

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

NORTH AMERICAN 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,)	238234 ENTERED Office of Proceedings April 20, 2015 Part of Public Record
Complainants,)	
v.)	
UNION PACIFIC RAILROAD COMPANY,)	NOR 42144
Defendant.)	
)	

ANSWER

GAYLA L. THAL
LOUISE A. RINN
DANIELLE E. BODE
JEREMY M. BERMAN
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
(402) 544-3309

MICHAEL L. ROSENTHAL
CAROLYN F. CORWIN
Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, D.C. 20001
(202) 662-6000

Attorneys for Union Pacific Railroad Company

April 20, 2015

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

NORTH AMERICAN 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)	NOR 42144
CARGILL INCORPORATED,)	
)	
Complainants,)	
)	
v.)	
)	
UNION PACIFIC RAILROAD COMPANY,)	
)	
Defendant.)	
)	

ANSWER

Union Pacific Railroad Company (“Union Pacific”) hereby answers the Complaint of North American 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 filed on March 31, 2015. To the extent that Union Pacific does not specifically admit an allegation in the Complaint, that allegation is denied.

RESPONSE TO COMPLAINANTS’ ALLEGATIONS

Union Pacific responds to the allegations in each separately numbered paragraph of the Complaint as follows:

1. Union Pacific lacks sufficient information to form a belief about the truth of the allegations in Paragraph 1, except that Union Pacific admits that it does not hold itself out to furnish tank cars to customers.

2. Union Pacific lacks sufficient information to form a belief about the truth of the allegations in Paragraph 2, except that Union Pacific admits that it does not hold itself out to furnish tank cars to customers.

3. Union Pacific lacks sufficient information to form a belief about the truth of the allegations in Paragraph 3, except that Union Pacific admits that it does not hold itself out to furnish tank cars to customers.

4. Union Pacific lacks sufficient information to form a belief about the truth of the allegations in Paragraph 4, except that Union Pacific admits that it does not hold itself out to furnish tank cars to customers.

5. Union Pacific lacks sufficient information to form a belief about the truth of the allegations in Paragraph 5, except that Union Pacific admits that it does not hold itself out to furnish tank cars to customers.

6. Union Pacific lacks sufficient information to form a belief about the truth of the allegations in Paragraph 6, except that Union Pacific admits that it does not hold itself out to furnish tank cars to customers.

7. Union Pacific lacks sufficient information to form a belief about the truth of the allegations in Paragraph 7, except that Union Pacific admits that it does not hold itself out to furnish tank cars to customers.

8. Union Pacific lacks sufficient information to form a belief about the truth of the allegations in Paragraph 8, except that Union Pacific admits that it does not hold itself out to furnish tank cars to customers.

9. Union Pacific admits that the Complainants refer to themselves using the terms set forth in Paragraph 9.

10. Union Pacific admits that it is a common carrier by rail engaged in the transportation of freight in interstate commerce; that it is generally subject to the Interstate Commerce Commission Termination Act of 1995 and to the jurisdiction of the Surface Transportation Board; and that it regularly provides rail transportation in tank cars it does not own. Union Pacific denies that it requires shippers or receivers to enter into any particular ownership or lease arrangements with regard to the tank cars used to transport their products.

11. Union Pacific lacks sufficient information to form a belief about the truth of the allegations in Paragraph 11, except that Union Pacific admits that by some measures it is the nation's largest freight railroad.

12. Union Pacific admits that in 2014 it received over \$1.5 billion in revenue from customers for providing transportation services involving shipments in tank cars.

13. Union Pacific admits that it does not hold itself out to furnish tank cars to customers, consistent with the Interstate Commerce Commission's recognition that "[a]s a rule carriers have never furnished these cars, and it has come to be mutually understood that they should not do so." *In the Matter of Private Cars*, 50 I.C.C. 652 (1918). Union Pacific denies the remaining allegations in Paragraph 13, including any allegation that it is obligated to furnish tank cars to customers.

14. Paragraph 14 states legal conclusions to which no response is necessary.

15. Union Pacific admits that the Interstate Commerce Commission issued a decision in a proceeding that was docketed as Ex Parte No. 328, in *Investigation of Tank Car Allowance System*, 3 I.C.C.2d 196 (1986). Union Pacific asserts that the decision speaks for itself. Union Pacific denies the remaining allegations in Paragraph 15, including any allegation that it is obligated to pay mileage allowances to the owners of private tank cars or to shippers that furnish leased tank cars when it provides transportation under rates commonly referred to as zero-mileage rates or zero-allowance rates.

16. Union Pacific admits that movements of tank cars pursuant to Union Pacific contracts or tariffs are made in private tank cars under zero-mileage rates and that it does not pay mileage allowances when it provides transportation under zero-mileage rates. Union Pacific denies the remaining allegations in Paragraph 16, including any allegation that it is obligated to pay mileage allowances to the owners of private tank cars or to shippers that furnish leased tank cars when it provides transportation under zero-mileage rates or that it is required to establish rates under which it would pay a mileage allowance when it has established zero-mileage rates.

17. Union Pacific admits that it does not hold itself out to furnish tank cars to customers; that most movements of tank cars pursuant to Union Pacific contracts or tariffs are made in private tank cars under zero-mileage rates; and that it does not pay mileage allowances when it provides transportation under zero-mileage rates. Union Pacific denies the remaining allegations in Paragraph 17, including any allegation that it is obligated to furnish tank cars to its customers or that it is obligated to pay mileage allowances to the owners of private tank cars or to shippers that furnish leased tank cars when it provides transportation under zero-mileage rates.

18. Union Pacific admits that Tariff UP 6004-C, Item 55-C provides for mileage-based charges on empty movements of tank cars to and from repair facilities, except when the

empty movement is immediately preceded by a loaded line-haul revenue movement on Union Pacific and under certain other specified circumstances. Union Pacific further asserts that Item 55-C is consistent with the Interstate Commerce Commission's decisions in *General American Transportation Corp. v. Indiana Harbor Belt Railroad Co.*, 3 I.C.C.2d 599 (1987), and *Charges for Movement of Empty Cars, Buffalo & Pittsburgh Railroad, Inc.*, 7 I.C.C.2d 18 (1990), which recognize that charging shippers directly for repair movements encourages efficiency by giving shippers more incentive to consider transportation costs in selecting repair facilities, promotes individual market pricing of different aspects of rail service consistent with the Staggers Act, and eliminates the harmful cross-subsidization inherent in the recovery of costs associated with repair movements through Freight Tariff RIC 6007-Series and the mileage equalization provisions of the National Tank Car Allowance Agreement. Union Pacific denies the remaining allegations in Paragraph 18, including any allegation that shippers are not compensated when they furnish private tank cars, that shippers that furnish private tank cars are entitled to additional compensation in connection with Union Pacific's publication of Tariff UP 6004-C, Item 55-C, or that Union Pacific previously received no compensation for empty movements of private tank cars to repair facilities. Union Pacific asserts that compensation to Union Pacific for empty movements of private tank cars was provided through Freight Tariff RIC 6007-Series and in accordance with the mileage equalization provisions of the National Tank Car Allowance Agreement. *See Investigation of Tank Car Allowance System*, 3 I.C.C.2d 196 (1986). Union Pacific further asserts that when it adopted Item 55-C it also established an exception to Freight Tariff RIC 6007-Series, so that any empty miles for which Union Pacific imposes charges under Item 55-C would be excluded from mileage equalization accounting under Freight Tariff RIC 6007-Series.

19. Paragraph 19 states legal conclusions to which no response is necessary.

20. Paragraph 20 states legal conclusions to which no response is necessary.

21. Paragraph 21 states legal conclusions to which no response is necessary.

22. Paragraph 22 states legal conclusions to which no response is necessary.

23. Union Pacific incorporates by reference its responses to the allegations in the preceding paragraphs.

24. Union Pacific admits that it adopted UP Tariff 6004-C, Item 55-C, effective January 1, 2015. Union Pacific asserts that Item 55-C speaks for itself.

25. Union Pacific admits that UP Tariff 6004-C, Item 55-C refers to line-haul charges provided in UPRR 4703-Series. Union Pacific asserts that UPRR 4703-Series speaks for itself. Union Pacific denies that the minimum round trip charge under Item 55-C for a movement to and from a repair facility is \$2,634 for a one mile movement. Union Pacific asserts that the minimum round trip charge is \$0.

26. Union Pacific denies the allegations in Paragraph 26. Union Pacific asserts that compensation to Union Pacific for empty movements of private tank cars was provided through Freight Tariff RIC 6007-Series and in accordance with the mileage equalization provisions of the National Tank Car Allowance Agreement. *See Investigation of Tank Car Allowance System*, 3 I.C.C.2d 196 (1986).

27. Union Pacific denies the allegations in Paragraph 27.

28. Union Pacific denies the allegations in Paragraph 28, including any allegation that shippers are not compensated when they furnish private tank cars or that shippers that furnish private tank cars are entitled to additional compensation in connection with Union Pacific's adoption of Tariff UP 6004-C, Item 55-C. Union Pacific asserts that when it adopted Item 55-C it

also established an exception to Freight Tariff RIC 6007-Series, so that any empty miles for which Union Pacific imposed charges under Item 55-C would be excluded from mileage equalization accounting under Freight Tariff RIC 6007-Series.

29. Union Pacific denies the allegations in Paragraph 29.

30. Union Pacific incorporates by reference its responses to the allegations in the preceding paragraphs.

31. Union Pacific admits that in 2014 it received over \$1.5 billion in revenue from customers for providing transportation services involving shipments in tank cars. Union Pacific denies the remaining allegations in Paragraph 31.

32. Union Pacific admits that most movements of tank cars pursuant to Union Pacific contracts or tariffs are made in private tank cars under zero-mileage rates and that it does not pay mileage allowances when it provides transportation under zero-mileage rates.

33. Paragraph 33 states legal conclusions to which no response is necessary. Union Pacific denies the remaining allegations in Paragraph 33. Union Pacific asserts that, all other things being equal, the 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.

34. Union Pacific denies the allegations in Paragraph 34. Union Pacific asserts that, all other things being equal, the 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.

35. Union Pacific denies the allegations in Paragraph 35. Union Pacific asserts that, all other things being equal, the 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.

RESPONSE TO COMPLAINANTS' REQUEST FOR RELIEF

Union Pacific denies that Complainants are entitled to any of the relief they seek.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim for Relief)

1. Complainants fail to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

(Jurisdiction)

2. The Board lacks jurisdiction over Complainants' claims to the extent the claims involve movements pursuant to contracts.

THIRD AFFIRMATIVE DEFENSE

(Standing)

3. The Association Complainants lack standing to assert the claims for reparations and damages they allege.

FOURTH AFFIRMATIVE DEFENSE

(Estoppel, Waiver)

4. Complainants' claims are barred, in whole or in part, by the doctrines of estoppel and waiver.

FIFTH AFFIRMATIVE DEFENSE

(Statute of Limitations)

5. Complainants' claims are barred in whole or in part by the applicable statute of limitations.

SIXTH AFFIRMATIVE DEFENSE

(Laches)

6. Complainants' claims are barred by the doctrine of laches.

SEVENTH AFFIRMATIVE DEFENSE

(Filed Rate Doctrine)

7. Complainants' claims for reparations and damages are barred by the filed rate doctrine.

EIGHTH AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

8. Complainants are barred from recovery by reason of their failure to mitigate, minimize, or avoid the damages alleged in the Complaint.

WHEREFORE, Union Pacific requests that the Complaint be dismissed with prejudice; that no relief of any kind be awarded to Complainants; that Union Pacific be awarded its costs; and that the Board grant Union Pacific such other and further relief as may be appropriate.

Respectfully submitted,

GAYLA L. THAL
LOUISE A. RINN
DANIELLE E. BODE
JEREMY M. BERMAN
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
(402) 544-3309

/s/ Michael L. Rosenthal
MICHAEL L. ROSENTHAL
CAROLYN F. CORWIN
Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, D.C. 20001
(202) 662-6000

Attorneys for Union Pacific Railroad Company

April 20, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2015, I caused a copy of the foregoing document to be served by e-mail or first-class mail, postage prepaid, on all of the parties of record in NOR 42144:

/s/ Michael L. Rosenthal
Michael L. Rosenthal