

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

240852

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June 2, 2016
Part of
Public Record

**NORTH AMERICA FREIGHT CAR
ASSOCIATION; AMERICAN FUEL &
PETROCHEMICALS MANUFACTURERS;
THE CHLORINE INSTITUTE; THE
FERTILIZER INSTITUTE; AMERICAN
CHEMISTRY COUNCIL; ETHANOL
PRODUCTS, LLC D/B/A POET ETHANOL
PRODUCTS; POET NUTRITION, INC.; and
CARGILL INCORPORATED**

vs.

**UNION PACIFIC RAILROAD
COMPANY**

NOR 42144

MOTION TO COMPEL DISCOVERY

Pursuant to 49 C.F.R. § 1114.31(a), the Association Complainants,¹ Ethanol Products, LLC d/b/a POET Ethanol Products (“POET Ethanol”), POET Nutrition, Inc., (“POET Nutrition”), and Cargill Incorporated (“Cargill”) (collectively “Complainants”) hereby move for an order compelling Defendant Union Pacific Railroad Company (“UP”) to provide a complete response to an Interrogatory and related Document Request posed in Complainants’ Second Discovery Requests to UP, served February 4, 2016.²

¹ The Association Complainants are the North America Freight Car Association (“NAFCA”), the American Fuel & Petrochemicals Manufacturers (“AFPM”), The Chlorine Institute, Inc. (“CI”), The Fertilizer Institute (“TFI”), and the American Chemistry Council (“ACC”).

² On April 30, 2015, Complainants and UP exchanged their respective first sets of discovery requests. Subsequently, counsel for the parties met on several occasions to discuss and

I. BACKGROUND

This is a complaint proceeding seeking declaratory relief and reparations in connection with (1) UP's adoption of Tariff UP 6004, Item 55-C, effective January 1, 2015 (hereinafter, the "Repair Facility Charge"), which imposes charges for the movement of empty tank cars to and from repair facilities upon providers of private tank cars used by UP in revenue service, and (2) UP's failure and refusal to compensate providers of private tank cars used by UP in revenue service through mileage allowances as required by Ex Parte No.328, *Investigation of Tank Car Allowance System*, 3 I.C.C.2d 196 (1986).

The Complaint in this proceeding was filed on March 31, 2015. On April 20, 2015, UP filed its Answer to the Complaint accompanied by a Motion to Dismiss Complaint or to Make Complaint More Definite ("Motion to Dismiss"). Complainants filed a Reply to UP's Motion to Dismiss on June 1, 2015. On June 2, 2015, Complainants filed their first Amended Complaint, withdrawing the Association Complainants' request for reparations on behalf of their members and modifying slightly the allegations of Paragraph 26 of the original Complaint. UP renewed its Motion to Dismiss on June 22, 2015, and Complainants filed a reply to UP's renewed motion dismiss on July 10, 2015. On December 21, 2015, the Board denied UP's Motion to Dismiss.

Count I of the Amended Complaint challenges UP's new tariff which imposes a line-haul charge for the movement of empty tank cars to and from repair facilities. The expense of moving empty tank cars to and from repair facilities for required repairs, maintenance, retrofits

attempt to narrow the discovery issues presented by the initial discovery requests. At that time, the parties mutually agreed to toll any application of 49 CFR §1114.31(a) to the timing of motions to compel pending their efforts to reach agreements on production without the STB's involvement. The parties subsequently served additional requests on each other, and have engaged in additional discussions and also exchanged several letters and email correspondence on discovery issues. Complainants' and UP were able to reach agreement on UP's responses to Complainants first set of discovery requests. This motion follows the final correspondence from on UP's production, dated June 1, 2016.

and inspections is a cost of providing adequate car service that UP is required to bear pursuant to 49 U.S.C. §§11121 and 11122 and would incur directly if UP owned the tank cars it uses to provide rail transportation. However, because UP chooses not to provide tank cars for the transportation of commodities requiring them, virtually all tank car movements handled by UP move in private tank cars. Prior to UP's adoption of its Repair Facility Charge, UP bore the costs of moving empty tank cars to repair facilities in furtherance of its statutory obligation to provide an adequate supply of rail cars. UP's imposition of the Repair Facility Charge shifts these costs onto providers of private tank cars without any concomitant mechanism for car providers to recoup those costs from UP. Moreover, UP's adoption of the Repair Facility Charge is not authorized by any agency precedent, contrary to UP's claim that the Interstate Commerce Commission's "*IHBIP*" decision provides the authority for UP's action.³

Count II of the Amended Complaint challenges UP's failure to meet its statutory obligation to compensate private car owners for its use of private tank cars through the payment of mileage allowances pursuant to Ex Parte 328. UP freely admits that it does not pay mileage allowances to providers of private tank cars for the vast majority of tank car movements on its lines. By not doing so, UP has shirked its statutory obligations under 49 U.S.C. §§11121 and 11122, and improperly shifted the costs of providing adequate tank car service to shippers and other providers of private tank cars.

³ *Indiana Harbor Belt Railroad, Co.*, 3 I.C.C. 2d 599 (1987); *aff'd General American Trans. Corp. v. ICC*, 872 F.2d 1048 (D.C. Cir. 1989). Prior to the imposition of the Repair Facility Charge, UP recovered its tank car supply costs, including empty tank car movements, through its line-haul rates for loaded revenue moves, supplemented by mileage equalization payments in connection with the tank car equalization program administered by RailInc. The implementation of UP's new Repair Facility Charge was not accompanied by reductions to UP's line-haul rates.

In in response to the allegations in Count II, UP has asserted that it has no obligation to compensate rail tank car providers by paying mileage allowances, but instead “may compensate car providers *either* by paying mileage allowances *or* by charging zero-mileage rates that are lower than the transportation rates the railroad would charge if it paid mileage allowances.” Motion to Dismiss at 13 (emphasis added). UP has also argued that its rates for tank car shipments are discounted below what they would be if UP paid mileage allowances. *Id.* Consistent with this statement, UP has further asserted that it meets its statutory obligation to compensate tank car providers because, it alleges, “[i]n today’s commercial environment, Union Pacific has offered lower freight rates rather than mileage allowances to compensate shippers for furnishing cars.” *Id.*

II. **COMPLAINANTS’ DISCOVERY REQUEST TO WHICH UP HAS REFUSED TO RESPOND**

A. Interrogatory No. 16

Complainants’ Second Set of Discovery Requests to UP, served on February 4, 2016 primarily ask UP to provide Complainants with facts, documents and other information supporting various assertions made by UP in its Answer and its Motion to Dismiss. Accordingly, Interrogatory No. 16 asks UP the following:

Identify all facts, documents, and analyses upon which You intend to rely to support Your claim that the Zero-Mileage Rates charged by You for tank car shipments are or were less than the rates You otherwise would have charged.

This question is directed toward obtaining discovery from UP of facts, documents, and analyses⁴ supporting the statement in its Motion to Dismiss that “[i]n today’s commercial

⁴ Complainants Document Request No. 17 asks for “all documents that were referred to or relied upon to provide the answers to Interrogatories 5-19.” UP responded to this request by stating:” Subject to and without waiving its objections, Union Pacific will produce non-privileged, responsive documents.” Accordingly, granting this motion as to Interrogatory No. 16

environment, Union Pacific has offered lower freight rates rather than mileage allowances.” Motion to Dismiss at 13. It also seeks discovery of additional facts related to UP’s repeated, affirmative assertion in its Answer to the Complaint that “all other things being equal, the rates it charges for transportation under zero mileage rates are lower than the rates that it would charge for the same transportation under rates that provided for the payment of mileage allowances.”

Answer at ¶¶ 33-35.

In response, UP refused to provide any of the requested information, stating:

Union Pacific objects to this interrogatory to the extent it purports to characterize claims that have been made or might be made by Union Pacific. Union Pacific further objects to this request as improperly seeking attorney work product and as premature because it requests that Union Pacific formulate its position prior to completing discovery and prior to reviewing the evidentiary submissions of Complainants.

In the correspondence between the parties, UP has refused to provide any information in response to this interrogatory, primarily based on the assertion that Complainants are inappropriately seeking discovery of “the information that Union Pacific intends to rely upon in its reply evidence.” *See* Exhibit A (Letter from Michael Rosenthal to Jeffrey Moreno, dated April 13, 2016, at 2). Specifically, UP contends that, “the evidence it submits regarding any issue potentially in dispute will depend on the evidence that Complainants submit on opening,” *id.*, and so Complainants must wait until UP files its reply evidence to learn of the factual basis for UP’s defense that UP’s “zero-mileage rates” are less than the rates it would charge if UP paid mileage allowances.

should be accompanied by ordering UP to fully respond to Request No. 17 and produce all documents related to its answer to Interrogatory No. 16.

III. UP SHOULD BE COMPELLED TO PROVIDE A COMPLETE ANSWER INTERROGATORY NO. 16

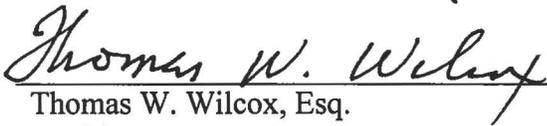
The party seeking discovery may apply for an order to compel an answer when another party fails to answer or gives evasive or incomplete answer to interrogatories. 49 C.F.R. § 1114.31(a). This regulation has also routinely been applied to requests for orders from the Board to a party to produce responsive documents. *See, e.g.,* Docket No. FD-35496, *Denver & Rio Grande Rwy. Historical Found. – Pet'n for Declaratory Order* (S.T.B. served Apr. 30, 2012) at 2. Interrogatory No. 16 is straightforward and seeks relevant information directly related to potential defenses raised by UP in its Answer and Motion to Dismiss – i.e., that it does not have to pay mileage allowances to parties that supply private tank cars for UP's use because UP compensates the providers by charging lower line haul rates. Since UP cannot reasonably question the relevance of the discovery sought, it instead attempts to raise other objections, none of which are valid.

UP's primary objection to Interrogatory No. 16 is that it is premature "because it requests Union Pacific to formulate its position prior to completing discovery and prior to reviewing the evidentiary submissions of Complainants." UP further refuses to respond on the grounds that the request inappropriately asks in discovery for the information UP intends to rely upon in its reply evidence. However, Interrogatory No. 16 merely asks UP to identify the facts, documents, and analyses supporting UP's repeated contention in its Answer that "all other things being equal, the rates it charges for transportation under zero mileage rates are lower than the rates that it would charge for the same transportation under rates that provided for the payment of mileage allowances." By UP's own words, this indicates that UP has information in its possession demonstrating the rates it currently charges "are lower" than an alternative rate the shipper would pay if UP paid the shipper a mileage allowance.

To test this contention at the core of UP's defense, Complainants must be able to assess whether UP's zero-allowance rates are in fact discounted or reduced. Information is discoverable if it is reasonably likely to lead to admissible evidence. See 49 C.F.R. § 1114.21(a)(2) (2015). Complainants are entitled to discovery directed at testing UP's claim that it provides reduced zero-allowance rates for tank car movements in lieu of paying mileage allowances. It would be contrary to the basic discovery rules for Complainants to have to wait for UP to present such facts and documents for the first time in UP's reply evidence. See I.C.C. Docket No. 40810, *Ashley Creek Phosphate Co. v. FS Indus.*, 1992 WL 334176, at *52 (I.C.C. served Nov. 16, 1992) (explaining that discovery must allow a litigant to prepare rebuttal testimony and cross-examination).

WHEREFORE, Complainants request that, for all the reasons set forth above, the Board should grant this motion to compel discovery, and that UP should be ordered to immediately provide a complete and responsive answer and documents in response to Interrogatory No. 16.

Respectfully submitted,



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EXHIBIT A

COVINGTON

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Via Email and First-Class Mail

April 13, 2016

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**Re: STB Docket No. NOR 42144, North America Freight Car
Association, et al. v. Union Pacific Railroad Company**

Dear Jeff:

This responds to your April 6 letter regarding Union Pacific's responses and objections to Complainants' Second Discovery Requests.

Interrogatory Nos. 5 and 7. To the extent prior responses were not clear, Union Pacific clarifies that, to the extent reasonably available, Union Pacific will produce information regarding the name and location of tank car Repair Facilities served by Union Pacific and/or other railroads. Union Pacific objects to undertaking a special study to produce a list of the names and locations of every tank car Repair Facility served by Union Pacific or Class III railroads that interchange with Union Pacific. Union Pacific also objects on the ground that Complainants are equally or better positioned to compile such a list.

Interrogatory No. 9. Union Pacific modifies its objection based on the stated and incorporated evidentiary immunities and agrees to identify the names of the lawyers who gave legal advice regarding the various actions set out in Interrogatory No. 9, to the extent the lawyers were among the employees most involved in those actions through their provision of legal advice. Union Pacific does so on the grounds that such information would otherwise be available ultimately in Union Pacific's privilege log and, as an accommodation to Complainants, Union Pacific agrees to provide that information before its privilege log must be produced. Union Pacific restates, however, its privilege objection on the grounds, and to the extent, that Complainant's Interrogatory No. 9 seeks information protected by the attorney-client privilege and the attorney work-product doctrine. Union Pacific hereby supplements its response to Interrogatory No. 9 by stating in response to subpart (b) that Louise A. Rinn and Danielle E. Bode provided legal advice in the drafting of Tariff 6004, Item 55-C and the most recent update to Tariff 4703, Items 1100 and 1200 as those items relate to empty tank car movements to/from Repair Facilities.

COVINGTON

Jeffrey O. Moreno, Esq.
April 13, 2016
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Interrogatory No. 15. To the extent prior responses were not clear, Union Pacific's clarifies that its response to Document Request Nos. 6 and 7 will include information about empty tank cars that it moved without charge beginning in 2010.

Interrogatory No. 16. This Interrogatory mischaracterizes statements made in Union Pacific's Answer by implying that Union Pacific is required to submit evidence about the level of hypothetical full-mileage rates. Union Pacific does not have the burden of proof in this case, so the evidence it submits regarding any issue potentially in dispute will depend on the evidence Complainants submit on opening. Moreover, as you are certainly aware, the well-established practice in Surface Transportation Board proceedings is that a defendant submits its reply evidence after complainants submit their opening evidence, not before, so it is completely inappropriate for Complainants to ask in discovery for the information that Union Pacific intends to rely upon in its reply evidence.

In response to Complainants' requests for information and documents regarding zero-mileage and full mileage rates – including in particular Document Request No. 6 – Union Pacific will be producing a substantial amount of information potentially bearing on transportation that occurs or has occurred under zero-mileage and full-mileage rates, so the Complainants can address the issue in their opening evidence.

Interrogatory No. 18. Even with your "clarification," it is not clear what information Complainants want from Union Pacific. As you know, the formula that you reference appears in the National Tank Car Allowance Agreement, which speaks for itself. If Complainants are asking how tank car companies are reflecting Union Pacific's Item 55-C charges in implementing the formula, that information should be in the possession of those companies, which are members of Complainant NAFCA. Finally, your characterization of *IHB-II* and its progeny is incorrect, as explained in *IHB-II*'s progeny and Union Pacific's Motion to Dismiss.

Sincerely,



Michael L. Rosenthal

cc: Thomas W. Wilcox, Esq.
Paul M. Donovan, Esq.
Justin A. Savage, Esq.
Louise A. Rinn, Esq.

CERTIFICATE OF SERVICE

I do hereby certify that on this 2nd day of June, 2016, I have served a copy of the accompanying Motion to Compel Discovery via electronic mail and regular mail to counsel for Defendant at the following addresses:

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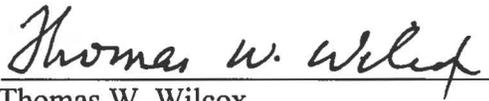
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