

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

240883

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June 8, 2016
Part of
Public Record

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

NOR 42144

COMPLAINANTS' REPLY TO
UNION PACIFIC RAILROAD COMPANY'S
MOTION TO HOLD PROCEDURAL SCHEDULE IN ABEYANCE

Complainants¹ in the above-captioned proceeding hereby reply in opposition to the Motion of Defendant Union Pacific Railroad Company (“UP”) to hold the procedural schedule in abeyance, filed June 6, 2016.

UP’s Motion is premature and potentially unnecessary. UP provides two reasons for its Motion: (1) several pending discovery motions that will be the subject of a hearing before Judge Dring on June 23 and 24; and (2) UP’s representation that it does not know when document discovery will be completed. Several of these matters are expected to receive greater clarity either during or soon after the upcoming discovery hearing, at which time the parties will

¹ Complainants are The North America Freight Car Association; the American Fuel & Petrochemicals Manufacturers; The Chlorine Institute, Inc.; The Fertilizer Institute; and the American Chemistry Council (collectively, the “Association Complainants”); and Ethanol Products, LLC d/b/a Poet Ethanol Products; Poet Nutrition, Inc.; and Cargill Incorporated (collectively, the “Individual Complainants”).

be better positioned to assess whether there is a need to modify the procedural schedule, and if so, to propose specific new dates rather than the open-ended abeyance that UP has requested.

There is no urgency for the Board to take any action before then, as the due date for Complainants' Opening Evidence would still be two months away.

There even is some potential that no extension would be needed. All of the Complainants except Cargill intend to complete their production of documents either by, or close to, the June 10 deadline in the current schedule. UP, however, has represented that it will not meet that deadline even for categories of documents where there has been agreement for several months on what UP will produce. Nor, according to UP, can it at present provide a reasonable estimate of when such production would be completed. Whether or not the Complainants will need an extension for submitting Opening Evidence will depend upon the length of UP's delay in completing its document production. The purported inability of UP even to estimate when it will complete production, just days before the end of document discovery under the current procedural schedule, is very troubling to Complainants, and should not be the basis for granting the open-ended abeyance that UP requests.

The other major variable is the resolution of the pending discovery disputes. The primary issue is whether or not UP is entitled to obtain discovery of the Association Complainants' members, either through a motion to compel or subpoenas, of literally millions of traffic movement data points and other information. UP also has filed a motion to compel against the Individual Complainants, which they have opposed. If those motions and subpoena requests are denied, the Complainants' discovery responses will be complete. Although the Complainants also have filed a motion to compel against UP, that motion pertains to a single interrogatory, which should not be cause for a significant delay. Once these disputes are resolved, which may

occur within the next 30 days, the parties will be in a better position to confer and perhaps agree upon a modified procedural schedule.

Therefore, Complainants urge the Board to deny UP's motion to hold the procedural schedule in abeyance, to give the parties time to obtain greater clarity on the status of their discovery responses, so that they can jointly propose a realistic modified procedural schedule, if necessary, soon after their discovery hearing before Judge Dring.

Respectfully submitted,



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June 8, 2016

CERTIFICATE OF SERVICE

I do hereby certify that on this 8th day of June, 2016, I have served a copy of the foregoing “Complainants’ Reply to Union Pacific Railroad Company’s Motion to Hold Procedural Schedule in Abeyance” to be served by first-class mail, postage prepaid, or a more expeditious manner of delivery upon the following parties of record.

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I also caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or a more expeditious manner of delivery upon Administrative Law Judge John P. Dring, Federal Regulatory Commission Office of Administrative Law Judges, 888 First Street, N.E., Washington, DC 20426



Jeffrey O. Moreno