

**PUBLIC VERSION**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

240946

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NORTH AMERICA FREIGHT CAR	)	ENTERED Office of Proceedings June 20, 2016 Part of Public Record
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,	)	
	)	
Complainants,	)	
	)	
v.	)	
	)	
UNION PACIFIC RAILROAD COMPANY,	)	
	)	
Defendant.	)	

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Docket No. NOR 42144

**JOINT REPLY OF NON-PARTY TANK CAR OWNERS TO  
UNION PACIFIC RAILROAD COMPANY'S PETITION FOR SUBPOENAS**

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**JOINT REPLY OF NON-PARTY TANK CAR OWNERS TO  
UNION PACIFIC RAILROAD COMPANY’S PETITION FOR SUBPOENAS**

Union Tank Car Company (“Union Tank”), GATX Corporation (“GATX”), Trinity Industries, Inc. (“Trinity”), and American Railcar Industries, Inc. (“ARI”) (individually, “Tank Car Owner” or “Owner,” and collectively, “Tank Car Owners” or “Owners”), non-parties to the above captioned matter, hereby submit this Joint Reply in opposition to the Petition for Subpoenas that Defendant Union Pacific Railroad Company (“UP”) filed on May 17, 2016 (“UP Pet.”).

Tank Car Owners are filing jointly, rather than separately, in the interests of brevity and efficiency, and because they are similarly situated with respect to UP’s petition. In the further interests of brevity and efficiency, Tank Car Owners will also rely upon and incorporate by reference the Reply of Association Complainants to Union

Pacific Railroad Company's Motion to Compel Discovery of Member Information from Association Complainants ("Association Compel Reply") and the Association Complainants' Reply to Petition for Subpoenas ("Association Subpoena Reply"), both filed June 6, 2016. Tank Car Owners further state as follows.

## I. INTRODUCTION

UP filed its petition for subpoena fully aware that the Tank Car Owners are not Complainants or otherwise "Parties" to the complaint proceeding in this docket.<sup>1</sup> Instead, the Tank Car Owners or their affiliates are four of the approximately thirty members of one trade association, the North America Freight Car Association ("NAFCA"). NAFCA joined with four other associations and three individual shippers in the complaint filed against UP. UP filed a motion to compel against NAFCA and the other trade association Complainants on May 17, 2016, seeking to require them to produce certain information from their member companies, including Tank Car Owners, but NAFCA plainly has no ability to produce information held by Tank Car Owners because it is not within NAFCA's possession, custody, or control.<sup>2</sup> Moreover, as NAFCA and Complainants have separately established, this information is not relevant to

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<sup>1</sup> "*Party* means a complainant, defendant, applicant, respondent, protestant, intervener, or petitioner in any proceeding, or other persons permitted or directed by the Board to participate in a proceeding." 49 C.F.R. § 1101.2(d) (original italics). Tank Car Owners are not parties to this proceeding and do not believe their intervention is necessary in order to reply to UP's Petition, but to the extent the Board believes otherwise, Tank Car Owners move for leave to intervene under 49 C.F.R. § 1112.4 for the limited purpose of responding to UP's Petition.

<sup>2</sup> "To be discoverable, information must be under the control of the party ordered to produce the information." *Metro Edison Co. v. Consol. Rail Corp.*, NOR 37931S (ICC decided July 8, 1987), 1992 WL 67306 at \*5.

their dispute with UP. In seeking discovery from a non-party (or non-jural-party), UP can proceed, if at all, only through a subpoena pursuant to 49 C.F.R. § 1113.2.

Issuance of subpoenas against non-parties is an extraordinary measure in proceedings before the Surface Transportation Board (“Board” or “STB”). In only a handful of instances has the Board ever allowed “subpoena discovery” against a non-party.<sup>3</sup> Such subpoenas are not the norm, and for multiple reasons no subpoena should be issued here to the Tank Car Owners. First, the information requested is not relevant nor is it reasonably calculated to lead to the discovery of admissible evidence, as required under 49 C.F.R. § 1114.21(a)(1) and (2), a requirement that is heightened when seeking a discovery by subpoena to non-parties. Second, UP has made little pretense of even attempting to make its requests “narrowly tailored,” as required under Board precedent, for seeking information that might somehow be properly discoverable. Third, and related, where Tank Car Owners have information that might be deemed relevant, UP’s requests impose undue burdens, particularly, for example, where UP seeks “all documents” falling in broad and vaguely defined categories. Fourth, UP’s requests are also improper in seeking to require the Tank Car Owners to produce information that they do not regularly maintain in the form specified by UP. Board precedent is clear that even parties will not be required to conduct “special studies” to produce such information, at

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<sup>3</sup> *E.g., Reasonableness of BNSF Ry. Co. Coal Dust Mitigation Tariff Provisions*, FD 35557 (STB served June 25, 2012) (“*Coal Dust*”), at 7. No subpoena was ever issued in that case because BNSF’s requests were too broad, and the scope was later narrowed by negotiation. In other instances, the non-party asked that the information be requested through a subpoena, but did not oppose the subpoena itself.

least not without compensation from the requesting party. Fifth, and related, much of the information requested, insofar as it might be relevant, is at least as readily available to UP as it is to the Tank Car Owners. Sixth, in some instances, NAFCA has already proposed to provide the responsive, relevant information available to UP or has offered to enter into stipulations that would moot the need for further discovery.

As explained in the attached verified statements from Union Tank, GATX, Trinity, and ARI,<sup>4</sup> complying with UP's requests would impose massive burdens and disrupt the regular day-to-day operations of the each of the Tank Car Owners. Where Tank Car Owners have information responsive to an individual request, dozens and, in some cases, hundreds of man-hours would be required to collect and compile the responsive data.<sup>5</sup> GATX, for example, estimates that the cost to produce responsive information would amount to { }, and this figure excludes several requests where the burden cannot even be estimated.<sup>6</sup> The other Tank Car Owners would also face large burdens, to the extent it is even feasible to locate the requested information.

Numerous individuals and departments would need to be involved, especially for the majority of UP's requests that seek the production of *all* responsive documents, including those that merely refer or relate to UP's broad topics. Even in those cases where UP merely requests documents sufficient to show particular data, the data specified is encompassing, in all or nearly all cases not the data that the Owner

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<sup>4</sup> The statements from Union Tank, GATX, Trinity, and ARI are attached as Exhibits B, C, D, and E, respectively.

<sup>5</sup> *E.g.*, Exhibit E at 3.

<sup>6</sup> Exhibit C at 2.

regularly compiles and utilizes in the course of business, and substantial effort would be required. Such requests are the equivalent of an interrogatory that is reframed as a request for production because interrogatories can only be addressed to actual parties.

For these reasons, and others as explained more fully herein, UP's petition must be denied.

## **II. FACTUAL BACKGROUND**

For efficiency, Tank Car Owners adopt and incorporate the considerable factual background provided in both (a) the Reply of Association Complainants to Union Pacific Railroad Company's Motion to Compel Discovery of Member Information from Association Complainants, and (b) the Reply to Petition for Subpoenas filed by Complainants. Tank Car Owners expand on matters within their particular areas of experience and expertise. Railroads do not own, with very rare exception, the tank cars that they transport. Instead, tank car shippers are responsible for providing their own tank cars. Tank Car Owners are the four largest owners of tank cars.

### **A. Item 55-C of UP Tariff 6004**

Count I of the underlying Complaint addresses Item 55-C of UP Tariff 6004. Effective January 1, 2015, UP adopted Item 55-C to apply new per-car and mileage-based charges to empty rail tank car movements to and from repair facilities.<sup>7</sup> The new charges, as published in a separate tariff (UP Tariff 4703), are as follows:

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<sup>7</sup> Item 55-C defines "Repair Facilities" broadly to include any facility that cleans, lines, relines, maintains, modifies, repairs, or retrofits tank cars.

<u>Movement Mileage</u>	<u>Charge per Car</u>
1-250 miles	\$1,317 per car
251-500 miles	\$1,477 per car
501 miles or greater	\$2.96 per mile

Item 55-C also applies to new tank cars moving prior to their first loaded move in commercial service, restenciled tank cars moving prior to their first loaded move in commercial service, and (empty) tank cars moving for dismantling, sale, or scrap.<sup>8</sup>

Item 55-C shifts the cost of transporting empty tank cars to and from repair facilities from UP to the tank car providers without compensating them for UP’s use of their cars. UP previously provided this transportation service without a separate charge within the context of mileage equalization, discussed *infra*. Tank Car Owners understand that the Item 55-C charges will in a number of cases exceed the line-haul charges for shipping freight in tank cars.

**B. Compensation for Providing Tank Cars**

Count II of the underlying Complaint addresses the compensation that UP provides for the cost of using tank cars provided by others. Tank Car Owners are in the business of providing tank cars and incurring related costs for compensation. In Ex Parte No. 328, the Interstate Commerce Commission (“ICC”), the Board’s statutory predecessor, established a system whereby UP and other carriers provide compensation for the cars they utilize in providing service in the form of mileage allowances.<sup>9</sup> UP

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<sup>8</sup> Item 55-C does not apply to empty movements immediately preceded by a loaded line-haul revenue movement on UP, movement of empty tank cars bad-ordered and taken out of service by UP, or movement of empty tank cars damaged by UP.

<sup>9</sup> As discussed further *infra*, the Lessor Costs associated with EP 328 are calculated based on data from only three tank car providers. UP mistakenly asserted Trinity to be such a

contends that it now provides compensation through “zero-allowance” (what it calls “zero-mileage”) transportation rates and claims such rates are reduced to reflect compensation for providing tank cars in lieu of paying a mileage allowance.

Count II challenges whether UP is compensating car providers through zero-allowance rates. The relevant facts are primarily, if not exclusively, within the knowledge and possession of UP.<sup>10</sup> Even if UP does not have all the relevant facts, Tank Car Owners are not an appropriate source for additional information. Tank Car Owners do not ship goods, do not negotiate zero-allowance rates, and thus lack information as to compensation that UP may, or may not, provide through such arrangements.

### **C. Railinc**

Most of the Tank Car Owners do not independently maintain much of the information sought by UP’s requests for production, and certainly not in the format requested by UP. Instead, the information resides with Railinc Corp. (“Railinc”), a wholly-owned, for-profit subsidiary of the Association of American Railroads (“AAR”). UP is the largest member of the AAR, and the Senior Vice President and Chief Information Officer of UP’s holding company sits on Railinc’s Board of Directors.<sup>11</sup>

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provider, but as the Association Complainants already established, it is not. *See also* Exhibit D at 5. As such, data from Trinity in this respect is even further disconnected from any reasonable scope of discovery.

<sup>10</sup> Association Compel Reply at 12.

<sup>11</sup> Railinc Board of Directors, <https://www.railinc.com/rportal/board-of-directors> (last accessed June 12, 2016).

Railinc describes itself as the “railroad industry’s most innovative and reliable resource for IT and information services.”<sup>12</sup> Railinc “helps railroads and rail equipment owners increase productivity, achieve operational efficiencies and keep their assets moving.”<sup>13</sup> Railinc is the storehouse for much of the informational “glue” that holds the rail system, broadly defined, and its constituents together. Railinc compiles extensive information regarding tank cars, including their ownership, specifications, movements, and loaded and empty mileage records.<sup>14</sup>

Railinc maintains the UMLER® system, which is an electronic resource for critical data on transportation equipment in North America.<sup>15</sup> Identifying information must be reported to Railinc before a tank car can be offered for service or interchanged by railroads, and this information is the basis for Railinc’s database used in connection with Tariff RIC 6007-O,<sup>16</sup> discussed *infra*.

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<sup>12</sup> Railinc *Company Overview*, <https://www.railinc.com/rportal/company-overview> (last accessed June 12, 2016).

<sup>13</sup> Railinc Railroads <https://www.railinc.com/rportal/railroads> (last accessed June 12, 2016).

<sup>14</sup> Association Compel Reply at 29.

<sup>15</sup> *The Umler® System*, [Railinc.com, https://www.railinc.com/rportal/umler-system](https://www.railinc.com/rportal/umler-system) (last accessed June 5, 2016) (describing UMLER); *UMLER Data Specification Manual*, [Railinc.com](https://www.railinc.com/rportal/documents/18/260655/UmlerDataSpecs.pdf), pp. 83-84, ), <https://www.railinc.com/rportal/documents/18/260655/UmlerDataSpecs.pdf> (last accessed June 5, 2016) (identifying the multitude of tank car data captured by UMLER).

<sup>16</sup> *RailSight Technical Overview*, [Railinc.com](https://www.railinc.com/rportal/documents/18/260635/RailSightTechSpecs.pdf) (last accessed June 10, 2016) (“RailSight’s robust CLM data engine easily integrates with business and logistics systems. . . to add critical equipment (characteristics, health, inspections), shipment (status, trip details, ETAs/ETIs) and rail network (location, mileage) data.”), <https://www.railinc.com/rportal/documents/18/260635/RailSightTechSpecs.pdf>; *see also RailSight™ Demand Trace*, [Railinc.com](https://www.railinc.com/rportal/documents/18/260635/RailSightTechSpecs.pdf) (2016) (“RailSight™ Demand Trace gives

Railinc is committed to safeguarding data and has strict standards for data access. Customers may request access to confidential information related to their own data. Railinc requires a “Letter of Authorization” in order for one organization to obtain access to another company’s data. This process ensures that access to data is restricted to the owner of the data or to the owner’s expressly designated third party.<sup>17</sup>

#### **D. Tank Car Mileage Allowance Equalization**

Railinc publishes Tariff RIC 6007-O,<sup>18</sup> the tariff for mileage allowances and the rules governing the handling and payment of mileage, and has published predecessors to that Tariff.<sup>19</sup> This tariff implements the Ex Parte No. 328 Agreement for both mileage allowance and mileage equalization charges.

As indicated by Item 180 of Tariff RIC 6007-O, the information supplied to Railinc is the basis for the reporting marks assigned to a rail tank car and thus the basis for mileage allowance payments (governed by Item 185) owed to the person holding those reporting marks.<sup>20</sup> Mileage allowance payments are based on the loaded miles moved by a rail tank car as reported by the handling railroad and compiled by Railinc

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you access to the complete lifecycle of your shipments and equipment[.]”), <https://www.railinc.com/rportal/railsight-demand-trace>; *RailSight™ Monitor*, Railinc.com (2016) (noting the ability to “[m]anage loaded and empty equipment”), <https://www.railinc.com/rportal/railsight-monitor>.

<sup>17</sup> <https://www.railinc.com/rportal/letters-of-authorization> (last accessed June 12, 2016).

<sup>18</sup> [http://www.nationaltariffs.com/RIC\\_6007-O.htm](http://www.nationaltariffs.com/RIC_6007-O.htm) (last accessed June 5, 2016).

<sup>19</sup> Association Compel Reply at 29.

<sup>20</sup> *Id.*

though various information technology systems and programs.<sup>21</sup> Pursuant to Item 187, Railinc also tallies the empty mileage travelled by each tank car for purposes of assessing mileage equalization charges to the holder of the reporting marks and distributing that revenue across railroads in proportion with their handling of those empty miles.<sup>22</sup>

Railinc also operates Tank Car Mileage Equalization (“TME”), a system of accounting that entails the aggregate reporting of loaded and empty private tank car miles.<sup>23</sup> Rail carriers collect and report loaded and empty private tank miles to Railinc, Railinc process the information, and Railinc then distributes to the railroads and tank car owners a monthly report on loaded and empty tank car mileage a format called the National Tank Car Equalization Register.<sup>24</sup> If a tank car owner’s empty mileage accumulated during the calendar year exceeds its loaded mileage by more than six percent, the owner must pay empty mileage compensation to the AAR at a rate that is determined yearly.<sup>25</sup> These funds, less an administration fee, are then distributed to those railroads whose empty tank car miles exceeded their loaded handling miles by more than six percent. The ICC’s decision in Ex Parte No. 328 established this process, and the rules and regulations for mileage equalization are published in the Tariff ASLG 6007

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<sup>21</sup> *Id.* at 30.

<sup>22</sup> *Id.*

<sup>23</sup> <https://www.railinc.com/rportal/documents/18/260641/GuideforRailroads.pdf> at 25.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

series.<sup>26</sup> To the extent such information may be at all relevant, Railinc's TME is thus the prime source for much of the information covered by UP's subpoena.

#### **E. Railinc and Tank Car Ownership and Maintenance Costs**

Three of the Tank Car Owners (GATX, Union Tank, and ARI, but not Trinity) are obliged to report their ownership and maintenance ("O&M") costs annually to Railinc pursuant to the Agreement in Ex Parte No. 328.<sup>27</sup> Complainants previously represented to UP that all three companies are willing to produce the same data that they have provided annually to Railinc.<sup>28</sup> UP rejected that offer, insisting that it be provided with greater detail and more sources.<sup>29</sup> Complainants have already explained that, absent a reopening of Ex Parte No. 328, the only potentially relevant tank car O&M cost data is the data submitted to and used by Railinc to calculate mileage allowances pursuant to the Ex Parte No. 328 Agreement.<sup>30</sup> In any case, there is no reason to believe GATX, Union Tank, and ARI have any materially different information on tank car ownership and maintenance costs that are not reported to Railinc pursuant to Ex Parte No. 328 or that Trinity's tank car ownership and maintenance cost information has any relevance.

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<sup>26</sup> *Id.*

<sup>27</sup> Ex Parte No. 328, *Investigation of Tank Car Allowance System*, 3 I.C.C.2d at 206.

<sup>28</sup> UP Pet., Ex. 26 at 2.

<sup>29</sup> *Id.*, Ex. 27 at 2.

<sup>30</sup> Association Compel Reply at 33 n.23.

### III. REVIEW OF RELEVANT BOARD DISCOVERY PRINCIPLES

Although UP acknowledges that its subpoena requests must seek information that is relevant,<sup>31</sup> UP nonetheless fails to make any sensible argument for relevance within the scope of its dispute with the Association Complainants. UP also fails to address established principles and limitations on discovery in matters before the Board, particularly when seeking documents from non-parties.

#### A. Discovery Requests Must be Narrowly Drawn

First, discovery must be narrowly tailored to obtain information that is properly requested. The Board has emphasized this principle many times. “[D]iscovery requests must be narrowly drawn, directed toward a relevant issue, and not used for a general fishing expedition.”<sup>32</sup> “[D]iscovery requests must be narrowly tailored to the specific issue.”<sup>33</sup> “While there could arguably be admissible evidence contained in such reports, again there are less intrusive means to obtain it, and we will not facilitate an unnecessary fishing expedition....”<sup>34</sup> UP has overreached before in pursuing discovery, and its requests have been struck because those requests “likewise fail to meet our third

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<sup>31</sup> UP Pet. at, *e.g.*, 1, 8.

<sup>32</sup> *Duke Energy Corp. v. Norfolk Southern Ry.*, NOR 42069, *et al.* (STB served July 26, 2002), at 4.

<sup>33</sup> *Railroad Ventures, Inc.—Abandonment Exemption—Between Youngstown, OH and Darlington, PA, in Mohoning and Columbiana Counties, OH, and Beaver County, PA*, AB-556 (STB served March 5, 2007), at 1.

<sup>34</sup> *Trailer Bridge, Inc. v. Sea Star Lines, L.L.C.*, WCC-104 (STB served Oct. 27, 2000), at 6.

criterion” in that “[t]hey are not ‘narrowly tailored,’ to the contrary they essentially ask for all documents (except freight bills, invoices, and the like) that address” the subject.<sup>35</sup>

UP’s requests are especially deficient in this regard. The bulk of UP’s requests seek “all documents” falling in broad categories,<sup>36</sup> and the remaining requests seek “documents sufficient to show” various matters in others.<sup>37</sup> Such requests are manifestly not narrowly drawn or intended to reduce the scope of information that a non-party is required to produce. Accordingly, even if UP’s requests sought relevant information, which they do not, the subpoenas should still be denied. Discovery is not to cause “undue burden or expense.”<sup>38</sup> “[D]iscovery may be denied if it would be unduly burdensome.”<sup>39</sup>

The Board also recently warned parties not to evade this requirement by starting with overly broad requests and then narrowing their scope after the initial requests are opposed:

Finally, ... we emphasize that it is generally not helpful to the Board for parties to move to compel responses to very broad and potentially burdensome document requests and interrogatories, force opponents to respond to the motion, and then narrow the discovery sought in a reply for which leave to file must be sought. Motions to compel should reflect at the outset any limitations that the party seeking

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<sup>35</sup> *FMC Wyoming Corp, et al. v. Union Pacific R.R. Co.*, NOR 42022 (STB served Aug. 31, 1998), at 7.

<sup>36</sup> Requests for production 1-2, 5-8, 10-12.

<sup>37</sup> Requests for production 3-4, 9, 13.

<sup>38</sup> 49 C.F.R. § 1114.21(c).

<sup>39</sup> *CSX Transp. Inc. and Delaware and Hudson Ry. Co. – Joint Use Agreement*, STB Docket No. 35348 (STB served Aug. 16, 2010) at 3.

discovery is willing to accept to reduce the burden of discovery. Parties that fail to heed this warning run the future risk that the Board will deny the motion to compel based on the Board's assessment of the relevance and burden of the discovery requests as initially presented without considering late efforts to narrow the discovery through a reply.<sup>40</sup>

Such tactics increase the costs of discovery and waste the time of parties, non-parties, and the Board itself that must review overly broad requests that are ultimately not to be pursued.

**B. Parties are Not Required to Conduct Special Studies to Compile Information Not Maintained in the Ordinary Course of Business**

Second, the Board will not require a party, let alone non-parties, to conduct a “special study” to prepare or compile information that the party does not maintain in the ordinary course of its business in order to respond to a discovery request. Even actual parties are not required “to develop evidence rather than merely to supply data in their possession.”<sup>41</sup> “[T]o the extent special studies are required . . . , motions to compel will not be granted.”<sup>42</sup> “Our discovery rules, however, require parties to furnish information in their possession, not to prepare special studies.”<sup>43</sup> “CN states further that burdensome

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<sup>40</sup> *Application of the National Railroad Passenger Corporation Under 49 U.S.C. § 24308(a)—Canadian National Railway Company*, FD 35743 (STB served Sept. 23, 2014), at 10-11.

<sup>41</sup> *Arizona Elec. Power Coop., Inc. v. The Atchison, Topeka, and Santa Fe Ry. Co., et al.*, No. 37437 (ICC served Oct. 23, 1986) at 9.

<sup>42</sup> *Cheney R.R.—Feeder Line Acquisition—CSX Transp., Inc. Line Between Greens & Ivalee*, FD 31012 (ICC decided Apr. 26, 1989), 1989 WL 238453 at \*2 n.6, citing *Ark. Power & Light Co.—Amendment—Staggers Act*, 365 I.C.C. 983, 997 (1982).

<sup>43</sup> *PPL Montana, Inc. v. The Burlington N. & S.F. Ry. Co.*, NOR 42054 (STB served Nov. 9, 2000), at 3), citing *Bituminous Coal, Hiawatha, UT, to Moapa, NV, NOR 37038, et al.* (ICC served Oct. 24, 1984), at 8-9.

special studies would be necessary to provide the information on transit times... If information on transit times is not readily available, we will not require CN to finance a special study to produce it.”<sup>44</sup> UP itself has successfully invoked this principle in other matters: “UP does not have to conduct special studies or attempt to recreate information that was not kept in the ordinary course of business.”<sup>45</sup>

In rare instances, a party may agree to conduct a special study, provided it is compensated by the requesting party:

Because parties are obligated to produce only data in their possession, I will not compel Conrail to conduct any special studies it is not willing to conduct... As subsequently discussed, however, Conrail has indicated that it will perform such special studies if petitioners agree to pay for them. Conrail is entitled to charge petitions for conducting these studies. Consequently, I will require petitioners to reimburse Conrail for reasonable expenses incurred in performing them.<sup>46</sup>

**C. Confidential Contracts are Discoverable Only Upon a Showing of Special Need, and Even Then, the Scope is Narrow**

Board precedent provides that confidential contracts may be obtained in Board proceedings only when a party demonstrates a specific need for it. “[C]ontracts are discoverable, subject to protective orders, where a need for them is shown.”<sup>47</sup>

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<sup>44</sup> *Waterloo Ry. Co.—Adverse Abandonment—Lines of Bangor & Aroostook R.R. Co. and Van Burden Bridge Co. in Aroostook Cty., Maine*, AB-124 (Sub-No. 2), *et al.* (STB served May 6, 2003), at 5.

<sup>45</sup> *Entergy Ark., Inc. v. Union Pacific R.R.*, NOR 42104, *et al.* (STB served May 19, 2008), at 6.

<sup>46</sup> *Rail General Exemption Auth.—Miscellaneous Agric. Commodities—Pet. of G.&T. Terminal Packaging Co., Inc., et al. to Revoke Conrail Exemption*, EP 346 (Sub-No. 14A) (ICC decided June 6, 1989), 1989 WL 238737, at \*8 n.3.

“Contract information is privileged but disclosure may be compelled if in balance the necessity for sharing the information outweighs the need for confidentiality.”<sup>48</sup> Where there is no credible, specific need for access to contracts, discovery is denied. Requests for a party, much less a non-party, “to disclose every agreement that it may have,” are subject to particular scrutiny.<sup>49</sup>

#### **IV. UP Has Not Made the Stronger Showing that is Required to Obtain Information from Non-Parties Through Subpoena**

UP faces a greater challenge in seeking to obtain information from non-parties through subpoenas. In the twenty years since its creation under the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995), the Board has issued only five subpoenas duces tecum,<sup>50</sup> and then only for limited purposes and on the basis of a strong showing.<sup>51</sup> “[F]rom very early in its existence the Commission has required the laying of a very strong foundation before it will use its subpoena power.”<sup>52</sup>

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<sup>47</sup> *Aggregate Volume Rate on Coal, Acco, UT to Moapa, NV*, Docket No. 37409 (ICC served Jan. 15, 1988), at 1.

<sup>48</sup> *Degussa Corp. v. Southern Pac. Transp. Co.*, (ICC served Aug. 3, 1993), at 1.

<sup>49</sup> *Canadian Pac. Ry. Co., et al. – Control – Dakota, Minnesota & Eastern R.R. Corp., et al.*, FD No. 35081 (STB served Mar. 27, 2008) at 5-6 (“*Canadian Pacific*”)

<sup>50</sup> Subpoenas “may be issued by the Board or by the officer presiding at a hearing and must be signed by the Director of the Office of Proceedings or a member of the Board.” 49 C.F.R. §1113.2(a)

<sup>51</sup> *Ballard Term. R.R. Co., L.L.C. – Acquisition and Operation Exemption – Woodinville Subdivision*, Docket No. AB 6 (Sub-No. 465X), (STB Served May 17, 2013) (directing third party shipper to produce information concerning demand for service on a 11.2-mile portion of a railbanked line of railroad); *E.I. DuPont de Nemours and Co. v. Norfolk S. Ry.*, Docket No. 42125 (STB served Dec. 9, 2011), at 1-2 (directing corporate affiliate of the complainant shipper to produce information concerning the affiliate’s private truck fleet operations); *Arizona Pub. Serv. Co. v. Burlington N. and Santa Fe Ry.*, Docket No.

The required showing of relevance increases substantially when seeking discovery from a non-party. “All discovery requests entail the balancing of the relevance of the information sought against the burden of producing that information.”<sup>53</sup> “[W]here the information is sought from a nonparty, *greater weight should be given to the burden and thus a stronger showing of relevance is required.*”<sup>54</sup>

UP attempts to meet its heightened burden with general arguments that are addressed below. UP’s individual requests for production are addressed in Part VI.

**A. The Allocation of Charges and Allowances Among Tank Car Owners, Lessees, and/or Shippers is Irrelevant to UP**

UP first attempts to evade the heightened requirements for obtaining discovery by claiming that NAFCA and the other Association Complainants are nothing more than fronts for the Tank Car Owners. For example, UP notes the Tanks Car Owners “are among the entities that Union Pacific is charging for empty repair moves under Item 55-C, and they are among the entities that Association Complainants claim are entitled to

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41185, (STB served Dec. 23, 2003) 2003 WL 23009129 at \*1 (directing non-party utility whose traffic was included in the complainant shipper’s traffic group to produce traffic projections); *Pub. Serv. Co. of Colo. d/b/a Xcel Energy v. Burlington N. and Santa Fe Ry.*, Docket No. 42057, (STB served Feb. 1, 2002) 2002 WL 127071 at \*2 (directing a contractor of the defendant railroad to produce locomotive fuel gauge data); *Wisconsin Power & Light Co. v. Union Pac. R.R.*, Docket No. 42051, (STB served June 21, 2000), 2000 WL 799085 at \*2 (directing production by a consultant, employed by the complaint shipper, to produce specified coal demand and traffic forecasts).

<sup>52</sup> *Asphalt Supply & Serv., Inc. v. Union Pac. R.R.*, ICC Docket No. 40121, 1987 WL 98155 at \*1 (ICC decided March 27, 1987) (“*Asphalt*”).

<sup>53</sup> *Coal Dust* at 4.

<sup>54</sup> *Id.* (emphasis added).

mileage allowance payments from Union Pacific.”<sup>55</sup> UP thus tries to depict the Tank Car Owners as real parties in interest, such that they should be subject to discovery on the same basis as the actual parties.

However, how the burden of the Item 55-C charges and UP’s failure to provide mileage allowances is allocated among Tank Car Owners, lessees, shippers, or some combination thereof is irrelevant. Long-standing precedent establishes that “[s]o far as the carrier is concerned it can make no difference whether the shipper is owner or lessee” of the tank car.<sup>56</sup> UP successfully relied on a corresponding principle in opposing discovery regarding UP’s division or share of challenged joint through rates on the grounds that the shipper’s interest was in the reasonableness of the overall rate.<sup>57</sup> The fact that Tank Car Owners are among the entities victimized by UP’s imposition of an additional charge for moving empty cars and its failure to pay the Ex Parte No. 328 mileage allowances does not expand the scope of permissible discovery.

UP has elected to impose a new charge for the movement of empty tank cars, and it will be paid by someone. UP has similarly elected to avoid paying mileage allowances for most of the tank cars it uses to provide railroad transportation. Whether the burden of paying Item 55-C charges — and not receiving mileage allowances — falls on the owner, the lessee, the shipper, or someone else, is not a reason to allow UP to

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<sup>55</sup> UP Pet. at 9.

<sup>56</sup> *In the Matter of Private Cars*, 50 I.C.C. 652, 674 (1918).

<sup>57</sup> *Arizona Elec. Power Coop, Inc. v. The Burlington N. & S.F. Ry. Co.*, NOR 42058 (STB served Dec. 26, 2001), at 7-8; *see also Metropolitan Edison Co. v. Consolidated Rail Corp.*, 5 I.C.C.2d 385, 408 (1989).

engage in a fishing expedition of burdensome and harassing discovery against the Tank Car Owners. Where a party “seeks information irrelevant to the issues genuinely present,” constituting a “fishing expedition” and a “‘dragnet’ of discovery,” discovery requests will be denied.<sup>58</sup> Relevance requires a showing that the information sought “is necessary for or would be useful to the Commission in the resolution of the specific issues raised in the complaint.”<sup>59</sup> “The requirement of relevance means, generally, that the information sought might be able to affect the outcome of a proceeding.”<sup>60</sup> Here, the information from non-parties has no relevance, is not tailored to the specific issues raised in the complaint, will not affect the outcome of the proceeding, and is not likely to lead to relevance evidence.<sup>61</sup>

**B. Complainants Have Not Admitted that Tank Car Owners are Likely to File Individual Claims for Reparations, and Possible Future Reparations Claims Cannot Establish Current Relevance in Any Event**

UP also asserts that Association Complainants admitted, in a petition that they filed for expedition, that the Tank Car Owners “are expected to file individual claims for reparations should Complainants prevail under Count I.”<sup>62</sup> UP’s assertion is both wrong and irrelevant.

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<sup>58</sup> *Changes in Routing Provisions – Himont*, No. 38676 (Sub-No. 1) *et al.*, (ICC served June 6, 1990), at 9.

<sup>59</sup> *Farmland Indus., Inc. v. Gulf C. Pipeline Co., et al.*, No 40411 (ICC ALJ served Apr. 2, 1992), 1992 WL 67306, at \*4.

<sup>60</sup> *Canadian Pacific*, FD No. 35081 (STB served Mar. 27, 2008) at 1.

<sup>61</sup> The potential relevance of the information for future reparations claims is addressed next.

<sup>62</sup> UP Pet. at 17, citing Complainants’ Petition to Expedite (Oct. 28, 2015) at 3-4.

First, UP misrepresents what the Association Complainants actually said. Complainants referred only to the potential future reparations claims of “*rail shippers*” that were being charged by UP under new Item 55-C.<sup>63</sup> There was no assertion that Tank Car Owners specifically would file such claims. Tank Car Owners have made no such determination, and the matter is entirely speculative.

Second, the information could become relevant only if and *after* individual reparations claims are filed, which would be *after* UP’s practices are found to be unreasonable (which UP denies will ever occur). To obtain reparations, a party will need to show that it has been harmed, and the information UP seeks about pass-through and allocation might perhaps become relevant at that time to show that UP will not be required to pay twice for the same violations. But potential future relevance assuming two contingencies (UP’s practices are first found unreasonable, and Tank Car Owners then file reparations claims) does not establish current relevance. UP should not be allowed to subpoena irrelevant materials today on the supposition that they might become relevant in the future in subsequent proceedings that might or might not occur. Furthermore, UP should have its own records about which parties have paid what to UP, which parties have or have not received mileage allowances or discounted rates, and thus

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<sup>63</sup> Association Subpoena Reply at 9.

should be able to guard against duplicative recoveries on its own. UP does not need a subpoena to discover information from non-parties that it already possesses.<sup>64</sup>

**C. NAFCA Did Object to UP’s Discovery Requests on Relevancy**

UP also seeks to justify the broad scope of its requests on the grounds that NAFCA did not object to UP’s requests on grounds of relevancy in most instances.<sup>65</sup> That claim is incorrect as NAFCA and the other Association Complainants clearly did object to the relevance of UP’s discovery requests.<sup>66</sup>

Beyond that, UP’s notion that a member entity may be bound by its association’s failure to make repeated or strident objections is nonsensical. A lack of stridency in an association’s objections cannot possibly bind a different party, much less a non-party to the proceeding.

**D. UP’s Document Requests Do Not Parallel Complainants’ Requests**

UP also attempts to support the relevance and reasonableness of its discovery requests by claiming that they merely “parallel” the discovery requests that Complainants made to UP.<sup>67</sup> Mere equivalence between parties (if even shown), however, is insufficient as it ignores the heightened showing of relevance and need that is required for discovery against non-parties.

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<sup>64</sup> *Duke Energy Corp. v. Norfolk Southern Ry.*, NOR 42070 (STB served July 26, 2002), at 8 (stating that “it is unnecessary to require Duke Energy to provide information that the defendants already possess or have ready access to”).

<sup>65</sup> UP Pet. at, *e.g.*, 9-11, 12-14, 16. UP acknowledges relevancy objections to a few individual requests.

<sup>66</sup> Those objections are addressed in Association Compel Reply at 17 n.10.

<sup>67</sup> UP Pet. at 10-16.

Moreover, UP's requests to the Tank Car Owners differ substantially from those Complainants made to UP. Complainants tied their requests directly to specific claims made by UP in its pleadings. In contrast, UP's requests seek very broad discovery into matters at most merely noted by Complainants.<sup>68</sup> Complainants' requests are also much narrower and focused, *e.g.*, Complainants did not seek "all documents" falling in broad and vaguely-defined categories, and instead seek information that UP regularly maintains and utilizes in the course of its business.

**E. Complainants Offered to Enter into Stipulations that Would Moot the Need for Discovery**

Furthermore, to the extent that UP seeks documents in areas that might potentially have some relevance for the proceeding, NAFCA has already offered to enter into stipulations that would moot the need for the burdensome requests. For example, UP seeks to justify some discovery of car repair decisions and arrangements by noting that separate charges may "promote efficiency by giving car owners stronger incentives to consider transportation costs in selecting repair facilities."<sup>69</sup> Notwithstanding UP's failure to establish how "efficiency" is at all relevant, "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."<sup>70</sup> The offered stipulation is sufficient to resolve the issue and moots UP's far-ranging requests for all contracts with repair facilities, all documents relating to negotiations of those contracts, and all documents discussing,

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<sup>68</sup> Association Compel Reply at 17-25.

<sup>69</sup> UP Pet. at 11.

<sup>70</sup> Association Compel Reply at 18.

analyzing, or explaining reasons for directing particular tank cars to particular facilities (RFPs 5 and 6).<sup>71</sup>

UP similarly seeks documents pertaining to Tank Car Owners' interactions with other railroads, and not just with UP, on the grounds that UP might somehow be able to justify its actions, after-the-fact, by reference to practices of other railroads.<sup>72</sup> However, Complainants offered to stipulate that other railroads also charge zero-allowance rates, do not pay mileage allowances, and have begun to follow UP's lead and charge for tank car repair movements, particularly as much of that information is available from the public tariffs of other railroads.<sup>73</sup> Even assuming *arguendo* that the information has any relevance, the need for discovery is moot.<sup>74</sup>

## **V. GENERAL OBJECTIONS TO UP'S REQUESTS**

Tank Car Owners' general objections are included as Exhibit A.

## **VI. OBJECTIONS TO INDIVIDUAL DOCUMENT REQUESTS**

### **A. Requests for Documents Regarding Empty Tank Car Movements (RFPs 1 and 2)**

UP's RFP 1 seeks "all documents that refer or relate to Item 55-C," and RFP 2 seeks "all documents that refer or relate to costs associated with movements of empty tank cars other than charges under Item 55-C," including various sub-categories.

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<sup>71</sup> UP Requests for Production 5 and 6.

<sup>72</sup> UP Pet. at 13.

<sup>73</sup> Association Compel Reply at 11.

<sup>74</sup> Additional stipulation offers are noted in the discussion of the individual discovery requests.

Together, RFPs 1 and 2 seek *all* documents that relate to any and all charges and costs associated with movements of empty tank cars.

As such, the requests are colossally overbroad and burdensome, and UP has made no effort to tailor the requests to matters that may be relevant. Any document relating to any empty tank movement would be encompassed within UP's request. RFPs 1 and 2, when taken in combination with UP's other broadly-worded requests, such as RFPs 5 (all contracts with repair facilities and documents relating to negotiations of those contracts), 6 (all documents relating to reasons for directing particular tank cars to particular shops), 8 (all documents relating to communications on compensation for providing tank cars), and 10 (all documents discussing tank car ownership or maintenance costs and their allocation), would effectively require Tank Car Owners to open their entire files to UP for what constitutes a broad and unfocused fishing expedition.

As explained in the attached statements from the individual Tank Car Owners, complying with UP's responses would create enormous burdens. A preliminary analysis performed by the Tank Car Owners indicates there may be easily in excess of tens, perhaps hundreds, of thousands of documents that would need to be reviewed, if not produced.<sup>75</sup> While many of these records may be in electronic form for some Owners,

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<sup>75</sup> Union Tank, for example, owned between 90,000 and 120,000 tank cars in a given year since 2013, and between 6,300 and 12,000 went to repair shops in each of those years. Exhibit B at 6. At a minimum, there would be 6,300 repair car movements annually to review, plus movements of empty cars for other reasons, generating an immense volume of documents to review.

many others are not in electronic form at all, and thus the review largely would have to be manual.<sup>76</sup>

Moreover, Tank Car Owners do not maintain or retain much of the information in the form requested by UP in the ordinary course of their business, and thus would need to conduct a special study on such charges, their allocation, and mileage equalization charges.<sup>77</sup> Tank Car Owners cannot be required to undertake the considerable effort to conduct such special studies for UP's benefit, even assuming the information is otherwise a permissible subject of discovery.

UP's request is also overbroad in requesting information on "charges imposed by other railroads, charges Tank Car Owners impose on Lessees, and Mileage Equalization Charges."<sup>78</sup> Those matters are irrelevant as discussed at 17-19, *supra*. The charges that other railroads levy are irrelevant, and Complainants have offered to stipulate that other railroads now impose similar charges. UP has no legitimate interest in

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<sup>76</sup> For Union Tank alone, at least 50 employees would be likely candidates to have interactions regarding Item 55-C, requiring review of their electronic records, paper files, and emails in order to conduct a thorough search that would span weeks. Exhibit B at 2-3. Responding to RFP 2 (empty move charges other than Item 55-C) could take months and disrupt its ability to carry on regular business activities. *Id.* at 4. For GATX, { } Exhibit C at 3. ARI would face a major undertaking just to define the universe of responsive information. Exhibit E at 8.

<sup>77</sup> "[T]hese are not topics for which [Trinity] collects, maintains or otherwise tracks information," and Trinity "would not be able to sensibly provide anything other than Mileage Equalization Charges." Exhibit D at 2. ARI would also have to research and explore numerous files and records. Exhibit E at 8. Union Tank has no single source for this information. Exhibit B at 2-4. For {

} Reviewing earlier data would impose additional burdens. Exhibit C at 3-4.

<sup>78</sup> RFP 2 of the Subpoena Requests.

the compensation and allocation arrangements between lessors and lessees. Nor does UP need to seek “all documents” from Tank Car Owners to learn about mileage allowances that UP does or does not pay.

As justification for its request, UP relies solely on NAFCA’s lack of objection on relevancy grounds and Complainants’ own discovery requests to UP.<sup>79</sup> Neither has any substance. As explained at 21, *supra*, NAFCA did object on relevancy grounds. Moreover, Tank Car Owners are wholly separate non-parties that are not bound by the positions of others. Nonetheless, while UP references various requests of Complainants,<sup>80</sup> Complainants made very specific requests, to a party, that focused only on relevant information. For example, Complainants sought data on total empty mile payments under UP’s tariff after January 1 2015 (7(m)), documents addressing UP’s decision to begin charging under Item 55 (10), related studies or analyses (11), and estimates of revenues (16). UP develops, maintains, and relies on such information in the ordinary course of its business.<sup>81</sup> Moreover, as the party that elected to create and impose a new charge for empty tank car movements, UP inherently must have the information to justify the charge and/or that it utilized in its decision to impose the charge. UP likewise should have, in the ordinary course of its business, estimated the expected revenues from that charge. UP must also know what it has charged for movements of empty tank cars, regardless of who owns or leases the tank cars.

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<sup>79</sup> UP Pet. at 10-11.

<sup>80</sup> *Id.* at 10, nn. 12, 14.

<sup>81</sup> As ARI notes, UP generates the invoices for such charges. Exhibit E at 8.

**B. Request for Documents to Identify in Detail Each Tank Car Movement to a Repair Car Facility (RFP 3)**

UP's RFP 3 seeks documents sufficient to identify each tank car movement to a repair facility and reasons for movement. UP presents the same insufficient justification as with RFP 1 and 2, *i.e.*, NAFCA did not object, and Complainants sought similar information from UP.<sup>82</sup> However, NAFCA did object, as noted at 21, *supra*. Moreover, the requests were not reciprocal. UP admits that complainants did not ask UP about the reasons the tank cars moved to repair facilities, which UP states it does not know.<sup>83</sup> Accordingly, the requests are not matching. But UP has made no attempt to show why the specified information on the reasons for each individual movement has any relevance. The primary information requested, movements of a tank car to a repair facility, is information already known and available to UP. Indeed, UP, and only UP, has complete information about the movement of tank cars on its system, which is why Complainants requested such information in the discovery requests referenced by UP.<sup>84</sup> UP has not presented any explanation why the reason that the empty tank car movement occurred is, or could be, of any relevance to this proceeding. UP is simply engaged in a fishing expedition.

Moreover, Tank Car Owners generally do not maintain the information in the form requested by UP in the ordinary course of their business, and thus would need to conduct a burdensome special study to compile the information based on the data

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<sup>82</sup> UP Pet. at 10.

<sup>83</sup> *Id.* at 10 n.16.

<sup>84</sup> *Id.*

maintained by Railinc.<sup>85</sup> Tank Car Owners must not be required to conduct such special studies for UP's benefit, even assuming the information is otherwise a permissible subject of discovery.

**C. Request for Documents with Detailed Data on Tank Car Movements (RFP 4)**

While framed as a request for production, RFP 4 actually seeks very detailed information regarding each car reporting mark (meaning each individual tank car owned by each individual Tank Car Owner) regarding loaded, empty, revenue billed empty, to, from, or between repair facilities miles on UP and on all railroads.

As above, UP presents the same skimpy, insufficient justification: *i.e.*, NAFCA did not object, and Complainants sought similar information from UP.<sup>86</sup> Again, NAFCA did object, as noted at 21, *supra*. Moreover, UP acknowledges that

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<sup>85</sup> For Trinity, responding “would entail the individual review of at least one shop directive for each group of cars with each directive potentially encompassing tasks other than that requested by UP,” with “approximately 10,000 cars per year” to be considered, as Trinity “does not collect or maintain documents per the categories defined by UP in the normal course of its business.” Exhibit D at 3.

Union Tank does not maintain this data in a single, readily-accessible source, and the available data originated with the railroads and UP. Source code would need to be created and a manual review conducted that would take at least three to four weeks and still not produce the information requested by UP. Exhibit B at 4-5.

ARI also does not maintain this data in the ordinary course of business and estimates that a special study of this sort would take dozens of man-hours. Exhibit E at 5.

GATX would {

} Exhibit C at 4-5.

<sup>86</sup> *Id.* at 11.

Complainants did not ask UP about information about movements on other railroads.<sup>87</sup>

UP's request is thus not reciprocal, and the information is not relevant in any event, especially as the Complaint is directed to UP and not to other railroads. Moreover, NAFCA offered to stipulate that other carriers engage in similar conduct. UP is engaged in another fishing expedition designed to obtain information irrelevant to the case at issue.

Furthermore, UP must inherently and logically already have the information about subparts (a), (c), (e), (g), (i), and (k) because those requests address actual movements that occurred on UP's system. The other subparts relate to corresponding movements on other railroads, which are irrelevant, as noted. UP must not be permitted to engage in discovery to non-parties to obtain information it already possesses. The Complainants presented discovery to UP in order to obtain information about the aggregate movements to and from repair facilities on UP's system, information that is not otherwise available to the individual owners, lessees, shippers, repair facilities, or other associations.

As with the other requests, Tank Car Owners do not maintain the information in the form requested by UP in the ordinary course of their business, and thus would need to conduct a burdensome special study to compile the information based on the data maintained by Railinc.<sup>88</sup> Tank Car Owners must not be required to conduct such

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<sup>87</sup> *Id.* at n.18.

<sup>88</sup> Union Tank relies on data that UP and other railroads report to Railinc, and would have to create source code to retrieve the information that would then need to be manually

special studies simply for UP's benefit, even assuming the information is otherwise a permissible subject of discovery.

**D. Requests for Documents on Decisions to Direct Tank Cars to Particular Repair Facilities (RFPs 5 and 6)**

RFP 5 seeks “*all* contracts with Repair Facilities” to which Tank Car Owners directed tank cars and “*all* documents relating to negotiations of those contracts” (emphasis added). RFP 6 seeks *all* documents addressing the reasons for routing cars to particular Repair Facilities, including, but not limited to, capacity, backlogs, delays, differences in pricing, location, preexisting agreement, or ownership and control.

These requests are overbroad, burdensome, and not reasonably calculated to lead to admissible evidence.<sup>89</sup> Tank Car Owners typically deal with multiple repair facilities.<sup>90</sup> Decisions to send a particular repair car to a particular facility are inherently fact-specific and varied, typically made real-time; thus, documents addressing the reasons for sending a particular car to a particular facility might include the damage or condition needing repair, the allocation of responsibility, the relative availabilities, capabilities, costs, location, backlog, and charges of potential facilities, the availability of

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reviewed for several weeks. Exhibit B at 5-6. Trinity “does not maintain records of car movements back to 1987 and ... would need to create documents that do not presently exist;” even for information that might exist, at least three business weeks would be required. Exhibit D at 4. GATX would {  
}. Exhibit C at 6.

<sup>89</sup> UP acknowledges that NAFCA did object to this request. UP Pet. at 11.

<sup>90</sup> Trinity alone would have “to identify and then coordinate with up to 164 repair facilities as to whether they would even be willing to have their information disclosed.” Exhibit D at 4. ARI would require dozens of man-hours to retrieve contract information with repair facilities, and redacting sensitive, non-relevant information would take hundreds of man-hours. Exhibit E at 3.

transportation, the need or demand for the car, *etc.* Tank Car Owners would have to search multiple files and repositories, and thus a far-ranging search would be required to attempt to identify responsive documents, which would be unlikely to yield anything useful, as such decisions commonly are not documented.<sup>91</sup> In short, the effort required to accumulate all responsive information would be overwhelming, if not impossible, in any meaningful respect.

Moreover, this information is not relevant to any claim at issue but a defense for which UP appears to be seeking support; namely, “that allowing separate charges for empty repair moves would promote efficiency by giving car owners stronger incentives to consider transportation costs in selecting repair facilities.”<sup>92</sup> As noted at 22, *supra*, NAFCA has already offered to stipulate “that any person faced with dramatically higher charges from a supplier of services will seek to avoid those charges if possible.”<sup>93</sup> UP has not explained why such a stipulation is insufficient for its purposes.

In any event, the request is overbroad, and UP has not begun to show that the information requested is reasonably likely to lead to admissible evidence that UP does not already possess.

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<sup>91</sup> Union Tank, Trinity, and ARI do not document such decisions. Exhibit B at 6; Exhibit D at 4; Exhibit E at 7. The time that GATX would require to review its records that {  
}. Exhibit C at 6-7.

<sup>92</sup> UP Pet. at 11.

<sup>93</sup> Association Compel Reply at 18.

**E. Request for All Documents for Movements Relating to Retrofits Required by PHMSA (RFP 7)**

RFP 7 seeks “all documents” referring or relating to movement of cars to repair facilities to comply with the enhanced tank car standards adopted by the Pipeline and Hazardous Materials Safety Administration and the Federal Railroad Administration (“PHMSA”) on May 1, 2015.

This request is overbroad in form as it requests *all* documents referring or relating to movements made to comply with the new PHMSA requirements, even if the resulting number of responsive documents might be small because such movements to date have been limited because the requirements have been recently adopted and have been the subject of litigation and legislation. Requests that require a wide search for a small number of questionably relevant documents are unduly burdensome and not narrowly tailored.

UP notes that NAFCA did object to this request, but asserts that the information is relevant because Complainants noted in their reply to UP’s motion to dismiss that the volume of such future movements could not have been anticipated in 1987 and because Complainants sought discovery regarding UP’s anticipated future revenues resulting from such movements.<sup>94</sup> However, there is a critical difference between (a) asking the carrier for information on its volumes and its projected revenues, and (b) asking non-parties for all documents that somehow refer or relate to such movements. For example, every document that relates to the characteristics of a car that

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<sup>94</sup> UP Pet. at 12.

might need to be retrofitted if it is to continue in service could relate to a potential future movement to a repair facility.

Tank Car Owners do not maintain a repository of responsive documents in the form sought by UP in the ordinary course of business, and would need to undertake a burdensome special study to identify and accumulate responsive documents.<sup>95</sup>

**F. Request for All Documents Relating to Communications or Studies of Mileage Allowances, Zero-Allowance Rates, or Reductions in Line-haul rates Reflecting Furnished Tank Cars or Comparing the Costs of Tank Car Ownership with Benefits of Mileage Allowances or Zero-Allowance Rate (RFP 8)**

RFP 8 is impossibly overbroad in seeking all documents, other than lease agreements (which are a separately request in RFP 12), relating to communications or studies regarding mileage allowances, zero-allowance rates, or reductions in line-haul rates to reflect furnished tank cars. The request includes all documents relating to any communications Tank Car Owners may have had, with anyone, concerning mileage allowances. The volume of documents responsive to just this subpart is enormous, as it encompasses every document relating to each mileage allowance that each Tank Car Owner may have received or requested. The request exacerbates the burden by all seeking all communications regarding zero-mileage rates and reductions in line-haul

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<sup>95</sup> Union Tank does not itself maintain any tank car movement information and would need to conduct the same type of special study as in response to RFP 3 that would take three to four weeks are special source code is created and run. Exhibit B at 4-5, 6-7. ARI also does not maintain this data in the ordinary course of business and estimates that a special study of this sort would take dozens of man-hours. Exhibit E at 5.

rates, which Tank Car Owners generally do not receive because those items are negotiated and received by lessees and shippers, not the Tank Car Owners.<sup>96</sup>

Moreover, UP does not need to request the information regarding the mileage allowances it pays because UP knows how much it pays in allowances and to whom it pays those allowances. UP also has knowledge as to its practices regarding zero-allowance rates and reductions in line-haul rates. As noted at 18, *supra*, precedent holds that the carrier is indifferent as to whether an owner or shipper receives the compensation.<sup>97</sup> But insofar as UP needs additional information regarding those matters, it should seek discovery from someone else since Tank Car Owners do not receive zero-allowance rates and reductions in line-haul rates.<sup>98</sup>

UP acknowledges that NAFCA did object to UP's discovery requests in this area.<sup>99</sup> UP also claims that Complainants sought similar information,<sup>100</sup> but the referenced requests of Complainants were narrowly drawn and went directly to matters in direct dispute in the litigation.<sup>101</sup> The fact that UP is seeking to obtain information from

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<sup>96</sup> Union Tank does not maintain or track this information in any single readily accessible source and is not aware at this time of any Union Tank studies or analyses on these topics. Exhibit B at 7. Trinity “does not collect, maintain or otherwise track information” relating “to topics of discussion between a shipper and a railroad.” Exhibit D at 5. Nor does ARI. Exhibit E at 7. The burden for GATX to review its potentially responsive records is too large to be estimated. Exhibit C at 8.

<sup>97</sup> *In the Matter of Private Cars*, 50 I.C.C. 652, 674 (1918).

<sup>98</sup> *E.g.*, Exhibit B (Union Tank) at 7.

<sup>99</sup> UP Pet. at 12.

<sup>100</sup> *Id.* at 13.

non-parties does not give it license to make its requests more overbroad, unduly vague, and burdensome; indeed, it is obliged to do the opposite.

**G. Request for Documents to Show, By Railroad, the Number of Tank Car Movements on which Tank Car Owners Were or Were Not Paid an Allowance and the Associated Mileage Allowance and Mileage Allowances Paid or Not Paid (RFP 9)**

RFP 9 seeks documents sufficient to show separately, both by year and railroad, information on the number of tank car movements for which allowances were paid or not paid, the associated number of miles, the total amount of allowances paid.

The request is overbroad and burdensome, especially in seeking information about non-UP movements. UP inherently already has in its possession information about its own movements, and because it does not need to obtain a subpoena to obtain information it already possesses from non-parties, such requests are patently harassing. The non-UP allowances are irrelevant, but Complainants have offered to stipulate that other railroads now engage in similar practices, thus mooting the issue in any event.

UP's efforts to rely on NAFCA's supposed lack of objection and Complainants' own discovery requests<sup>102</sup> are makeweight. NAFCA did object as to

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<sup>101</sup> Complainants' RFP 2 focused on internal deliberations, RFP 4 focused on actual payments, RFP 5 focused on calculations of the extent of reimbursement, RFP 9 focused on quantification of discounts, RFP 12 focused on the quantification of rate reductions in lieu of allowances, RFP 14 focused on studies of the extent to which zero-mileage rates compensated owners, and RFP 15 focused on quantification of the costs of private ownership for which UP maintains it reimburses its customers through zero-mileage rates.

<sup>102</sup> UP Pet. at 13.

relevance, as noted at 21, *supra*. Moreover, NAFCA itself does not possess this information and Tank Car Owners are wholly separate non-parties that are not bound by the positions of others. In fact, Tank Car Owners do not maintain this information in the form requested in the ordinary course of their business, and they would have to conduct a burdensome special study to compile the information and/or otherwise obtain the information from Railinc.<sup>103</sup>

Complainants also had an entirely valid basis for requesting this information from UP. Only UP has information about the aggregate impact of its approach to allowances. Complainants' requests to UP do not confer any legitimacy to UP's requests to Tank Car Owners.

**H. Requests for all Documents that Discuss or Analyze Tank Car Ownership and Maintenance Costs Incurred by Tank Car Owners or Lessees, Their Allocation between Owners and Lessees, and All Documents Relating to the Development of Lessor Cost for Section 3 of Ex Parte No. 328 (RFPs 10 and 11)**

RFP 10 seeks all documents that discuss tank car ownership and maintenance ("O&M") costs incurred by Owners or Lessees and the allocation of those

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<sup>103</sup> Union Tank does not maintain this information in a single readily accessible source, and largely relies on the railroads Railinc as the source for such data. To find responsive information within its own documents, Union Tank would need to review at least thousands of invoices. A comprehensive search could take weeks and disrupt its ability to carry on regular business activities. Exhibit B at 7-8. For Trinity to find information on mileage allowances that might exist "would require an estimated 3 weeks of time at minimum to prepare specialized system queries that do not presently exist that might be able to output such information"). Exhibit D at 5. ARI also does not maintain this information. Exhibit E at 5. GATX would face the same enormous burden for this request as with RFP 4. Exhibit C at 9.

costs between Owners and Lessees. RFP 11 seeks all documents that refer or relate to development of Lessor Cost for Ex Parte 328.

UP's requests are overbroad in multiple respects. There is an extremely large volume of responsive information: Each Tank Car Owner owns at least ten thousands tank cars,<sup>104</sup> and most or all of the costs that they incur as Tank Car Owners consist of O&M costs. At the same time, Tank Car Owners know little, if anything, about the O&M costs incurred by lessees, and thus any such information would be indirect and thus of little, if any, probative value. Tank Car Owners, not knowing anything directly about the O&M costs incurred by Lessees, are also not in a position to know anything probative about the allocation. Moreover, the allocation is irrelevant, as explained at 17-19, *supra*.

The compilation of data on O&M costs that UP requests would require Tank Car Owners to engage in a burdensome special study of information that is not maintained in the form requested in the ordinary course of business. RFP 10 is "so broad as to require Union Tank to search every database, paper file and email that has been created, sent, received or otherwise obtained in any manner by Union Tank since January 1, 2001."<sup>105</sup> The time required for that exercise is unquantifiable.<sup>106</sup>

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<sup>104</sup> 90,000-120,000 tank cars in years starting 2013 for Union Tank alone. Exhibit B at 6.

<sup>105</sup> Exhibit B at 8.

<sup>106</sup> *Id.*



of the Complaint. It is also appropriate to note that Complainants' requests were narrowly drawn in seeking "any calculation by UP of the extent to which it has reimbursed its customers" and document "in which UP has quantified the costs of private car ownership."

**I. Requests for All Lease Agreements and Documents Sufficient to show Average Lease Rate for Tank Cars, by Type, Including Documents Sufficient to Show Whether Lease Rates Presumed Railroad Payments of Mileage Allowances (RFPs 12 and 13)**

RFP 12 seeks all lease agreements for tank cars, including all riders and documents referenced in or attached to each lease. RFP 13 seeks document sufficient to show average lease rate for tank cars, by car type, including whether those lease rates presumed railroad payments of mileage allowances.

UP's requests are both overbroad and unduly burdensome. The Tank Car Owners have thousands of leases, much of which is not digitized, and a laborious review of individual contracts would be required in most instances. For example, Union Tank Car estimates that the requests cover more than 800 and even as many as 1,000 individual leases, each of which may have numerous individual riders and other ancillary documents that would be responsive.<sup>111</sup>

RFP 12 is especially egregious in seeking all leases over a fifteen-year period. Fifteen years is an extraordinary period of time, and counsel cannot recall

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<sup>111</sup> Exhibit B at 9. ARI would have to review approximately 80 customer files and hundreds of agreements and riders. Calculating average lease rates would take dozens of man-hours. Exhibit E at 2-3. For GATX to compile this information, {  
}. Exhibit C at 9.

discovery of contracts over such a lengthy period in any other Board proceeding, let alone as to non-parties. Moreover, UP has made no effort to limit its request to any specific information in those leases. UP is instead demanding production of each Tank Car Owner's most sensitive documents, the lifeblood of its businesses, without any particularized showing of need for the full leases.<sup>112</sup> A request for a party, much less a non-party, "to disclose every agreement that it may have," is too broad.<sup>113</sup> Moreover, coordination with the lessees would be required in many instances, increasing the burden of responding.<sup>114</sup>

UP's purported justifications for seeking the leases all relate to the allocation of responsibilities, costs, and compensation between the lessor and the lessee.<sup>115</sup> However, the allocation of responsibility, liability, and compensation for empty car movements and tank car compensation as between lessor and lessee is a matter of no legitimate interest to UP.<sup>116</sup> Furthermore, Complainants offered to stipulate that the empty movement charges will have an effect on conduct. UP is simply engaged in a

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<sup>112</sup> Exhibit B (Union Tank) at 8-9; Exhibit C (GATX) at 10; Exhibit D (Trinity) at 6; Exhibit E (ARI) at 2.

<sup>113</sup> *Canadian Pac. Ry. Co., et al. – Control – Dakota, Minnesota & Eastern R.R. Corp., et al.*, FD No. 35081 (STB served Mar. 27, 2008) at 5-6 ("*Canadian Pacific*")

<sup>114</sup> Exhibit B (Union Tank) at 9; Exhibit D (Trinity) at 6; Exhibit E (ARI) at 2.

<sup>115</sup> UP Pet. at 16, references responsibility for directing movements to repair facilities, allocation of Item 55-C charges, ability of lessees to enter into zero-allowance rates (of which UP already has adequate information since it enters into those rates), and changes in lease rates and market rates over time.

<sup>116</sup> *In the Matter of Private Cars*, 50 I.C.C. 652, 674 (1918).

fishing expedition that has no bearing on the matters raised in the Complaint and appears designed to and would harass the non-party Tank Car Owners.

UP's focus on lease rates is particularly specious. Lease rates vary for all sorts of reasons, and UP's claim that such information is "highly relevant to explaining why so few shippers express interest in transportation rates that include payments of mileage allowances"<sup>117</sup> is vapid.

UP's Petition makes reference to its proposal for a sample that would reflect a list of 35 shippers from 2001 to the present for three Tank Car Owners (excluding ARI),<sup>118</sup> but that request would still encompass a large amount of information and would require a burdensome manual sorting of responsive data.<sup>119</sup> UP also references a proposal for a narrower time frame, contingent upon the Tank Car Owners' producing information on average lease rates and whether those lease rates presumed payment of mileage allowances.<sup>120</sup> That compromise proposal corresponds exactly to what UP requests in RFPs 12 and 13, and thus represents no movement at all from its subpoena request. Again, calculating average lease rates for a large number of leases is a substantial undertaking, and determining whether an average presumes an allowance is nonsensical to the extent an individual lease either does or does not presume an

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<sup>117</sup> UP Pet at 16.

<sup>118</sup> *Id.* at 17.

<sup>119</sup> UP's failure to identify the 35 shippers prevents Tank Car Owners from quantifying the universe of responsive documents. However, use of a sample would still require Tank Car Owners to separate responsive documents from non-responsive ones.

<sup>120</sup> UP Pet. at 17.

allowance, especially as the lease may not be explicit on its face. UP has thus failed to present a workable proposal.

## **VII. CONCLUSION**

UP has not begun to substantiate its request for subpoena, and its assertions to the contrary are hollow. UP's requests do not seek relevant information, and the requests are extraordinarily overbroad and burdensome. UP's claims that Tank Car Owners have not admitted they will file individual complaints for reparations, and reparations-related information could become relevant only after the claims are filed, which would be after UP's practices are found to be unreasonable. Moreover, UP already possesses the portion of the requested information that could actually be relevant at this time. UP is trying to use its subpoena request to engage in a broad and unwarranted fishing expedition, and its petition should not be granted.

Respectfully submitted,

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**Exhibit A**

**GENERAL OBJECTIONS TO UP'S REQUESTS**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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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,	)	Docket No. NOR 42144
	)	
Complainants,	)	
	)	
v.	)	
	)	
UNION PACIFIC RAILROAD COMPANY,	)	
	)	
Defendant.	)	

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**GENERAL OBJECTIONS OF TANK CAR OWNERS TO REQUESTS FOR  
PRODUCTION OF DOCUMENTS INCLUDED IN UNION PACIFIC RAILROAD  
COMPANY’S PETITION FOR SUBPOENA**

Union Tank Car Company (“Union”), GATX Corporation (“GATX”), Trinity Industries, Inc. (“Trinity”), and American Railcar Industries, Inc. (“ARI) (individually, “Tank Car Owner” or “Owner”, and collectively, “Tank Car Owners” or “Owners”), hereby submit their general objections to the requests for production of documents included in UP Union Pacific Railroad Company (“UP”) Petition for Subpoena filed in the above-captioned proceeding on May 17, 2016 (“UP Pet.”).

Tank Car Owners are submitting their general objections jointly in the interests of brevity and efficiency. The objections are based on information presently

known. Because Tank Car Owners continues to investigate the facts and information relating to the issues in this case, they reserve the right to modify and/or supplement any of their responses as the existence of additional responsive information becomes known.

The following General Objections, Objections to Definitions, and Objections to Instructions are incorporated into the specific response and/or objection to each Interrogatory and Document Request as presented in Tank Car Owners' reply to UP's Petition for Subpoena:

### **GENERAL OBJECTIONS**

The following general objections and statements apply to each of UP's particular document requests.

1. Tank Car Owners object to UP's Requests to the extent they seek to impose upon Tank Car Owners any obligation or responsibility other than those mandated by 49 C.F.R. § 1114.21 *et seq.*

2. Tank Car Owners object to UP's Requests to the extent they purport to impose on Tank Car Owners the burden to collect, produce, or disclose information that cannot be found in the course of a reasonable search.

3. Tank Car Owners object to UP's Requests to the extent they call for information outside Tank Car Owners' possession, custody or control.

4. Tank Car Owners object to the production of any information, documents, data or other materials that are not relevant to the subject matter involved in this proceeding or calculated to lead to the discovery of admissible evidence in this proceeding.

5. Tank Car Owners object to UP's Requests to the extent that any request would impose an undue burden on Tank Car Owners in relation to the relevance and probative value of the information sought.

6. Tank Car Owners object to UP's Requests to the extent any request is overbroad, vague or ambiguous.

7. Tank Car Owners object to UP's Requests to the extent they are not limited by date and seek information from outside the relevant time period for this Proceeding. ARI specifically objects to producing information prior to the time that it became a significant owner of tank cars.

8. Tank Car Owners object to UP's Requests to the extent they seek information that is already within UP's possession, custody, or control or that is more appropriately sought from third parties to whom discovery requests may be directed.

9. Tank Car Owners object to UP's Requests to the extent they may be construed to require Tank Car Owners to search for and disclose or produce information that is a matter of public record or otherwise as accessible, or more accessible, to UP than to Tank Car Owners.

10. Tank Car Owners object to UP's Requests to the extent they seek discovery more appropriately obtained by means other than requests for the production of documents or interrogatories.

11. Tank Car Owners object to UP's Requests insofar as they seek production or disclosure of information subject to the attorney-client privilege, work product doctrine, or any other applicable privilege, rule, doctrine or immunity, whether

created by statute or common law. All Requests have been read to exclude discovery of such privileged information. By responding to any Request, UP does not waive the attorney-client privilege, the work product doctrine, or any other applicable privilege, doctrine, immunity or law as to that Request or as to any other Request or any future Request. Inadvertent production of any such information shall not constitute a waiver of any privilege or any other ground for objecting to discovery with respect to such information, nor shall inadvertent production waive the right of Tank Car Owners to object to the use of any such information in any proceeding.

12. Tank Car Owners object to UP's Requests to the extent they call for the production or disclosure of trade secrets, proprietary, personal, commercially sensitive, or other confidential information. Tank Car Owners will produce such confidential information that is responsive, non-privileged, relevant, and not otherwise protected from discovery, if any, only pursuant to the terms of a Protective Order issued in this proceeding, and reserve the right to seek further entrance of protective orders by the Board should the need arise.

13. By responding to any Request, Tank Car Owners do not adopt UP's definitions of words and phrases contained in these Requests. Tank Car Owners object to words and phrases to the extent they are undefined and/or inconsistent with (a) the ordinary and customary meaning of such words and phrases and/or (b) the rules governing the permissible scope of discovery.

14. Tank Car Owners object to UP's Requests to the extent that they use language incorporating or calling for a legal conclusion or making an erroneous statement

of law. Tank Car Owners' responses herein shall be as to matters of fact only and shall not be construed as stating or implying any conclusions of law concerning the matters referenced in any discovery request or concerning any matter relevant to this Proceeding.

15. Nothing in Tank Car Owners' responses shall be construed as constituting or implying an admission of any allegation or agreement with any assertion or characterization in UP's Requests.

16. Tank Car Owners' discovery and investigation into the matters specified is ongoing. These answers and objections are made as of the date stated and include information located or obtained up to that time after reasonable inquiry. Tank Car Owners does not purport to have reviewed and extracted information from every potentially relevant document. Further information responsive to UP's Requests may be ascertained or identified at a later time, and Tank Car Owners reserves the right to amend its answers and objections to rely on such information and to assert additional objections as necessary.

17. The information and documents supplied in response to UP's Requests are for this Proceeding only and for no other purpose.

18. The applicable foregoing General Objections are incorporated into each of the specific objections and answers that follow. The assertion of the same, similar, or additional objections and specific objections to an individual Request, or the failure to assert any additional objection to an individual Request, shall not be construed as a waiver of any objection by Tank Car Owners.

19. Tank Owners specifically object to the request to search and produce responsive documents going back to January 1, 2001, and in certain requests, back to 1987. ARI specifically objects to having to search and produce documents prior 2011, the year in which it became a significant owner of tank cars.

### **OBJECTIONS TO DEFINITIONS**

The following objections to UP's Instructions and Definitions, and the following statements, apply to each of the particular Requests propounded by UP and are hereby incorporated within each specific response set forth below:

1. Tank Car Owners object to the definition of "Communication" to the extent that it exceeds the scope of discoverable material under, or seeks to impose any obligation or responsibility in excess of those required under, 49 C.F.R. § 1114.21 *et seq.*

2. Tank Car Owners object to the definition of "Document" to the extent that it exceeds the scope of discoverable material under, or seek to impose any obligation or responsibility in excess of those required under, 49 C.F.R. § 1114.21 *et seq.*

3. Tank Car Owners object to the definitions of "Identify" to the extent that they seeks to impose any obligation or responsibility in excess of those required under 49 C.F.R. § 1114.21 *et seq.*

4. Tank Car Owners object to the definition of "You" as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence in that it seeks discovery on parents, subsidiaries, affiliates, employees, agents and others that are not party or relevant to these proceedings or to the activities of Tank Car Owners as Tank Car Owners.

5. Tank Car Owners object to the definitions of “You” and “Your” as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence in that they include Tank Car Owners’ members, outside attorneys, advisers, consultants, and other persons or entities not within Tank Car Owners’ control, as well as Tank Car Owners’ members’ parent companies, subsidiaries, and other persons or entities not party or relevant to these proceedings.

### **OBJECTIONS TO INSTRUCTIONS**

The following objections to UP’s Instructions, and the following statements, apply to each of the particular Requests propounded by UP and are hereby incorporated within each specific response set forth below:

1. Tank Car Owners object to Instruction Nos. 3 and 4 to the extent that they are overly broad, unduly burdensome, and not reasonably limited in time, as UP seeks discovery from January 1, 2001 and in some individual requests for 1987. Any production will be limited to responsive information or documents that can be obtained without undue burden or expense and that are located after a reasonable search, as required by 49 C.F.R. § 1114.21 *et seq.*

2. ARI objects to producing documents, especially its leases and any other relevant contracts, at any location other than its regular places of business where the documents are maintained. Tank Car Owners also object to producing copies of documents at their own expense. Tank Car Owners specifically object to producing full copies of leases, particularly information on lease rates.

**Exhibit B**

**DECLARATION OF JOHN M. KIERAS  
ON BEHALF OF UNION TANK CAR COMPANY**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

NORTH AMERICA FREIGHT CAR  
ASSOCIATION; AMERICAN FUEL &  
PETROCHEMICAL 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,

Complainants,

v.

UNION PACIFIC RAILROAD  
COMPANY,

Defendant.

Docket No. NOR 42144

**DECLARATION OF JOHN M. KIERAS IN SUPPORT OF  
JOINT REPLY OF TANK CAR OWNERS  
TO UNION PACIFIC RAILROAD COMPANY'S PETITION FOR SUBPOENAS**

I, John M. Kieras, hereby declare as follows:

1. I am an individual over the age of 18, not a party to this action and am otherwise competent to make this declaration. I am the Director of Railroad and Industry Relations for Union Tank Car Company ("Union Tank"). I have been employed in my present position since 2007. For the five years before that, I was the Director of Railroad Relations and Revenue Accounting. I have been employed by Union Tank since 1976. Over time, I have had responsibility for administration of Union Tank's lease billing system, railroad repair accounting and auditing, mileage accounting system, and Umler registrations.

2. This declaration is offered in support of the opposition to Union Pacific Railroad Company's ("UP") Petition to the Surface Transportation Board seeking

authority to subpoena four non-parties to this matter, including Union Tank. This declaration is based on my personal knowledge and experience as well as information collected by other Union Tank employees.

3. The proposed UP subpoena identifies thirteen (13) requests for production, not including subparts. I note that legal objections have been separately asserted as to each of these requests in the Joint Reply of Tank Car Owners to Union Pacific Railroad Company's Petition for Subpoenas. This declaration is provided subject to all such objections and Union Tank reserves the right to assert additional objections in the event UP is permitted to serve the subpoena. Below I specifically address the availability of documents and the burden of complying with certain of UP's requests.

4. Union Tank is the largest owner/lessor of tank cars in the United States currently owning over 120,000 tank cars that are leased to approximately 400 different lessees.

5. Request 1 seeks "all documents" that refer or relate to Item 55-C, the UP tariff at issue in this matter. Union Tank does not maintain or otherwise track this information in a single readily accessible source in the form requested in the ordinary course of its business and instead relies on UP to provide data regarding when Item 55-C has been applied to an empty movement of a tank car it owns. As such, the best source for comprehensive information responsive to this request is UP. Even if Union Tank is forced to review and produce the information in its possession, it will be incomplete. While all of Union Tank's approximately 115 leasing employees may have documents that may refer or relate to Item 55-C in some way, at least 50 employees hold positions that make interactions regarding Item 55-C likely, including internal discussions regarding the publication of the

tariff, contact with customers responding to questions and seeking advice about the tariff, and accounting and invoicing issues associated with Item 55-C. These largely electronic documents, including email, are not separated, segregated, or otherwise centralized in the ordinary course of Union Tank's business and the electronic records, paper files and email of these 50 or more employees would need to be manually reviewed for responsive documents. Finally, a search for responsive documents would also require a manual review of more than 6,300 (estimating conservatively) unique invoices received by Union Tank for tank cars owned during the nearly 18 months the tariff has been in place in order to determine if such invoice contained Item 55-C charges. Such an effort would require substantial time for our Information Technology (IT) department as well as numerous weeks of time to review the mailboxes, electronic files, and paper files companywide. Searching for, compiling and producing the information requested would be an overwhelming undertaking that would disrupt the ability of Union Tank to carry on regular business activities.

6. Request 2 seeks "all documents" that refer or relate to costs associated with movement of empty tank cars other than Item 55-C charges since January 1, 2001. Union Tank does not maintain or otherwise track this information in a single readily accessible source in the form requested in the ordinary course of its business and instead relies on the railroads and Railinc to provide data regarding the movement of its tank cars and charges related thereto. If UP was just seeking documents evidencing the actual costs (rather than anything that refers or relates to such costs), that task alone would be arduous and significantly time-consuming as Union Tank maintains several distinct systems that may contain information on costs associated with movement of empty rail cars, both electronic

and paper. In order to search for documents evidencing these costs, our IT staff would be required to draft source code for a specialized program to search the electronic systems and create a report on potentially responsive documents and someone would have to manually review both electronic documents identified as potentially responsive, as well as all of the paper files. By way of example of the enormity of the task, and making a conservative estimate, a search of just the invoicing information would potentially entail a review of more than 65,000 unique invoices received by Union Tank for its tank cars during the fifteen years since January 1, 2001. UP's request, however, also requires production of any document that relates or refers to such costs. This would further entail the review of paper and electronic records and email of potentially every leasing employee that has ever worked for Union Tank since January 1, 2001. Together this could be months of work to review the necessary databases and files. Searching for, compiling and producing the information requested would be an overwhelming undertaking that would disrupt the ability of Union Tank to carry on regular business activities.

7. Request 3 seeks documents sufficient to identify movements of tank cars to a repair facility, the repair work performed at the facility, and the repair reason for each movement for the period between January 1, 2013 to December 31, 2015. Union Tank does not maintain or otherwise track tank car movement information in a single readily accessible source in the form requested in the ordinary course of its business and instead relies on the railroads and Railinc to provide data regarding the movement of its tank cars. While Union Tank has a leasing database of information that includes the identity of shops that made repairs to its tank cars along with some generic information on the type of repair and the *planned* origin/destination of the car, it does not include details of the *actual* movements of

the tank cars to or from those repair shops. The railroad is the best place to obtain actual movement information. The best Union Tank can do is provide data associated with repairs of its tank cars, but even this would require its IT staff to draft source code for a specialized program that would search the electronic system and create a report on potentially responsive information, and then require a manual review of these records for production. A conservative estimate is that this process would take at least three to four weeks and would still leave UP in a position of not having the information regarding how a movement was related to a repair.

8. Request 4 seeks documents sufficient to show the number of loaded and empty miles, as well as empty movements in 12 different categories each over 16 separate years. Union Tank does not maintain or otherwise track this information in a single readily accessible source in the form requested in the ordinary course of its business and instead relies on the railroads and Railinc to provide much of data requested. For Requests 4(a) through (f), the exact information requested is specifically calculated and reported by railroads, including UP, to Railinc, which is the most readily accessible source. Although Union Tank maintains various databases that contain some limited raw data (e.g. loaded miles and empty miles), any data available would have been obtained from the railroads and Railinc in the first place. Even collection of this limited, incomplete data would require Union Tank's IT staff to draft source code for special programs that would create a report of potentially responsive data. Thereafter, it would take several weeks for the results to be manually reviewed for actual responsiveness. Requests 4(g) through (l), seek information similar to UP's Request 3 and Union Tank's response is the same as identified therein regarding availability of information and burden of searching for responsive documents.

9. Request 6 seeks all documents related to the reason each tank car was sent to a particular repair facility since January 1, 2013. Union Tank does not maintain or otherwise track this information in a single readily accessible source in the form requested in the ordinary course of its business. In each year from 2013, Union Tank owned between approximately 90,000 and 120,000 tank cars. Roughly and conservatively estimated, between 6,300 and 12,000 tank cars owned by Union Tank were in repair facilities each year since 2013. As such, UP is seeking information on tens of thousands of repair shop events since 2013. Repair facility decisions are made on a case-by-case basis considering a multitude of complex and often fluid factors, including, but not limited to, numerous federal regulations, AAR Interchange Rule requirements (e.g., rules governing the handling of damaged or destroyed equipment); Federal Railroad Administration One Time Movement Authority for movement of tank cars that no longer conform to applicable Hazardous Waste Regulations; carrier car rejection protocols (e.g., “bad order” car movement requirements); lessee requirements and preferences; shop affiliations; shop repair capabilities; shop location/proximity; shop availability; shop turn-around time; and other factors. Union Tank does not document such decisions and locating “all” responsive documents “discussing, analyzing, or explaining reasons” for shipment to facilities in each instance would entail a massive, overwhelming undertaking that would disrupt the ability to carry on regular business activities.

10. Request 7 seeks documents that refer or related to movements of tank cars to repair facilities for repairs related to the May 1, 2015 PHMSA rule. Union Tank does not maintain or otherwise track any tank car movement information in a single readily accessible source in the form requested in the ordinary course of its business and instead

relies on the railroads and Railinc to provide data regarding the movement of its tank cars. This Request seeks information similar to UP's Request 3 and Union Tank's response is the same as identified therein regarding availability of information and burden of searching for responsive documents.

11. Request 8 seeks communications and studies/analyses regarding Mileage Allowances, Zero-Mileage Rates, or reductions in line-haul rates. Union Tank does not maintain or otherwise track this information in a single readily accessible source in the form requested in the ordinary course of its business and is not aware of any Union Tank studies or analyses on these topics. Railroads negotiate and contract directly with rail shippers, not Union Tank, for rail service. Union Tank is neither a party nor privy to shipper-railroad rate agreements and terms. Whatever rates or non-allowances UP or other railroads negotiate with shippers that might pertain to tank car mileage is confidential or otherwise not available to Union Tank. Searching all Union Tank files and emails for any reference to this subject or peripheral documentation would be a needle in a haystack exercise that would be extremely burdensome and disruptive, and also likely to be fruitless.

12. Request 9 seeks documents regarding tank car movements and miles associated with mileage allowance payments over a period of 16 years. Union Tank does not maintain or otherwise track this information in a single readily accessible source in the form requested in the ordinary course of its business and instead relies on the railroads and Railinc to provide much of data requested. In order to search for any responsive information, our IT staff would be required to draft source code for a specialized program that would search the electronic systems and create a report on potentially responsive documents and someone would have to manually review both electronic documents

identified as potentially responsive as well as any paper files. Together this could be weeks of work to review the necessary databases and files. Searching for, compiling and producing the information requested would be an overwhelming undertaking that would disrupt the ability of Union Tank to carry on regular business activities.

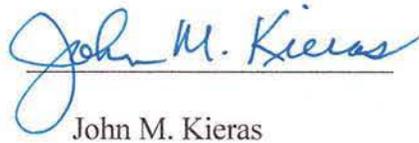
13. Request 10 and 11 seek highly confidential information regarding the costs of Union Tank's business operations. Union Tank provides Railinc an annual summary of tank car ownership costs as part of the Ex Parte 328 Agreement, which is used, in collaboration with data from the other three largest tank car companies (now two others), for updating mileage allowance rates. Railinc keeps the individual data confidential and the aggregates are used for this purpose. UP seeks to circumvent these protections of the core economics of Union Tank's business by seeking this information directly from Union Tank. This aside, the requests seeking documents "that discuss or analyze" how costs are allocated between tank car owners and lessees or "refer or relate" to the development of the "Lessor Cost" of the Ex Parte 328 Agreement are so broad as to require Union Tank to search every database, paper file and email that has been created, sent, received or otherwise obtained in any manner by Union Tank since January 1, 2001. Simply searching for the information requested would require an unquantifiable amount of research time, including drafting numerous source codes for database searches and would be an overwhelming undertaking that would disrupt the ability of Union Tank to carry on regular business activities.

14. Request 12 and 13 seek information related to the terms contained within and whole copies of each lease agreement, together with all riders and ancillary documents, Union Tank has entered into since January 1, 2001. These documents

embody some of Union Tank's most commercially sensitive and proprietary business information and allowing UP or any third party access to these materials, even pursuant to a protective order, would critically undermine Union Tank's core business. Moreover, these requests implicate confidentiality agreements between Union Tank and other third parties that prohibit their unilateral disclosure. While the commercial and other economic terms of these agreements, including even the standard form of the contract, are extremely commercially sensitive, in light of Union Tank's current portfolio of over 120,000 tank cars and approximately 400 currently active lessees, I conservatively estimate this request covers more than 800 or even as many as 1,000 individual leases, each possibly having numerous individual riders and other ancillary documents, the vast majority of which are only maintained in paper form in numerous locations.

Searching for, compiling and producing the information requested would be an overwhelming undertaking that would disrupt the ability of Union Tank to carry on regular business activities.

I declare under penalty of perjury that the foregoing is true and correct.

  
John M. Kieras

June 20, 2016

**Exhibit C**

**VERIFIED STATEMENT OF TERRENCE HEIDKAMP  
ON BEHALF OF GATX CORPORATION**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

\_\_\_\_\_)  
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

TERRENCE HEIDKAMP, being first duly sworn on oath, does hereby depose and state:

1. I am Vice President, Government and Industry Relations for GATX Corporation ("GATX"). My responsibilities in that capacity include coordinating GATX's interests and activities with regulatory authorities in the United States and Canada, and with trade associations, including NAFCA. I am competent to testify to the matters contained herein, which are either based upon personal knowledge or my discussions with persons responsible for those matters within GATX, and are within the scope of my authority.

2. I have been asked to provide certain information pertinent to the proposed subpoena and discovery requests directed to GATX by the Union Pacific Railroad in its May 17, 2016 Petition for Subpoenas in Docket No. NOR 42144.

GATX VERIFIED STATEMENT - PUBLIC

3. In furtherance of this task, I reviewed the proposed subpoena and conferred with relevant employees within GATX as to the location of responsive records and to develop estimates of the time and cost likely required to respond to the subpoena.

4. The following is a description of the work required to collect and review documents in response to the subpoena, tracked to each numbered item in the subpoena. In addition to describing the work, provided herein is an estimate of the number of hours of work by GATX employees and the total cost to gather the materials.

5. Based on GATX's current understanding of the scope of the subpoena requests, the total costs for internal resources to gather the documents requested by the subpoena is estimated at approximately [REDACTED]. As discussed in paragraph 16 below, additional costs are currently not estimable given the breadth of Item 10's request for all documents that discuss tank car ownership or maintenance costs. Note that the estimates do not include time required by outside counsel to review materials or for the costs associated with having to create electronic and/or paper production copy sets of records; which expense will be significant given the large volume of materials UP seeks. Additionally, GATX does not have internal resources dedicated to responding to subpoenas. Consequently, any time spent collecting records responsive to the subpoena will be time employees will not be performing their regular job activities.

6. The estimates specified herein include time and material for GATX employees to gather documents, extract and analyze data from GATX's information systems, review the reports and materials and prepare the materials for review by outside counsel. The estimate of the fully loaded cost for a GATX employee is [REDACTED].

7. Item 1: Producing “all documents that refer or relate” to OT-55 will require a review of emails and other correspondence between GATX and UP related to the UP tariff. Additionally, it will require a review of the email and correspondence of at least [REDACTED] GATX employees to identify any correspondence that was sent to or received from customers. Once the correspondence is collected, it would need to be reviewed by both internal resources and outside counsel for privilege and confidentiality. The collection alone will require approximately [REDACTED]. The estimated total cost of this effort is [REDACTED].

8. Item 2: Producing “all documents that refer or relate” to costs for movement of empty tank cars will require a review of an [REDACTED] that contains freight charges paid and what was billed to lessees from the time period of [REDACTED]. This file contains approximately [REDACTED] records. The file must then be manually reviewed line by line to identify all tank car data and to separate that data from freight car data. A tank car-only file will be created to answer this request. This review will require approximately [REDACTED]. The estimated total cost of this effort is [REDACTED]. It is assumed that analysis and reporting of the contents of this electronic file will be acceptable. However, if a hard copy of each invoice is required, the timeframe and cost would increase significantly. This additional work will require approximately [REDACTED] of time.

9. Producing all documents related to mileage equalization is a large undertaking which involves mileage system analysis. GATX tracks its billing and payments through an electronic system. Our IT team will [REDACTED] and make it available for analysis and reporting. It is very likely our team will also need to review the [REDACTED] to verify some of the data. GATX has billing data from [REDACTED] in this electronic system. Our team will need to review the data to remove cancellations and

credits, [REDACTED]  
[REDACTED]  
[REDACTED] it will take substantial time to sort through the data to separate charges between Excess Mileage and Mileage Equalization. [REDACTED]  
[REDACTED]  
[REDACTED] Sorting through [REDACTED] data, [REDACTED]  
[REDACTED] will require approximately [REDACTED] of work for [REDACTED]. Additionally, it will take approximately [REDACTED] for [REDACTED] to summarize the [REDACTED] data. [REDACTED] It will take approximately [REDACTED] for [REDACTED] to summarize the data from [REDACTED]. In total, this collection will require approximately [REDACTED] of work for [REDACTED]. The estimated total cost of this effort is [REDACTED].

10. Item 3: Producing the movements of each tank car to a repair facility from 1/1/2013 – 12/31/2015 and identifying “the reason for each movement (e.g., (i) scheduled maintenance, (ii) a Lessee’s return of a tank car to its Owner at the end of a lease or other agreement governing the use of such tank car, (iii) a regulatory inspection requirement of any kind applicable to such tank car, (iv) a mishap, accident or other event causing damage or defect to such tank car, or (v) a bad order determination issued by any railroad or other entity regarding such tank car)” will require an extensive review of the GATX database that records details each time a car is shopped for repair. Our team will use the database to produce a report for each year detailing the reason each car is shopped. The report will contain the car number, the location of the shopping and the reason for the shopping. GATX records indicate there are approximately

shopping events for tank cars from 1/1/2013 to 12/31/2015. Our team estimates it will take approximately hours of work to collect this information. The estimated total cost of this effort is

11. Once the report is prepared, our team will then have to extract information from other systems to determine the work performed during each shopping event. The work will be described using industry standard Billing Repair Card (“BRC”) format. The average number of BRC line items for each shopping event is. As such, over million BRC line items will be generated. Our team estimates it will take approximately for to extract the data and produce reports for review by relevant internal GATX employees. The estimated total cost for this portion of the effort is. Our team will review approximately of the BRC lines, which is approximately 1%, to ensure the information is accurate. Our team estimates it will take hours of work to review the line items. The estimated total cost for all portions of Item 3 is.

12. Item 4: Producing the loaded and empty mileage statistics for 1987, and each year from 2001-2016 is also a significant undertaking. As written, the subpoena request is ambiguous as to whether the information is to be grouped by reporting mark or by individual car. The detailed data needs to be produced in a format that would enable consolidation into the categories as required by this request. This categorization will require significant review by persons familiar with movement data. importing it to the current system will require extensive work and IT resources. In addition to the IT

resources, our team estimates it would take approximately [REDACTED] of work for [REDACTED] to extract and categorize the data pre-dating [REDACTED]

[REDACTED] As such, our team estimates that there are approximately [REDACTED] million lines of data for the period being requested. To respond to the request, our team would have to classify the movements per car shopping events, revenue billing, etc. This will require resources from various departments within GATX. Our team may also need an information systems resource to link information with various systems to classify the mileage information. This task will require approximately [REDACTED] including IT resources, to review and categorize data and produce reports. Our team estimates this task will be the equivalent of [REDACTED]

[REDACTED] The estimated total cost of this effort is [REDACTED]

13. Item 5: Producing “all contracts with Repair Facilities to which [GATX] has directed tank cars” since 1/1/2013 will require a review of available contracts [REDACTED]

[REDACTED] The bulk of the work will be to review the contracts to determine what should be provided to respond to the request; these negotiated contracts are proprietary business records. Additionally, all of the documents related to the negotiations of these contracts will have to be identified and collected from multiple departments and reviewed for privilege and confidentiality. Our team estimates this task will require [REDACTED] of work for [REDACTED] The estimated total cost of this effort is [REDACTED]

14. Item 6: Producing “all documents discussing, analyzing, or explaining reasons for directing particular tank cars to particular Repair Facilities” since 1/1/2013 is such a broad request that it would require the collection and review of voluminous records from multiple departments within GATX, more than [REDACTED] locations throughout the United States and Canada, and

would require the collection and review of the email and paper records of more than [REDACTED] employees. Given the extensive collection and review that would be required to respond to this broad request, GATX cannot currently estimate the cost associated with such an effort.

15. If the subpoena request is interpreted more narrowly than written, and is read to only seek shop disposition information (rather than discussions and analyses relating to the reasoning behind that disposition), it will require GATX to review information [REDACTED] [REDACTED] Our team estimates that this will require [REDACTED] of work for [REDACTED]. The estimated total cost of this effort is [REDACTED].

16. Item 8: Producing documents that refer to mileage allowances or zero mileage rates will require a search of emails of at least [REDACTED] GATX employees. [REDACTED]

[REDACTED] GATX has over [REDACTED] emails in its mileage inquiry email folder alone. Our team will have to review each email individually to distinguish between daily mileage requests and emails relating to contract mileage. Our team estimates this will require [REDACTED] of work for [REDACTED]. The estimated total cost of this effort is [REDACTED]. Given that at least [REDACTED] other employee email records will need to be reviewed to respond to this broad request, GATX cannot currently estimate the cost associated with such an expansive electronic collection and review.

17. Item 9: Producing railroad statistics for moves where mileage was paid, and movements without mileage paid, is included as part of the work described in Item 4, *supra*.

18. Item 10: Producing “all documents that discuss or analyze costs of tank car ownership and/or maintenance costs incurred by tank car Owners or Lessees or how those costs are allocated between tank car Owners and Lessees” is such a broad request that it would require the collection and production of voluminous records from multiple departments within GATX, more than [REDACTED] locations throughout the United States and Canada, and would require the collection and review of email as well as records contained in multiple databases. This includes records such as individual BRCs, individual leasing records, and communications with customers, internal communications regarding charges to the customer versus charges to GATX, invoices, etc. In addition to the cost of ownership study mentioned in Item 11, the request could be read to require GATX to produce documents [REDACTED]

[REDACTED] This would be a much more significant undertaking and is highly proprietary business information. Given the breadth of this request, it is not currently possible to estimate the time and cost of this effort.

19. Item 11: GATX participates in the annual cost of ownership study required by EP 328. [REDACTED]

[REDACTED] Our team estimates that collecting this information will take [REDACTED] of work for [REDACTED]. The estimated total cost of this effort is [REDACTED].

20. Item 12: Producing all lease agreements for tank cars since [REDACTED] will require a thorough review of all leases that are [REDACTED]. Our team estimates that approximately [REDACTED] leases and related documents would need to be collected and reviewed. Staff would be required to search [REDACTED]

[REDACTED] In addition

to the time it will take our IT staff to [REDACTED] it will take approximately [REDACTED] minutes per lease to locate and retrieve each document. With approximately [REDACTED] leases at [REDACTED] minutes per lease, this review will take approximately [REDACTED] minutes, or [REDACTED] hours. This is essentially the equivalent of [REDACTED]. The estimated total cost of this effort, including the IT query, is [REDACTED]. The records will then need to be reviewed for confidentiality; GATX's negotiated leases are proprietary business records.

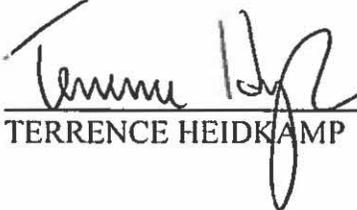
21. Item 13: Producing average monthly lease rates (which is highly proprietary GATX business information) by tank car for 2001-2016 will require the production of [REDACTED] individual data points. GATX has approximately [REDACTED] tank cars in its fleet, consisting of [REDACTED] different cars types [REDACTED]

[REDACTED] it would take approximately [REDACTED]  
[REDACTED] In

total, our team estimates this will require [REDACTED]. The estimated total cost of this effort is [REDACTED].

22. In summary, based on the scope of the proposed subpoena, and as detailed above, our team estimates that responding to the subpoena would require the dedicated attention to this

project of numerous GATX employees to retrieve and review potentially tens of thousands of emails and other electronic and paper records, from multiple databases, which could yield tens of millions of lines of data, which also will require review by company personnel for privilege and proprietary information, all of which could entail in excess of [REDACTED] man hours dedicated to this project rather than regular job duties, at a potential total cost in excess of [REDACTED]

 6/20/2016  
TERRENCE HEIDKAMP

**Exhibit D**

**DECLARATION OF DANI G. COOK  
ON BEHALF OF TRINITY INDUSTRIES, INC.**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

NORTH AMERICA FREIGHT CAR	)	
ASSOCIATION; AMERICAN FUEL &	)	
PETROCHEMICAL 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,	)	
	)	Docket No. NOR 42144
Complainants,	)	
	)	
v.	)	
	)	
UNION PACIFIC RAILROAD	)	
COMPANY,	)	
	)	
Defendant.	)	

**DECLARATION IN SUPPORT OF OPPOSITION TO PETITION FOR SUBPOENAS**

I, Dani G. Cook, hereby declare as follows:

1. I am an individual over the age of 18, not a party to this action and am otherwise competent to make this declaration. I am Vice President, Litigation Information Management for Trinity Industries Leasing Company (“TILC”). I have served in my present position since October 2015, prior to which I was Vice President Business Services and have been with the company since 1995.

2. This declaration is offered in support of the opposition to Union Pacific Railroad Company’s (“UP”) petition to the Surface Transportation Board seeking authority to subpoena non-party, Trinity Industries, Inc. (“TIC”). The petition appears to presume TIC is a member of North America Freight Car Association (“NAFCA”), one of the Complainants in the proceeding filed against UP at docket NOR 42144. TIC, however, is not a member of NAFCA, rather its

subsidiary, Trinity Industries Leasing Company (“TILC”), is the member. I have thus assumed as a courtesy to the Board and UP that UP’s intent was to direct the requests to TILC. I have reviewed the proposed request for production in the draft UP subpoena and understand the purpose of this declaration is to describe to the best of my knowledge, the existence, if any, of information within TILC’s possession, custody and control that is responsive to the subject requests and the burdens associated with retrieving and producing such information. As a result of my job duties and responsibilities, this declaration is based on my personal knowledge and experience as well as information collected by other TILC employees.

3. The draft UP subpoena identifies thirteen (13) requests for production, not including subparts. Provided below as to each of these categories is a description of what information TILC might have and the nature of the burden that would be imposed to search and produce such information. I understand that legal objections have been separately asserted as to each of these requests in the Joint Reply of Tank Car Owners to Union Pacific Railroad Company’s Petition for Subpoenas, which include, among others, a challenge to the right of UP to serve any subpoena. This declaration is provided subject to all such objections and further reserves the right to assert additional objections in the unlikely event UP were allowed to serve the subpoena.

4. As to Request numbers 1 and 2 these are not topics for which TILC collects, maintains or otherwise tracks information and is exceedingly broad in that nearly anything in the railroad industry could be said to refer or relate to charges by a railroad. Nonetheless, TILC would not be able to sensibly provide anything other than Mileage Equalization Charges provided to TILC by Railinc as the information from Railinc is what TILC receives and relies upon. TILC does not separately process this information. TILC additionally relies upon RSI

Logistics, Inc. for auditing and processing third party freight movements, but this is not separately processed or tracked by TILC making any feasible search for information indiscernible. I note that Railinc rightfully describes itself as “the industry's largest and most accurate source for real-time interline rail data.” <<https://www.railinc.com/rportal/company-overview>>(site last visited June 8, 2016). As Railinc summarizes, “Today Railinc applications and services are embedded in critical operations and financial systems throughout the industry and support railroads, equipment owners and rail industry suppliers along every link of the supply chain. We deliver more than 9 million messages each day over our EDI network, including transportation waybills, advance train consists, blocking requests and responses, and trip plans.” This service and the quality of its data is well known to UP as it sits on its Board of Directors. <<https://www.railinc.com/rportal/board-of-directors>> (site last visited June 8, 2016). In short, while TILC does possess certain summary reports from Railinc back to 2010, the only way for TILC to produce responsive information would be to devise a currently nonexistent means of searching Railinc data.

5. Request number 3 seeks data as to each movement of a car and thus represents an innumerable amount of information in respect of approximately 10,000 cars per year and calls for the exceedingly onerous task of sifting through shop directives encompassing numerous types of varied service before then assigning to the categories described by UP. As TILC does not collect or maintain documents per the categories defined by UP in the normal course of its business, this would entail the individual review of at least one shop directive for each group of cars with each directive potentially encompassing tasks other than that requested by UP. UP's request thus calls for TILC to create documents that do not presently exist out of voluminous data that is not collected or maintained in the ordinary course of business for such purpose.

6. Request number 4 requests information as to all tank car movements from as far back as 1987 and broken out by individual year. Regardless of the plainly onerous timeframe of this request, TILC does not maintain records of car movements back to 1987 and for those years they might, would need to create documents that do not presently exist. Nonetheless, as to subcategories a) and b), this information is possessed by UP and/or Railinc (see paragraph 4 above) and while TILC may possess some information it is not readily accessible from TILC. For TILC to produce such information, if available at all, is estimated to entail at least a full day of searching per year requested or 16 business days - over three full business weeks of time to conduct such searches. The balance of the subcategories c) through l) requests information that TILC simply does not possess, presumably such information is available from Railinc or already possessed by UP.

7. Request numbers 5 through 7 ask for the production of contracts between non-party TILC and non-party repair facilities and documents relating to the negotiation of those contracts and the decision process for selecting a particular repair facility. Such requests would require TILC, among other things, to identify and then coordinate with up to 164 repair facilities as to whether they would even be willing to have their information disclosed. Regardless, decisions on movements of particular tank cars to particular repair facilities are made in real time and not documented. To the extent a movement relates to compliance with DOT-117 this would not be discernible absent a review of shop directives as noted above in paragraph 5.

8. Request number 8 inquires as to categories that TILC does not collect, maintain or otherwise track information as it entails what appears to relate to topics of discussion between a shipper and a railroad.

9. Request number 9 again seeks information that is best obtained from Railinc. Nonetheless, TILC does not otherwise collect, maintain or track this information in the ordinary course of its business. To the extent responsive information might be on an invoice to a lessee, such information would be very burdensome to collect as it would require an estimated 3 weeks of time at minimum to prepare specialized system queries that do not presently exist that might be able to output such information. Even then, the request seeks information as to movements over a 15 plus year period representing an innumerable amount of data.

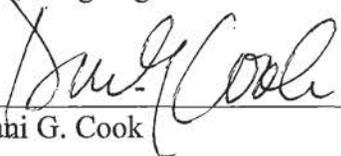
10. Request numbers 10 and 11 seeks cost of ownership and “Lessor Cost” related to Ex Parte 328. TIC and TILC, however, were mistakenly presumed by UP to be one of the tank car companies whose costs are used to calculate these Lessor Costs per Ex Parte 328 – they are not. Request number 11 is simply inapplicable for this reason. UP’s vague request for “ownership and/or maintenance” costs thus seeks an innumerable amount of proprietary data over a 15 plus year period. On merely an annual basis, this would require reviewing line item maintenance billing on over 10,000 maintenance events. Adding the movement or storage costs of tank cars moving to repair facilities increases the complexity and burden of this review as well and as stated above such information is not maintained by TILC. This plainly entails significant unquantifiable research time as the maintenance billing would need to be separated by lessor and lessee cost which would then require the review of every lease agreement and the establishment of some sort of programming to process and sort data. UP’s request would thus call for TILC to specially create documents that do not presently exist out of voluminous data that is not collected or maintained in the ordinary course of business for such purpose.

11. The lease agreements and lease rate information sought in request numbers 12 and 13 are incapable of production without identification of and coordination with other non-party

lessees with whom the referenced agreements are entered and would require the creation of summary documents and calculations that do not presently exist. Regardless, these requests seek TILC's sensitive, proprietary contracts, central to its business, to be produced to strangers to those contracts as to issues that do not relate to these contracts; a confidentiality agreement is simply not sufficient to address these issues. Further, the volume of this endeavor would be onerous inasmuch as several thousand leases, riders and ancillary documents relate to leases originated by TILC since 2001, but TILC is not one of the lessors that supply the costs for Ex Parte No 328 calculations making this request even more inappropriate as to TILC. Moreover, asking a non-party to conduct a special review of all of its leases to produce an average lease rate over a 15-year period is a nonsensical request in addition to being exceedingly burdensome as rates vary for numerous reasons wholly unrelated to mileage allowances that might be at issue between UP and the complainants.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 20, 2016

  
\_\_\_\_\_  
Dahi G. Cook

**Exhibit E**

**VERIFIED STATEMENT OF WARNER FENCL  
ON BEHALF AMERICAN RAILCAR INDUSTRIES, INC.**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

---

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,	)	Docket No. NOR 42144
	)	
Complainants,	)	
	)	
v.	)	
	)	
UNION PACIFIC RAILROAD COMPANY,	)	
	)	
Defendant.	)	
	)	

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**VERIFIED STATEMENT OF  
WARNER FENCL**

My name is Warner Fencl. I am Director Fleet Services of American Railcar Industries, Inc. (“ARI”), a position that I have held since 2007. I am responsible for the ARI Railcar Service segment which includes railcar repair plants and mini/mobile operations. My office address is at 100 Clark Street, St. Charles, MO 63301.

The purpose of this statement is to address the burden that ARI would encounter if it were required to respond to the requests for production (“RFPs”) set forth in the Petition for Subpoena of Union Pacific Railroad Company (“UP”) dated May 17, 2016. This response is based on my personal knowledge and my investigation of the areas covered by UP’s requests at issue. Requiring ARI to produce materials responsive to UP’s extremely broad discovery

requests would impose a substantial, unmanageable burden on ARI, and intrude into some of ARI's most proprietary, sensitive business information, records, and negotiations.

### **I.**

#### **Requests for All Lease Agreements and Average Lease Rate for Tank Cars, by Type (RFPs 12 and 13); Repair Facility Contracts and Contract Negotiations (RFP 5)**

UP has requested an extraordinarily broad and intrusive range of requests into ARI's most commercially sensitive and confidential business/contract information with its customers and vendors over an expansive period. RFP 12 seeks "all lease agreements for tank cars [ARI] leased to Lessees since January 1, 2001, including all riders and any other documents referenced in or attached to each lease agreement." RFP 13 seeks documents showing "the average lease rate for tank cars, by car type, for cars [ARI] leased to Lessees in each month from 2001 through the present, including documents sufficient to show whether those lease rates presumed railroad payments of mileage allowances." RFP 5 seeks "all contracts with Repair Facilities," including "all documents relating to negotiations of those contracts."

These are extremely broad and burdensome requests that seek to explore and intrude into all aspects of the most sensitive, proprietary business data and relationships of ARI with its current and former lessees and repair facilities. Additionally, the requests implicate confidentiality agreements between ARI and third parties not participating in this proceeding that, if produced without appropriate notice/disclosure and protections, may result in the violation of confidentiality obligations to third parties. The requests as stated are clearly overbroad, and have nothing to do with the allegations in the underlying complaint pertaining to lack of compensation for UP's use of private tank cars and UP's new repair facility charges.

While pricing, customer, and other economic terms, and even the standard form of contract are extremely commercially sensitive for ARI, and irrelevant to the claims at issue,

requiring ARI to compile the hundreds of agreements and riders and additional lease rate information sought over a multi-year period in any reasonable amount of time would be oppressive, especially as some of them are likely in hard-copy form only.

Based on my review, I estimate that responding to these specific UP requests for tank car agreements would involve review of approximately 80 customer files, each with primary/master agreements, and each agreement often containing multiple riders, over a multiyear period. Similarly, locating/reviewing all Repair Facility contracts and “all documents relating to negotiations of those contracts,” even under the shorter three-year period requested (from January 1, 2013 to present) would entail a substantial undertaking, and be highly disruptive, especially given that ARI does business with numerous Repair Facilities, involving many separate commercial and pricing arrangements. Retrieving this contract and related negotiation file information would take dozens of man-hours, and redacting sensitive, non-relevant information would take potentially hundreds of man-hours more – although it is impossible to estimate with any degree of certainty the amount of time and resources responding to these requests would entail – largely because of the broad scope of the requests seeking “all agreements” and “all documents relating to negotiations of [Repair Facility] contracts.”

Additionally, ARI does not maintain in the ordinary course of business average lease rates for tank cars, by car type (RFP 13). Compiling responsive information for average lease rates, even for a part of the period covered by the request would require ARI to conduct a burdensome special study and analysis based on the limited rate information readily available to it, which may be incomplete, and would likely take dozens of man-hours to retrieve and compile, because ARI does not maintain business records that reflect in a searchable manner any such rate or mileage allowance information. Further, while mileage allowance provisions are sometimes

contained in industry agreements, any such allowances would vary by individual agreement, are not linked to lease rates.

**II.**  
**Request for Detailed Data on Tank Car Movements (RFP 4); Tank Car Movements to Repair Car Facilities (RFPs 3, 7); Mileage Allowances Paid (RFP 9)**

UP's requests seek extremely broad and detailed car movement and mileage data and information that ARI does not maintain in the ordinary course of business. RFP 4 seeks for each car reporting mark (*i.e.*, for each individual tank car owned by ARI) for the year 1987, and for each year from 2001 to the present, documents that show:

- a) The number of loaded miles the cars moved on Union Pacific;
- b) The total number of loaded miles the cars moved on all railroads;
- c) The number of empty miles the cars moved on Union Pacific, excluding mileage for empty cars moving on revenue billing;
- d) The number of empty miles the cars moved on all railroads, excluding mileage for empty cars moving on revenue billing;
- e) The number of empty miles cars moved on revenue billing on Union Pacific;
- f) The number of empty miles cars moved on revenue billing on all railroads;
- g) the number of empty miles on Union Pacific associated with the cars' movements to or from Repair Facilities;
- h) The number of empty miles on all railroads associated with the cars' movements to or from Repair Facilities;
- i) The number of empty miles on Union Pacific associated with the cars' movements from Repair Facilities to other Repair Facilities;
- j) The number of empty miles on all railroads associated with the cars' movements from Repair Facilities to other Repair Facilities;
- k) The number of empty movements to Repair Facilities on Union Pacific or a Class III railroad that interchanged with Union Pacific; and
- l) The number of empty movements to Repair Facilities on all railroads.

RFP 3 seeks ARI to produce documents that "identify each movement of a tank car for which [ARI] were the Owner to a Repair Facility, the work performed at the Repair Facility, and the reason for each movement (*e.g.*, (i) scheduled maintenance, (ii) a Lessee's return of a tank car to its Owner at the end of a lease or other agreement governing the use of such tank car, (iii) a regulatory inspection requirement of any kind applicable to such tank car, (iv) a mishap, accident

or other event causing damage or defect to such tank car, or (v) a bad order determination issued by any railroad or other entity regarding such tank car),” from January 1, 2013 through December 31, 2015. RFP 7 seeks “all documents that refer or relate to movements of cars to Repair Facilities as a result of [new] enhanced tank car standards.” RFP 9 seeks documents for 1987 and from 2001 through the present sufficient to show Mileage Allowances paid and not paid to ARI, and associated mileage and tank car movement traffic data.

ARI does not maintain its own central electronic database of rail car traffic or train/car movements to provide information responsive to these requests. Conversely, we understand that UP, like other large railroads, does maintain a central electronic database of rail traffic and movement records, which may cover at least a portion of the information covered by these requests. Regarding tank car movements to repair facilities (RFPs 3, 7), and tank car movements and miles associated with any mileage allowance payments (RFP 9), this information is potentially available through Railinc Corp. (“Railinc”), headquartered in Cary, North Carolina, which provides railroad industry tracking and tracing services to track cars/shipments on the United States railroad network. Railroads, and not lessors such as ARI, report loaded and empty mileage data on Railinc’s Car Hire Data Exchange (“CHDX”). While ARI is a participant in the CHDA, and has access to its databases with respect to ARI’s own cars, UP should have ready access to its loaded/empty car records for all cars that it handled through Railinc, as well as through its own train/car record databases.

In comparison to the relative minimal burden this would represent for UP, gathering and assembling all of the information for this request over a multi-year period, even if it were available, would require ARI to assemble numerous periodic reports previously received from Railinc, and conduct a massive special study and analysis, which would be highly disruptive and

likely take dozens of man-hours to retrieve and compile. Such an undertaking would be particularly burdensome and difficult for ARI to complete as ARI's fleet includes approximately 10,000 tank cars. Alternatively, should ARI not have sufficient car movement information, Railinc may need to perform its own special study for us, which would likely entail considerable work and expense.

### **III.**

#### **Request for Documents on Decisions to Direct Tank Cars to Repair Facilities (RFPs 6, 7); Communications/Studies regarding Mileage Allowances and Zero-Mileage Rates (RFP 8); Cost of Tank Car Ownership and/or Maintenance Costs (RFPs 10, 11)**

UP has requested extraordinarily wide ranging information that it contends is pertinent to this proceeding relating to ARI's management decisions over car movements to repair facilities, and tank car cost and rate data. Through RFP's 6, 8, 10, and 11, UP seeks "all documents" that ARI has in its possession:

- (i) "discussing, analyzing, or explaining" ARI decisions "for directing particular tank cars to particular repair facilities" over a 3 year period (RFP 6) or "refer or relate to movements of cars to Repair Facilities" as a result of new federal enhanced tank car standards (RFP 7);
- (ii) "that refer, relate to or consist of" communications or studies/analyses regarding "Mileage Allowances, Zero-Mileage Rates" over a 15 year period (RFP 8); and
- (iii) that "discuss or analyze costs of tank car ownership and/or maintenance costs incurred by tank car Owners or Lessees" over a 15 year period (RFP 10) or "refer or relate to the development of Ex Parte No. 328 "Lessor Cost" over an 18 year period (RFP 11).

ARI does not maintain this information in its repair files or in any documented study or analysis. Also, searching all ARI files and emails for any reference to these subjects or peripheral documentation would be extremely burdensome and difficult for ARI to complete, even if we had a large group of employees to devote to this matter, which we do not.

ARI does not maintain any directives or governing protocols for directing specific cars to specific repair car facilities, where it is responsible (rather than lessees) for such movements.

Myriad facts may come into play when directing individual repair car shop movements, including AAR Interchange Rule requirements (*e.g.*, rules governing the handling of damaged or destroyed equipment); carrier car rejection protocols (*e.g.*, “bad order” car movement requirements); lessee requirements and preferences; shop affiliations; shop repair capabilities; shop location/proximity; shop availability; shop turn-around time; shop pricing; and other factors. While ARI does not specifically document such decisions, locating “all” responsive documents “discussing, analyzing, or explaining reasons” for shipment to facilities in each instance for the thousands of involved ARI car shipments over a multi-year period covered by UP’s request (*e.g.*, possible email documentation) would entail a massive, overwhelming undertaking that would disrupt the ability to carry on regular business activities.

Similarly, because UP’s requests pertaining to tank car ownership/maintenance costs over multiple years (RFPs 10, 11) are so extremely vague, broad, and open-ended, responding in full would require ARI to devote more dozens of man hours to retrieve all of the responsive information, which would again be extremely disruptive to its business.

Finally, UP’s requests for “all documents” (other than lease agreements) pertaining to Mileage Allowances/Zero-Mileage Rates over a 15 year period (RFP 8), is also extremely broad and open-ended, as well as vague and confusing. ARI does not contract with railroads for rail service, rail shippers do. ARI is not party to, nor privy to shipper-railroad rate agreements and terms. Whatever rates or non-allowances UP or other railroads negotiate with shippers that might pertain to tank car mileage is confidential or otherwise not available to ARI. Searching all ARI files and emails for any reference to this subject or peripheral documentation would be

extremely burdensome and disruptive, if not unmanageable, and also likely be fruitless.

ARI simply does not have the manpower to undertake the massive, multi-year, open-ended discovery review and document compilation sought by UP through these requests.

#### **IV.**

#### **Request for Documents on Item 55-C (RFP 1) or on Costs of Movements of Empty Tank Cars Other than Charges Assessed under Item 55-C (RFP 2)**

UP has requested an extraordinarily broad-range of information seeking “all documents that refer or relate to Item 55-C” (RFP 1), as well as “all documents that refer or relate to costs associated with empty tank cars other than charges under Item 55-C” – from 2001 to the present (RFP 2).

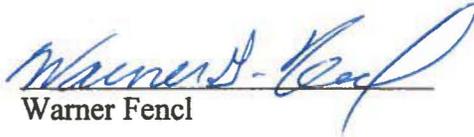
As discussed above, ARI has identified that the challenged tariff items apply to the ARI cars that are directed to repair shops each year. The Tariff Item applies to tank car movements to and from repair facilities, as well as new tank cars moving prior to their first loaded move in commercial service, re-stenciled tank cars moving prior to their first loaded move in commercial service, and (empty) tank cars moving for dismantling, sale, or scrap.

While it is ARI’s experience that most of UP’s Item 55-C charges are charged to and remitted by shippers and not lessors, ARI may also sometimes be assessed Item 55-C charges, especially for cars moving prior to or after scheduled revenue service. Searching all myriad ARI files for any reference to Item 55-C (RFP 1) would be extremely burdensome and disruptive, and to the extent that it involves UP Item 55-C invoices, UP already has those invoices. UP’s requests for broad-reaching information over multiple years on empty tank car movement costs besides those sought through Item 55-C (RFP 2) would require ARI to research and explore numerous files and records. Even determining the universe of what is available in response to these requests, and what is not, would require a massive undertaking by ARI, likely across

several departments, or otherwise require a special study to run reports on discrete aspects. It is impossible to estimate with any degree of certainty exactly how much time and resources responding to this request would entail – largely because of the broad scope of the request, and the difficulties ARI would face in locating/evaluating information that might be responsive. However, to compile and produce the information and materials would be highly disruptive and burdensome, even if we had a large group of employees devoted to the matter, which we do not, and there were no time constraints.

## VERIFICATION

I, Warner G. Fencil, verify under penalty of perjury that I have read the foregoing Verified Statement, that I know the contents thereof, and that the same are true and correct as stated to the best of my knowledge, information and belief. Further, I certify that I am qualified and authorized to file this Verified Statement.

  
Warner Fencil

Executed on June 17<sup>th</sup>, 2016

## **CERTIFICATE OF SERVICE**

I hereby certify that this 20th day of June, 2016, I have caused copies of the foregoing to be served via first-class mail, postage prepaid, or by more expeditious means, upon all parties of record to this proceeding.

In addition, I have caused a copy of the foregoing to be served by hand on Administrative Law Judge John P. Dring, Federal Energy Regulatory Commission, Office of Administrative Law Judges, 888 First Street, N.E., Washington DC 20426.

/s/ Robert D. Rosenberg