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June 11, 2012

Ms. Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
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ENTERED
Office of Proceedings
June 11, 2012
Part of
Public Record

Re: STB Docket No. 42119

North America Freight Car Association v. Union Pacific Railroad Company

Dear Ms. Brown:

Some time ago, the Board issued a Protective Order providing that confidential or highly confidential information could be included in Highly Confidential briefs, but had to be redacted from any public version of the brief filed with the Board. The parties have followed that practice with respect to the briefs previously filed.

At this point, North America Freight Car Association is filing its Final Brief pursuant to the Board's decision of May 11, 2012. NAFCA, however, is filing herewith only a public version of that brief, and does not intend to file a Highly Confidential version because nothing in the brief discloses material that has been designated as Confidential or Highly Confidential by Union Pacific.

Please contact the undersigned if you have any questions.

Sincerely,



Andrew P. Goldstein

cc: Michael L. Rosenthal, Esq.

PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. 42119
NORTH AMERICA FREIGHT CAR ASSOCIATION
v.
UNION PACIFIC RAILROAD COMPANY

FINAL BRIEF OF
NORTH AMERICA FREIGHT CAR ASSOCIATION

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TABLE OF CONTENTS

	<u>Page</u>
I. <u>BACKGROUND SUMMARY</u>	2
II. <u>UP GROSSLY EXAGGERATES THE NEED FOR NEW “DIRTY CAR” LIABILITY PROVISIONS AND PROVIDES NO REASONABLE FOUNDATION FOR ITS TARIFF</u>	6
A. <u>Shippers Already Make Reasonable Efforts To Tender Clean, Safe Cars to UP</u>	9
B. <u>UP Has Alternatives to Item 200 that Would Help Address Its Alleged Safety Concerns</u>	10
III. <u>ITEM 200 REVERSES THE RULE OF LAW STATING THAT IT IS THE RESPONSIBILITY OF THE CARRIER TO FURNISH A CLEAN CAR FOR LOADING</u>	12
IV. <u>ITEM 200 IMPOSES NEW AND AMBIGUOUS DUTY ON SHIPPERS</u>	14
V. <u>OTHER TARIFFS FAIL TO SUPPORT UP’S POSITION</u> ...	16
VI. <u>THE PRIMARY GOAL OF ITEM 200 APPEARS TO BE TO AVOID OR NARROW UP’S TORT LIABILITY</u>	18
VII. <u>CONCLUSION</u>	19

In its Decision served May 11, 2012, the Board called for final briefs in this proceeding of no more than 20 pages, with no attachments or new evidence. This brief, filed in compliance with that Decision, summarizes key arguments by Complainant North America Freight Car Association (“NAFCA”) that were developed in greater detail in prior pleadings.

I. BACKGROUND SUMMARY

In light of the fact that NAFCA has filed Opening and Reply Statements setting forth in some detail the background of this dispute and the reasons for its unreasonableness challenge to the UP tariff in issue, Item 200- B of UP Tariff 6004-C, entitled “EXTERIOR RAILCAR CONTAMINATION,” NAFCA will provide only an abbreviated summary of the UP tariff. NAFCA incorporates herein its prior statements.

In 2008, UP published Item 200-A, purporting to make it an “obligation” of consignees and shippers to tender clean cars, safe for transportation, or face a penalty of \$650 per car plus other accessorial charges, as well as a requirement to indemnify UP for any harm suffered by it as a consequence of noncompliance with this new “obligation.”

Additionally, the last sentence of the Item provided that: “Acceptance of a railcar in interchange by UP that is later determined to be contaminated or unsafe will in no way relieve Customer of its obligation herein, and shall not constitute waiver by UP of the consignor’s, consignee’s, or its designated agent’s obligations hereunder to tender a clean and safe railcar to UP.....” NAFCA interpreted that sentence as meaning that, even if UP failed to inspect a car prior to departure in a train, as required by Federal Railroad Administration (“FRA”) rules,¹ or examined the car and found it to be clean and safe, and accepted it into transportation, in either event UP would have the right to later contend that the shipper or consignee had failed to tender

¹ See Exhibit 3 to NAFCA’s Opening Statement.

a safe, clean car, thereby creating a legal advantage for UP in any adjudicatory dispute that would arise under State, or common, law.

NAFCA filed a complaint against Item 200-A on grounds of unreasonableness. Thereafter, the parties agreed to negotiate or to seek Board-sponsored mediation. UP amended its tariff, publishing Item 200-B effective July 1, 2011. The notable difference between Items 200-A and 200-B is the absence of an indemnity clause in the latter. Shippers remained liable, however, for fines and accessorial charges arising from “unclean” or leaking cars, as well as for property damage and personal injury, based on a breach of the shipper’s “obligation.” The last sentence of the Item was broadened so that the “obligation” now applies to “lading leakage” or “lading residue” and to any car accepted by UP for transportation, whether as an interchange or originating car.

The parties agreed that further negotiations were unlikely to bear fruit and agreed on a procedural schedule for litigation. The Board approved that schedule by Decision served August 2, 2011.

For the reasons summarized below, and for the reasons detailed in NAFCA’s prior pleadings, the provisions of Item 200 constitute one or more unreasonable practices.

This case involves yet another example of the kind of overreaching by major railroads which necessitates invocation of the Board’s jurisdiction to remedy unreasonable railroad practices. Indeed, in some respects the need for remedial action is greater here than in Docket No. 35305, *Arkansas Electric Coop. Corp. – Petition for Declaratory Order*, in which the Board is considering the reasonableness of BNSF tariff provisions claimed to be necessary to reduce coal dust affecting track beds.

In its decision served March 3, 2011 in that proceeding, the Board accepted the reasonableness of BNSF’s goal of addressing track bed ballast maintenance concerns. Here, as shown

by the record evidence and as summarized below, there is little or no data support for UP's claims of safety hazards posed by lading residues. It appears that UP's main, alleged rationale for its tariff change is its posturing of residues as causing *potential* disruption of its yard operations and *potential* liability, though actual reported incidents have been almost nonexistent. As a response to its own posturing, UP has come up with a solution costless to UP: penalizing shippers for damage UP may attribute to lading residue, even if such shippers are or could be blameless. More fundamentally, UP has adopted its "solution" in contravention of, and as a way of relieving itself from, its own potential liability exposure under the Interstate Commerce Act, the regulations of the Federal Railroad Administration, and under well-established principles of tort law.

Contrary to UP's contentions, the Interstate Commerce Act requires railroads, not shippers, to provide "safe and adequate car service." See 49 U.S.C. § 11121. For its part, the FRA, rather than simply relying on railroads to provide safe equipment as required by the Act, affirmatively requires railroads to conduct pre-departure car inspections and to remove from transportation cars failing to meet FRA standards.

See 49 C.F.R. Part 215, Appendix D, which mandates that each freight car shall, "as a minimum," be inspected for a list of hazardous conditions, all readily discoverable by train crew members during normal pre-departure inspections, that could lead to an accident, as well as "*any other apparent safety hazard likely to cause an accident or casualty before the train arrives at its destination.*" (Emphasis supplied.) Thus, the duty of UP to supply clean, safe cars is derived from both STB and FRA law.

UP attempts to shore up the weaknesses in its position by arguing for a legal standard that amounts to *carte blanche* for railroads to shift any and all costs, burdens and risks to shippers,

based on bogus claims of safety and the assertion that railroad operational decisions can never be second-guessed or even questioned.² As NAFCA explained in more detail at pages 6-12 of its March 5, 2012 Rebuttal Statement, this is simply not the law.

Many years ago, in a situation analogous to this one, railroads argued that they should have a free hand to impose requirements on shippers in the name of safety that could not be justified in light of parallel regulatory determinations by other executive branch agencies. The railroads also argued that the burden of proving unreasonableness was on those challenging their tariffs. The D.C. Circuit rejected both arguments in *Consolidated Rail Corp. v. ICC*, 646 F.2d 642 (D.C. Cir. 1981). The court explained (646 F.2d at 648):

The mere assertion of safety as a justification for any particular expenditure by a railroad company is not conclusive upon the Commission's judgment of the reasonableness of that expenditure or the tariff based upon it. The safety measures for which expenditures are made must be reasonable ones, which means first, that they produce an expected safety benefit commensurate to their cost; and second, that when compared with other possible safety measures, they represent an economical means of achieving the expected safety benefit.

More recently, in *Arkansas Electric Coop, supra*, the Board rejected BNSF's argument that its coal dust tariff provisions should be considered presumptively valid, and that opponents were required to present compelling evidence of unreasonableness. It is remarkable that UP continues to insist that the tariff certainty and safe harbor called for in the coal dust proceeding are not needed in this case, where the Act and FRA regulations impose on UP, not its shippers, the primary responsibility for keeping rail cars safe and clean.

² UP is obligated by FRA regulations to sideline cars with "safety hazards," and UP's tariff states that it is the shipper's "obligation" to police that hazard. Under that rationale, what would stop UP from making it the shipper's "obligation" not to tender cars with cracked wheels or other defects that FRA believes rail carriers must prevent, thus making compliance with all FRA regulations the shipper's "obligation"?

Under any circumstances, the Board needs to be skeptical of efforts by railroads to use their power over tariffs to alter established terms of service to their advantage and to their customers' detriment. The Board must be even more skeptical where the tariff changes would undercut legal requirements in the governing statute and regulations, would displace well-established tort law principles allocating responsibility, and where the rationale is essentially unsupported on the factual record.

**II. UP GROSSLY EXAGGERATES THE NEED FOR NEW "DIRTY CAR"
LIABILITY PROVISIONS AND PROVIDES NO REASONABLE
FOUNDATION FOR ITS TARIFF**

In response to NAFCA's opening assertion that there was no established basis for the new "obligation" imposed by Item 200-B, UP offered but one principal piece of testimony – the verified statement of Wayne L. Ronci, UP's Director, Damage Prevention Field Services ("Ronci V.S."), which consists virtually entirely of unsupported claims.³

Mr. Ronci explains that the primary hazard that UP seeks to avoid through Item 200-B is product residue that fouls the retarders in UP's classification "hump" yards. UP has several such yards throughout its system, all of which have the same basic characteristic: an incline (the "hump") over which cars are pushed and then allowed to proceed downward by force of gravity, while being guided by switches to an appropriate track where a train is being made up. The speed of the cars is controlled by retarders, which are devices that clamp the wheels to slow overspeed cars. If the retarders become fouled, they may not work as effectively and cars may exit the hump at excessive speeds, colliding with other cars with more impact than intended, possibly resulting in property damage.

³ UP also offered a short statement by Mark S. Barnum, Senior Director of Operating Practices, to point out that night or weather conditions may make it difficult for train crews to make a pre-departure inspections. There are two answers to that claim: if it is difficult for UP crews it is just as difficult for shippers; and UP can wait until conditions improve to perform inspections.

Mr. Ronci states that contaminated retarders are the result of foreign matter on the wheels of one or more cars passing through the retarder, leaving the retarder less able to do its work properly on succeeding cars. UP argues that one of the more pernicious results of “dirty” wheels and retarder-related yard disruptions is interference with efficient UP yard operations and the additional costs produced by such interference. Mr. Ronci states that cars exiting retarders over their intended speed cause hazards to not just property, but the potential for personal injury.

Yet despite repeated claims of imminent hazards from fouled retarders, UP admits that not one employee or other person has been injured by an overspeed car exiting a retarder. As the FRA has noted, “[r]ailroading is an inherently dangerous industry.”⁴ Cars exiting retarders as overspeeds fortunately have not contributed to that dangerous environment.

Nor is there any demonstrated data supporting UP’s claim that overspeed retarder car exits cause extensive property damage, or even occur more than sporadically. In the four years following publication of Item 200, there were only 17 incidents reported to the FRA of collisions resulting from retarder malfunctions.⁵

The number of cars handled by UP is enormous – over 2 million per year, according to UP’s evidence. Hundreds of thousands of those cars no doubt traverse UP’s classification yards and its hump retarders. Nevertheless, since Item 200 became effective, there have been only about four overspeed impacts per year, resulting in what UP itself calculates to be a mere \$175,000 annually in damage.

⁴ Exhibit No. 2 to NAFCA’s Rebuttal Argument, FRA Technical Bulletin MP&E09-01.

⁵ UP argued in its Reply that Item 200 had been successful in reducing accidents due to overspeed retarder exits. In fact, the contrary is true. The 17 incidents in the four years following publication of Item 200 greatly exceeded the 11 incidents in the four years preceding publication of that Item. These data, ignored by UP, clearly establish that Item 200 is not responsible for improving the main problem at which it is aimed – mishaps resulting from overspeed retarder exits.

UP argues that those retarder-related incidents reported to FRA do not present a complete picture, because it experienced a “far great number of non-reportable overspeed incidents than it recorded with FRA.”⁶ It strains credulity for UP to claim that it has no records whatsoever of most overspeed impacts. It should not be left to the Board’s imagination to fill in the blanks where UP has failed to provide facts. A review of Mr. Ronci’s statement readily discloses that, insofar as retarder-related events are concerned, his testimony consists of pictures of a few damaged or residue-laden cars, interwoven with all manner of conjecture about what *might* occur if more cars left retarders at over desired speeds, or more cars leaked in more areas of the UP system. This highly speculative testimony is not accompanied by any facts to illustrate the potential for mishaps over and above the seventeen that occurred in the four years between 2008 and 2012, while Item 200 was in effect, or any projection of actual costs expected to flow from product residue on cars.

As for UP’s concerns about what *might* occur from product residue on wheels, its hypothesis fails to take into account the measures that UP itself might adopt to reduce possible retarder-related incidents, and UP’s own contributions to those incidents by failing to improve its wheel inspections and other policies, as described below.

From the scant facts UP has provided, it is plain that there is no serious safety threat from contaminated retarders and that UP has not supported its claim that Item 200 has corrected the foremost problem – fouled retarders – that UP contends is the result of exterior product residue.

⁶ In 2011, the threshold for a reportable incident was \$9,400. UP Reply at 10. That does not mean, however, that UP lacks records of such minor incidents. In fact, UP concedes that it maintains a database identifying the 25 commodities that most often were involved in exterior car product contamination. (NAFCA Rebuttal at 20).

A. Shippers Already Make Reasonable Efforts to
Tender Clean, Safe Cars to UP

UP admits, as it must, that shippers generally take the steps necessary to tender clean, safe cars to UP for transportation. See UP Reply at 19-24. UP provides no grounds for concluding that its shippers spurn a policy of tendering cars free from external product residue. As UP itself concedes, its most effective policy is to work with its shippers where deviations from desired standards are spotted.⁷

The “dirty car” situation cannot possibly be as ominous as UP contends. Not once has UP found it necessary to levy a penalty under Item 200 against a shipper. UP apparently follows that policy even where there is manifest evidence of exterior product residue, such as tallow.

The fact that UP has not levied penalties under Item 200 does not make this Complaint premature. In a recent decision, Finance Docket No. 35387, *Ag Processing Inc A Cooperative - Petition for Declaratory Order* (May 9, 2012), the Board dismissed a declaratory order petition that a tariff of Norfolk Southern Railway be found unreasonable because, the Board said, no party had yet been penalized by the tariff. This Complaint cannot be dismissed for the same reason, due to 49 U.S.C. 11701(b), which states: “the Board may not dismiss a complaint ... because of the absence of direct damage to the complainant.” See also *Car Float Service New York Harbor*, 49 I.C.C. 259, 261 (1918).

Were the Board to overlook Section 10701(b) and hold that a tariff may not be challenged by complaint in the absence of direct damage, shippers would have no way to question the reasonableness of a carrier’s rules before they are applied, and railroads could publish unrea-

⁷ UP pictures isolated conditions under which leakage from cars creates pools of product residue that threaten the purity of car wheels that may move through those pools. However, UP offers no quantification of the number of such incidents on its line per year and uses one or two examples of mishaps to create the impression that shipper facilities are all swamps. The difficulty with UP identifying a limited number of anecdotal problems as symptomatic of the whole system is not only that it contradicts UP’s claim that most shippers comply with safe operating practices most of the time, but it also ignores the shipper testimony that, wherever such spills do occur, they are promptly cleaned up by the shipper.

sonable penalties as a threat but avoid a challenge by not imposing them, or imposing them only on shippers unlikely to complain. There are times when groups of complainants will proceed jointly, for economic or competitive reasons, while members of the group shy away from individual action for economic reasons or fear of carrier retribution. Shippers have a protectable interest in tariffs, such as that of UP, which expose them to damage judgments, as addressed in more detail below.⁸

B. UP Has Alternatives to Item 200 that Would Help Address Its Alleged Safety Concerns

UP's Reply does not record even a single instance in which UP stopped a car on account of exterior wheel contamination when that car approached a hump retarder, although it claims to do so, and UP admits that it does not inspect retarders between cars on the grounds of "impracticability," although UP never states why it is impracticable to do so.

UP knows which commodities it considers the most likely to result in product residue on wheels. While it asserts that there are 25 commodities that are the most culpable of all those it carries, it identifies by name only about a half dozen, including tallow and oils. UP easily can identify cars carrying problematic commodities and problematic origins from its computer database, which shows the commodity (or its STCC code) in every car and its origin, and UP knows when those cars are approaching a classification yard. See NAFCA Rebuttal Exhibit 4-A, a typical UP car-itinerary report.

Nevertheless, UP refuses to stop problematic cars or otherwise inspect them closely before or as they enter a classification yard. Its stated reason is that it would be too disruptive to UP operations to identify and remove or clean such cars before they progress to the "hump." Yet, UP likewise asserts that it is costly and disruptive when a car has wheels that "contaminate"

⁸ See *Liability for Contaminated Covered Hopper Cars*, 10 I.C.C. 2d 154, fn. 37 (1994).

a retarder. Thus, UP posits a choice between incurring “expense and disruption” before a retarder-related accident occurs, or after one occurs and produces property damage. UP has chosen the latter course of action. If it is willing to gamble on whether a car containing a potentially problematic commodity will make it through the hump and not foul the retarders, that is UP’s choice, although it seems to NAFCA that, if safety is UP’s primary concern, it is far more sensible to incur costs and delays on account of problematic cars before they are involved in collisions.

Responsibility for “dirty cars” is not something that can be addressed rationally by creating and imposing an unconditional “obligation” on shippers. UP argues that leaks from a loading area on a tank car can migrate to the wheels of the car. NAFCA rebutted, however, by pointing out that it is approximately 35 feet from a tank car’s loading dome to the car’s wheels, and that it is physically impossible for liquid lading to reverse its gravity-driven downward course to travel 35 lateral feet on a standing car and settle on a wheel. If it is UP’s position that the same spill will migrate to a wheel when the car is moving, NAFCA would respond that whether this is possible depends on the amount of the spill, the ambient temperature and sensitivity of the product to temperature, the speed of the car, and other factors. All of these factors should be subject to proof, and not to irrebuttable assumptions of fault on the part of the shipper that loaded the car accepted into transportation by UP and later be found to be leaking.

Freight cars often proceed through environments where fouled wheels arise from conditions that are not attributable to the car that may later be identified as responsible for fouling a retarder. NAFCA’s testimony shows that, if there is a tank car that leaks product onto the ground and tracks, it is entirely possible that the following car will pick up some of that residue, or even that additional trailing cars will do so. These following cars may be owned or used by other shippers, in which case UP’s tariff could unreasonably penalize blameless parties. This

sequence of events, we should add, might well be eliminated if UP paid more diligent attention to the condition of wheels on cars that are moving slowly as they enter a classification yard.⁹

III. ITEM 200 REVERSES THE RULE OF LAW STATING THAT IT IS
THE RESPONSIBILITY OF THE CARRIER TO FURNISH A
CLEAN CAR FOR LOADING

Item 200 states that, whenever a car is released to a carrier, whether loaded or empty, it must be free of “unsafe” exterior product. The approach of Item 200 to the relative duties of shippers and carriers with respect to “clean” cars turns existing law on its head.

After a loaded car is shipped and unloaded, Item 200 requires the unloading consignee to tender a “clean” empty car to UP. Apparently, that seldom happens because the environments in which many cars are unloaded are, almost by definition, dusty areas laden with product debris in the air. These cars are then transported by UP to a loading point. NAFCA testimony shows (Opening Statement, Exhibit 11) that the vast majority of empty cars received for loading are covered with product residue from the prior movement. The shipper receiving such an empty car for loading is faced with the unpleasant and uneconomic choice of rejecting the car to UP for cleaning, cleaning the car at its own expense, or ignoring the product residue. If the empty car is loaded in the condition in which it was received from UP, then the shipper runs the risk of being penalized by UP under Item 200 for tendering an unclean car. That is an unreasonable cycle of events, and Item 200 should not be enforced because it so often has the propensity to penalize shippers for failing to clean, at their own expense, empty cars that have accumulated product residue at their destination and have been accepted into transportation by UP, with or without an inspection.

⁹ UP does not deny that it has eliminated large numbers of its carman work force, who are personnel specially trained to inspect cars.

It is not the shipper's responsibility to furnish a safe and clean car to the carrier, but it is the carrier's duty under 49 U.S.C. 11121 to provide safe and clean cars. *Liability for Contaminated Covered Hopper Cars*, 10 I.C.C. 2d 154 (1994).¹⁰ UP's claim that it does, in fact, inspect empty cars when accepted into transportation for return movements to loading positions must be taken with a grain of salt, given the absence of any data by UP of how many such cars, if any, are rejected and the uncontested shipper testimony showing that the overwhelming number of empty cars received for loading contain product residue. It is manifestly unreasonable to require shippers who receive these cars with exterior product residue to clean them at the shipper's expense or run the risk of having UP assess its penalties and other ancillary charges for tendering an "unclean" car for transportation.

UP maintains that NAFCA is of the view that once UP accepts a car into transportation, the shipper thereafter is relieved of all liability regarding the "cleanliness" of that car. Interestingly, although UP raises this argument more than once, it does not cite to any place in NAFCA's pleadings where NAFCA takes that position. In fact, UP's representation of NAFCA's position is entirely erroneous.

NAFCA does take the position that, once UP has accepted a car into transportation, whether by failing to inspect it as provided in FRA's rules or by inspecting the car and finding it compliant with those rules, UP cannot presume that the car nevertheless violated either the FRA's regulations or the "obligation" in UP's tariff *at the time the car was accepted into transportation*. If, for example, the car later is found to have product residue on its wheels, UP should be required to demonstrate that the car acquired that residue after the car was accepted into

¹⁰ *Liability for Contaminated Covered Hopper Cars* involved duties to inspect car interiors prior to loading which a carrier attempted to impose under the Carmack Amendment. Nevertheless, the rule of law that "[t]he duty under 49 U.S.C. 11121 to provide safe and clean cars is on the carrier" is not applicable only to loss and damage claims. Moreover, it would make little sense for the Board to rule that a carrier must place empty cars for loading with clean interiors but with residue-laden exteriors.

transportation as the result of shipper fault. Similarly, if a tank car is found to have product residue on its exterior after being accepted into transportation by UP, UP cannot presume that the car was “unclean” or “unsafe” at the time the car was accepted into transportation, and, on the basis of that presumption alone, attempt to hold the shipper liable for any fouled retarders.

There are simply too many possible explanations for leakage on the exterior of a tank car to permit a conclusive presumption by UP that the leakage from a car fouled its own wheels or caused the fouling of a retarder. The leakage may have occurred hundreds of miles before the car reached the retarder, and what was left on the car is a stain or thin, harmless film of product. That product cannot possibly migrate to the forward wheels of the car, because the movement of the car would drive the product, if there was enough of it present on the car, only towards the rear wheels, so that UP should have to prove that the rear wheels of that car had received product residue. Also, as NAFCA’s evidence pointed out, product spillages occur in UP’s yards (where there appears to be a scant effort made to watch for such cars as they approach the hump), and product residue may contaminate wheels on trailing cars as they move through the area affected by a prior car’s leakage.¹¹

IV. ITEM 200 IMPOSES NEW AND AMBIGUOUS DUTY ON SHIPPERS

Item 200-B creates a new “obligation” on shippers and consignees to “remove lading residue from the rail car’s exterior.” The amount of exterior residue that would violate this new “obligation” is not set forth in the tariff.

¹¹ It is highly likely that UP would endeavor to attribute such an event to the car or cars found to have “contaminated” wheels based on the last sentence of Item 200-B, which purports to permit UP to claim that a car accepted into transportation and later found to have lading residue can be deemed by UP to have been tendered with unclean wheels. That position is as senseless as it would be for UP to assert in a new tariff that shippers have an “obligation” to tender cars without cracked wheels and then, after accepting a car with cracked wheels into transportation in violation of FRA rules, later asserting that by accepting such a car, UP is not waiving its right to demand enforcement of the shipper’s “obligation” to tender cars without cracked wheels.

In the Board's recent decision in Finance Docket No. 35305, *Arkansas Electric Coop.*, *supra*, involving coal dust emissions, the Board held that "[a] reasonable rule would provide certainty to the shippers." In a case even more closely analogous to this one, *Liability for Contaminated Covered Hopper Cars*, a carrier published a rule requiring shippers to perform a "reasonable inspection" to "confirm the absence ... of contaminants." The Board held (10 I.C.C. 2d at 169):

Such an ambiguous standard leaves much open to interpretation. [The carrier] could shift the burden of proof to the shipper merely by alleging that a shipper did not make a "reasonable inspection"¹²

UP contends that its tariff is sufficiently clear because most shippers strive to tender cars in "safe" and "clean" condition. Those are, indeed, good business practices followed by virtually all shippers. But there is a difference between a good business practice and an "obligation" enforced by a penalty and other sizeable costs. Penalties are inappropriate and unreasonable where their standards are unclear. Not even UP seems able to decide the proper standard for application of the "cleanliness" provisions of Item 200 and the consequent penalties. In its Reply (at 48), it contends that no "product residue" should be on the car's exterior if it is loaded properly, but Mr. Ronci testifies that UP won't penalize its customers for a car that "is a little dirty." Ronci V.S. at 25. Which is the proper standard? No product residue at all, or just a "little dirty" amount of residue? If UP can't make up its mind, how can the Board regard the tariff as providing sufficient guidance to shippers?

¹² *Liability for Contaminated Covered Hopper Cars* was a case involving carrier liability for loss and damage to goods. The specific tariff provisions there involved required the shipper to make an inspection of the interior of the car prior to loading. That distinction is immaterial because the rule of law relied upon there by the Board was simply the long-standing proposition that tariffs must be unambiguous. See also *Union Pacific R. Co. v. Burke* 255 U.S. 317, 321 (1921) and *Union Pacific R. Co. v. United States*, 292 F.2d 521,523 (Ct. Cl. 1961), holding that it is against public policy for rail carriers to use tariffs to evade responsibility for their own negligence.

Ambiguous standards such as those in Item 200 are inherently unfair. What may constitute an unclean car to one UP crew may satisfy the next crew on the next train or the crews serving other shippers. The crew that works a shipper's plant on Monday may have a different view of "cleanliness" from the crew that works on Friday or Saturday.

FRA rules require UP crews to conduct a pre-departure inspection of all cars before or when they are placed in a train. Under those rules, if UP discovers a condition that is "likely to cause an accident or casualty before the train arrives at its destination," it must reject or remedy the car. Product residue on wheels is not a specifically enumerated condition for rejection of a car, but it is, at least according to UP, an "apparent safety hazard likely to cause an accident" before the car reaches its destination. *See* NAFLA Opening Statement, Appendix 3, p. 5. It is UP's job to detect safety hazards on cars tendered to it for transportation. Item 200-B makes it expressly clear that UP considers product residue on car wheels to be a safety hazard. It should expressly assume the duty of inspecting for and identifying those hazards, rather than making it the "obligation" of the shipper to do so.

V. OTHER TARIFFS FAIL TO SUPPORT UP'S POSITION

UP points to several tariffs of its own and other carriers to suggest that the Item 200-B approach is an industry standard and reasonable. UP's exhibits include a BNSF Railway Tariff and a CSX Transportation Customer Rail Safety Guide Book, from which UP argues that its own Item 200-B is an industry standard (Reply 16-19). But the comparable provisions of BNSF Tariff Item 3251-B are applicable just to covered hopper cars, and the BNSF tariff version supplied by UP took effect on November 15, 2011, thereby setting no precedent for UP's own Item 200-A, which took effect in July 2008, or Item 200-B, which took effect in July 2011. If anything,

the BNSF tariffs relied upon by UP show that, should the Board not intervene to halt UP's unreasonable practices, they will promptly be mimicked by other railroads.

The BNSF tariff, moreover, contains no language similar to the last paragraph of UP Item 200-B, which attempts to excuse UP from liability due to its acceptance of an "unsafe" car. The CSX publication is not even a tariff, but only a "guidebook."

UP maintains that its Item 200-B is indistinguishable from railroad tariffs imposing weight loading limits (see UP Reply, Exhibit K). UP reproduces overweight tariff provisions of several carriers, the first being BNSF. However, in contrast to UP's Item 200, BNSF's tariff contains an express "safe harbor" provision which provides a tolerance of 5,000 pounds per car for overloading. The CSX tariff weight tariff cited by UP contains no such provision, but the NS overload tariff provided by UP does have "safe harbor" clauses. UP also provides its own overload tariff, with a "safe harbor" exemption of 2,000 to 5,000 pounds. There is no similar "safe harbor" provision in Item 200. UP's tariff, in other words, differs in material respects from most of the railroad tariffs UP relies upon.

The right of a carrier to enact loading rules is not unlimited. As UP concedes, those rules must be "reasonable." Rules regarding overweight cars, with safe harbors that recognize that many loading facilities do not have precise scales, provide reasonable boundaries for shippers, unlike the UP tariff which creates a hitherto nonexistent "obligation" for shippers to remove product residue or face penalties, without any clearly drawn line to tell the shippers what amount of residue is unacceptable or acceptable. UP obviously recognizes that freight cars cannot be expected to be operating-room clean and that the amount of unacceptable product residue is totally subjective. The *Consolidated Rail Corp. and Liability for Contaminated Cover Hopper Cars* decisions correctly condemn loading standards that are ambiguous.

VI. THE PRIMARY GOAL OF ITEM 200 APPEARS TO BE TO
AVOID OR NARROW UP'S TORT LIABILITY

In the absence of Item 200-B, if there was a collision between a car exiting a retarder overspeed and another car or piece of property (or resulting in personal injury or death), liability would be controlled entirely by State tort law. UP could not look to a tariff to assert the existence of a binding legal “obligation” on a shipper to furnish a “clean” car, or rely on a tariff to excuse itself from the consequences of accepting into transportation an “unclean” car in a condition that violates FRA rules, as UP does through the last sentence of Item 200-B. That invidious sentence in effect allows UP to fail to inspect a car and later claim, perhaps after the car was involved in a collision, that the shipper nevertheless had breached its “obligation” to tender a “clean” car to UP.

The application of tort law to a collision between two cars, as available to UP in a suit by UP to recover damages from a shipper tendering an “unclean” car, would permit any number of defenses to be raised by the shipper, depending, in part, on the nature of the applicable state law.

For example, under state law, a trier of fact could find that, although a car arguably had product residue on its wheels, the railroad was wholly or partially at fault for failing to inspect that car before it went through a retarder and caused harm. Under those circumstances, the shipper might be completely exonerated from liability because the carrier had the last clear chance to prevent the damage. *United States v. Savage Truck Line, Inc.*, 209 F.2^d 442 (4th Cir. 1953).

More commonly applied tort theories would enable triers of fact to apportion damages based on the relative liability of the parties. *See, e.g., Symington v. Great W. Trucking Co.*, 668 F. Supp. 1278, 1284-85 (S.D. Iowa 1987) (citing *Franklin Stainless Corp. v. Marlo Transp. Corp.*, 748 F.2d 865, 870-71 (4th Cir. 1984)). Item 200-B recognizes no such apportionment; it simply assumes that, if UP somehow can prove that a car entered transportation with some product debris

on its wheels, which is later discovered by UP in one way or another, the shipper is *fully* responsible for payment of the UP penalty and all associated costs for switching the car to a cleaning position and returning it to a loading position, regardless of UP's own negligent omissions.

As railroads have argued in many forums, the potential for elevated, or even catastrophic, damage awards is seen by them as a major threat. If a car exits a retarder at overspeed and is involved in a collision with another car or cars, who knows what the potential damages might be for cars and their lading. At present, those issues are resolved in court without any Item 200-B to tilt the scales in favor of the railroad. There is no reason why that should not remain so.

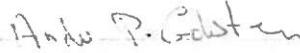
VII. CONCLUSION

There is no precedent for a tariff such as UP's which places all of the burden for the use of "clean" and "safe" cars on the shipper and overlooks the regulatory obligations of the carrier to reject cars that present an imminent safety hazard. It is beyond argument that UP has defined a safety hazard as including any car that leaks or has product residue on the exterior, and that its tariff penalizes those conditions. Shippers realize that, under applicable law, where they are solely responsible for a negligent act, they will face sole liability. Likewise, however, where they and another party are negligent, liability should be apportioned.

UP's penalties are unreasonable in and of themselves because they apply regardless of UP's own oversights or negligence, use unclear standards with no safe harbor, and are not warranted by factual events. They are also unreasonable because UP has other steps it can take to remedy the conditions of which it complains, including the cooperative effort with shippers that

UP extolls, and with which NAFCA agrees. In the circumstances, the penalties and associated costs imposed by UP's tariff are unreasonable and should be set aside.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Final Brief of North America Freight Car Association has, this 11th day of June 2012, been served on counsel for defendant.



Andrew P. Goldstein

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