

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

238516

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June 1, 2015  
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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 )  
)  
)  
v. )  
)  
UNION PACIFIC RAILROAD )  
COMPANY )**

**Docket No. NOR 42144**

**REPLY TO MOTION TO DISMISS COMPLAINT  
OR TO MAKE COMPLAINT MORE DEFINITE**

Complainants the North America Freight Car Association (“NAFCA”), the American Fuel & Petrochemicals Manufacturers (“AFPM”), The Chlorine Institute, Inc. (“CI”), The Fertilizer Institute (“TFI”), the American Chemistry Council (“ACC”), Ethanol Products, LLC d/b/a POET Ethanol Products (“Poet Ethanol Products”), POET Nutrition, Inc., (“Poet Nutrition”), and Cargill Incorporated (“Cargill”), (together “Complainants”) hereby reply to Defendant Union Pacific Railroad Company’s (“UP”) Motion to Dismiss Complaint or to Make Complaint More Definite (“Motion”). For all the reasons set forth herein below, the Motion should be denied in its entirety, as it falls far short of meeting the standards the Board applies to motions to dismiss formal complaints, and the allegations in the Complaint are sufficiently definite to proceed to the discovery and evidentiary phases of this proceeding.

## I. Introduction

Pursuant to 49 U.S.C. §§ 11121 and 11122, common carriers such as UP must either supply the tank cars necessary for the provision of transportation services or compensate tank car owners for the tank cars that they supply. Complainants allege that UP does not provide any of the tank cars needed to serve its customers, yet UP, despite collecting over \$1.5 billion annually in revenues for such transportation, does not compensate tank car providers. Complaint at ¶¶ 12-14. More specifically, the Complaint alleges that UP does not compensate entities who supply tank cars to it either (1) by paying mileage allowances, as calculated pursuant to the negotiated formula adopted by the Board in *Ex Parte No. 328, Investigation of Tank Car Allowance System*, 3 I.C.C. 2d 196 (1986) or (2) through reduced line haul rates that properly compensate the provider of the car for the costs of car ownership.

Additionally, the Complaint sets forth the facts surrounding UP's adoption of Tariff UP 6004, Item 55-C, effective January 1, 2015 ("Item 55-C"), pursuant to which UP imposed new tariff charges for the movement of empty tank cars to repair shops for a variety of reasons, including routine maintenance, federally mandated inspections and retrofits. This is a transportation service for which UP previously had not assessed a separate charge, and the evidence will show that the tariff charges and the timing of their adoption are significant in terms of additional revenues to UP and costs to car owners and shippers.<sup>1</sup> The allegations in the

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<sup>1</sup> UP alleges that it previously received compensation for empty-repair movements through mileage equalization charges. Motion at 11, note 10. But UP only received mileage equalization payments when and to the extent that all of the tank cars in a customer's fleet with the same reporting marks cumulatively accumulate empty miles that are 106% greater than the loaded miles over the course of an entire calendar year. Unlike UP's Tariff 6004, Item 55-C, mileage equalization payments are not for any specific empty movement and do not depend upon whether the empty movement is to a repair facility or for any other purpose. More significantly, the requirement to make mileage equalization payments can be controlled or even eliminated by the shipper by managing the empty miles its fleet of tank cars travels. Because UP's tariff charges

Complaint explain how this action by UP violates 49 U.S.C. §§ 11121, 11122, and 10702, since the adoption of the tariff was not accompanied by any measures to ensure that parties supplying tank cars will be compensated for this new and additional cost of tank car ownership.

In UP's April 20, 2015, Answer to the Complaint, UP admits that it "does not hold itself out to supply tank cars to customers." Answer at ¶¶ 1-8, 13. UP also admits that it does not compensate providers of tank cars by paying them mileage allowances. Instead UP states that "movements of tank cars pursuant to Union Pacific contracts or tariffs are made in private tank cars under zero-mileage rates and that [UP] does not pay mileage allowances when it provides transportation under zero-mileage rates." *Id.* at ¶ 16,<sup>2</sup> which UP defines as rates "that are lower than the transportation rates the railroads would charge if it paid mileage allowances." Motion at 13. Nothing in UP's Motion or Answer provides any basis to support UP's bare assertion that "all other things being equal, the [hypothetical] 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 payment of mileage allowances." Answer at ¶¶ 33-35. Furthermore, UP's assertion that, "[i]n today's commercial environment . . . , railroads typically compensate shippers for furnishing tank cars not through mileage allowance payments, but by charging lower

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would be accompanied by elimination of empty-repair movements from the equalization payment calculation, UP asserts this would prevent a shipper from paying twice for the same movement. *Id.* at 8. However, the result of UP's action was to replace a low (or no) charge for an empty movement under the mileage equalization formula with a high tariff charge assessed independently of how efficiently the shipper manages its fleet. This is an obvious increase in tank car operating costs to car owners and shippers, and it also undermines the current incentives to effectively manage the nation's tank car fleet.

<sup>2</sup> UP inconsistently states elsewhere in its Answer that "*most* movements of tank cars pursuant to Union Pacific contracts or tariffs are made in private tank cars under zero mileage rates" Answer at ¶ 17 (emphasis added). *See, e.g.*, Motion at 6. However, UP does not mention or cite to any specific examples of tank car movements where it pays mileage allowances in either the Answer or the Motion. Indeed, UP states it "does not concede" that it is obligated under the law to provide any rates that "include payment of a mileage allowance when we have established zero-mileage rates." *Id.* at 16, note 13.

transportation rates (or ‘freight rates’) than the railroad would charge if it were to pay a mileage allowance,” Motion at 5, does not establish that UP is in fact compensating tank car owners through zero-mileage rates that are lower than the hypothetical rates that UP contends it otherwise would charge.

UP seeks dismissal of the Complaint in whole or in part, or an order requiring Complainants to make their Complaint more definite, based on several of these conclusory assertions, none of which have merit. The Motion should be summarily denied.

## **II. The Standards Applicable to Motions to Dismiss**

Motions to dismiss formal complaints presented to the STB are “disfavored and rarely granted.” *Entergy Arkansas, Inc. & Entergy Servs., Inc.*, STB Docket No. 42104 (served Dec. 30, 2009). A complaint may only be dismissed if it “does not state reasonable grounds for investigation and action.” 49 U.S.C. § 11701(b). In considering a motion to dismiss, the Board “construe[s] the factual allegations in a light most favorable to the complainant.” *See Sierra Pac. Power Co. v. Union Pac. R.R.*, STB Docket No. NOR 42012 (served Jan. 26, 1998). Dismissal is therefore appropriate only if there are no material issues of fact to be resolved, because the disputed issues are “essentially legal.” *ZoneSkip, Inc. v. UPS, Inc. and UPS of America, Inc.*, 8 I.C.C.2d 645 (1992), *aff’d mem.* 998 F.2d 1007 (3d Cir. 1993); *Caribbean Shippers Assoc. v. NPR, Inc.*, STB Docket No. WCC-100 (served Mar. 25, 1997), *aff’d sub nom. Caribbean Shippers Assoc. v. NPR, Inc.*, 145 F.3d 1362 (D.C. Cir. 1998). *See also, Entergy Arkansas*, STB Docket No. 42104 (denying a motion to dismiss when the parties’ dispute required consideration of evidence). This high burden requires the defendant to show there is no basis on which the Board could grant the relief sought, and no basis for further consideration of the issues. *Sierra R.R. Co. & Sierra N. Ry.*, STB Docket No. NOR 42133 (STB served Apr. 23,

2012) (denying motion to dismiss because the “novelty of the issue” gave rise to a “reasonable basis for further Board consideration”). The defendant may meet this burden by showing that the complainant “has presented no facts . . . which, if proven, would result in a violation of law.” *Trailer Bridge, Inc.*, STB Docket No. WCC-104 (STB served Dec. 10, 1999).

### **III. Argument**

#### **A. The Motion on its Face Does not Meet the Board’s Standards Governing Motions to Dismiss**

UP’s Motion fails to satisfy the most basic requirement of a motion to dismiss, and thus UP cannot meet its high burden to dismiss this action at the pleading stage. The allegations in the Complaint, which for purposes of a motion to dismiss must all be deemed true and considered in the light most favorable to the Complainants, plainly allege that UP has violated 49 U.S.C. §§ 11121, 11122, and 10702 by not compensating parties who provide UP with privately owned or leased tank cars for railroad transportation, either through mileage allowances or through line haul rates discounted to permit the provider of the car to recoup some or all of its tank car ownership costs. Furthermore, UP admits most of the critical facts in the Complaint, including the fact that it does not supply tank cars to its customers, and that it does not compensate car owners with mileage allowance payments. In its Motion, UP further asserts that the law does not require it to pay mileage allowances, so long as UP provides rates that it labels “zero-mileage” or “zero-allowance” rates. In fact, UP’s principal defense to the Complaint’s allegations that UP does not compensate tank car owners for the use of their cars, and that the adoption of Item 55-C is an unreasonable practice, is a generic, blanket assertion that UP offers zero-allowance rates, in lieu of paying mileage allowances, that are lower than hypothetical, non-existent rates that UP otherwise would charge. This defense requires development of facts through discovery and the presentation of evidence. The mere assertion of a blanket defense to

allegations in a complaint, without the facts necessary to support that defense, cannot provide sufficient grounds to grant UP's Motion.

**B. The Complaint states proper claims as to both Counts I and II.**

**1. ICC precedent is not a bar to Count I**

In Count I, Complainants allege that UP has violated 49 U.S.C. §§ 10702, 11101, 11121, and 11122 through the adoption of Item 55-C and the application of the charges in UP Tariff 4703 for certain movements of empty tank cars to repair shops. Through this tariff, UP has imposed a new and potential significant additional cost of tank car ownership upon tank car providers, and has done so without properly compensating them for this added cost. This is because Item 55-C was not accompanied by any other action by UP to ensure the providers of tank cars would recoup these additional costs through the payment of mileage allowances or rate reductions.

In seeking to dismiss Count I, UP relies exclusively on two decisions from over a quarter century ago in which the ICC, based upon the specific facts before it and the state of the industry then, allowed several short line railroads to establish tariff charges “for movements of privately owned cars to and from private facilities for ordinary maintenance and repair.” Motion at 9, 12, citing *General American Transp. Corp. v. Indiana Harbor Belt Railroad Co.*, 3 I.C.C. 2d 599 (1987) (*IHB II*); *aff'd General American Transp. v. ICC*, 872 F.2d 1048 (D.C. Cir. 1989) and *Charges for Movement of Empty Cars, B&P RR Inc.*, 7 I.C.C. 2d 18 (1990) (*Buffalo & Pittsburgh*). Whether a particular railroad practice is reasonable, however, depends on the facts and circumstances of the particular case presented to the Board. The Board has consistently held the view that, “in section 10702, Congress . . . gave the Board ‘broad discretion to conduct case-by-case fact-specific inquiries to give meaning to those terms, which are not self-defining in the wide variety of factual circumstances encountered’ . . . . This broad discretion is necessary to

permit the Board to tailor its analysis to the evidence proffered and arguments asserted under a particular set of facts.” STB Docket FD 35305, *Arkansas Elect. Power Coop. Corp. - Petition for Declaratory Order* (Served March 3, 2011) (citations omitted). Furthermore, as explained in more detail below, the precedent relied upon in the Motion does not control UP’s adoption, in 2015, of tariff charges for the movement of empty tank cars to “repair facilities” as defined by UP. Both decisions are inapposite due to different facts and circumstances, including substantial changes that have occurred in the rail industry over the past 25 years.

**a. UP’s Tariff Provision Substantially Exceeds the Scope of the Tariff at Issue in *IHB II***

Turning back to the specifics of this dispute, the facts and circumstances of the tariff provisions and policy issues in *IHB II* were very different from the circumstances surrounding the adoption of Item 55-C, including the basic fact that the tariff language at issue—and therefore the issues presented to the ICC for decision—was much narrower than the UP tariff provision challenged in this proceeding. Specifically, in *IHB II*, the ICC decided the reasonableness of two short line railroad<sup>3</sup> tariff provisions that charged for switching empty tank cars over their lines for “ordinary maintenance and repair.” 3 I.C.C. 2d at 1. (*See also*, 872 F.2d at 1050 (where court referred to ICC policy it affirmed as applying to the transportation of empty cars to repair shops “for ordinary maintenance”). In contrast, Item 55-C covers a much broader range of empty tank car movements, by defining “Repair Facilities” to include “any facility that cleans, relines, maintains, modifies, repairs or retrofits tank cars.” Complaint at Exhibit 1. The activities upon which UP has imposed separate charges for empty tank car movements thus range far beyond the “ordinary maintenance and repair” activities at issue in *IHB II*.

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<sup>3</sup> The short line railroads were, the Indiana Harbor Belt Line Railroad (“IHB”) and the Baltimore and Ohio Chicago Terminal Railroad Company (“BOTC”), who primarily provided switching services to and from repair facilities.

The inclusion of “retrofits” is particularly expansive, since the specter of retrofitting the existing rail tank car fleet to comply with new regulations issued by the Pipeline and Hazardous Materials Administration (“PHMSA”) on May 8, 2015 is one of the most significant issues facing tank car owners and rail shippers over the next decade.<sup>4</sup> These regulations, which potentially affect tens of thousands of tank cars that carry flammable liquids, will require the movement of empty tank cars to shops that are qualified to do the repairs. The volume of empty tank car movements to repair shops to comply with the new rule—and its implications for the cost of car ownership upon railroads, car owners, and shippers—was not foreseen by the industry or the ICC in 1987, and so could not have been factored into the *IHB II* decision. Thus, there are overarching factual and policy differences to distinguish *IHB II* from this case.

**b. The Policy Questions Addressed by the Board in *IHB II* are not at Issue in this Dispute**

Next, the ICC’s rationale in *IHB II* does not apply to UP’s tariff, or this dispute, because the problems of “cross-subsidization” and “averaging” that predominated in 1987 do not apply to UP—nor any other Class I Railroad—in 2015. Specifically, in *IHB II*, private car owners filed formal complaints when the IHB and BOTC adopted tariffs in which they imposed separate switch charges for empty tank car repair movements not preceded by a loaded revenue movement to repair facilities on their tracks. *IHB II* at 602. Such tariffs violated existing precedent, which for 40 years had prohibited railroads from charging for such movements.<sup>5</sup>

The short lines sought to reverse that precedent on the ground that requiring them to switch cars in and out of repair shops without charge was hurting them financially, because they

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<sup>4</sup> See 80 Fed.Reg. 26,644 (May 8, 2015).

<sup>5</sup> See, *General American Transp. Corp. v. Indiana Harbor*, 357 I.C.C. 102 (1977) *aff’d sub nom. Indiana Harbor Belt R. Co. v. ICC*, 577 F.2d 394 (1978) (“*IHB I*”), the last proceeding applying the old rule, which the ICC “overruled” in *IHB II*.

did not participate in much, if any, of the loaded revenue movements. They persuaded the ICC that mileage equalization payments did not adequately compensate them for those empty movements. The ICC thus concluded that these short lines, and other similarly situated railroads, were unfairly cross-subsidizing the line haul railroads which received most of the loaded revenues.

The ICC's concern in *IHB II* was with cross-subsidization that occurs when "the cost of repair movements have unfairly been placed on certain railroads who make a disproportionate number of repair moves," and "[m]ost often the railroads that bear the costs of repair moves are terminating roads" who subsidize "other carriers who have benefitted from the use of loaded private cars." *IHB II* at 604. The specific claim presented to the ICC in *IHB II*, therefore, was that the existing "regime of collective railroad responsibility for empty moves left certain carriers (predominantly switching or terminating railroads) with an empty repair mileage burden considerably out of proportion to the economic benefit those carriers derived from the line haul movement of freight." 872 F.2d at 1051. As discussed further below, the ICC resolved this concern by permitting the short lines to charge for switching tank cars in and out of repair facilities on their lines, but *only* because the ICC concluded that this cost of tank car ownership eventually would be recouped by the car owner through the direct payment of mileage allowances by the line haul railroads through the agreed upon formula in Ex Parte 328.

Although UP quotes the ICC's language about the prevention of cross subsidies and rate averaging in *IHB II*, as if those provisions somehow support its Motion, UP does not assert that it experiences any of these harms in 2015. The reason is obvious: UP has no such issues, or if it does, they are inconsequential, because UP is far differently situated than the short line railroads in *IHB II*. Moreover, the railroad industry has changed considerably since 1987. In that year,

there were 17 Class I railroads operating in the United States, and scores of short line railroads, with far greater potential for a disproportionate allocation of repair-movement responsibility relative to loaded revenue movements even among Class I carriers. Consequently, the ICC in *IHB II* was grappling with the reality that “the carrier that performs the repair moves (and that recovers under the repair move tariffs) is often different from the carrier who uses the tank car equipment for revenue producing moves.” *See, Buffalo & Pittsburgh*, 7 I.C.C. 2d at 26. The *IHB II* holding, therefore, was driven almost entirely by a need to balance compensation (rate revenues) and repair expenses across multiple carriers and especially terminal carriers serving repair facilities.

Today, in stark contrast, there are only 7 Class I railroads, and 4 of them—one of which is UP—control over 90% of the rail traffic in the United States. UP is the Nation’s largest railroad, operating over 30,000 miles of track, some of which serves tank car repair facilities, as evidenced by Item 55-C. The cross-subsidy and averaging issues the ICC faced in 1987 are no longer present, or have been reduced to inconsequence, particularly when one notes UP’s admission that it receives more than \$1.5 billion in loaded tank car revenue annually. Without these same concerns the solution fashioned by the ICC to address them in *IHB II* has no application, and would fail to promote the policies originally envisioned by the Board’s ruling.

**c. *IHB II* did not address whether or how a carrier may assess empty-repair movement charges when it employs zero-mileage rates in lieu of paying mileage allowances**

As stated above, the fundamental underpinning of the holding in *IHB II* was the ICC’s determination that charges for the movement of empty tank cars to repair facilities “are more properly considered a cost of repair to be included in the computation of mileage allowances that railroads pay the shippers.” *IHB II* at 599. Further, “the cost of repair is a cost of car ownership

and is factored into the mileage allowance that the railroads pay to private car owners to reimburse them for providing the cars.” *Id.* at 600. According to the ICC, “[t]he statutory scheme for paying for private cars is based upon the payment of allowances by carriers to car owners. No statutory requirement would be violated if private car owners initially pay repair move costs and *then are reimbursed for those expenses through the allowance system.*” *Id.* at 608 (emphasis added).

Based on that fundamental premise, the ICC ultimately held that the short line railroad defendants in *IHB II* could charge for the movement of empty tank cars to repair shops, “because repair costs could be recovered through the mileage allowance system in the same manner other private car costs are recovered.” *Id.* at 613. The ICC reached this decision in large part because “the Association of American Railroads (AAR) and virtually every carrier that filed comments in response to the March 15, 1985, reopening order acknowledge that, if charges for repair moves are made, the car owners may pass them back to the railroads as repair expense elements in mileage allowance computations.” *Id.* at 614. Thus, the ultimate responsibility for those charges would remain with the carriers as required by 49 U.S.C. § 11122. There was no such determination, however, as to zero-allowance rates.

This fundamental premise of *IHB II*—that the charges for movements of tank cars to repair shops would be recouped in mileage allowance payments—permeated the decisions that followed *IHB II*. For example, the D.C. Circuit affirmed *IHB II* on grounds that, under the ICC’s new policy, “the ultimate responsibility for the costs of owning railcars, including the costs of empty-repair moves, would continue to be transferred to railroads through customary channels - such as mileage allowances.” 872 F.2d at 1051-52. Because compensation through zero-

mileage rates was not discussed by the ICC, it would have been beyond the scope of the court's review.

Furthermore, in *Buffalo & Pittsburgh*, the ICC acknowledged that in *IHB II* it had “adopted a system permitting railroads to impose tariff charges for repair moves and a potential ‘passback’ to the car owners of such charges *through the mileage allowance system.*” 7 I.C.C. 2d at 23 (emphasis added). Moreover, “empty repair moves, instead of being free to the owner (and the basis for a reduced allowance to *all* owners) would now be paid by each owner, who would be reimbursed (at least in part) through increased allowances.” *Id.* at 23. As in *IHB II*, *Buffalo & Pittsburgh* does not discuss or consider “zero-mileage rates” as a substitute for mileage allowances as compensation for the charges assessed under an empty tank car movement tariff.

Thus, none of the precedent cited in the Motion provides grounds to dismiss Count I of the Complaint in this proceeding. Accordingly, even if the ICC's holdings in *IHB II* and *Buffalo & Pittsburgh* somehow applied to UP's Tariff in spite of the myriad differences in underlying facts and circumstances, they still cannot provide a basis for dismissal of Count I. In order to rely upon the specific holding of these precedents, UP would have to demonstrate that its adoption of Item 55-C was accompanied by an agreement or commitment by UP to permit car owners or shippers to recoup the additional cost of car ownership imposed by the tariff by paying them mileage allowances, something UP has admitted it does not do. Having already admitted in its Answer and Motion that it does not pay mileage allowances to parties who supply private tank cars, UP's reliance on *IHB II* is clearly misplaced, despite UP's strained effort to expand that holding to permit compensation for empty repair charges through means other than allowances. Motion at 11.<sup>6</sup> But even if the ICC's holding in *IHB II* can still

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<sup>6</sup> UP omits the actual statement of the ICC that, “[t]he statutory scheme for paying for private cars is based upon the payment of allowances by carriers to car owners. No statutory requirement would be violated if private car

somehow be stretched to apply to the facts of this dispute, the issue of whether UP may assess empty-repair charges on tank cars when it applies “zero-allowance” rates in lieu of mileage allowances poses a distinct, significant question that precludes dismissal of Count I.

**d. The Board may alter past interpretations in light of different facts and changed circumstances**

UP’s Motion to dismiss Count I of the Complaint also fails because it rests upon the mistaken premise that the Board is unalterably bound by past decisions in perpetuity. Motion at 9-12. That is not the law. The *IHB II* decision itself disproves UP’s argument. There, the ICC rejected arguments that *IHB I* had either res judicata or collateral estoppel effect even as to the same defendant in both cases involving very similar facts. *IHB II* at 616-17. The ICC’s holding was based upon the following statement of the Supreme Court:

[T]he [Interstate Commerce] Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. \*\*\*[T]his kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices \*\*\*.

*Id.* at 617, quoting *American Trucking v. A.T. & S.F. R. Co.*, 387 U.S. 397, 416 (1967). The ICC noted that changes in circumstances since *IHB I* had to be considered and that six years was a “decent interval” for assessing such changes. *Id.*

Twenty-eight years have passed since the ICC decided *IHB II*, during which the rail industry has experienced significant structural (e.g., mergers) and financial (e.g., revenue adequacy) changes that make it appropriate for the Board to reexamine past policies, including

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owners initially pay repair move costs and then are reimbursed for those expenses through the allowance system.” *IHB II* at 608 (emphasis added).

the central issue in *IHB II* of how to equitably allocate the burden of empty-repair movements among rail carriers. Furthermore, as stated above, UP's reliance almost solely upon zero-mileage rates in lieu of mileage allowances to meet its statutory obligations is contrary to the critical conclusion in *IHB II* that permitting charges for empty-repair movements would not violate the statute because "[t]he ultimate responsibility for the costs of owning railcars, including the costs of empty-repair moves, would continue to be transferred to railroads through customary channels—such as mileage allowances." 872 F.2d at 1052, citing *IHB II* at 614; Complaint, ¶¶ 16-18, 28. Even assuming that UP's substitution of zero-mileage rates to fulfill its statutory obligation to compensate private tank car providers for the use of their tank cars is permissible under applicable law and agency precedent, it would be both appropriate and necessary for the Board to reevaluate the relevance of *IHB II* in the context of UP's practices and empty-repair movement burden in today's rail marketplace.

Finally, in affirming *IHB II*, the D.C. Circuit held that the statutory provisions underlying *IHB II* "do not *compel* the approach adopted by the Commission," but merely "support the reasonableness of the Commission's construction of the Act." 872 F.2d at 1055. Thus, the Board is free to reach a different conclusion under the different facts and circumstances that exist in today's rail transportation industry.

## **2. ICC precedent is not a bar to Count II.**

UP also seeks dismissal of Count II of the Complaint, which alleges that UP does not compensate parties who provide it tank cars for transportation, either through direct payment of mileage allowances, or through "reduced line haul rates . . . in lieu of paying mileage allowances." Complaint at ¶¶ 32, 33. In support, UP argues, "railroads are not obligated to pay mileage allowances when they compensate shippers . . . through the use of zero mileage transportation rates." Motion at 12. This argument suffers from the same fundamental flaw as

its argument for dismissal of Count I, *i.e.*, UP cannot meet its burden for a motion to dismiss with a generic retort that it has met its obligations under §§ 11121 and 11122 by supplying self-described “zero mileage rates.” Motion at 12-13. Whether UP complies with its statutory common carrier obligation to compensate for its use of private tank cars through zero-mileage rates presents a question of fact that can only be resolved after discovery and the presentation of evidence.

UP cites *LO Shippers v. Aberdeen & Rockfish Ry Co*, 4 I.C.C. 2d 1 (1987) (“*LO Shippers*”); *aff’d sub nom LO Shippers Action Committee v. ICC*, 857 F.2d 802 (D.C. Cir 1988), for the proposition that “a railroad may compensate car providers *either* by paying mileage allowances *or* by charging zero-mileage rates . . . ,” and that the *LO Shippers* holding applies to railroad tank cars. Motion at 13-15. This discussion appears to have been prompted by the fact that the Complainants’ request for relief is for UP to begin paying mileage allowances. Complaint at 10, ¶¶ 5, 6. UP further argues that the ICC’s holding in *LO Shippers* gives UP a “right” to establish *only* rates UP labels “zero-mileage rates” or “zero allowance rates” for private tank car shipments. Motion at 15-16. Thus, UP argues, Complainants cannot “state a claim that Union Pacific is acting unlawfully by not paying mileage allowances on movements using private tank cars.” *Id.* at 14.

However, a proper consideration of Complainants’ arguments in Count II can only proceed after discovery and presentation of evidence of applicable industry conditions. The same industry changes in the last quarter century that call into question UP’s reliance on *IHB II* and *Buffalo & Pittsburgh* for dismissal of Count I, as discussed *infra* in section III.B.1, also merit careful review of UP’s reliance upon *LO Shippers* for dismissal of Count II. First despite UP’s claims to the contrary, nowhere in *LO Shippers* does the ICC state that the decisions it made

concerning the railroads' use of "zero-allowance" rates for the grain cars at issue in that proceeding also applied to compensation for use of private tank cars. Unlike grain cars, railroads do not own tank cars and thus cannot offer full-service rates in railroad-provided cars against which to compare the sufficiency of a zero-mileage rate. *LO Shippers* at 18. Moreover, UP acknowledges, as it must, that the *Investigation of Tank Car Allowance System, IHB II* and *Buffalo & Pittsburgh* cases were all either ongoing or decided contemporaneously with *LO Shippers*, and in none of these proceedings did the ICC mention that zero-mileage rates could be utilized instead of mileage allowances to compensate for the use of private tank cars. Finally, UP's attempt to confirm its interpretation of the 1987 *LO Shippers* precedent by pointing to widespread use of "zero-mileage rates" for tank cars in 2015 should also be rejected, since UP's refusal to pay mileage allowances is attributable principally to UP's exercise of market power over the vast majority of tank car shipments on its system.

In summary, UP has cited no valid grounds for dismissing Count II.

**C. The Complaint Does Not Ask The Board To Assert Jurisdiction Over Contracts, Or Require the Board To Do So.**

UP argues that, even if the Board denies its Motion to dismiss Counts I and II in their entirety for failure to state a claim, it nevertheless should dismiss both Counts to the extent they seek relief that would apply to movements under present or future transportation contracts. Motion at 17-18. The compensation for the use of rail tank cars that 49 U.S.C. § 11122(b) requires UP to pay the car provider is not somehow extinguished because UP has entered into a transportation contract with a shipper. This is particularly true where, as here, UP does not offer any tariff that would allow for the shipper or the car provider to receive the required compensation. The existence of a rail transportation contract does not mean that the car provider is being compensated for the use of the rail tank car, nor does it mean that UP's new tariff

charges for movements to repair facilities are covered by the transportation contract. The Board should deny UP's Motion as to both Counts I and II of the Complaint.

UP's argument for dismissal is a *non sequitur*. UP contends that the Board must dismiss the Complaint "to the extent it seeks relief that would apply to movements under . . . contracts or would require payment of reparations or damages for services provided under transportation contracts." *Id.* at 17. Although UP may raise this argument as a defense against its liability to specific shippers, such a defense is a matter to be proven, and not the subject of a preliminary motion to dismiss. Moreover, whether or not specific disputes are to be resolved through contract interpretation would be the purview of the courts, not this agency.<sup>7</sup> In contrast, whether or not UP's tank car compensation practices are reasonable is a matter entirely separate and independent from whether the tank car is used in connection with a transportation contract or a tariff, and it is well within the Board's jurisdiction.

UP's argument also is predicated upon the unsupported assumption that empty tank car movements are governed by contracts. UP implies that empty tank car movements are governed by the same contracts that cover loaded tank car movements. But the only basis that UP provides for this claim is its allusion to a general contract provision that purportedly incorporates UP's tariffs, and thus presumably Item 55-C, into its transportation contracts. Motion at 18. There are multiple flaws in UP's argument.

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<sup>7</sup> See e.g., STB Ex Parte No. 669, *Interpretation of the Term "Contract" in 49 U.S.C. 10709*, slip op. at (served March 29, 2007) ("If the parties have a dispute regarding such a contract—such as whether there has been adequate performance or whether the contract is void because it was signed under duress—such matters are to be decided by the courts under applicable state contract law."); *Kansas P&L Co. v. Burlington N. R.R. Co.*, 740 F.2d 780, 785 (10th Cir. 1984) ("The courts, not the ICC, . . . is the appropriate forum for determining the existence of an enforceable contract.").

First, shippers are typically responsible for arranging for the movement of empty tank cars to repair facilities, but the authority for selecting the repair facility belongs to the car owner. Shippers lease, rather than own, the majority of their tank cars. Because the car owners (*i.e.*, the lessors) are not parties to rail contracts between the shipper and UP, those contracts cannot control the transportation of empty tank cars to repair facilities.

The compromise agreement approved in *EP 328* reinforces this point. Section 3, which defines the maintenance and operating costs to be included in calculating the annual mileage allowance rate, addresses Lessor costs in subpart (a) and Lessee costs in subpart (b). Subpart (a) identifies charges for moving tank cars to repair facilities as a Lessor cost. *EP 328*, 3 I.C.C.2d at 206. There is no reference to such charges at all among the Lessee costs in subpart (b). Thus, if UP's charge for empty repair movements is a Lessee cost (which would be necessary in order to be covered by a Lessee's transportation contract with UP), that charge would not be recovered in the mileage allowance rates. That, in turn, would prove Complainants' allegation that UP has imposed this new tank car charge without compensation. Complaint, ¶ 28. Moreover, it would undermine a critical foundation of the ICC's decision in *IHB II* to permit rail carriers to assess charges on empty repair movements. Specifically, the ICC concluded, and the D.C. Circuit affirmed on this basis, that permitting empty repair charges would not violate the statute because "[t]he ultimate responsibility for the costs of owning railcars, including the costs of empty-repair moves, would continue to be transferred to railroads through customary channels—such as mileage allowances." 872 F.2d at 1052, *citing IHB II* at 614. UP's position that empty-repair movements are the responsibility of the shipper-lessee, if accurate, would violate this critical assumption.

Furthermore, responsibility for tank car repair and maintenance costs, including empty repair movement charges, is a matter governed by the lease between the car owner-lessor and shipper-lessee to which UP has no privity. The terms of such leases may vary from one lease to another and can change over time as old leases expire and new leases begin. Finally, even when the shipper also is the car owner, its transportation contract with UP does not extend to empty car movements, as noted above.

Second, when UP enters into contracts with shippers, those contracts nearly always are for the transportation of specified commodities (usually identified by Standard Transportation Commodity Code) in the tank cars. Because those contracts do not include the movement of empty tank cars as a distinct commodity under the contract they cannot be deemed to control such transportation. Furthermore, because UP did not charge for empty tank car movements to repair facilities prior to the publication of Item 55-C, effective January 1, 2015, there would have been no reason for the parties even to address such movements in their transportation contracts. Thus, there is no foundation for UP's assumption that its transportation contracts cover empty tank car movements to repair facilities in addition to the commodities specifically identified in those contracts.

Third, UP cannot rely upon generic contract provisions that incorporate its tariffs as a basis for claiming that empty-repair movements are governed by contracts. Because those contract terms incorporate only tariffs that would apply to the contract transportation but for the existence of the contract, they only incorporate lawful tariff terms. Therefore, if Complainants prove their claim that Item 55-C is unlawful, that tariff cannot apply to a contract via incorporation any more than it can apply to a common carrier movement. In other words, there

will be no tariff for a contract to incorporate by reference. UP's Motion to dismiss the Complaint to the extent it applies to transportation contracts should be denied.

**D. Association Complainants Withdraw Their Request For Reparations And Damages On Behalf Of Their Members.**

UP requests that the Board dismiss claims by the Association Complainants for reparations and damages on behalf of their member companies who are not named parties to this proceeding. Motion at 19-21. Complainants agree that the number of issues, the complexity, and potential discovery in this case are greatly increased by their request for reparations and damages on behalf of the Association Complainant members. Therefore, in order to avoid the distractions associated with such issues, and to focus the evidence and argument upon the lawfulness of UP's practices which fail to compensate tank car providers in accordance with the statute, Association Complainants have opted not to pursue their request for reparations and damages on behalf of their members. This is without prejudice to the ability of any member company to pursue reparations through an individual complaint.

**E. There is no Basis for Requiring Complainants to Make more Definite Statements.**

If a party moves for a more definite complaint, it "must specify the defects in the particular pleading and must describe fully the additional information or details thought to be necessary." 49 C.F.R. § 1111.5. The motion must be denied if the movant "is fully aware of the issues and basic facts involved," *United States v. Seigle's Express, Inc.*, MC-C-30132, 1989 WL 237763, at \*1 (served Jan. 5, 1989), or if the motion demands facts or argument that would be elicited in discovery or subsequent motions. *Entergy Arkansas*, Docket No. 42104 (served Dec. 30, 2009) (denying motion for more definite statement because the relevant issues would be more properly addressed in "opening evidence and argument"). *Save the Rock Island*

*Committee, Inc. v. The St. Louis Southwestern Ry. Co.*, Docket No. 41195, slip op. (STB served Apr. 1, 1994) (holding that discovery, not a motion for more definite statement, was the proper mechanism to obtain information). UP’s motion for more definite allegations as to both Counts I and II must fail because UP attempts to substitute the claims it would prefer to defend disguised as a request for more definite statement, and UP requests details that are more appropriately elicited through discovery.

With respect to Count I, UP asks the Board to require Complainants to make more definite allegations that UP has charged them or their members for empty repair moves in connection with common carrier transportation. Motion at 21. In formulating its demand, however, UP wrongly assumes that empty-repair movements are governed by contracts, and thus are not within the Board’s jurisdiction. The Board should reject UP’s assumption for precisely the same reasons discussed in section III.C, above. It would be improper to require Complainants to allege a particular “more definite” legal theory when the theory is contingent upon assumptions from opposing counsel—and thus touches the core of the parties’ dispute.

As to Count II, UP again asks the Board to force Complainants to adopt the legal theory UP would prefer, instead of what Complainants have alleged. UP first asks that Complainants be required “to allege clearly that their complaints about non-payment of mileage allowances involve movements that are not under zero-mileage rates.” Motion at 22. But the Complaint clearly does encompass movements under zero-mileage rates. UP’s request that Complainants reformulate Count II and adopt its assumptions must be denied, and the dispute over the propriety of compensation must be left for subsequent argument. *See Entergy Arkansas*, STB Docket No. 42104.

Next, UP asks the Board to force Complainants to plead Count II to a level of specificity appropriate only after discovery. Namely, UP asks that Complainants allege “clearly and in detail the circumstances under which specific shippers requested that [UP] establish such rates [that include a mileage allowance], so that [UP] has fair notice of their claims.” Motion at 22. Implicit in UP’s request is an assumption that shippers are required to request such rates before UP has a duty to compensate tank car providers. That is an appropriate dispute for subsequent argument. Moreover, even if there is such a requirement, the details requested are not required at this early stage and can be elicited through the discovery process.

Finally, UP asks the Board to require that Complainants “identify the specific rates, routes, tank car types, car ownership costs, and car ownership conditions as to which they allege that [UP] is not adequately compensating them or their members . . . ” and “to clarify the respects in which they believe the transportation rates [UP] charges when it uses private cars are inconsistent with the statute.” Motion at 22-23. UP purports to need this information because it is “uncertain whether Complainants intend to challenge the differentials between rates [UP] charges and the rate [UP] would charge if [it] were required to pay mileage allowances.” *Id.* at 23. Again, UP seeks to force Complainants to adopt its legal theory which would require Complainants to speculate as to the non-existent, hypothetical rates UP would have charged if it had complied with the statute and then challenge the hypothetical differential. Furthermore, the details UP demands of the Complaint can be elicited through the discovery process.

#### **IV. Conclusion**

For all the reasons set forth above, the Motion should be denied in its entirety.

Respectfully submitted,



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June 1, 2015

**CERTIFICATE OF SERVICE**

I do hereby certify that on this 1st day of June, 2015, I have served a copy of the foregoing *Reply to Motion to Dismiss Complaint or to Make Complaint More Definite* via electronic mail and regular mail to counsel for Defendant at the following address:

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