

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
June 14, 2016
Part of
Public Record

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

NOR 42144

Complainants,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

**CARGILL, INCORPORATED’S REPLY TO UNION PACIFIC’S MOTION TO
COMPEL DISCOVERY OF INFORMATINON FROM INDIVIDUAL COMPLAINANTS**

Thomas W. Wilcox
David K. Monroe
Svetlana Lyubchenko
GKG Law, P.C.
1055 Thomas Jefferson Street NW
Suite 500
Washington, DC 20007
(202) 342-5200
twilcox@gkglaw.com
dmonroe@gkglaw.com
slyubchenko@gkglaw.com

Counsel for Cargill, Incorporated

Dated: June 14, 2016

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I. INTRODUCTION

Complainant Cargill, Incorporated (“Cargill”) hereby submits its Reply to the “Motion to Compel Discovery of Information from Individual Complainants” (“Motion to Compel”), filed by Defendant Union Pacific Railroad Company (“UP”), on May 25, 2016. The Motion to Compel addresses certain discovery that UP seeks to compel from Cargill and co-Complainants Ethanol Products, LLC d/b/a POET Ethanol Products and POET Nutrition, Inc. (collectively, “POET”). This Reply addresses the Motion to Compel only to the extent it seeks to compel discovery from Cargill. POET is filing a separate reply.

II. BACKGROUND

Cargill hereby incorporates and adopts the extensive summary of the background of the applicable law and this case set forth in Part I of the Association Complainants¹ Reply to “Union Pacific’s Motion to Compel Discovery of Member Information from Association Complainants,” (Motion to Compel Member Information), filed June 6, 2016. As additional background, Cargill is a shipper of commodities on UP in private tank cars provided by Cargill. In particular, Cargill owns and/or leases a fleet of rail tank cars that it supplies to UP for use in the transportation of a variety of commodities shipped by Cargill. Cargill is both a member of NAFCA and an individual Complainant in this proceeding. UP has propounded discovery requests to Cargill separate from those served upon the Association Complainants. However, many of the discovery requests to Cargill are identical or similar to the requests served on the Association Complainants and raise the same issues of relevance, overbreadth and undue burden.

¹ The Association Complainants are North America Freight Car Association (“NAFCA”); American Fuel and Petrochemicals Manufacturers; the Chlorine Institute; the Fertilizer Institute; and the American Chemistry Council.

III. APPLICABLE LEGAL STANDARDS

Parties may seek discovery of non-privileged, relevant material. 49 C.F.R. § 1114.21(a). But “[a]ll discovery requests entail the balancing of the relevance of the information sought against the burden of producing that information.” Docket No. FD-35557, *Reasonableness of BNSF Rwy. Co. Coal Dust Mitigation Tariff Provision*, at 4 (S.T.B. served June 25, 2012). “[D]iscovery may be denied if it would be unduly burdensome in relation to the likely value of the information sought.” Docket No. FD-30186, *Tongue River R.R. Co. – Rail Constr. & Operation – In Custer, Powder River & Rosebud Counties, Mont.*, at 4 (S.T.B. served Sept. 10, 2014) (citing 49 C.F.R. § 1114.21(c)). Discovery requests must therefore be “narrowly drawn” lest they create excessive costs. Docket No. NOR-42051, *Wisc. Power & Light Co. v. Union Pac. R.R. C*, at 4. (S.T.B. served June 21, 2000). Similarly, a discovery request creates an inherently disproportionate burden when it requires production of redundant information or information readily accessible to the requesting party. *See* Finance Docket No. 35081, *Canadian Pac. Rwy. Co. – Control – Dakota Minn. & E. R.R. Corp.*, at 3 (S.T.B. Mar. 26, 2014) (rejecting a motion to compel responses that were “duplicative of other document requests”); I.C.C. Docket No. 38239S, *Amstar Corp. v. The Ala. Great S. R.R.*, 1989 WL 238989, at *6 (I.C.C. July 14, 1989). The Board has broad discretion to limit discovery that would be irrelevant, unduly burdensome, or otherwise objectionable. *See* 49 C.F.R. § 1114.21(c).

IV. UP’S MOTION TO COMPEL ADDITIONAL DISCOVERY FROM CARGILL SHOULD BE DENIED

In its Motion to Compel, UP seeks to compel the discovery of certain information from Cargill that it has also sought from Association Complainants’ members in the Motion to Compel Member Information. In doing so, UP weaves three core arguments throughout its Motion to Compel in an attempt to justify multiple discovery requests that clearly have no

relevance to the issues in this proceeding. UP also mischaracterizes statements made both by Complainants and the Board in response to UP's Motion to Dismiss in an attempt to justify the discovery requests that are the subject of this Motion to Compel.

In particular, UP seeks to compel the production of documents from Cargill in three general categories. First, UP seeks the production of information and documents that refer or relate to Cargill's interactions with railroads other than UP. Second, UP seeks production of information and documents related to the ownership and maintenance costs that Cargill incurs in connection with its tank car fleet. Third, UP seeks discovery of information it claims is relevant to "incentives" to increase the "efficiency" of empty tank car moves to repair facilities.

Because these three categories pertain to multiple discovery requests in the Motion to Compel, Cargill will address UP's relevance arguments with respect to these categories here rather than repeat them at length in response to each individual discovery response.

A. Information Pertaining to "Other Railroads" is Irrelevant

Several of UP's discovery requests seek information from Cargill about its interactions with railroads other than UP – information that simply is not relevant to the issues in the Complaint. *See* Motion to Compel at 10-13 and 22-25. The requests referenced in the Motion to Compel that seek such information, in whole or in part, are Interrogatories 16 and 18 and Document Requests 26, 34, and 35. The arguments advanced by UP for seeking such information from Cargill are identical to the arguments UP has raised in its Motion to Compel Member Information regarding the discovery of information pertaining to other railroads. Those arguments are generally summarized as follows: (1) because the Complainants' have challenged UP's Item 55-C as an unreasonable practice under 49 U.S.C. § 10702, the practices of other railroads are relevant; and (2) Complainants have conceded the relevance of information related to other railroads in their reply to UP's motion to dismiss the Complaint "by arguing . . . that the

Board's *IHB-II* precedent does not apply because Union Pacific does not make a disproportionate number of repair moves as compared to other railroads." *See* Motion to Compel at 12; *citing* Complainants Reply to Motion to Dismiss at 9.² Neither argument has merit.

UP has distorted the issues in this case in an attempt to manufacture a need for discovery of facts about "other railroads." First, UP claims that discovery as to "other railroads" is relevant because, if other railroads are engaged in the same practices as UP, that is evidence that UP's practices are reasonable. *See* Motion to Compel at 10-11. However, there is no need to debate UP's "everyone else is doing it too" defense for the purpose of this discovery dispute.³ All of the Complainants have offered to stipulate to UP's main factual contention – that other railroads also charge zero-allowance rates and generally do not pay mileage allowances for tank car movements. Moreover, all of the Complainants have stated they would be willing to stipulate that certain other Class I railroads began to charge for tank car repair movements after UP did so. Furthermore, most of these facts are available from the other railroads' publically available tariffs, just as the challenged UP actions also are evident in its public tariffs. Thus, even if this information were relevant, there would be no justification for the detailed and voluminous information UP is attempting to obtain from Cargill, when the information UP claims to need is equally available to UP.

² In the meet and confer discovery discussions between UP and Cargill, Cargill has responded to UP's requests for information pertaining to other railroads with the same arguments that are now set forth in the Association Complainants' reply to this aspect of UP's Motion to Compel Member Information. *See* Reply to Motion to Compel Member Information at Part II.B.2. Cargill hereby adopts and incorporates by reference Part II.B.2. of the Association Complainants' Reply to the Motion to Compel Member Information.

³ This defense is particularly ironic in light of a highly concentrated rail industry today in which UP and the next three largest railroads, which collectively control 90% of the rail transportation market in North America, are defending an antitrust class action complaint in which they are charged with collusion in their establishment of fuel surcharges. *See* Complaint, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, No. 1:07mc-489/MDL No. 1869 (D.D.C. Apr. 15, 2008), ECF No. 93.

Second, UP claims that the Complainants themselves have made information about other railroads relevant – because they argued in their reply to UP’s motion to dismiss the Complaint that “Union Pacific does not make a disproportionate number of repair moves as compared to other railroads.” *See* Motion to Compel at 12-13. But UP’s contention is incorrect and based on a misleading reading of this section of Complainants’ reply.

As a preliminary matter, UP’s statement is factually inaccurate. Nowhere on page 9 of their reply to UP’s motion to dismiss, or anywhere else in that pleading or their Complaint have Complainants alleged that comparing the number of empty tank car movements on UP with other railroads is relevant to determining whether UP may charge for tank car repair movements. Rather, Complainants consistently have identified the issue as whether UP bears a disproportionate responsibility for repair movements relative to its participation in revenue movements. *Id.* at 9 (*quoting* 872 F.2d at 1051); and 10 (referencing “a disproportionate allocation of repair-movement responsibility relative to loaded revenue movements”). All of the data required for this inquiry is in the possession of UP.

Thus, far from inviting a comparison between UP and other railroads today, Complainants’ statements in their reply to UP’s motion to dismiss invited only a comparison of today’s UP with the defendant terminating railroads in the *IHB-II*⁴ decision. The defendant terminating railroads in *IHB-II* – unlike today’s UP – bore a disproportionate burden of moving tank cars to repair facilities relative to the revenue they derived from loaded tank car movements. The language UP cites in Complainants’ reply to UP’s motion to dismiss was directed solely to that narrow issue.

⁴ *General American Transp. Corp. v. Indiana Harbor Belt Railroad Co.*, 3 I.C.C. 2d 599 (1987).

For example, immediately following their statement that “the railroad industry has changed considerably since 1987,” the Complainants explained that [i]n that year, there were 17 Class I railroads operating in the United States, and scores of short line railroads, with far greater potential for disproportionate allocation of repair-movement responsibility relative to loaded revenue movements even among Class I carriers. Consequently, the Interstate Commerce Commission 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 *Charges to Movement of Empty Cars, Buffalo & Pittsburgh RR, Inc.*, 7 I.C.C. 2d 18 (1990) at 25. Complts.’ Reply to Mot. to Dismiss at 9-10. In the next paragraph, the Complainants noted that just four railroads control over 90% of the U.S. rail traffic today and that UP is the largest of those railroads and receives over \$1.5 billion of revenue from tank car shipments annually, which does not implicate the inter-railroad cross-subsidy and averaging concerns that the ICC sought to address in *IHB-II*. *Id.* at 10. In its discovery motions in this case UP has completely ignored this context, which again, far from inviting a comparison with all other railroads today, draws a comparison of the key industry circumstances underlying the 1987 *IHB-II* decision with those of today, and particularly those of UP. None of those facts require discovery pertaining to “other railroads” today.⁵

⁵ Complainants also stated that: “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.” Complts.’ Reply to Mot. to Dismiss at 14. This was the concluding sentence to a paragraph that discussed the three key rail industry changes since *IHB-II* that Complainants consistently have identified as the basis for their claims: industry consolidation, stronger financials, and the near complete cessation of mileage allowance payments. *Id.* at 13-14. None of these contentions require discovery of information regarding “other railroads.”

B. Tank Car Ownership and Maintenance Costs.

In Interrogatories Nos. 30-33 and 35, and Document Requests Nos. 18-20, UP has requested an enormous amount of information relating to Cargill's tank car ownership and maintenance costs. *See* Motion to Compel at 16. UP has sought to compel the production of very similar information from each of the Association Complainants' members through its Motion to Compel Member Information. Moreover, UP raises the same arguments for production of car ownership and maintenance costs from Cargill in the Motion to Compel that it has made in its Motion to Compel Member Information. For the same reasons set forth in the Association Complainants reply to the Motion to Compel Member Information, the costs Cargill incurs to maintain its tank car fleet are simply not relevant to either Counts I or II of the Complaint.⁶

Specifically, As to Count I, Complainants have alleged that UP may not charge for transporting tank cars to and from repair facilities. The only tank car cost that is relevant to this claim is UP's new empty repair move charge in Item 55-C. UP attempts to argue otherwise based upon two quotations from Complainants' reply to UP's motion to dismiss. Motion to Compel at 19. But the "costs" referenced in both quotes are UP's repair move charges, nothing more.

As to Count II, UP contends that tank car ownership and maintenance costs are relevant to whether its zero-allowance rates properly compensate tank car providers for their costs of ownership. *Id.* at 19-20. But UP appears to stubbornly misapprehend the nature of Cargill's claim under Count II. Cargill is not seeking to recover its actual ownership and maintenance costs in Count II; it is seeking to recover the mileage allowances it is due pursuant to the formula

⁶ *See* Motion to Compel Member Information at Part II.C.6. Cargill hereby adopts and incorporates by reference Part II.C.6. of the Association Complainants' Reply to the Motion to Compel Member Information.

approved by the Board in Ex Parte No. 328, *Investigation of Tank Car Allowance System*, 3 I.C.C. 2d 196 (1986) (“Ex Parte 328”). More to the point, the formula for calculating mileage allowances under Ex Parte 328 does not depend in any way on the ownership or maintenance costs incurred by Cargill.

Mileage allowances under the Ex Parte 328 agreement are based, not on the costs of each individual tank car owner or lessee for each individual tank car, but rather on nationwide average costs measured by cost data submitted by the three largest tank car lessors in North America. Indeed, a major objective of the Ex Parte 328 Agreement was to develop a national mileage allowance system that eliminated the need for such individualized determinations. *See, id.*, at 199 (the Agreement “will foster adherence to a national allowance system unless departures are shown to be justified by special circumstances in particular cases.”). The three largest lessors submit their cost data to Railinc, a wholly-owned subsidiary of the AAR, which administers the Ex Parte 328 Agreement, and publishes the prescribed allowances in a nation-wide tariff, RIC-6007, to which all of the major railroads, including UP, subscribe. Cargill does not submit ownership or maintenance cost data, to Railinc. Thus, Cargill’s actual costs of ownership are completely irrelevant to Cargill’s Count II claim for mileage allowances.

C. UP’s Efficiency Arguments

UP claims that several of its discovery requests are relevant because they will provide information on the impact of its repair movement charges upon incentives to manage tank car fleets efficiently. *See* Motion to Compel at 8, 14. UP invokes this efficiency argument in an attempt to justify the following discovery requests either in whole or in part: Interrogatory Nos. 14-15, 19. However, UP never explains how “incentives” and “efficiency” considerations are in any way relevant to Count I.

UP's efficiency argument hangs upon a thin thread from *IHB-II*.⁷ See Motion. to Compel Member Information at 5-6, quoting *IHB-II* at 611. That quote, however, is part of a paragraph that explains multiple reasons why the agency was reversing *IHB-I*, including a determination that *IHB-I* promoted inefficiency. The ICC's willingness to permit empty repair move charges in *IHB-II* expressly was contingent upon its assumption that railroads ultimately would be responsible for those charges through the payment of mileage allowances. *IHB-II* at 607-08, 610, & 613-16. If that assumption is inaccurate, UP's repair move charge violates the statute, which requires railroads to bear ultimate responsibility for the costs of tank car ownership. No matter how strong the efficiency justification, it cannot trump the statutory compensation requirement.⁸

For that very reason, the Complainants offered to stipulate that any person faced with dramatically higher charges from a supplier of services will seek to avoid those charges if possible. See Motion to Compel Member Information, Ex. 28 at 6. This is a common sense argument that does not require any discovery to demonstrate, much less the burdensome discovery UP seeks from Cargill. The most telling evidence of this fact is that the ICC was able to reach that conclusion in *IHB-II* without citing any evidence.⁹

⁷ UP does not explain its "efficiency" argument in detail in its Motion to Compel discovery from Cargill, but it does attempt to do so in the Motion to Compel Member Information from the Association Complainants.

⁸ In affirming, *IHB-II*, the D.C. Circuit recognized the preeminent nature of the compensation argument. See, *General American Transp. Corp. v. I.C.C.*, 872 F.2d. 1048, 1055 (D.C. Cir. 1989) (briefly mentioning the "efficiency" rationale in a footnote to the core compensation issue in the main text).

⁹ UP's efficiency argument is a red herring for other reasons too. Tank car providers have ample incentives, apart from the payment of transportation charges for repair movements, to manage the repair and maintenance of their tank car fleets efficiently. The longer cars spend travelling to and from, or in, a repair facility, the longer those cars are not in revenue service.

D. Cargill's Position Regarding Specific Discovery Requests

1. Movements of Empty Tank Cars To Repair Facilities and Work Performed at Repair Facilities (Interrogatories Nos. 14 and 15)

In Interrogatories Nos. 14¹⁰ and 15,¹¹ UP demands that Cargill identify and provide detailed and extremely voluminous information about each movement of a Cargill tank car to a repair facility, including (a) identification of the repair facility to which the car was sent, (b) a description of the repairs or maintenance work performed in each instance, and (c) the amount UP charged Cargill for the movement of the empty tank car to or from the Repair Facility. Notwithstanding its objections as described below, Cargill has offered to produce a significant amount of information in response to Interrogatories Nos. 14 and 15. In particular, Cargill has agreed to provide information sufficient to show for each of its tank cars (1) the dates each Cargill tank car was at a Repair Facility, (2) the location of each such Repair Facility, and (3) the amount UP has charged Cargill for empty car movements to Repair Facilities under Item 55-C – information that UP already has in its files. From the information Cargill has agreed to produce, UP can determine from its own records whether it moved the tank to or from the Repair Facility and the details of each such movement.

UP's motion to compel production of further information in response to Interrogatories Nos. 14 and 15 should be denied on the grounds that the information sought is not relevant to the issues in this proceeding, would be unduly burdensome for Cargill to produce, and is information that UP already has in its possession. As a preliminary matter, the repair work performed on

¹⁰ Interrogatory No. 14 requests that Cargill “Identify each movement of an empty tank car owned or leased by You to or from a Repair Facility, and identify the Repair Facility to or from which the car moved and the work performed at the Repair Facility.”

¹¹ Interrogatory No. 15 requests that Cargill “Identify each movement for which You have been assessed a charge under Item 55-C and for which you are seeking reparations under Count I, and identify the amount of the charge, the Repair Facility to or from which the car moved, and the work performed at the Repair Facility.”

Cargill's tank cars is simply not relevant to any issue in this proceeding. Count I challenges UP's imposition of charges for empty moves to and from repair facilities under Item 55-C.¹² However, the application of Item 55-C does not depend in any way on the nature of the work performed at the repair facility. Consequently, the information UP seeks about the nature of the work performed on Cargill tank cars each time they were sent to a repair facility has no bearing on whether Item 55-C applies, much less whether Item 55-C is permissible under the Interstate Commerce Commission Termination Act ("ICCTA") and applicable precedent.¹³ Similarly, for the reasons stated in Part IV.A. above, information about empty moves of Cargill tank cars to repair facilities on railroads other than UP has no relevance to the issues in this proceeding – which addresses only UP's empty repair move tariff. Finally, UP's contention that the information it seeks is relevant to "incentives" to reduce "inefficient" movements to repair facilities – and thus relevant to this proceeding – is completely without merit. As set forth above in Part IV.C., UP's "efficiency" arguments have no possible relevance to the issues in this proceeding.

Moreover, the expense and effort required to locate, collect and produce the voluminous information requested in Interrogatories Nos. 14 and 15 would be unduly burdensome, particularly given the information's complete lack of relevance to the issues in this case. Cargill

¹² Count II addresses UP's failure to pay mileage allowances on loaded tank car movements. Since the obligation to pay mileage allowances arises only with respect to only loaded moves, information about empty repair moves or the nature of the repairs involved obviously has no relevance to Count II.

¹³ UP contends that Cargill made the work performed at repair facilities relevant by noting in Complainants Reply to UP's Motion to Dismiss that UP's empty move tariff is more expansive than the tariffs at issue in *IHB II*, since it covers car cleaning, retrofits, and inspections. However, the differences noted between UP's empty move tariff and the tariffs at issue in *IHB II* are clear from the express terms of the respective tariffs. The nature of the work performed for any particular car at any particular repair facility has no relevance to the point Complainants made in their Reply – that the UP empty move tariff is broader than those involved in *IHB II*.

has owned or leased hundreds of tank cars over the applicable time period, and each of its cars has likely been sent to repair facilities on numerous occasions. As Cargill attempted to explain during meet and confer discussions with UP, Cargill does not maintain the detailed information UP seeks in a centrally located and easily accessible repository.¹⁴ As a result, Cargill would have to manually search archived paper files, emails, invoices, and collateral sources at great cost to find the requested information, and the result of that effort and expense would produce at best, incomplete, anecdotal information of little or no evidentiary value.

Perhaps most importantly, most of the information UP seeks is already in UP files. UP obviously knows, and can easily track, when and where it moves Cargill's tank cars on the UP system, including to repair facilities. Indeed, UP must be able to do so in order to bill and collect its empty repair move charges under Item 55-C of its tariff. Requiring Cargill to produce information that UP already has in its own files would serve no purposes other than to impose an unnecessary and unfair burden on Cargill.¹⁵

2. Charges for Movements of Empty Tank Cars to Repair Facilities By Other Railroads (Interrogatory No. 16)

Interrogatory No. 16 seeks information about empty moves of Cargill tank cars to repair facilities on railroads other than UP, including – for each such empty move – the identity of the other railroad that assessed a charge for empty moves to repair facilities and the amounts of the charges.¹⁶ Cargill has objected to Interrogatory No. 16 on the grounds that information relating

¹⁴ In addition, Cargill simply does not track or retain some of the information requested by UP.

¹⁵ Requiring the production of voluminous documentation and information relating to issues having no relevance to the proceeding would also discourage other potential claimants from bringing their legitimate grievances to the Board.

¹⁶ Interrogatory No. 16 asks Cargill to “Identify each movement for which You have been assessed a charge by a railroad other than Union Pacific for the movement of a private tank car to a Repair Facility, identify the railroad that assessed the charge, the amount of the charge, and whether You paid the charge.”

to other railroads has no relevance to the issues in this proceeding – a proceeding which challenges only UP’s empty move tariff. UP’s motion to compel discovery of information relating to other railroads should be denied for the reasons stated in Part IV.B. above, as well as the reasons stated below.

UP argues that the requested information is “highly relevant” for two reasons. First UP suggests that information relating to charges by other railroads is relevant to an “everybody else does it” defense that UP apparently intends to advance. *See* Motion to Compel at 10-11. Noting that the Complaint characterizes UP’s assessment of charges for empty repair moves as an “unreasonable practice,” UP argues that the Board looks to industry practice in determining what practices are reasonable. UP further argues that whether other railroads charge for empty moves to repair facilities -- and what they charge – is therefore relevant to whether UP should be permitted to charge for empty moves to repair facilities.

Whether or not UP’s dubious contention that “everyone does it” is a legitimate defense to Count I has any merit, it is not grounds for the discovery UP seeks in Interrogatory No. 16. UP obviously already knows whether other railroads assess charges for empty repair moves, as well as the amount of such charges, because such charges are publicly announced and set forth in published tariffs, just as UP did in establishing Item 55-C. Discovery requests create an inherently disproportionate burden when they require production of redundant information or information readily accessible to the requesting party. *See* Finance Docket No. 35081, *Canadian Pac. Rwy. Co. – Control – Dakota Minn. & E. R.R. Corp.*, at 3 (S.T.B. Mar. 26, 2014) (rejecting a motion to compel responses that were “duplicative of other document requests”); I.C.C. Docket No. 38239S, *Amstar Corp. v. The Ala. Great S. R.R.*, 1989 WL 238989, at *6 (I.C.C. July 14,

1989). Thus, UP does not need detailed information from Cargill about “every movement” of Cargill tank cars to repair facilities to make its “everybody does it” argument.

Second, UP offers up the extremely speculative theory that information about empty moves charges by other railroads “may provide information about the likely effects of adopting Item 55-C,” or “may” show that shippers reacted to charges from other railroads by shifting empty repair movements to UP.¹⁷ UP does not explain, however, how the “likely effects of adopting Item C-55” or the possible “shifting of empty movements” is in any way relevant to the crux of Count I – the legal propriety of UP’s issuance of Item 55-C.

3. Tank Car Movements on Union Pacific as Compared to Other Railroads (Interrogatory No. 18)

Interrogatory No. 18 seeks information showing the loaded, empty, and empty repair moves of Cargill’s tank cars over a 27-year period.¹⁸ Cargill has objected to this interrogatory on a number of grounds, including relevance, overbreadth and undue burden. Moreover, much of the requested information is already within UP’s possession.¹⁹ For example, UP tracks the movement of all rail cars on its system, and thus clearly already has the requested information relating to loaded, empty and empty repair moves of Cargill tank cars on UP’s lines. Notwithstanding and subject to its objections, Cargill is willing to provide the requested

¹⁷ UP’s theory about “shifting empty movements” in response to charges by other railroads is all the more tenuous given the fact that UP was the first Class I railroad to establish such a charge.

¹⁸ Interrogatory No. 18 provides “Separately for each car reporting mark assigned to You, and separately for each year from 1987 through 2014, with respect to Your tank cars, state (a) The number of loaded miles the cars moved on Union Pacific, (b) The number of loaded miles the cars moved on all railroads, (c) The number of empty miles the cars moved on Union Pacific, (d) The number of empty miles the cars moved on all railroads, (e) The number of empty miles on Union Pacific associated with the cars’ movements to and from Repair Facilities, and (f) The number of empty miles on all railroads associated with the cars’ movements to and from Repair Facilities.”

¹⁹ See General Objection No. 7, Responses and Objections of Cargill, Incorporated to Union Pacific’s First Set of Discovery Requests, at 3 (objecting to discovery requests to the extent they seek information already in UP’s possession or equally available to UP).

information for a reasonable time period going back to 2007, to the extent the information is reasonably accessible.²⁰

UP's motion to compel responses to Interrogatory No. 18 should be denied to the extent UP seeks to compel Cargill to produce the requested information for periods prior to 2007 or for information not reasonably accessible. In addition, the information relating to movements on other railroads is simply not relevant to any issue in this case for the reasons set forth in Part IV.A above.²¹ Specifically, UP misleadingly argues that Complainants made movements on other railroads relevant by arguing that the *IHB II* decision is limited to rail carriers that can demonstrate a disproportionate number of repair moves in comparison to other railroads. *See* Motion to Compel at 12-13. However, in doing so, UP mischaracterizes Complainants' actual position and statements as well as the underlying rationale of the *IHB II* decision. Neither Complainants nor Cargill has ever taken the position that movements on other railroads are relevant to the applicability or not of *IHB II* to UP's empty repair move tariff. To the contrary, Complainants have consistently argued that the relevant comparison under *IHB II* is between the number of empty tank car repair moves on UP and the revenue generated by loaded moves of tank cars on UP.

4. Empty Mileage Charges Billed Pursuant to Freight Tariff RIC 6007-Series (Interrogatory No. 19)

Interrogatory No. 19 seeks the amount of equalization charges billed to Cargill pursuant to Freight Tariff RIC 6007-Series for empty movements of its tank cars for the years 1987

²⁰ To be clear, Cargill is willing to provide the requested information to the extent it is already kept in an accessible form or can be compiled with a reasonable effort. However, it would be extremely burdensome and expensive to produce the information to the extent Cargill would be required to review and extract information from invoices for individual shipments in order to compile the information. The effort and expense of doing so cannot be justified based on the lack of relevance of this information to the issues in this case, as discussed below.

²¹ As noted above, UP obviously already has the requested information relating to movements of loaded and empty tank cars on its own system.

through 2014 – a 27-year period.²² Although UP claims that producing this information should not be unduly burdensome, it has never explained in the first instance how the amount of equalization charges billed to Cargill could possibly be relevant to any issue in this case.²³ The discovery of equalization charges billed to Cargill requested In Interrogatory No. 19 should be denied.

5. Movements for Which Cargill is Seeking Damages Under Count II (Interrogatory No. 28)

In Interrogatory No. 28, UP seeks detailed and voluminous information about each movement for which Cargill seeks damages under Count II – i.e., each loaded movement for which Cargill supplied a private tank car for UP’s use in providing transportation services.²⁴ Cargill has responded that it seeks reparations in the form of mileage allowances for all loaded movements in Cargill provided tank cars on UP system during the two-year reparations period.²⁵

UP’s demand for the detailed information sought in Interrogatory No. 28 should be denied. Cargill is seeking mileage allowances under Count II for the two-year reparations period

²² Interrogatory No. 19 states, “Separately by each car reporting mark assigned to You, state the amount billed to You pursuant to the Freight Tariff RIC 6007-Series for empty mileage associated with movements of tank cars, separately for each year from 1987 through 2014.”

²³ In its Motion, UP suggests it would be “highly relevant” if Cargill were never billed for equalization because it would suggest that Cargill faces no marginal incentive to eliminate unnecessary empty moves to repair facilities. To the extent UP is referring to its “efficiency” argument, efficiency concerns are simply not relevant in this proceeding, as explained in Part IV.C. above.

²⁴ Interrogatory No. 28 requests that Cargill “Identify each movement for which You seek damages under Count II, the price documents (i.e., contract, tariff, exempt quotation) under which the movement occurred, and state whether You paid the line-haul transportation charge and whether You were the Car Owner or leased the car from the Car Owner. If You did not pay the line-haul transportation charge, identify the Person that paid the charge.”

²⁵ Cargill also indicated that none of the subject movements were pursuant to contracts. However, UP has subsequently pointed out that some of the movements were in fact under contracts with UP, and Cargill has confirmed that UP’s information is correct and that Cargill’s initial response was incorrect. This misunderstanding only goes to demonstrate that – as discussed above – UP already has the information it requests in Interrogatory 28 in its possession.

for all loaded shipments in Cargill-provided tank cars. UP as a matter of course tracks all of the loaded movements of Cargill's tank cars on UP's system, and thus already has in its possession all of the relevant information sought in Interrogatory No. 28.²⁶ Indeed, to the extent Cargill has this information, it would have received it directly or indirectly from UP.

6. Information Regarding Tank Car Ownership and Maintenance Costs (Interrogatories No. 30-33, 35; Document Request Nos. 18-20)

UP seeks detailed and incredibly voluminous information relating to Cargill's tank car ownership and maintenance costs in Interrogatories Nos. 30-33 and 35, and Document Requests Nos. 18-20. Indeed, the scope of UP's requests for information about Cargill's tank car costs is breathtaking. For example, Interrogatory No. 30 alone has 19 subparts requesting detailed individualized information about *each* tank car Cargill has owned over 27 years and also asks for specific information about *each* car's use and costs over a 10-year period. Similarly, Interrogatory No. 32 has 15 subparts seeking detailed information about categories of costs for *each* car over a 10-year period.

UP's Motion to Compel discovery of extremely detailed and voluminous information about Cargill's ownership and maintenance costs should be denied. As set forth in Part IV B. above, Cargill's costs of ownership and maintenance have no possible relevance to the claims alleged in the Complaint. More to the point, UP has never explained why it needs discovery of cost information, to what issue in the case it would apply, or how it could otherwise possibly be relevant to Cargill's claims. Instead, UP continues to point to out-of-context language in filings in this case to suggest that cost information is somehow relevant.

²⁶ Interrogatory No. 28 also asks whether Cargill is the owner or lessee of each tank car. But that information can be determined by UP from the tank car leases that Cargill has already agreed to provide in response to other discovery requests from UP.

However, the Association Complainants and Cargill have repeatedly advised UP that the Complaint seeks reparations based only on refunds of empty repair move charges incurred under UP's Item 55-C (Count I) and mileage allowance calculated pursuant to the formula approved by the Board in Ex Parte 328 (Count II) – neither of which depend on the underlying costs of ownership and maintenance incurred by Cargill or any other individual car provider.²⁷ Complainants have even offered to amend the Complaint to make clear that they do not intend to put ownership costs at issue in this proceeding. Notwithstanding all attempts to make clear the nature of Complainants' claims, UP persists in attempting to misinterpret and/or mischaracterize language in Complainants' Complaint and other filings in this proceeding in order to impose extremely burdensome discovery on Cargill. However, even if UP could articulate some tenuous theory under which cost information would be marginally relevant, the significant expense and effort of collecting the enormous amount of cost data requested would itself justify denial of the Motion to Compel.

UP also argues that Cargill has itself requested discovery from UP of tank car ownership and maintenance costs, thus putting its own costs at issue. *See* Motion to Compel at 20-21. UP's contention is mistaken – Cargill has not requested discovery of tank car costs from UP. Cargill and the other Complainants have instead sought information relating to UP's general or specific knowledge of tank car costs – not because costs are in any way relevant to Complainants' claims, but because UP's knowledge or understanding about tank car costs are relevant to its asserted defense that UP has adequately compensated providers of private tank cars through discounted “zero-allowance” rates. However, since UP will apparently contend that its “zero-allowance”

²⁷ As noted in Part IV.B. above, the only costs relevant to the calculation of mileage allowances are those submitted to Railinc, on an annual basis by the three largest tank car lessors. The Railinc cost data is readily available to UP directly from Railinc.

rates were specifically designed to account for tank car costs, only UP's understanding of what those costs were at the time it established its rates are relevant to its defense. Cargill's actual costs would have no bearing on UP's "zero-allowance" rates unless UP knew what those costs were at the time it established its rates. Of course, if UP already knew what Cargill's ownership costs were when it established its rates, it has no need for discovery of those costs now.

7. Documents Relating to Reasons for Moving Tank Cars To Repair Facilities (Document Requests Nos. 25-26 and 34-35)

In Document Requests Nos. 25-26 and 34-35, UP seeks "all documents" relating to Cargill's plans for retrofitting its tank cars, communications between tank car lessors and lessee about repair moves, and the reasons Cargill's tank cars are moved to or between particular repair facilities. UP suggests that these Requests are designed to determine the reasons tank cars are sent to repair facilities. Cargill has objected to these discovery requests on the grounds of relevance, overbreadth and undue burden. UP's Motion to Compel the production of the requested documents should be denied.

The reasons Cargill's tank cars are sent to repair facilities have no relevance to the issues in this proceeding. Cargill is challenging UP's imposition of charges in Item 55-C for the movement of empty tank cars to repair facilities. UP's charges under Item 55-C apply for all movements to repair facilities, regardless of the reasons the tank car is required to be inspected, maintained, repaired or retrofitted. Accordingly, the reasons tank cars are sent to repair facilities have no bearing on the applicability or propriety of UP's empty repair move tariff charges set forth in Item 55-C. Moreover, UP has never been able to articulate any basis upon which the reasons tank cars are sent for repairs would be relevant in this proceeding.

As it does throughout its Motion to Compel, UP plucks bits and pieces of language out of context from the Complaint or other filings by Complainants to argue that the information it

seeks is somehow relevant, without ever explaining how that information relates to the limited issues raised in this proceeding. For example, UP claims all information about possible retrofits of tank cars is relevant simply because Complainants referred to the well-known fact that certain recent regulatory actions will require the retrofit of many existing tank cars and thus will likely increase the number of empty tank car moves to repair facilities. But UP does not explain how that obvious fact relates to the issues in this case or how the information it requests would be material to any of the issues in this case.²⁸

8. Document Relating to Communications Between Lessors and Lessees Regarding Mileage Allowances (Document Request No. 29)

In Document Request No. 29, UP seeks discovery of all communications regarding mileage allowances between Cargill and any tank car lessor or lessee. UP claims that this non-party discovery “may shed light on the reasons why shippers negotiate zero-mileage rates rather than rates that provide for the payment of mileage allowances, and thus whether [UP’s] use of zero-mileage rates is reasonable.” Motion to Compel at 26. UP does not explain what it expects to find and how that information will inform its theory of the case. Rather, this has all the appearance of another “fishing expedition” by UP to justify its zero-allowance rates. Lessor/lessee communications regarding allowances will not and cannot prove or disprove whether UP is compensating either the lessor or the lessee for the use of the tank car as it is required to do under the statute. These non-party communications are not relevant and are not permitted under the Board’s discovery rules.

²⁸ UP appears to suggest that regulatory actions requiring retrofits possibly could be a factor to be considered in determining whether the *IHB II* decision should apply to UP’s empty repair move tariff. However, even if that were so, the detailed discovery UP seeks would not be necessary or germane in this case. To the extent UP wants to argue that increased traffic to repair facilities somehow abrogates the Ex Parte 328 equalization regime and justifies its establishment of charges in Item 55-C, it can make that argument without the detailed information it seeks from Cargill in discovery.

**9. Documents Relating to Requests for Zero-Mileage Rates
(Document Request No. 31)**

In Document Request No. 31, UP seeks “all documents” relating to Cargill’s alleged decision to request zero-allowance rates rather than rates that included payment of mileage allowances.²⁹ Based on UP’s Instructions applicable to UP’s second set of discovery requests, Document Request No. 31 would require Cargill to search for documents going back to 1987. Cargill raised objections based on lack of relevance, overbreadth and undue burden, but nonetheless agreed to search for and produce for responsive documents for the period January 1, 2013 to the present – in other words, for the reparations period applicable to Cargill’s claims, plus three months. In its Motion to Compel, however, UP demands that Cargill be compelled to search for documents dating back to 2001.

Cargill has already agreed to perform a search for responsive documents relating to the reparations period, and believes doing so would constitute a reasonable search.³⁰ Moreover, Cargill is willing to conduct a reasonable search for responsive documents dated before the reparations period. However, Cargill believes that any documents responsive to this request would be in the form of email correspondence, and Cargill’s document retention period for emails is three years. Accordingly, there is little likelihood that responsive documents dating back more than three years, much less to 2001, exist. Consequently, Cargill is willing to search for and produce email correspondence and other documents for the three-year period prior to the filing of the complaint in this proceeding.

²⁹ Document Request No. 31 provides: “Produce all documents that refer or relate to decisions by You to request zero-mileage rates rather than rates that include payment of a mileage allowance.”

³⁰ Cargill expects there to be few, if any, documents responsive to Document Request No. 31, since Cargill has not made the decision to request zero-allowance rates. Cargill accepts zero-allowance rates because those are the only rates UP has offered to Cargill for at least the last ten years.

Respectfully submitted,

/s/ David K. Monroe
Thomas W. Wilcox
David K. Monroe
Svetlana Lyubchenko
GKG Law, P.C.
1055 Thomas Jefferson Street NW
Suite 500
Washington, DC 20007
(202) 342-5200
twilcox@gkglaw.com
dmonroe@gkglaw.com
slyubechnko@gkglaw.com

Counsel for Cargill, Incorporated

Dated: June 14, 2016

CERTIFICATE OF SERVICE

I do hereby certify that on this 14th day of June, 2016, I have served a copy of the foregoing via electronic mail and regular mail to counsel for Defendant at the following addresses:

Michael Rosenthal
Kavita Pillai
Covington & Burling, LLP
One CityCenter
850 10th Street, NW
Washington, DC 20001

Craig Richardson
Louise A. Rinn (e-mail and regular mail)
Danielle E. Bode
Jeremy M. Berman
Union Pacific Railroad Company
1400 Douglas Street
Omaha, NE 68179

The Honorable John P. Dring
Federal Energy & Regulatory Commission
Office of Administrative Law Judges
888 First Street, N.E.
Washington, DC 20426

Patricia E. Charles
181 W. Madison Street
26th Floor
Chicago, IL 60602

Jennifer A. Kenedy
111 South Wacker Drive
Chicago, IL 60606

Peter A. Pfohl
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, DC 20036

Kevin M. Sheys
Nossaman LLP
1666 K Street, N.W.
Suite 500
Washington, DC 20006

Paul M. Donovan
Laroe, Winn, Moerman & Donovan
1250 Connecticut Avenue, N.W., Suite 200
Washington, DC 20036

Jeffrey O. Moreno
Thompson Hine LLP
1919 M Street, Suite 700
Washington, DC 20036

Houston Shaner
Hogan Lovells US LLP
555 Thirteenth St, Nw
Washington, DC 20004

/s/ David K. Monroe