

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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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,

Complainants,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

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October 30, 2015
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Public Record

NOR 42144

**UNION PACIFIC'S REPLY
TO COMPLAINANTS' PETITION TO EXPEDITE PROCEDURE**

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Union Pacific favors an expeditious resolution of this case. We believe the proper way to expedite the case is for the Board to grant our motion to dismiss promptly. But assuming that the Board does not dismiss one or both counts at this time, “bifurcation” is unlikely to help expedite resolution of Count I. If Complainants continue to contend that the issue in Count I—the right to charge for empty repair moves—is linked to the issue in Count II—the obligation to pay mileage allowances¹—the two counts should proceed together. Moreover, the Board should be aware that

¹ See Complaint ¶ 28; Complainants' Reply to Motion to Dismiss at 10-13.

the parties appear to have disagreements over the proper scope of discovery associated with both counts, not just Count II.

Contrary to Complainants' assertions, the Board is in a position to dismiss Count I based on the submissions before it. Discovery is not required to resolve the issue raised by that Count. In opposing Union Pacific's motion to dismiss, Complainants claimed that this case raises issues of fact and policy because Board precedent permitting rail carriers to charge for empty repair moves applies only to short lines and only to moves for certain types of repairs.² However, the relevant precedent addresses all railroads and all movements to repair facilities. In *General American Transport Corp. v. Indiana Harbor Belt Railroad Co.* ("IHB-II"), 3 I.C.C.2d 599 (1987), the Interstate Commerce Commission made a clean break from the past in rejecting the free repair moves rule. The ICC found that its prior policy of prohibiting charges for empty repair moves "misallocates economic burdens among carriers and conflicts with the Congressional mandate for demand-based rail pricing, rate flexibility, and revenue adequacy expressed in the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act) and the Staggers Rail Act of 1980." *Id.* at 599. The ICC stated that its ruling applies to all railroads and all movements to shops: "Railroads may charge initially for moving private cars to and from repair shops." *Id.* at 620. The agency reinforced the broad scope of the *IHB-II* decision in *Charges for Movement of Empty Cars, Buffalo & Pittsburgh Railroad, Inc.* ("Buffalo & Pittsburgh"), 7 I.C.C.2d 18, 28 (1990): "If the *IHB-II* decision is to have its intended remedial effect, all carriers with potential for repair moves must be free to impose charges."³

² See Complainants' Reply to Motion to Dismiss at 7-10.

³ See also *id.* at 23 n.9 ("Substantial use of the *IHB-II* ruling is economically inevitable, since any railroad with a potential for repair move traffic will have everything to gain and nothing to lose by publishing such tariffs.").

If the Board nevertheless were to deny our motion to dismiss and both counts remained, bifurcation would not simplify this proceeding. Complainants now assert that the issues in Count I and Count II are “subject to disparate treatment.”⁴ In opposing our motion to dismiss, however, they argued that resolution of Count I is linked to the resolution of Count II, because the “fundamental premise of *IHB II*” was that “charges for movements of tank cars to repair shops would be recouped in mileage allowance payments.”⁵ If Complainants continue to maintain that the issues are related in this manner, little or nothing would be gained by adjudicating Count I separately from Count II. Although Union Pacific vigorously disagrees with Complainants’ argument that the issues involved in the two counts are related,⁶ in addressing Count I we would have no choice but to pursue much of the same discovery needed to address Count II, so we can respond to any evidence they submit in support of their theory.

In addition, if in pursuing Count I Complainants are allowed to relitigate *IHB-II* and related decisions, we would need factual information regarding empty repair moves and the impact of charging for such moves. The Association Complainants have thus far resisted our requests to produce information about their members’ movements of cars to shops and their experiences with similar charges imposed by other railroads. Bifurcation would not help resolve these disputes, and it would likely generate new disputes about whether particular discovery is needed to address Count I, Count II, or both counts.

⁴ Petition at 4.

⁵ Complainants’ Reply to Motion to Dismiss at 11.

⁶ The Board has made clear that “the ICC’s decision . . . did not turn on whether a portion of the empty repair move charges might be recovered through allowances.” *N. Am. Freight Car Ass’n–Protest & Petition for Investigation–Tariff Publications of the Burlington N. & Santa Fe Ry.*, NOR 42060, slip op. at 6 (STB served Aug. 13, 2004). Instead, “the rationale . . . related to the misallocation of burdens among carriers . . . and the conflict with the statutory policies of rate flexibility, revenue adequacy, and demand-based carrier pricing.” *Id.*

If the Board were to dismiss either Count I or Count II (or both counts), that would expedite the resolution of this proceeding. But an order bifurcating the case while allowing Complainants to continue pursuing both counts would extend and complicate this proceeding.

Respectfully submitted,



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October 30, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, 2015, I caused a copy of the foregoing document to be served by e-mail or first-class mail, postage prepaid, on all of the parties of record in NOR 42144:



Michael L. Rosenthal