo Sys., STB Docket No. WCC-102 (STB served Jan. 14, 2000) at 2 ("discovery . . . is very

In applying these broad standards, the Board considers information to be “relevant” if “the information might be able to affect the outcome of a proceeding.” Canadian Pac. Ry. Co. – Control – Dakota, Minn. & E. R.R. Corp., STB Finance Docket No. 35081 (STB Decision No. 8 served Mar. 27, 2008) at 1 (“Canadian Pacific”). The Board also permits discovery of inadmissible information “if it appears reasonably calculated to lead to the discovery of admissible evidence.” Id. (citing 49 C.F.R. § 1114.21(a)(2)). “[B]oilerplate, generalized responses are not sufficient to satisfy a party’s discovery obligations.” Trailer Bridge, Inc. v. Sea Star Lines, I.L.C., STB Docket No. WCC-104 (STB served Oct. 27, 2000) at 8. Finally, the Board’s discovery rules permit the Board to deny discovery of information “if it would be unduly burdensome in relation to the likely value of the information sought.” Canadian Pacific at 1.

The Board’s clarifying instructions in its July Decision address the evidence that Dairyland needs to submit to prove it is entitled to relief. Specifically, the Board clarified in its decision that Dairyland must show that the fuel surcharges UP is collecting on the issue traffic “exceeded [UP’s] incremental fuel costs incurred in handling [the] traffic.” Id. at 5. However, the Board ruled that such a showing “will not *by itself* demonstrate an unreasonable practice.” Id. at 6. The Board found that to prevail on its unreasonable practice claim, Dairyland will also have to show the overcharges resulted

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broad” and parties are “expect[ed] to comply with discovery in a prompt and forthright manner”); General Exemption Authority – Misc. Agricultural Commodities – Petition of G. & T. Terminal Packaging Co., Inc., ICC Ex Parte No. 346 (Sub-No. 14A) (ICC decided June 6, 1989) 1989 WL 238737 at \*3 (ICC grants motion to compel and rejects defendant railroad’s attempts to substantially restrict its discovery responses because such restrictions “could compromise petitioners’ opportunity to develop [their] evidence”).

from flaws in UP's "general formula used to calculate fuel surcharges" or because UP was engaged in other impermissible activities, for example, double-recovering the same incremental fuel cost increases. Id.

As demonstrated below, each discovery request subject to this motion is permitted under the Board's discovery rules and the clarifying instructions set forth in the July Decision.

I.

**WITHHELD DOCUMENT PRODUCTION**

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

The above-cited document production requests ask UP to produce existing studies UP has prepared concerning the costs, including specifically the fuel costs, included in the base rates applicable to the issue traffic. Specifically, RFP No. 3 asks UP to produce cost and contribution analyses UP has prepared for the issue traffic movements; RFP No. 6 asks UP to produce analyses of fuel costs, and analyses of incremental fuel costs. UP has prepared on the issue traffic movements: RFP No. 18 asks UP to produce documents that summarize or quantify the fuel portion of variable costs for the issue traffic movements; RFP No. 19 asks UP to produce documents reflecting cost of service analyses used or considered by UP in setting the issue traffic rates; RFP Nos. 20 and 21 ask for specified documents that UP used in making its issue traffic cost of service analyses; RFP No. 22 asks UP to produce documents reflecting analyses UP used or considered in evaluating the profitability of the issue traffic rates; and RFP Nos. 23 and

24 ask for specified documents reflecting data used or relied upon by UP in making its issue traffic profitability analyses.<sup>9</sup>

In its Response, UP submits the same boilerplate objections to each request. UP claims that the information sought is “not relevant,” that responding to the request “would require UP to disclose proprietary internal costing information,” and that the request is “overbroad” and providing responses would be “unduly burdensome.” Dairyland addresses each objection in turn.

**1. The Requested Information Is Relevant**

The cited requests are relevant as they seek UP’s calculations of the fuel costs included in the issue traffic base rates. The Board held in Rail Fuel Surcharges,<sup>10</sup> and reaffirmed in its July Decision, that to prevail in a fuel surcharge unreasonable practice case, a shipper must show as part of its proof that the carrier is collecting fuel surcharges that exceed the incremental fuel cost increases “that are not reflected in the

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<sup>9</sup> Some of the above-referenced requests overlap, but that was intentional on Dairyland’s part. UP frequently has told opposing parties in pending cases that UP failed to produce certain information because the party did not frame its questions properly. To counter such tactics, Dairyland attempted to cover all potential linguistic bases.

<sup>10</sup> See Rail Fuel Surcharges I at 2.

base rate.”<sup>11</sup> To make this showing, the fuel costs included in the base rates must be identified.

The cited requests are also relevant to the issue of double recovery of fuel costs. The Board held in Rail Fuel Surcharges, and reaffirmed in its July Decision, that a carrier should not be allowed to double-dip, i.e. “charging twice for the same fuel cost increases.”<sup>12</sup> In Rail Fuel Surcharges, the Board expressly rejected as an unreasonable practice one form of double-dipping – adjusting rates with “both an index that includes a fuel component and a fuel surcharge for the same movement to cover the same time period.” Rail Fuel Surcharges III at 11.

As shippers pointed out in Rail Fuel Surcharges, there were other forms of double-dipping, e.g., 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. See, e.g., Rail Fuel Surcharges, STB Ex Parte No. 661. Comments of the Western Coal Traffic League, dated Oct. 2, 2006, at 13-15; Id., Comments of the Western Coal Traffic League, dated Apr. 2, 2007, at 6-8.

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<sup>11</sup> See, e.g., Rail Fuel Surcharges II at 4 (“we believe [it] is an unreasonable practice [to] apply [what the railroads label a fuel surcharge in a manner that is not limited to recouping increased fuel costs that are not reflected in the base rate]”); Rail Fuel Surcharges III) at 7 (“when there is no real correlation between the rate increase and the increase in fuel costs for that particular movement to which the surcharge is applied, [the increase] is a misleading and ultimately [an] unreasonable practice”); July Decision at 2 (“if there is no ‘real correlation’ between the surcharge and the increase in fuel costs for the particular movement to which the surcharge is applied, then it is a misleading and ultimately unreasonable practice”).

<sup>12</sup> See Rail Fuel Surcharges III at 10-11; July Decision at 6.

By way of illustration, if a carrier set a rate to recover its 2006 fuel prices which were \$2.05 per gallon, but then applied a fuel surcharge procedure which called for the application of fuel surcharges to recover increases in fuel prices over a 2002 base of \$0.75 per gallon, the carrier would be double recovering the same fuel cost increases. Id. The Board held in Rail Fuel Surcharges that shippers could present any such claims for the Board's consideration in individual complaint cases. See Rail Fuel Surcharges III at 10.

Based upon information and belief, the fuel surcharges UP has imposed on the Dairyland traffic are triggered at the fuel costs UP incurred in the third quarter of 2002 (which approximated \$0.75 per gallon). UP set the issue traffic tariff base rates much later, and these base rates are substantially higher than the contract base rates Dairyland had been paying for the issue traffic service. It appears that UP has prepared costs studies identifying the fuel costs included in the base tariff rates, and discovery will permit Dairyland to determine whether UP's analyses show that UP was double-dipping Dairyland.

**2. UP's Management Cost Objection is Unavailing Here**

UP objects to providing the requested information on grounds that it would require UP to "disclose proprietary internal costing information." Governing Board precedent holds that a carrier will be required to disclose internal costing information where it is relevant to the issues presented and a protective order is in place to maintain

the confidentiality of the information produced.<sup>13</sup> Courts have applied similar standards in ordering rail carriers to turn over management cost data.<sup>14</sup>

Here, the information requested is clearly relevant because it appears UP is using its internal management costing system to calculate pertinent fuel costs and there is a protective order in place to protect the confidentiality of the materials produced. Dairyland notes that the Board's decisions holding that management costs need not be produced in rate cases litigated under the Board's stand-alone cost ("SAC") constraint are inapposite here. This case is a reasonable practice case, not a SAC case. In addition, the Board has ruled that management costs are not discoverable in a SAC case because the Board relies exclusively on its Uniform Rail Costing System ("URCS") to make

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<sup>13</sup> See Increased Rates on Coal, L&N R.R. v. Louisville and Nashville R.R. Co., Docket No. 37063 (ICC served Aug. 22, 1990) 1990 WL 287825 at \*1; Western Fuels Ass'n, Inc. v. Ill. Cent. Gulf R.R. Co., ICC Docket No. 40127 (ICC decided May 7, 1987) 1987 WL 98430 at \*3; San Antonio, Tex., Acting By and Through Its City Pub. Serv. Bd. v. Burlington N. R.R. Co., Docket No. 36180 (ICC served Dec. 5, 1986) at 7; Ariz. Elec. Power Coop., Inc. v. Atchison, Topeka and Santa Fe Ry. Co., ICC Docket No. 37437 (ICC served Oct. 23, 1986) at 5.

<sup>14</sup> See Sw. Elec. Power Co. v. Burlington N. R.R. Co., No. D-0102-CV-910720 (Dist. Ct. for the 102nd Jud. Dist. of Tex.), entered Oct. 6, 1993, at 2-4 (unpublished Order Granting Plaintiff's Motion to Compel) ("[d]efendants Burlington Northern Railroad Company, Kansas City Southern Railway Company, and Louisiana & Arkansas Railway Company shall produce the internal management costing systems' information, data, and computer programs as requested by Plaintiff in its Motions to Compel, together with such documentation that is in Defendants' possession, custody, or control to translate such material into reasonably usable form").

jurisdictional threshold and SAC computations, and, as a result, management costs are not relevant.<sup>15</sup> Here, of course, the management costs are relevant.

### **3. UP's Burden Objections Must Be Rejected**

UP claims that the requests are "overbroad," and responding to the cited requests would be "burdensome," but it offers no explanation why this is the case.<sup>16</sup> The information requested is limited to the issue traffic and is limited to production of existing analyses and data. The Board also should not permit UP to sandbag by offering no support for its burden objections until after Dairyland has filed its motion to compel. Dairyland also represents to the Board that if UP has any legitimate, specifically explained burden concerns, Dairyland will work with UP to address those concerns in a reasonable fashion.<sup>17</sup>

#### **B. Other Issue Traffic Documents (RFP Nos. 1 and 2)**

Dairyland's RFP No. 1 asks for UP to produce "all documents related to UP's development of the terms set forth in Item 6630-E of UP Circular 111" [the item

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<sup>15</sup> See, e.g., N. States Power Co. Minn. v. Union Pac. R.R. Co., STB Docket No. 42059 (STB served May 24, 2002) at 8-9; Tex. Mun. Power Agency v. Burlington N. and Santa Fe Ry. Co., STB Docket No. 42056 (STB served Feb. 9, 2001) at 4 n.9.

<sup>16</sup> See, e.g., Minn. Power, Inc. v. Duluth, Missabe and Iron Range Ry. Co., 4 S.T.B. 64, 74 (1999) ("boilerplate objections of vagueness, relevance, or burden" are "overruled" by Board); Trailer Bridge, Inc. v. Sea Star Lines, LLC, STB Docket No. WCC-104 (STB served Oct. 27, 2000) at 8 ("boilerplate, generalized responses are not sufficient to satisfy a party's discovery obligations").

<sup>17</sup> UP also objects to producing studies on response to RFP No. 17 on grounds that the studies were "submitted under a protective order in other proceedings." Response at 13. This objection is baseless. The protective order in this proceeding will continue to maintain the confidentiality of the requested studies.

setting forth the rates on the issue traffic]. Dairyland's RFP No. 2 asks UP to 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 objects to these requests on the grounds that they seek irrelevant information and are overbroad/burdensome.

These requests are clearly relevant to the issues raised in Dairyland's Complaint. In its Complaint, Dairyland explained the factual circumstances giving rise to its Complaint. See, e.g., Complaint ¶¶ 1-5, 6. In its Answer, UP disputes some of these contentions and refers to discussions between the parties concerning proposals UP avers "would allow UP to recover its rising fuel costs." UP Answer at ¶4. To address UP's scope concerns, Dairyland requests that the Board order UP to provide documents responsive to Dairyland RFP Nos. 1 and 2 that address UP's recovery of its fuel costs.

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

In paragraph 9 of its Answer, UP claimed that its collection of mileage-based fuel surcharges on the Dairyland traffic did not constitute an unreasonable practice because UP's collection of mileage-based fuel surcharge revenues from its Powder River Basin ("PRB") coal customers would "recover the incremental fuel costs associated with all of its PRB coal traffic." Id. In response to this assertion, and to obtain information pertinent to its claim, Dairyland presented UP with seven document production requests concerning UP's collection of fuel surcharge revenues from its PRB coal customers and the incremental fuel cost increases UP has incurred in providing service to these customers.

RFP No. 4 asks UP to produce documents explaining how it developed its percent of price-based fuel surcharge procedures and mileage-based fuel surcharge procedures that it has applied to its PRB coal customers (including Dairyland). RFP No. 5 asks UP to produce all cost and contribution analyses UP has performed concerning its collection of fuel surcharges using the procedures UP has applied to its PRB coal customers; RFP No. 8 asks UP to produce all documents supporting the allegations set forth in paragraph 9 of its Answer; RFP No. 9 asks UP to produce all documents supporting UP's representation to the Board that its mileage-based fuel surcharge programs are "designed to produce the same level of fuel cost recovery on average as UP's prior, rate-based programs;" RFP No. 10 asks UP to provide documents supporting its representation to the Board that "[s]ome customers may pay more than the actual incremental cost of fuel we use to handle their particular shipments;" RFP No. 17 asks UP to produce studies UP has prepared concerning fuel consumption on PRB unit coal train movements; and RFP No. 7 asks UP to produce any documents it provided in response to a grand jury subpoena UP stated "pertain[ed] to our fuel surcharge program."

UP presents the same boilerplate objections to each of these requests, claiming that they do not seek relevant information, would require UP to disclose proprietary internal costing information, and are overbroad/unduly burdensome. Without waiving these objections, UP states in response to four of the above-cited requests, that "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." See UP responses to RFP Nos. 4, 8, 9, and 10.

UP's relevance objection is wrong. UP's principal defense to Dairyland's claim appears to be that in the aggregate, UP is collecting, or plans to collect, fuel surcharges from its PRB customers that equal its incremental fuel cost increases incurred in providing service to these customers. See UP Answer at ¶ 9. UP cannot present this issue to the Board and then deny Dairyland discovery concerning UP's claims.<sup>18</sup> Moreover, apart from UP's defenses, if UP has prepared studies or has other information concerning fuel surcharge revenues collected, and incremental fuel costs incurred, for a class of shippers that includes Dairyland, that information is clearly relevant to the subject matter of Dairyland's Complaint. Similarly, UP's management cost objections must be rejected. As discussed above, the Board permits discovery of management cost data when it is relevant and a protective order is in place. The information is clearly relevant because it appears UP is using its management costing system to calculate pertinent fuel costs, and a protective order is in place.

Finally, the requests are not overbroad or burdensome and the Board should not permit UP to define the scope of discovery by limiting discovery responsive to these requests to a self-selected set of documents culled by UP that explain how UP developed its mileage-based fuel surcharge program. The Board should order UP to provide all responsive documents, including requested documents that address both UP's mileage-

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<sup>18</sup> See, e.g., Amstar Corp. v. Ala. Great S. R.R., ICC Docket No. 38239S (ICC served July 21, 1989) at 2-3 (defendant railroad may not "open the door by introducing" an argument or evidence and then "close that door by arguing that [complainant] does not need [discovery] information" relating to that argument or evidence).

based and percentage-based fuel surcharge programs.<sup>19</sup> Dairyland emphasizes here that the Board specifically held in its July Decision that UP's percentage-based "fuel surcharge program could be challenged as an unreasonable practice." Id. at 6. Dairyland intends on presenting such a challenge and seeks documents in support of this challenge.

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

Dairyland's RFP Nos. 11 through 16 seek movement-specific data relating to UP's transportation of the issue traffic. Dairyland offered to withdraw these requests if UP stipulated it would not use the requested information in this case. See Attachment 2 at 1. In its Response, UP ignored Dairyland's requested stipulation and objected to producing any responsive documents. Dairyland does not ask the Board to take any action in connection with these other requests because, under governing Board discovery precedents, a party cannot introduce as evidence material it refused to produce in discovery.<sup>20</sup>

**II.**

**DELAYED AND WITHHELD INTERROGATORY RESPONSES**

Dairyland tendered four interrogatories to UP. Interrogatory No. 1 asks UP to identify the persons who participated in the development of the Circular 111 terms

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<sup>19</sup> Again, if UP has any legitimate, specifically explained burden concerns, Dairyland will work with UP to address those concerns in a reasonable fashion.

<sup>20</sup> See, e.g., Potomac Elec. Power Co. v. CSX Transp., Inc., STB Docket No. 41989 (STB served Nov. 12, 1997) at 7-8 ("[i]t is unfair gamesmanship and an abuse of the administrative process for a party to withhold information during discovery and then introduce that information"); FMC Wyo. Corp. v. Union Pac. R.R., 4 S.T.B. 699, 729-30 n.70 (2000) (same).

specifically applicable to the Dairyland traffic. Interrogatory No. 2 asks UP to identify the persons who prepared, inter alia, cost and contribution analyses relating to the Circular 111 rates on the Dairyland traffic. Interrogatory No. 3 asks UP to identify the persons who participated in the development of (a) the percent of price-based fuel surcharge procedures UP applied on the issue traffic and (b) the mileage-based fuel surcharge procedures UP is now applying on the issue traffic. Interrogatory No. 4 asks UP to identify the persons who prepared cost and contribution analyses concerning (a) UP's percent of price-based fuel surcharges and (b) UP's mileage-based fuel surcharges.

In its Response, UP states that it "will identify" the persons "principally involved" with the topics addressed in Interrogatory Nos. 1, 2, 3(b) and 4(b). However, UP objects to identifying the persons who participated in the development of UP's percent of price-based fuel surcharge procedures (Interrogatory No. 3(a)) and the persons responsible for the development of cost or contribution analyses concerning its percent of price-based fuel surcharge program (Interrogatory No. 4(a)).

UP's "will identify" answer is obviously a delaying tactic. It should not take UP very long to identify the involved personnel. Additionally, to date, UP has not provided this information to Dairyland. Moreover, as a practical matter, Dairyland will not be in a position to know whether it wants to depose these individuals until it receives and reviews UP's document production -- production UP is refusing to provide.

Dairyland does not request that the Board take any action at this time concerning UP's "will identify" responses. Dairyland simply notes the dilatory nature of UP's actions for the record.

Dairyland does request that the Board overrule UP's objection to identifying the persons who participated in the development of UP's percent of price-based fuel surcharge procedures that UP applied on the issue traffic (Interrogatory No. 3(a)) and the persons who prepared cost and contribution analyses of these procedures (Interrogatory No. 4(a)). As explained above, the Board clearly ruled in its July Decision that UP's "rate-based fuel surcharges . . . . could be challenged as an unreasonable practice" and Dairyland is clearly entitled to discovery in support of such challenges.

### III.

#### GENERAL OBJECTIONS

UP has interposed a number of general objections and responses. Dairyland asks the Board to overrule three of these objections.

First, UP objects to producing documents or information prepared "prior to January 2005." General Objection ¶5. This start date is arbitrary and impermissible in this case. Based upon information and belief, UP first included issue traffic rates in Circular 111 in March of 2004. Also, the percent of price-based fuel surcharge item applicable to the issue traffic (UP Circular 6603, Item 690) attached to Dairyland's Complaint references an "Original Issue Date: 11/04/2004." Additionally, as discussed above, the fuel surcharges UP has imposed on the Dairyland traffic are triggered at the fuel prices UP incurred in 2002. Dairyland requests that the Board overrule UP's arbitrary start date.

Second, UP states that it objects to producing documents beyond those "sufficient to show" an "evidentiary point." General Objection ¶10. This is not the governing standard under the STB's discovery rules and arrogates to UP the authority to

define the “evidentiary point” and then pick and choose whatever documents UP believes is “sufficient to show” that point. The Board’s discovery rules require UP to produce all requested relevant documents unless the burden of producing the documents outweighs the benefits. Canadian Pacific at 1. The Board should overrule UP’s General Objection ¶10 and direct UP to produce responsive documents in accordance with governing STB discovery standards. In this regard, Dairyland has advised UP that it is willing to work with UP “to facilitate the expeditious production of documents with the minimum practical burden.” Attachment 1 at 1.

Third, Dairyland requested that responsive documents be delivered to the offices of its outside counsel. This is standard procedure in STB complaint cases. UP, in a further effort to complicate this case, has stated that documents will be made available at its outside counsel’s office only, and to obtain the documents, Dairyland will be required to pay UP’s “duplicating costs (including, in the case of computer tapes, costs for programming, tapes, and processing time).” General Response ¶1. Obviously, the refusal to serve documents on Dairyland’s outside counsel is another delaying tactic and UP’s demand that Dairyland pay for “duplicating costs” is an impermissible attempt to shift UP’s litigation costs onto Dairyland.<sup>21</sup> Dairyland requests that the Board direct UP to serve copies of responsive documents at the offices of Dairyland’s outside counsel, with “duplicating costs” borne by UP.

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<sup>21</sup> See, e.g., Kan. City S. Ry. Co. – Abandonment Exemption - Line in Warren County, MS, STB Docket No. AB-103 (Sub-No. 21X) (STB served May 20, 2008) (“[t]he Board has consistently rejected requests for [litigation] costs”).

IV.

**REQUESTED RELIEF**

For the reasons set forth above, Dairyland asks the Board for an order directing UP to:

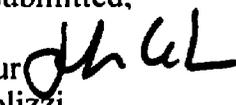
- Produce documents requested in RFP Nos. 3, 6, 18, 19, 20, 21, 22, 23 and 24;
- Produce documents requested in RFP Nos. 1 and 2 that address UP's recovery of its fuel costs on the issue traffic movements;
- Produce documents requested in RFP Nos. 4, 5, 7, 8, 9, 10 and 17;
- Answer Interrogatory Nos. 3(a) and 4(a); and
- Overrule UP's General Response ¶1 and General Objection ¶¶5 and 10 in the manner set forth above.

OF COUNSEL:

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

Dated: August 29, 2008

Respectfully submitted,

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

Attorneys for Dairyland Power  
Cooperative

**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

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

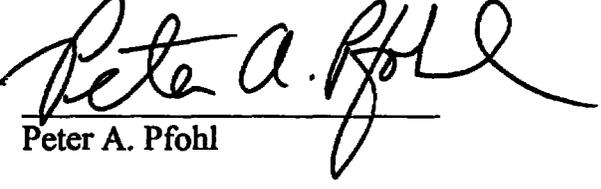
Dated: April 3, 2008

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

**SLOVER & LOFTUS**

ATTORNEYS AT LAW

1224 SEVENTEENTH STREET, N. W.  
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(202) 347-3619

WRITER'S E-MAIL:

August 5, 2008

fjp@sloverandloftus.com

**VIA E-Mail and HAND DELIVERY**

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

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

Dear Mike:

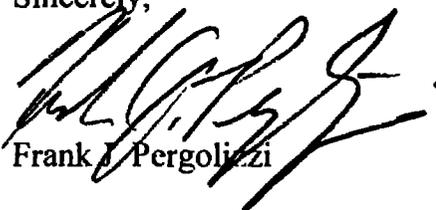
As you know, the Board's July 29, 2008 decision ("Decision") in the above-referenced proceeding directs that discovery begin today. We served Complainant's Interrogatories and Requests for Production of Documents on April 3, 2008. By this letter, Dairyland asks UP to respond to these requests and interrogatories in the manner set forth therein, except that the due date for UP's written objections, and UP's written responses to interrogatories, is changed to August 19, 2008 and the date for UP's rolling production to be completed is changed to September 4, 2008.

Based upon its review of the Decision, Dairyland is prepared to withdraw Document Request Nos. 11 through 16, if UP first enters into an agreement stipulating that that it will not rely upon, or submit to the Board, any of the data or information that is responsive to these requests.

Michael L. Rosenthal, Esq.  
August 5, 2008  
Page 2

Also, enclosed please find Complainant's Second Set of Requests for Production of Documents. Please feel free to contact us should you wish to discuss Dairyland's discovery requests.

Sincerely,



Frank J. Pergolizzi

Enclosure

**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

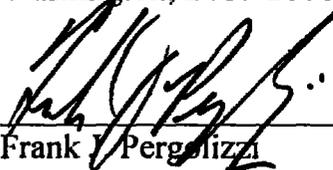
A handwritten signature in black ink, appearing to read "P. A. Pfohl", is written over the printed name of Peter A. Pfohl.

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

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

---

DAIRYLAND POWER COOPERATIVE, )  
 )  
 Complainant, )  
 )  
 v. )  
 )  
 UNION PACIFIC RAILROAD COMPANY, )  
 )  
 Defendant. )

---

Docket No. 42105

**RECEIVED** AUG 21 2008

**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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*Attorneys for Union Pacific Railroad Company*

August 19, 2008

CERTIFICATE OF SERVICE

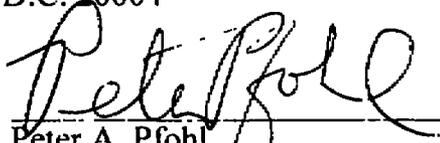
I, Michael L. Rosenthal, certify that on this 19th day of August, 2008, I caused a copy of Union Pacific's Objections and Responses to Dairyland's First and Second Sets of Discovery Requests to be served electronically and by first class mail, postage prepaid, on counsel for Dairyland Power Cooperative.

  
\_\_\_\_\_  
Michael L. Rosenthal

**CERTIFICATE OF SERVICE**

I hereby certify that this 29th day of August, 2008. I served a copy of Dairyland's Motion to Compel Discovery by hand delivery on designated outside counsel for UP, as follows:

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

  
Peter A. Pfohl