

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

Complainants,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant.



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

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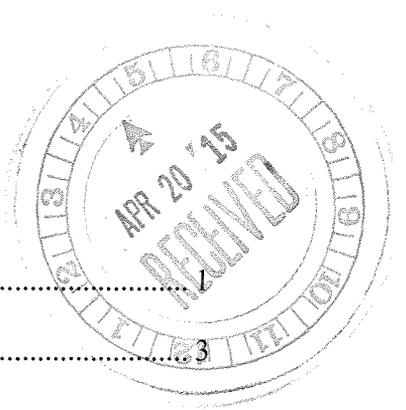


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- Exhibit A: Thomas M. Corsi & Ken Casavant, *Economic and Environmental Benefits of Private Rail Cars in North America* (Jan. 2011) (excerpt)
- Exhibit B: UP Tariff 6004-C, Item 55-C
- Exhibit C: UP Tariff 6004-C, Item 50-F
- Exhibit D: Freight Tariff RIC 6007-O (excerpt)
- Exhibit E: GATX web site material regarding zero-mileage rates.

practices are manifestly lawful. Board precedent establishes that railroads may adopt tariff charges for moving empty tank cars to and from repair facilities. *See Charges for Movement of Empty Cars, B&P RR, Inc.* (“*Buffalo & Pittsburgh*”), 7 I.C.C.2d 18 (1990); *Gen. Amer. Transp. Corp. v. Ind. Harbor Belt RR Co.* (“*IHB-IP*”), 3 I.C.C.2d 599 (1987), *aff’d sub nom. Gen. Am. Transp. Corp. v. ICC*, 872 F.2d 1048 (D.C. Cir. 1989). Board precedent also establishes that railroads are not obligated to pay mileage allowances when they charge zero-mileage rates and compensate shippers for furnishing private cars by charging lower transportation rates than they would otherwise charge. *See LO Shippers v. Aberdeen & Rockfish Ry Co., et al.* (“*LO Shippers*”), 4 I.C.C.2d 1 (1987), *aff’d sub nom. LO Shippers Action Comm. v. ICC*, 857 F.2d 802 (D.C. Cir. 1988).

If both counts are not dismissed in their entirety, the Board should dismiss certain aspects of the Complaint. Complainants fail to allege that they or their members use Union Pacific to provide transportation under common carrier tariffs, as opposed to transportation under contracts, which is beyond the Board’s jurisdiction to regulate. *See* 49 U.S.C. § 10709. Additionally, the Association Complainants lack standing to claim reparations and damages on behalf of members who are not named as parties to this case.¹ Thus, if the Board does not dismiss the Complaint in its entirety, it should dismiss any claims relating to transportation provided under contracts and all claims for reparations and damages by the Association Complainants on behalf of members who are not parties to this case.

¹ Complainants refer to North American Freight Car Association, American Fuel & Petrochemicals Manufacturers, The Chlorine Institute, The Fertilizer Institute, and American Chemistry Council as the “Association Complainants,” and they refer to Ethanol Products, LLC, POET Nutrition, Inc., and Cargill Incorporated as the “Individual Complainants.” *See* Complaint ¶ 9.

Finally, if the Board does not dismiss both counts in their entirety, it should require Complainants to make their allegations more definite in various respects. If the Board does not dismiss Count I, it should require Complainants to make more definite any allegations that they or their members have been improperly charged for movements of empty cars to or from repair facilities in connection with transportation provided under common carrier rates. If the Board does not dismiss Count II, it should require Complainants to make more definite any allegations that Union Pacific failed to pay mileage allowances in situations where they or their members ship under common carrier rates that are not zero-mileage rates and that Union Pacific refused reasonable requests to establish rates that include mileage allowances. If Complainants intend to proceed and are allowed to proceed with challenges to the level of zero-mileage rates that Union Pacific charges for transportation in shipper-furnished cars, they should be required to make their allegations more definite by identifying the specific rates, routes, tank car types, car ownership costs, and car ownership conditions as to which they allege that Union Pacific is not adequately compensating them or their members for furnishing tank cars and specifying the respects in which they believe these rate are inconsistent with the statute.

Union Pacific urges the Board to act expeditiously on this motion. We believe this case can and should be dismissed before the parties incur substantial litigation costs. Even if the case is not dismissed in its entirety, Board action to narrow or clarify the issues will reduce the length and complexity of this proceeding, helping to conserve the resources of all parties, as well as the Board's own resources.

II. BACKGROUND

A review of some history provides useful perspective on the issues raised by the Complaint. For more than 125 years, almost all tank cars used in rail service have been privately

owned.² Many private tank cars are controlled by companies in the business of leasing rail cars to shippers, while others are controlled directly by shippers.

When the Interstate Commerce Commission examined private car ownership issues in 1918, it found that “tank-car owners prefer to furnish their own cars, and they assert it would be impractical for carriers to do so.” *In the Matter of Private Cars*, 50 I.C.C. 652, 681 (1918). The impracticality arises from the diversity of products that move in tank cars. Because of this wide range of products, a railroad would need to own many different specific car types and would have to incur the costs of avoiding product contamination where the same car could be used for multiple products. *See id.* at 682. Shippers are in a better position to determine the particular types of cars they need and to avoid problems such as product contamination than are railroads. Nearly 100 years later, an even more diverse set of products moves in tank cars, and railroad ownership of these specialized cars is even less practicable now.

The Commission recognized that private ownership of tank cars “has been of incalculable benefit to shippers.” *Id.* at 683. “[B]usiness could not be done in the most effective manner were carriers to own or control [tank] cars.” *Id.* Thus, “[a]s a rule carriers have never furnished these cars, and it has come to be mutually understood that they should not do so.” *Id.*; *see also United States v. Penn. R.R.*, 242 U.S. 208 (1916) (holding that railroad was not required to furnish tank cars to customer); *Chi. Rock Island & Pac. Ry. v. Lawton Ref. Co.*, 253 F. 705 (8th Cir. 1918) (same).

² The practice of using private tank cars is so well established that the Board does not even provide an option for railroads to separately report freight car-miles in railroad-owned and railroad-leased tank cars in their Annual Report R-1. *Compare* Schedule 755, lines 15-46 (railroad car types), *with id.*, lines 47-82 (private car types).

Shippers are entitled to compensation in some form for furnishing private tank cars used to provide transportation. At the same time, railroads are entitled to compensation for the costs they incur in providing that transportation. Railroads and shippers have occasionally disagreed over the appropriate levels and forms of compensation.

Historically, railroads compensated shippers for furnishing tank cars by paying a fixed amount per car mile, or a “mileage allowance.”³ When railroads pay a mileage allowance today, the amount is based on a negotiated agreement, the National Tank Car Allowance Agreement, approved by the Commission in *Investigation of Tank Car Allowance System*, 3 I.C.C.2d 196 (1986).⁴ In today’s commercial environment, however, railroads typically compensate shippers for furnishing tank cars not through mileage allowance payments, but by charging lower transportation rates (or “freight rates”) than the railroad would charge if it were to pay a mileage allowance.⁵ The lower transportation rates are commonly called “zero-mileage rates” or “zero-allowance rates.” A recent study prepared for Complainant North American Freight Car Association (“NAFCA”) found that railroads pay mileage allowances on only about 10 percent of tank car movements. *See Exhibit A (Thomas M. Corsi & Ken Casavant, Economic and*

³ Originally, tank car mileage allowances were paid on both loaded and empty miles. In the 1960s, railroads adopted the practice of paying allowances on loaded miles only. *See Mileage Allowance, Tank Cars Between Points in the United States*, 337 I.C.C. 23, 26-27 (1970).

⁴ Prior to 1979, mileage allowances for tank cars were established by railroads, usually acting collectively, and were subject to challenge at the Commission. Since 1979, tank car mileage allowances have been based on formulas and schedules that were negotiated by railroads, shippers, car manufacturers, and car lessors and approved by the Commission. *See Buffalo & Pittsburgh*, 7 I.C.C.2d at 20 n.3.

⁵ Where a lessor, rather than a shipper, owns the car, Union Pacific understands that the lessor and the shipper agree on lease terms that allocate between them the benefit of either a lower transportation rate or a mileage allowance. *See*, for example, the GATX policy described below at note 12.

Environmental Benefits of Private Rail Cars in North America at 21 (Jan. 2011)).⁶ Union Pacific uses zero-mileage rates in order to compensate shippers for furnishing tank cars in most cases.

Compensation paid to railroads for empty movements of tank cars is subject to a much more complex set of rules than the rules that apply to empty movements of other private cars. Until 1987, railroads could obtain compensation for most movements of empty tank cars only through “mileage equalization” payments. Mileage equalization is a process that involves computing the total miles of loaded movements by a tank car owner’s fleet and comparing them to the total miles of empty movements by that fleet. If the owner’s fleet has substantially more empty miles than loaded miles, the owner makes a payment based on the “excess” empty miles. The payments received from car owners are then distributed to railroads that move tank cars.⁷

Mileage equalization for tank cars developed for two reasons—as a matter of fairness to railroads, which are generally paid only for loaded movements, *see Private Cars*, 50 I.C.C. at 686, and to provide shippers with incentives to manage cars efficiently, *see Mileage Allowances, Tank Cars*, 337 I.C.C. at 33 (mileage equalization provides “a discipline to regulate empty mileage”). Under the National Tank Car Allowance Agreement approved in 1986 in *Investigation of Tank Car Allowance System*, a car owner makes a mileage equalization payment in any year in which its cars’ empty miles exceed loaded miles by more than 6 percent. *See* 3 I.C.C.2d at 204.⁸

⁶ The full report can be accessed through NAFCA’s web site at <http://www.nafcahq.com/home>.

⁷ Today, the process of billing car owners for mileage equalization charges and distributing the mileage equalization payments to railroads according to a formula is coordinated by Railinc, a subsidiary of the Association of American Railroads. Depending on its overall balance of loaded and empty movements, a railroad may not receive any equalization payments at all.

⁸ Prior to 1979, as was the case with tank car mileage allowances, tank car mileage equalization rules were established by railroads and subject to challenge at the Commission. Since 1979, as (continued...)

In 1987, the Commission decided *IHB-II*, holding that railroads could establish separate tariff charges for moving empty private tank cars to and from repair facilities. In that decision, the Commission recognized that aspects of the mileage equalization system that had developed over time were inconsistent with principles Congress had articulated in more recent legislation, including the Staggers Act. The Commission commented in *IHB-II* that the prior precedent, which required railroads to rely on mileage equalization payments to provide compensation for empty repair movements, “prohibits individual pricing for distinct services . . . , encourages cross-subsidization . . . , and promotes inefficiency by giving private car owners little or no incentive to consider transportation costs in selecting repair facilities.” 3 I.C.C.2d at 611. In *Buffalo & Pittsburgh*, the Commission reaffirmed *IHB-II* and held that the National Tank Car Allowance Agreement did not preclude railroads from implementing tariff charges for empty movements to and from repair shops. *Buffalo & Pittsburgh*, 7 I.C.C.2d at 28.

In Item 55-C, Union Pacific adopted separate tariff charges for moving empty tank cars to and from repair shops, similar to the charges considered in *IHB-II* and *Buffalo & Pittsburgh*. Item 55-C provides for mileage-based charges on empty movements of tank cars to and from repair facilities, except when the empty movement is immediately preceded by a loaded line-haul revenue movement on Union Pacific and under other limited circumstances. *See* Exhibit B (Item 55-C). Union Pacific’s adoption of Item 55-C makes the rules it applies to empty repair moves of private tank cars more consistent with the rules it applies to empty repair moves of other types of

part of the same negotiation process that produced the tank car mileage allowance formulas and schedules, the Commission prescribed certain mileage equalization rules. However, the railroad industry’s mileage equalization rules include additional equalization accounting provisions that were not prescribed and remain the product of agreement among railroads. The full set of current equalization rules is published in Item 187 and Item 190 of Freight Tariff RIC 6007-Series.

private cars. *See* Exhibit C (UP Tariff 6004-C, Item 50-F, Movements of Empty Cars, With Private Markings, Other than Tanks).

When Union Pacific adopted Item 55-C, it also established an exception in Freight Tariff RIC 6007-Series, the railroad industry rules tariff that contains the mileage equalization accounting rules, so that any empty miles for which Union Pacific imposes charges under Item 55-C are excluded from mileage equalization accounting. *See* Exhibit D (Freight Tariff RIC 6007-O, Item 170). This prevents a shipper from potentially paying twice for those empty movements.

III. ARGUMENT

The Board may dismiss a complaint if the complaint “does not state reasonable grounds for investigation and action.” 49 U.S.C. § 11701(b). In this case, Board precedent establishes that the challenged practices are lawful, and accordingly, the Board should dismiss the Complaint in its entirety. If the Board does not dismiss the Complaint in its entirety, it should dismiss the portions relating to movements under transportation contracts, which are beyond the Board’s jurisdiction. *Id.* § 10709. It should also dismiss the claims of the Association Complainants to the extent they seek reparations and damages for their members that are not named Complainants. In addition, or in the alternative, if the Complaint is not dismissed in its entirety, the Board should require Complainants to make their allegations more definite in several respects in order to promote more orderly and efficient discovery and case management.

A. The Complaint must be dismissed for failure to state a claim.

1. Board precedent allows railroads to adopt tariff charges for movements of empty private tank cars to and from repair facilities.

The Board should dismiss Count I of the Complaint. That count alleges that Union Pacific’s implementation of tariff charges for moving empty private tank cars to and from repair

facilities in Item 55-C is an unreasonable practice and a violation of the railroad's obligation to compensate shippers that furnish private tank cars for use of the cars. *See* Complaint ¶¶ 23-29.

a. Railroads have been allowed to charge for moving private tank cars to repair facilities since 1987.

Over the past few decades, Board precedent has plainly established that railroads may adopt and implement tariff charges for moving empty tank cars to and from repair facilities. Before the Commission decided *IHB-II* in 1987, railroads generally could not impose separate charges for moving empty tank cars to and from repair facilities; instead, they had to rely on mileage equalization payments to compensate them for those empty movements. *See IHB-II*, 3 I.C.C.2d at 600-01. But in *IHB-II*, the Commission reversed its earlier decisions and *encouraged* railroads to adopt separate charges for empty repair moves. It said that requiring railroads to rely on mileage equalization payments as compensation for moving empty tank cars to and from repair facilities was in “direct conflict with Congressional direction in the statutory provisions of the 4R Act and the Staggers Act” because it “prohibits individual pricing for distinct services . . . , encourages cross-subsidization . . . , and promotes inefficiency by giving private car owners little or no incentive to consider transportation costs in selecting repair facilities.” *Id.* at 611.

In *Buffalo & Pittsburgh*, decided in 1990, the Commission reaffirmed its ruling in *IHB-II*. It held that provisions of the 1986 National Tank Car Allowance Agreement requiring the agency to investigate so-called “departure tariffs” did not apply to tariff charges for empty repair moves. 7 I.C.C.2d at 25-28. The Commission observed that “a finding that repair move tariffs must be individually investigated and meet a special circumstances test would be inconsistent with the rationale underlying our reversal of *IHB-I*: the elimination of inequities, undesirable cross-subsidies and inefficiencies.” *Id.* at 28.

In the years following the decisions in *IHB-II* and *Buffalo & Pittsburgh*, many railroads besides Union Pacific adopted tariff charges for empty repair movements of tank cars. *See* Exhibit D (RIC 6007-O, Items 40, 71, 75, 80, 99, 102, 104, 120, 124, and 150).

Item 55-C is clearly lawful under this agency's decisions in *IHB-II* and *Buffalo & Pittsburgh*. Thus, taking all the allegations in the Complaint as true, Complainants fail to state a claim that Item 55-C is unlawful.

b. Item 55-C is plainly permissible under the precedent established in *IHB-II* and *Buffalo & Pittsburgh*.

A generous reading of the Complaint suggests two ways in which Complainants might be alleging that Item 55-C is distinguishable from the tariffs in *IHB-II* and *Buffalo & Pittsburgh*, but neither possible distinction saves the Complaint from dismissal.

First, Complainants might be alleging that Union Pacific's empty mileage charges under Item 55-C are higher than the charges considered in prior cases. *See* Complaint ¶ 25.⁹ Even if that were true, it would be irrelevant. Complainants seeking to challenge the level of a railroad's charges must invoke the agency's jurisdiction over unreasonable rates, not unreasonable practices. *See Union Pac. R.R. v. ICC*, 867 F.2d 646 (D.C. Cir. 1989); *see also IHB-II*, 3 I.C.C. 2d at 611 n.21 (noting that the complainants had not challenged the reasonableness of the repair move rates, and that "[m]arket dominance and rate reasonableness issues that may arise in the future regarding charges for repair moves can be addressed in the same way they are addressed for rates in general").

⁹ Complainants are wrong when they allege that the minimum round trip charge for an empty repair move under Item 55-C would be \$2,634. *See id.* Under Item 55-C, movements to and from repair facilities under certain circumstances are free, and movements to repair facilities are always free when they are immediately preceded by a loaded line-haul movement on Union Pacific. *See* Exhibit B.

Second, Complainants might be alleging that Union Pacific imposed the new charges without increasing compensation the railroad pays to shippers for furnishing cars, while the carriers in *IHB-II* and *Buffalo & Pittsburgh* would have increased such compensation through the payment of higher mileage allowances. *See* Complaint ¶¶ 26-28.¹⁰ Again, even assuming that were true, it would be irrelevant. Union Pacific has no obligation to ensure that a car provider will receive enough to offset what it pays for an empty repair movement. *IHB-II* holds that a railroad may adopt charges for empty repair moves even though car providers would recover only a *proper proportion* of any increased car repair expenses *at a later time*, through mileage allowance payments *or* other means of compensating car providers, from railroads using private cars *in loaded moves*. *See IHB-II*, 3 I.C.C.2d at 607-08. In other words, the Commission recognized that the railroad adopting charges for empty repair moves will not necessarily be the same railroad that may be obligated to compensate car providers for use of a car for loaded movements.¹¹ The Commission also recognized in *IHB-II* that car providers are not necessarily entitled to any increase in compensation to offset increases in their costs associated with higher costs of moving cars to repair facilities: “[O]wnership cost is not the only factor we must consider in evaluating car compensation Other statutory considerations, such as efficiency of car use and the national level of car ownership may justify payment of allowances that do not fully cover ownership cost” *Id.* at 615.

¹⁰ Complainants allege that Union Pacific provided empty repair moves for free before we adopted Item 55-C. *See* Complaint ¶ 26. That is not accurate. Miles associated with empty repair moves were included in mileage equalization accounting, so car owners were billed for such moves to the extent their empty miles exceeded loaded miles by more than 6%. Now that Union Pacific charges separately for empty repair moves, those empty miles are not included in mileage equalization accounting, so there is no potential for a double charge. *See* Exhibit D.

¹¹ For example, a shipper that uses a tank car for loaded movements on a different railroad might ask Union Pacific to move that tank car to a repair facility located on our lines.

The Board made both points indisputably clear in discussing the *Buffalo & Pittsburgh* decision: “[T]he ICC’s decision . . . did not turn on whether a portion of the empty repair move charges might be recovered through allowances.” *N. Am. Freight Car Assoc.—Protest & Petition for Investigation—Tariff Publications of the Burlington N. & Santa Fe Ry.*, NOR 42060, slip op. at 6 (STB served Aug. 13, 2004). Rather, “the rationale in those decisions [*IHB-II* and *Buffalo & Pittsburgh*] . . . related to the misallocation of burdens among carriers . . . and the conflict with the statutory policies of rate flexibility, revenue adequacy, and demand-based carrier pricing.” *Id.*

In short, the distinctions Complainants might assert provide no basis for ordering Union Pacific to rescind Item 55-C or refund any charges car providers have paid under that provision. In light of the agency precedent discussed above, there is no question that Union Pacific may adopt charges for empty repair moves of private tank cars and that the level of charges cannot be challenged as an unreasonable practice or as a violation of § 11122. The level of compensation that the railroad pays tank car providers for use of their cars is a separate question—one that Complainants pursue in Count II, addressed below.

2. Board precedent establishes that railroads are not obligated to pay mileage allowances when they compensate shippers for supplying private cars through use of zero-mileage transportation rates.

The Board should also dismiss Count II of the Complaint. That count alleges that Union Pacific is unlawfully refusing to provide tank cars or to compensate Complainants and their members for use of tank cars they supply through mileage allowances or reduced transportation rates. *See* Complaint ¶¶ 30-35.

Complainants grumble about Union Pacific’s reliance on private tank cars, but—for good reason—they do not ask the Board to order us to supply tank cars. *See id.* p. 10 (Request for Relief). Railroads are not legally obligated to supply tank cars. *See Penn. R.R.*, 242 U.S. 208; *Lawton Refining*, 253 F. at 708-09. And, as a practical matter, railroads have never supplied tank

cars, and shippers have never wanted the railroads to supply tank cars. *See Private Cars*, 50 I.C.C. at 683 (“As a rule carriers have never furnished these cars, and it has come to be mutually understood that they should not do so.”). Neither shippers that use tank cars nor rail customers generally would be well-served if railroads were responsible for providing the variety of tank cars required to safely transport the many different commodities transported in tank cars. Allegations regarding our reliance on private tank cars thus provide no basis for any claim that Union Pacific is acting unlawfully.

What Complainants really want is a Board ruling that Union Pacific must pay mileage allowances when we use private tank cars for loaded movements. *See Complaint* p. 10 (Request for Relief ¶¶ 5, 6). However, Board precedent makes clear that a railroad may compensate car providers *either* by paying mileage allowances *or* by charging zero-mileage rates that are lower than the transportation rates the railroad would charge if it paid mileage allowances. *See LO Shippers*, 4 I.C.C.2d at 17. In *LO Shippers*, the complainant asserted that “private freight car use must be compensated by allowances, not by freight rate differentials.” *Id.* But the Commission disagreed and ruled that “railroads may eliminate allowance payments and instead compensate a shipper for supplying private cars by adjusting the freight rate.” *Id.* (citing *Natural Gas Pipeline Co. v. New York Central R.R.*, 323 I.C.C. 75, 79 (1964); and *Eastern Central Motor Carriers Ass’n v. Baltimore & O. R.R.*, 314 I.C.C. 5 (1961), *aff’d sub nom. Cooper-Jarrett, Inc. v. United States*, 226 F. Supp. 318 (W.D. Mo.), *aff’d per curiam*, 379 U.S. 6 (1964)). In today’s commercial environment, Union Pacific has offered lower freight rates rather than mileage allowances to compensate shippers for furnishing cars.

Taking all of the allegations in the Complaint as true, Union Pacific’s compensation of shippers for furnishing tank cars through transportation rates rather than mileage allowances is

clearly lawful under this agency's decision in *LO Shippers*. Thus, Complainants fail to state a claim that Union Pacific is acting unlawfully by not paying mileage allowances on movements using private tank cars.

Complainants might try to distinguish *LO Shippers* in two ways, but neither distinction is sound.

First, Complainants might argue that *LO Shippers* applies only to private cars other than tank cars and that the 1986 National Tank Car Allowance Agreement approved in *Investigation of Tank Car Allowance System* requires railroads to pay mileage allowances for using private tank cars. However, neither the 1986 Agreement nor the Commission's decision approving the Agreement requires railroads to pay mileage allowances when they use private tank cars. The Agreement produced an agency-approved method of calculating allowances *if* allowances are used. In the commercial environment that existed at the time, mileage allowances were commonly used, and the Agreement and its predecessors helped end protracted litigation over allowances. *See Investigation of Tank Car Allowance System*, 3 I.C.C.2d at 196 n.3. But neither the Agreement itself nor the Commission's approval of the Agreement overrode Commission precedent allowing railroads to compensate a shipper furnishing private cars through the freight rate. *See LO Shippers*, 4 I.C.C.2d at 17 & n.39. Thus, the *LO Shippers* holding applies to tank cars, as well as other car types. And a railroad's right to choose between paying mileage allowances and using zero-mileage rates has only increased in importance as conditions in tank car markets have changed, while the allowance formula has been frozen in place for the past 24 years. *See Investigation of Tank Car Allowance System*, 7 I.C.C.2d 645 (1991).

Moreover, Complainants cannot plausibly maintain that railroads must pay mileage allowances when they use private tank cars. Use of zero-mileage rates is not a new phenomenon,

but a well-established, nearly universal practice. As discussed above, a recent study prepared for Complainant NAFCA found that railroads pay mileage allowances on only about 10 percent of tank car movements. *See* p. 5, *supra*. NAFCA member GATX, one of the largest private railcar owners in the U.S., recognizes that zero-mileage rates are common and provide benefits to shippers that lease its cars:

Zero-mileage rates have been offered since railroads were deregulated. A zero-mileage rate means no mileage compensation is received from the railroad. Instead, the railroad charges a lower freight rate because it will not pass on credits to the owner or lessor for the loaded mileage traveled. There are different benefits to full- and zero-mileage rate structures. Customers must determine which option is best based on discussions with the billing railroad.

See Exhibit E.¹² Thus, not only does the Commission's holding in *LO Shippers* that railroads may charge zero-mileage rates rather than pay mileage allowances plainly apply to tank cars, the use of zero-mileage rates for tank cars is in fact a well-established and common practice.

Second, Complainants might argue that *LO Shippers* requires railroads to offer shippers rates that include mileage allowances at the same time the railroads offer zero-mileage rates. But *LO Shippers* imposes no such requirement. *LO Shippers* discusses publication of "dual rate scales," but that term refers to the publication of separate rates for movements in railroad-supplied and shipper-supplied cars. *See LO Shippers*, 4 I.C.C.2d at 2. The Commission made clear that "[w]here a carrier publishes a rate specifically applicable only to movements in private

¹² The GATX material was retrieved from GATX's website. *See* http://www.gatx.com/wps/wcm/connect/GATX/GATX_SITE/Home/Rail+North+America/Customer+Care/Mileage/.

If a shipper using GATX cars ships traffic under rates with a mileage allowance, GATX simply passes on the mileage allowance to the shipper: "Railroads generally process mileage earnings within 60 days following the month in which they were earned. As the owner of the cars you lease, GATX passes these earnings on to you when payment is received from the billing railroad." *Id.*

cars, the carrier is not obligated to provide a car and has no obligation to publish an allowance.” *Id.* at 17. And, in any event, Complainants never allege that any party requested that Union Pacific establish a rate that includes a mileage allowance and that we denied the request.¹³

Finally, the Complaint alleges that Union Pacific is not compensating Complainants for supplying tank cars through reduced line-haul transportation rates (an allegation we deny). *See* Complaint ¶ 33; Answer ¶ 33. However, Complainants’ requests for relief are based on a claim of absolute entitlement to mileage allowance payments, so there is no reason to consider their factual allegations regarding rate levels. *See* Complaint p. 10 (Request for Relief ¶¶ 5, 6). In addition, Complainants’ allegations regarding transportation rates amount to an assertion that our rates for movements in shipper-furnished cars are too high, and the law is clear that parties seeking to challenge the level of a railroad’s rates must invoke the agency’s jurisdiction over unreasonable rates, not its unreasonable practices jurisdiction. *See Union Pacific*, 867 F.2d at 649 (holding that the agency engages in rate regulation when “the so-called ‘practice’” it has identified “is manifested *exclusively* in the level of rates that customers are charged”); *Cargill, Inc. v. BNSF Ry.*, NOR 42120, slip op. at 6 (STB Jan. 4, 2011) (dismissing Cargill’s “Double Recovery” claim as “contrary to *Union Pacific*” and expressing “practical concerns about trying to deconstruct a base rate”), *reconsideration denied*, NOR 42120, slip op. at 5-6 (STB May 25,

¹³ We do not concede that we would be obligated to offer rates that include payment of a mileage allowance when we have established zero-mileage rates, *cf. Potomac Electric Power Co. v. Penn Central*, 356 I.C.C. 815, 827 (1977) (holding that a railroad is not obligated to provide service under the specific terms a shipper may prefer), *aff’d in relevant part sub nom. Potomac Elec. Power Co. v. United States*, 584 F.2d 1058, 1063 (D.C. Cir. 1978), especially since mileage allowances would have to be based on a formula last revised in 1991, *see Investigation of Tank Car Allowance System*, 7 I.C.C.2d 645 (1991).

2012).¹⁴ If Complainants actually intend to challenge the differentials between the rates Union Pacific charges and the rates we would charge if we paid mileage allowances, and if they were allowed to pursue such a challenge as an unreasonable practice case, they should be required to make their allegations more definite, as discussed below in Section II.D.

B. The Board should dismiss claims seeking relief related to movements governed by transportation contracts.

The Board should dismiss the Complaint to the extent it seeks relief that would apply to movements under Union Pacific's present or future transportation contracts or would require payment of reparations or damages for services provided under transportation contracts.

Complainants never state that the Complaint is limited to transportation that Union Pacific has provided or may provide under common carrier rates. In fact, Complainants seek a Board order that would apply to "all shipments in private tank cars." Complaint p. 10 (Request for Relief ¶ 5). Yet most transportation that Union Pacific provides in private tank cars moves under contracts. And, it is black-letter law that transportation provided under rail transportation contracts is not subject to the Board's jurisdiction. *See* 49 U.S.C. § 10709(c)(1); *Cross Oil Ref. & Mktg., Inc. v. Union Pac. R.R.*, FD 33582 (STB served Oct. 27, 1998); *Omaha Pub. Power Dist. v. Union Pac. R.R.*, NOR 42006 (STB served Oct. 17, 1997); *H.B. Fuller Co. v. S. Pac. Transp. Co.*, NOR 41510 (STB served Aug. 22, 1997).

Complainants cannot maintain claims that Union Pacific's rates or practices under transportation contracts violate ICCTA because the statute states that rail carriers may enter into contracts "to provide specified services under specified rates and conditions," 49 U.S.C.

¹⁴ Union Pacific believes the market requires us to set transportation rates that compensate shippers appropriately for furnishing cars and that our rates do so. Of course, if a shipper believes a zero-mileage rate does not adequately reflect its provision of cars, it has the right to challenge the rate under the Board's rate reasonableness procedures.

§ 10709(a), and, under § 10709(c)(1), the terms of such contracts cannot be challenged on the ground that they violate the statute:

A contract that is authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the ground that such contract violates a provision of this part.

See also 49 U.S.C. § 11701(b) (granting the Board authority over complaints alleging a violation by a rail carrier “providing transportation or service subject to the jurisdiction of the Board”).

Accordingly, the Board has no jurisdiction to prohibit Union Pacific from incorporating Item 55-C or its equivalent into transportation contracts. *See, e.g., Cross Oil*, slip op. at 3 (“Moreover, rail contracts can incorporate tariff provisions and still be outside the Board’s jurisdiction.”). Nor may the Board prohibit Union Pacific from entering into transportation contracts that do not include a mileage allowance (or require Union Pacific to include mileage allowance provisions in contracts). In fact, in *Investigation of Tank Car Allowance System*, the Commission recognized that parties could even agree to *mileage allowances* that depart from the approved industry agreement “by private contracts under 49 U.S.C. § 10713 [now § 10709].” 3 I.C.C.2d at 199.

For the same reason, the Board may not order Union Pacific to pay reparations or damages to Complainants that moved traffic under contract and that paid charges defined by Item 55-C or were not paid mileage allowances. *See also* 49 U.S.C. § 10709(b) (“A party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract.”).

C. The Board should dismiss claims by Association Complainants for reparations and damages on behalf of their members that are not named parties in this proceeding.

The Board should dismiss the Complaint to the extent the Association Complainants seek reparations and damages on behalf of members that are not named parties to this case. *See* Complaint p. 10 (Request for Relief ¶¶ 3, 6).

Union Pacific does not contest the Association Complainants' standing to challenge our adoption of Item 55-C or our use of zero-mileage rates for traffic moving under common carrier rates. *See* 49 U.S.C. § 11701(b). However, the Board should not allow the Association Complainants to seek reparations or damages on behalf of their members who are not themselves parties.

Associations lack standing to sue on behalf of their members when “the relief requested requires the participation of individual members in the lawsuit.” *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977). This principle almost inevitably precludes an association from pursuing damages claims on behalf of its members. *See, e.g., Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004) (“We know of no Supreme Court or federal court of appeals ruling that an association has standing to pursue damages claims on behalf of its members.”); *see also* 13A Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc. Juris.* § 3531.9.5 n.93 (3d ed.) (collecting cases). Associations are generally precluded from pursuing damages claims on behalf of their members because, in almost every case, “whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof.” *Bano*, 361 F.2d at 714 (quoting *Warth v. Seldin*, 422 U.S. 490, 515-16 (1975)). And, “[i]f the involvement of individual members of an association is necessary, either because the substantive nature of the claim or the form of the

relief sought requires their participation, [there is] no sound reason to allow the organization standing to press their claims.” *Id.* at 715.

The rule that associations lack standing to pursue damages on behalf of their members has been applied in this agency’s proceedings. In *Puerto Rico Manufacturers Association v. Trailer Marine Transport Corp.*, NOM 40343, 1990 WL 300490 (ICC July 24, 1990), an administrative law judge dismissed an association’s claims for reparations on behalf of its members because “for reparations to be awarded, the individual members must participate particularly.” *Id.* at *5. As the administrative law judge explained, individual members would have to participate by “supplying information concerning charges on specific shipments which the shippers believe are unreasonable and should be refunded.” *Id.*

Here, the participation of the Association Complainants’ members plainly would be required for reparations or damages to be awarded to their members. If Item 55-C were found unlawful, shippers that furnished tank cars would have to identify the specific shipments on which charges were imposed, and their records would have to be analyzed to determine the extent to which such charges exceeded the amount they would have paid if the empty miles had been included in mileage equalization accounting. Individual proof of damages would be even more complicated if the Board were to hold that Union Pacific should have been paying mileage allowances, since for different movements shippers use different cars that would qualify for different mileage allowances, and any allowances they might be due would have to be reduced to reflect the compensation that they have already received in connection with lower zero-mileage rates they paid. Further, if the shipper leased the tank cars, the question of whether the shipper suffered any actual damages would require a review of the lease agreement and records. Given the significant extent of individual participation that would be required to resolve these issues,

there is no sound reason to allow the Association Complainants to pursue claims for reparations or damages on behalf of their members who are not parties to this case.¹⁵

D. If the Board does not dismiss the Complaint, it should require Complainants to make their allegations more definite.

If the Board does not dismiss the Complaint, it should require Complainants to make more definite certain of their allegations, so that Union Pacific has proper notice of, and can prepare to respond to, the issues Complainants intend to pursue in this proceeding. It is critical that defendants (and the Board) have fair notice of the facts and legal issues that complainants ask the Board to decide so appropriate procedural schedules can be developed and appropriate discovery can be framed. It is especially important to require such notice when diverse complainants appear to reference a wide range of fact-specific actions and when they assert claims that on their face appear contrary to well-established precedent.

First, if the Board does not dismiss Count I, it should require Complainants to make more definite any allegations that Union Pacific has charged them or their members under Item 55-C for empty repair moves in connection with transportation provided under common carrier rates. As noted above, most of Union Pacific's tank car movements are governed by contracts. Complainants should be required to allege clearly that they have claims involving common carrier transportation subject to the Board's jurisdiction.

Second, if the Board does not dismiss Count II, it should require Complainants to make their allegations more definite in several respects:

¹⁵ If the Board does not dismiss the claims for damages and reparations by the Association Complainants on behalf of their members, it should require the Association Complainants to identify all of their members that have authorized them to pursue reparations and damages on their behalf and, if a shipper is a member of more than one of the Association Complainants, which of the Association Complainants is responsible for that shipper's claims.

- Complainants should make more definite any allegations that Union Pacific failed to pay mileage allowances in situations where they or their members ship traffic under common carrier rates that are not zero-mileage rates. Because (as explained above) Union Pacific has no obligation to pay mileage allowances when it provides transportation under zero-mileage rates, the Board should require Complainants to allege clearly that their complaints about non-payment of mileage allowances involve movements that are not under zero-mileage rates, if they can truthfully make such allegations.
- Complainants should make more definite their allegations in Count II, if any, that Union Pacific refused reasonable requests to establish rates that include a mileage allowance. Union Pacific believes it has no obligation to establish common carrier rates that include mileage allowances when it is offers zero-mileage rates. However, if Complainants intend to pursue claims based on a theory that Union Pacific has unlawfully refused to establish rates that include mileage allowance, they should be required to allege clearly and in detail the circumstances under which specific shippers requested that Union Pacific establish such rates, so that Union Pacific has fair notice of their claims.
- Finally, if the Board allows Complainants to challenge the level of zero-mileage rates that Union Pacific charges for transportation in shipper-furnished cars, it should require them to identify the specific rates, routes, tank car types, car ownership costs, and car ownership conditions as to which they allege that Union Pacific is not adequately compensating them or their members for supplying tank cars. They should also be required to clarify the

respects in which they believe the transportation rates Union Pacific charges when it uses private cars are inconsistent with the statute. We are uncertain whether Complainants intend to challenge the differentials between rates Union Pacific charges and the rates we would charge if we were required to pay mileage allowances. But if that is their intent, they should provide these more definite allegations to focus this proceeding so that Union Pacific has fair notice of their claims and can tailor its discovery appropriately.

Complainants may argue that Union Pacific can use discovery to obtain clarification of their allegations. However, such a response would ignore the breadth of their Complaint and the scope of relief they seek. The Association Complainants claim more than 770 members,¹⁶ yet they provide no information about how many of those members actually furnished tank cars for transportation provided by Union Pacific, which members shipped traffic under common carrier rates, and which members claim to have requested rates that include mileage allowances.

In addition, Complainants' legal theories are unclear. Their challenge to the long-standing and widespread practice of using zero-mileage rates calls into question charges for hundreds of thousands of shipments that were made under different rates over different routes in different car types with different ownership costs under different market circumstances. Are they seeking relief for transportation provided under contracts? Are they challenging use of zero-mileage rates under all circumstances? Do they intend to try to show that Union Pacific's rates are too high when shippers furnish tank cars?

¹⁶ The total number of members of the Association Complainants appears to exceed 900. The Complaint does not contain an allegation regarding the number of members of The Fertilizer Institute, but its website claims more than 175 members.

Discovery in this case is bound to be complicated—the Association Complainants presumably lack specific knowledge and information regarding many of the issues raised in this proceeding, and it will certainly be necessary to direct discovery to their members. But the discovery process will be more complicated than necessary if Complainants are not required to not make their factual allegations and legal theories more definite at the outset of this case.

IV. CONCLUSION

The Board should dismiss the Complaint in its entirety. Complainants challenge practices that are clearly lawful under agency precedent. If the Board does not dismiss the complaint in its entirety, it should dismiss claims relating to transportation governed by contracts and claims for damages brought on behalf of association members that are not named parties in this proceeding. In addition, or in the alternative, if the Board does not dismiss the complaint, it should require Complainants to make certain of their allegations more definite to provide fair notice of their claims and promote expeditious, efficient handling of this case.

Respectfully submitted,

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April 20, 2015

CERTIFICATE OF SERVICE

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

/s/ Michael L. Rosenthal
Michael L. Rosenthal

EXHIBIT A



Economic and Environmental Benefits of Private Railcars in North America

Prepared for the North America Freight Car Association

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January 2011

mileage allowances of 35 cents to 50 cents, to as high as 60 cents per loaded mile for some commodities and movements. Over time these allowances have been substantially reduced, resulting in the current mileage allowances in the 18-21 cents per loaded mile range, a range identified by shippers as being non-compensatory. In some cases these allowances are not provided at all. Regardless of the method of compensation shippers currently face a silent investment loss wherein allowances do not generate a return on leasing and accessorial charges sufficient to encourage future and continuing investment by shippers in the car fleet.

The initial mileage allowances, resulting from statutory requirements, were designed to compensate shippers for their investment or the lease charges they paid, and served as an incentive for shipper provided capacity. Currently, however, mileage charges at the existing level are only offered to and used by shippers for about 5-10% of the railcar fleet and these are offered by only select railroads. The common alternative is the use of a differential in rates for a given movement, with the spread being the difference between the rates for a shipper provided car versus a carrier provided car. This spread or reduced tariff rate for the shipper provided car was originally calculated by using the basic mileage allowance of 24 cents per loaded mile times the estimated turns per month. Shippers report that the original 24 cents per loaded mile was not a compensatory rate so any differential based on that rate was fatally flawed. This is even truer today -- the current purchase price of cars is double what it was 20 or 30 years ago. The rate spread methodology was accepted, and, in most cases, welcomed by both carriers and shippers only because of the significant decrease in administrative activities of tracking mileage and determining costs. Today many carriers do not even offer spreads. For many of their rates they simply offer a rate in private cars for which car compensation is invisible.

In the mid to late 90's the shortage of cars, particularly covered hopper cars, resulted in shippers scrambling to find cars. To ensure a guaranteed car supply, shippers leased many cars and in numerous cases subleased them to railroads, which guaranteed shippers a minimum monthly supply of cars in return. In addition to the benefit of an increased supply of shipper provided cars, sublease rates were compensatory. Unfortunately, these sublease programs have been discontinued by the railroads. Addi-

tionally, more and more railroad rates have abandoned spreads and allowances altogether, with railroads claiming that their freight rates would have to increase if they paid private car compensation of any sort. Some private car movements today are entirely without discernable compensation to the car owner, according to the survey respondents.

Shippers responding to the survey identified their cost to supply rail equipment as the sum of lease costs, maintenance, repair, and new accessorial costs. While some surveyed shippers believed rates were compensatory, most felt the rate structure was so blurred and complicated they could not determine if compensation was adequate, and a number felt that rates were definitely not compensatory.

Even if the rate differential resulted in compensation for the lease or ownership costs, the shippers universally identified additional costs imposed on them by railroads that were not covered by the differential rates, such as routine maintenance costs as well as new accessorial costs. Private car owners identified operating, maintenance and running repair costs at anywhere from \$800 annually per car for a low mileage general purpose freight car to over \$10,000 per car for a high mileage multi-platform intermodal car. Furthermore, recent unilateral decisions by the railroads have put shippers in a position of paying additional costs in varying forms.

Significant rail line abandonments have severely shrunk the branch tracks available for storage and positioning of cars. For the past 10 years, shippers have had to move empty private cars off railroads' lines after being returned to a loading point or pay storage charges, lease, or rent track. The carrier-compelled need for storage of private cars has resulted in some shippers building new rail yards and facilities encompassing multiple private tracks that shippers have to maintain. Thus, in addition to providing their own fleets, shippers now find they are required to provide infrastructure and locomotive power. Railroads traditionally made these investments, but now shippers are forced to make up for the inadequacy of the railroad investment in cars. When normal maintenance costs along with storage charges are considered, then the rates of return outlined below plunge significantly, making the overall investment in private rail cars less justifiable from a rate of return perspective.

Finally, for railroad car types in which the railroads have no investments, e.g., tank cars, the railroads usually

quote only a single rate, which they assert is lower than it would be if they were providing the car. However, the survey respondents emphasized that they were left with no real way to verify these railroad claims. As indicated above, the railroads do pay mileage compensation on about 10 percent of tank car movements.

Car-Hire Based Leases/Depreciation Rates

Car-hire based leases compensate rail car owners who lease their cars to railroads who use the equipment in revenue-generating services. These types of arrangements generally involve small railroads with limited ability to make capital investments in cars. Through these leases, the leasing companies and rail car owners provide cars to railroads and receive payments based on hourly and mileage revenues that the car lessee receives from other railroads using their equipment as cars are interchanged. Car-hire rates initially were determined through the use of a formula, developed by the ICC, to compensate car owners for the cost of equipment ownership along with a fair return on the investment. In an order effective on January 1, 1993, the ICC repealed the existing formulas for car-hire rates and adopted a then called market-based approach for setting car-hire rates, except for tank cars, which remained subject to prescribed car hire rates. The ICC's depreciation order was phased in over a ten-year period with full implementation becoming effective on January 1, 2003.

Depreciated rates in theory are designed to reflect the market conditions of supply and demand. Depreciation is designed to result in negotiated rates between equipment owners and users to reflect market conditions. If, however, negotiations between the parties fail to reach an agreement, either party may request binding best and final offer arbitration, somewhat similar to the process employed by Major League Baseball to resolve player salary disputes. In the established STB rules, the arbitration process is mandatory and legally binding. The associated arbitration fees are shared by both parties, up to a total of \$2,000. Fees beyond this ceiling, however, are borne by the losing party in the arbitration process. Each party bears its own costs and legal fees.

Of overriding significance for the owners of rail cars, however, is the extent to which market based depreciated rates provide the owners with a revenue stream that compensates them for the costs of ownership, plus a fair

return on their original investment. Returns to private car owners are under pressure from a variety of factors. In the case of railcars operating under depreciation rules, returns to private car owners have declined to the point of being marginally compensatory or nonexistent; such cars in many cases offer an average return of 3%, which is substantially below the railroad revenue adequacy standard of 10% defined by the STB. In order to investigate this question, we conducted an empirical analysis of the adequacy of return rates associated with market-based depreciated rates for five different types of railroad cars: A405 Boxcars (50 ft. in length); A606 Boxcars (60 ft. or above in length); E530 Gondola cars; C112 Hopper Cars (3,000-4,000 cubic feet); and C114 Hopper Cars (5,000 cubic feet).

We obtained market depreciation rates from the Association of American Railroad's Depreciation Market Report website from which all records were selected where Car-Hire Accounting Rate Master (CHARM) rate type code is equal to M (market rate) or S (spot market rate). For each railroad car type, we took the average monthly hourly market rate for each month of 2009 and calculated an annual average hourly rate. We then assumed that the equipment would have a 70 percent utilization rate or 511 revenue hours per month. We estimated annual revenue on the basis of the hourly market rates and the assumed utilization factor. We assumed that the mileage revenue received by the equipment owner would offset any maintenance expenses associated with the equipment.

We then calculated 30 year rates of return for each type of equipment under the following set of assumptions: (1) annual revenue based on 511 revenue hours per month times twelve months times the average annual hourly market rate; (2) industry estimated car replacement costs based on current equipment retail prices; (3) a \$5,000 residual equipment value at age 30; and (4) gross rail load of 286,000 lbs. for each rail car. Table 4 provides the implied 30 year rates of return under 2009 market based depreciation rates for each of the five railroad car types. The return rates vary from a low of 2.19 percent for the A405 Boxcars to 3.84 percent for the C112 Hopper Cars and the E530 Gondola Cars. In all cases, these rates of return are below the 20 year risk free treasury rate of 4.27 percent (as of May 4, 2010) and dramatically below the STB revenue adequacy return of around 10%.

Clearly, the market-based depreciated rates are not

EXHIBIT B



TARIFF UP 6004-C

Cancels UP 6004-B

(Revision 1)

Applying On

ACCESSORIAL SERVICES - RULES AND CHARGES

Governed, except as otherwise provided herein, by UFC 6000-series and
OPSL 6000-series.

Issued By:

E. A. HUNTER - MANAGER PRICING SERVICES
B. A. ROMMEL - MANAGER PRICING SERVICES

Union Pacific Railroad Company
1400 Douglas Street Omaha, NE 68179

Issued: March 26, 2008
Effective: April 1, 2008

UP 6004-C



UP 6004-C

Item: 55-C
MOVEMENT OF EMPTY TANK CARS WITH PRIVATE MARKINGS

MOVEMENT OF EMPTY TANK CARS

[i]

Empty tank car movements provided below are subject to Union Pacific line-haul charges, as provided in UPRR 4703-series, for the portion of the empty movement that occurs on Union Pacific:

- A. New tank cars moving prior to their first loaded move in commercial service (STCC 3742213);
- B. Restenciled tank cars moving prior to their first loaded move in commercial service (STCC 3742213);
- C. Tank cars moving for dismantling, sale, or scrap (STCC 3742293); and
- D. Empty tank cars moving to and from Repair Facilities (STCC 3742217) except that (i) empty movements that are immediately preceded by a loaded line-haul revenue movement on Union Pacific will move free of charge to Repair Facilities, (ii) empty tank cars taken out of service by Union Pacific inspection and waybilled by Union Pacific's Mechanical Department under Rule 1 of the Association of American Railroads Interchange Rules will move free of charge to and from Repair Facilities, and (iii) empty tank cars damaged by Union Pacific will move free of charge to and from Repair Facilities.

For purposes of this Item, the capitalized term "Repair Facilities" means any facility that cleans, lines, relines, maintains, modifies, repairs, or retrofits tank cars.

EXHIBIT C



TARIFF UP 6004-C

Cancels UP 6004-B

(Revision 1)

Applying On

ACCESSORIAL SERVICES - RULES AND CHARGES

Governed, except as otherwise provided herein, by UFC 6000-series and
OPSL 6000-series.

Issued By:

E. A. HUNTER - MANAGER PRICING SERVICES
B. A. ROMMEL - MANAGER PRICING SERVICES

Union Pacific Railroad Company
1400 Douglas Street Omaha, NE 68179

Issued: March 26, 2008
Effective: April 1, 2008

UP 6004-C



UP 6004-C

Item: 50-F
MOVEMENT OF EMPTY CARS, WITH PRIVATE MARKINGS, OTHER THAN TANKS

MOVEMENT OF EMPTY CARS, WITH PRIVATE MARKINGS, OTHER THAN TANKS

Empty movements of all non-tank rail cars with private reporting marks, including cars with private reporting marks that are owned or controlled by railroads, are chargeable subject to the provisions of Tariff UP 4703-series, except as follows:

- (a) [c] Empty cars returned to origin point of the prior load via the reverse route will be transported without charge.
- (b) [c] In lieu of a free return via the reverse route, allowed in (a) above, and upon receipt of written instructions within 150 calendar days of the UP loaded waybill date, an empty car will be transported to an alternate UP served station, or to a UP offline junction without charge, if UP received loaded line haul revenue on the immediately preceding movement of the car.
- (c) [c] One diversion or reconsignment of movements described in (a) and (b) will be permitted without charge, providing the diversion or reconsignment order is received, accepted and executed by UP prior to the car's arrival at a UP served destination or a UP offline junction, and provided further that the move does not result in any out-of-route or backhaul mileage.
- (d) Cars taken out of service by UP inspection and waybilled by UP Mechanical Department will move free to and from shop under A.A.R. Interchange Rule 1.

NOTE: In no event will UP provide any additional free transportation of an empty railcar to a new loading point after the railcar has been delivered or interchanged offline.

EXHIBIT D



FREIGHT TARIFF RIC 6007-O
(For cancellations, see Item 1, this tariff)

**MILEAGE ALLOWANCES AND RULES
GOVERNING**

THE HANDLING OF AND THE PAYMENT OF MILEAGE

ALSO CHARGES

**ON
CARS OF PRIVATE OWNERSHIP
AS DEFINED IN ITEMS 25 AND 400**

**BY
RAILROADS PARTIES TO THIS TARIFF**

For List of Participating Carriers, see Item 2.10

This tariff is also applicable on intrastate traffic, except where expressly provided to the contrary in connection with particular rates and provisions contained herein.

ISSUED: February 19, 2015

EFFECTIVE: March 1, 2015

ISSUED BY

RAILINC, AGENT
7001 WESTON PARKWAY, SUITE 200
CARY, NC 27513

<p align="center">SECTION 1 APPLIES ONLY ON TANK CARS</p>	<p align="center">SECTION 1 EXCEPTION TO APPLICATION OF RATES APPLIES ONLY ON TANK CARS</p>
<p>ITEM 25</p> <p align="center">APPLICATION OF SECTION 1</p> <p>1. The term "Cars of Private Ownership", when used in this tariff, is defined as cars bearing other than Railroad Reporting marks that are owned by individuals, firms, corporations, or car companies, including cars owned and/or operated by railroad controlled car lines.</p> <p>2. Except as otherwise provided herein, these rules govern the handling of tank cars including the payment of mileage allowances, when used by railroads parties to this tariff individually or jointly, where specifically provided herein, for transportation over their lines as follows:</p> <p>A. Between points in the United States (interstate and intrastate) including movements where part of the through route is through Canada.</p> <p>B. Internationally, i.e., between points in the United States and points in Canada. (Applicable only on that portion of the haul within the United States).</p> <p>C. For that portion of the haul in the United States in connection with movements between points in Canada where part of the through route is through the United States.</p>	<p>ITEM 30</p> <p align="center">GENERAL EXCEPTION</p> <p>The rules and mileage allowances published herein will not apply to:</p> <p>A. Cars that are not properly registered in the Official Railway Equipment Register, RER 6414-Series, showing capacities and assigned reporting marks.</p> <p>B. Mileage allowances named in Item 195-Series of this tariff will not apply to cars handled under the provisions of Item 190.</p>
	<p>ITEM 35</p> <p align="center">APPLIES ONLY FOR CARRIERS NAMED IN THIS ITEM</p> <p>The provisions of Item 187-Series "Equalization of Mileage on Tank Cars of Private Ownership", will not apply in connection with carriers named below:</p> <p>Angelina and Neches River Railroad Company Apache Railway Company, The Escanaba and Lake Superior Railroad Company Iowa Interstate Railroad, Ltd. Kansas City Southern Railway Company (Stations 31011 to 31315 only) Mississippi Export Railroad Providence and Worcester Railroad Company Tomahawk Railway, Limited Partnership Trona Railway Company Tulsa Sapulpa Union Railway Company</p>
	<p>ITEM 40</p> <p align="center">ACADIANA RAILWAY COMPANY (AKDN)</p> <p>The provisions of Item 190-Series, or other provisions for the movement of empty cars without charge to or from facilities for cleaning, lining, relining, maintenance, modification or repair, will not apply to such cars moving to or from facilities served by AKDN unless the empty movement is immediately preceded by or followed by a loaded revenue movement via the AKDN. In all other circumstances, the published tariff charges for movement of empty cars on their own wheels shall apply.</p>
<p>ISSUED: February 19, 2015 EFFECTIVE: March 1, 2015</p>	
<p>ISSUED BY: Railinc, Agent, 7001 Weston Parkway, Suite 200, Cary, NC 27513</p>	
<p>For explanation of abbreviations and reference marks not explained herein, see Item 9999, this tariff.</p>	

SECTION 1 EXCEPTION TO APPLICATION AND RULES APPLIES ONLY ON TANK CARS	SECTION 1 EXCEPTION TO APPLICATION AND RULES APPLIES ONLY ON TANK CARS
<p>ITEM 50</p> <p>APPLIES ONLY FOR CARRIERS NAMED IN THIS ITEM</p> <p>Empty privately-owned or leased tank cars used or to be used in Intra-Mexican service will be subject to the following provisions:</p> <p>A. Owner or lessee shall secure an entry permit from the involved Mexican carrier prior to empty movement to the border crossing and permit number must be shown in the writing instructions accompanying such car.</p> <p>B. Subsequent to Intra-Mexican service, written instructions for each car entering the U.S. must clearly indicate the exact consignee or facility for disposition of the car prior to movement beyond the border gateways.</p> <p>C. Upon failure to comply with paragraphs A or B, a holding charge of \$10.00 per day will be assessed for each 24 hours or fraction thereof beginning at 7:00 AM of the day following arrival of such empty privately owned or leased car at the border crossing, (excluding Saturdays, Sundays and holidays), until provisions of paragraphs A and B as applicable are fulfilled.</p> <p>BNSF Railway Company Union Pacific Railroad Company</p>	<p>ITEM 73</p> <p>BNSF RAILWAY COMPANY (EXCEPTION TO ITEM 190)</p> <p>When a tank car is released from load on BNSF, the empty will be returned via the reverse of the loaded route to the origin station of the last loaded movement. If the owner or lessee of the car desires movement via a different route or to a station other than the origin of the last loaded movement, empty billing instructions must be given to:</p> <p>BNSF Railway Co. Carload Billing 920 S.E. Quincy Topeka, KS 66612 Telephone: (800) 786-2873 FAX: (800) 786-2455</p> <p>prior to release of the empty car. If the owner or lessee of the car requests movement via a different route, or to a station other than the origin of the last movement, after release of the empty car, diversion provisions and charges, as named in BNSF Diversion Tariff 6200 Series, are applicable.</p>
<p>ITEM 70</p> <p>BNSF RAILWAY COMPANY (LINES IN CANADA)</p> <p>This tariff also applies on all traffic moving over the lines of the BNSF in Canada.</p>	<p>ITEM 75</p> <p>BUFFALO & PITTSBURGH RAILROAD, INC. (BPRR)</p> <p>The provisions of Item 190-Series, or other provisions for the movement of empty tank cars without charge to or from facilities for cleaning, lining, relining, maintenance, modification, repair or storage, will not apply to such cars moving to or from facilities served by the BPRR unless the empty movement is immediately preceded by or followed by a loaded revenue movement via the BPRR. In all other circumstances, the published tariff charges in Tariff BPRR 4004-Series for movement of empty cars on their own wheels to and from repair or storage facilities shall apply.</p>
<p>ITEM 71</p> <p>BNSF RAILWAY COMPANY (EXCEPTION TO ITEM 190)</p> <p>The provisions of Item 190 Series for the movement of empty tank cars without charge to or from facilities for cleaning, lining, relining, maintenance, modification, retrofit or repair, will not apply to such cars moving via BNSF to/from such facilities unless the empty movement is immediately preceded by a loaded line haul revenue movement via BNSF. In all other circumstances, the published tariff charges in BNSF 90020B, and other applicable BNSF price authorities, for the movement of empty cars on their own wheels shall apply and will be assessed to the car owner.</p>	<p>ITEM 80</p> <p>CEDAR RAPIDS AND IOWA CITY RAILWAY COMPANY (CIC)</p> <p>The provisions of Item 190-Series or other provisions provided in this tariff for the movement of empty tank cars without charge to and from facilities for cleaning, lining, relining, maintenance, modification, repair or storage, etc., will not apply for account of the CIC. For Rules and charges to apply, see Freight Tariff CIC 4006-Series.</p>
	<p>ITEM 90</p> <p>CANADIAN NATIONAL RAILWAY COMPANY</p> <p>The tariff rules contained herein regarding tank car movements will not apply to the movements described in Item 25.2.C. For those movements, the rules and charges contained in Tariff CN 6544 shall apply.</p>
<p>ISSUED: February 19, 2015 EFFECTIVE: March 1, 2015</p>	
<p>ISSUED BY: Railinc, Agent, 7001 Weston Parkway, Suite 200, Cary, NC 27513</p>	
<p>For explanation of abbreviations and reference marks not explained herein, see Item 9999, this tariff.</p>	

SECTION 1 EXCEPTION TO APPLICATION AND RULES APPLIES ONLY ON TANK CARS	SECTION 1 EXCEPTION TO APPLICATION AND RULES APPLIES ONLY ON TANK CARS
<p>ITEM 99</p> <p style="text-align: center;">CANADIAN PACIFIC RAILWAY (EXCEPTION TO ITEM 190)</p> <p>The provisions of Item 190 Series for the movement of empty tank cars without charge to or from facilities for cleaning, lining, relining, maintenance, modification or repair, will not apply to such cars moving via CPRS from or to said facilities unless the empty movement is immediately preceded by a loaded revenue movement via CPRS. In all other circumstances, the published tariff charges in Tariff CP 4000 Series for movement of empty cars on their own wheels shall apply and will be assessed to the car owner.</p> <p>On shipments moving within Canada, CP's Mileage Equalization program in Tariff CP 6 applies, except on miles in Canada for "bridge traffic" which only passes through the Canada for routing purposes that are under the terms of this tariff.</p>	<p>ITEM 106</p> <p style="text-align: center;">CSX TRANSPORTATION INC.</p> <p>The participation of this carrier is restricted to movements over its lines, as follows:</p> <ul style="list-style-type: none"> A. Between points in the United States, including movements where part of the through route is through the Dominion of Canada. B. For that portion of the haul in the United States on international movements, i.e., between points in the United States and points in the Dominion of Canada.
<p>ITEM 102</p> <p style="text-align: center;">COLUMBUS AND GREENVILLE RAILWAY (CAGY)</p> <p>The provisions of Item 190-Series, or other provisions for the movement of empty tank cars without charge will not apply to such cars moving, to, from, or via the CAGY unless the empty movement is immediately preceded by or followed by a revenue movement via Columbus and Greenville Railway. In all other circumstances, charges published in the Uniform Freight Classification for movement of empty cars on their own wheels observing the single line minimum charge shall apply.</p>	<p>ITEM 112</p> <p style="text-align: center;">ELGIN, JOLIET AND EASTERN RAILWAY COMPANY (EJE)</p> <p>For rules to apply, see Item 90 of FT RIC 6007-O.</p>
<p>ITEM 104</p> <p style="text-align: center;">CHICAGO SOUTH SHORE AND SOUTH BEND RAILROAD (CSS)</p> <p>The provisions of Item 190 Series, or other provisions for the movement of empty tank cars without charge to or from facilities for cleaning, lining, relining, maintenance, modification, repair or storage, will not apply to such cars moving via Chicago South Shore and South Bend Railroad from or to said facilities unless the empty movement is immediately preceded by or followed by a loaded revenue movement via Chicago South Shore and South Bend Railroad. In all other circumstances, the applicable CSS publication for the movement of empty cars on their own wheels shall apply.</p>	<p>ITEM 120</p> <p style="text-align: center;">IOWA INTERSTATE RAILROAD, LTD (IAIS) (Exception to Item 190-Series)</p> <p>The provisions of Item 190-Series, or other provisions for the movement of empty tank cars without charge to or from facilities for cleaning, lining, relining, maintenance, modification or repair, will not apply to such cars moving to or from facilities served by this railroad unless the empty movement is immediately preceded by or followed by a loaded revenue movement via the IAIS. In all other circumstances, the published tariff charges in Tariff IAIS 3000-Series for movement of empty cars on their own wheels shall apply.</p>
	<p>ITEM 124</p> <p style="text-align: center;">KANSAS CITY SOUTHERN RAILWAY COMPANY, THE</p> <p>Provisions of Item 190 Series, or any other provision allowing for free switching service of an empty freight car (or cars) to or from shop facilities for cleaning, lining, relining, maintenance, modification or repair, will not apply to and from shop facilities served by KCS. Matter of switch charge will be handled by the applicable KCS Tariff.</p>
	<p>ITEM 131</p> <p style="text-align: center;">NORFOLK SOUTHERN RAILWAY COMPANY</p> <p>When it is necessary to move a loaded private car to/from shop or repair facilities located on NS, NS will pay mileage payments not to exceed the amount that would have been earned had the car not required additional rail movements to/ from shop or repair facilities, provided that the mileage allowances for the loaded movement are not elsewhere restricted.</p>
<p>ISSUED: February 19, 2015 EFFECTIVE: March 1, 2015</p>	
<p>ISSUED BY: Railinc, Agent, 7001 Weston Parkway, Suite 200, Cary, NC 27513</p>	
<p>For explanation of abbreviations and reference marks not explained herein, see Item 9999, this tariff.</p>	

SECTION 1 EXCEPTION TO APPLICATION AND RULES APPLIES ONLY ON TANK CARS	SECTION 1 EXCEPTION TO APPLICATION AND RULES APPLIES ONLY ON TANK CARS
<p>ITEM 135</p> <p>NORFOLK SOUTHERN RAILWAY COMPANY (EXCEPTION TO ITEM 190) (See NOTE 1)</p> <p>When a car is released from load on NS, the empty will be returned via the reverse of the loaded route to the origin station of the last loaded movement. If the owner or lessee of the car desires movement via a different route or to a station other than the origin of the last loaded movement, empty billing instructions must be sent prior to release of the empty car via FAX, or NS internet application. If by fax send to:</p> <p style="text-align: center;">FAX: 800-580-6092 Norfolk Southern Railway Company Agency Operation Center 125 Spring Street South West Atlanta, GA 30303</p> <p>If the owner or lessee requests movement via a different route, or to a station other than the origin of the last loaded movement, after release of the empty car, diversion provisions and charges, as named in Norfolk Southern Tariff 8002 Series, are applicable.</p> <p style="text-align: center;">EXPLANATION OF NOTE</p> <p>1. If subject tank car has last contained Hazardous Materials, shipping paper must be furnished at the point of origin of the empty car for all moves whether they are reverse or not.</p>	<p>ITEM 150</p> <p style="text-align: center;">ST RAIL SYSTEM</p> <ol style="list-style-type: none"> 1. The provisions of Item 190 Series or other provisions for the movement of empty tank cars without charge to or from facilities for cleaning, lining, relining, maintenance, modification or repair, will not apply to such cars moving via ST Rail System from or to said facilities unless the empty movement is immediately preceded by or followed by a loaded revenue movement via the ST Rail System. In all other circumstances, the published tariff charges in Tariff ST 4020 Series for movement of empty cars on their own wheels shall apply. 2. The provisions of Item 180 Series concerning the payment of mileage will not apply to cars which are moving via ST Rail System under rates published in tariffs, quotes or contracts that are identified as "zero mileage rates". In the event that the party responsible for the payment of freight charges associated with zero mileage rates is different than the party to whom the reporting marks for said cars are assigned, the car owner must secure mileage payments from the freight paying party.
<p>ITEM 145</p> <p style="text-align: center;">SANDERSVILLE RAILROAD COMPANY (SAN)</p> <p>Inbound tank car mileage will be used as an offset to outbound loaded mileage (or vice versa) and the SAN will pay no mileage based on freight mileage table from or to station on its line.</p>	<p>ITEM 170</p> <p style="text-align: center;">UNION PACIFIC RAILROAD COMPANY (EXCEPTION TO ITEM 190)</p> <p>Provisions of Item 190-series, or any other provision provided in this tariff, regarding the movement of empty tank cars without charge to or from Repair Facilities will not apply for the account of UP. Movements of empty tank cars to or from Repair Facilities will be subject to the rules and charges provided in the applicable UP tariff(s). For purposes of this Item, the capitalized term "Repair Facilities" means any facility that cleans, lines, relines, maintains, modifies, repairs, or retrofits tank cars.</p>
<p>ITEM 148</p> <p style="text-align: center;">ST MARYS RAILROAD COMPANY (SM)</p> <p>Inbound tank car mileage will be used as an offset to outbound loaded mileage and the SM will pay no mileage based on freight mileage table:</p> <p>From Kingsland, GA to St Marys, GA and from St Marys, GA to Kingsland, GA.</p> <p>From Kingsland, GA to Kings Bay, GA and from Kings Bay, GA to Kingsland, GA.</p>	
<p>ISSUED: February 19, 2015 EFFECTIVE: March 1, 2015</p> <p>ISSUED BY: Railinc, Agent, 7001 Weston Parkway, Suite 200, Cary, NC 27513</p> <p>For explanation of abbreviations and reference marks not explained herein, see Item 9999, this tariff.</p>	

EXHIBIT E



Mileage

What is the basis for mileage earnings?

Mileage earnings primarily apply to tank railcars in the United States and to tank and hopper railcars in Canada. When putting together a quote or a contract with a railroad, freight rates can be negotiated with reduced or eliminated mileage rates on private (leased) equipment, resulting in either a capped or zero rate mileage rate. Under full mileage, you pay the quoted freight rate to the railroad. The railroad then pays an amount for every loaded mile the car(s) travel, based on the car(s) value, age and commodity carried. For more information, refer to Item 195 in the 6007IS Mileage Tariff at the website of the Association of American Railroads.

How are mileage rates established in the United States?

Rates are determined by a formula based, in part, on the age and value of the railcar. Mileage rates are consistent across most railroads in the U.S.

How are full mileage credit payments made?

Credits are made to the owner of the railcar, generally within 60 days. If you lease cars from GATX, railroads pay mileage credits to GATX, which credits the lessee for that amount. The process generally takes about three months. It is your responsibility, as lessee, to review the reported mileage data and audit it for accuracy. If there appear to be errors, your customer service representative can provide information about filing a claim.

What is "zero-rated mileage" and how is it applied?

Zero-mileage rates have been offered since railroads were deregulated. A zero-mileage rate means no mileage compensation is received from the railroad. Instead, the railroad charges a lower freight rate because it will not pass on credits to the owner or lessor for the loaded mileage traveled. There are different benefits to full- and zero-mileage rate structures. Customers must determine which option is best based on discussions with the billing railroad. If you enter into a zero-mileage rate contract, please provide the following information to GATX in writing, so we can ensure the correct application of the terms:

- **The beginning and ending dates of the contract routes;**
- **The railroads involved;**
- **The commodity being shipped.**

Do the same provisions apply to rail shipments in Canada and Mexico?

While Canadian railroad practices are similar to those in the United States, each railroad maintains its own rate schedule and tracks its own movement of loaded and empty cars. There also are differences in how equalization is handled. (See "equalization" below.) Railroads in Mexico generally do not issue credits for mileage.

How long does it take for a railroad to send mileage earned to the car owner?

Railroads generally process mileage earnings within 60 days following the month in which they were earned. As the owner of the cars you lease, GATX passes these earnings on to you when payment is received from the billing railroad. The whole process averages about 90 days. However, the tariff allows railroads to make adjustments up to 24 months after a move has been reported.

What is "equalization?"

If the combined empty miles traveled in a year by a customer's leased tank railcars are more than 106% of combined loaded miles, a penalty will be assessed against the difference in the third quarter of every year. Canadian railroads have different penalty percentages, and apply equalization to both tank and hopper railcars.

What is an "excess mileage charge" and when does it apply?

In most new contracts, there is a clause noting that there will be a per mile charge for every mile a railcar travels in excess of a stated limit of miles during a calendar year. This provision offsets the greatly increased maintenance expenses associated with railcars traveling above the average number of miles.

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