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June 11, 2012

BY HAND

Ms. Cynthia T. Brown
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ENTERED
Office of Proceedings

JUN 11 2012

Part of
Public Record



Re: Docket No. 42119, *North American Freight Car Association v. Union Pacific Railroad Company*

Dear Ms. Brown:

Enclosed for filing in the above-referenced matter, please find the original and ten copies of the Final Brief of Union Pacific Railroad Company.

I have also enclosed an additional copy of Union Pacific's Final Brief to be date-stamped and returned to our messenger.

Thank you for your attention to this matter.

Sincerely,

Michael L. Rosenthal

cc: Andrew P. Goldstein, Esq.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

NORTH AMERICAN FREIGHT CAR)
ASSOCIATION,)
)
Complainant,)
)
v.)
)
UNION PACIFIC RAILROAD COMPANY,)
)
Defendant.)

Docket No. 42119

JUN 11 2012

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FINAL BRIEF OF UNION PACIFIC RAILROAD COMPANY

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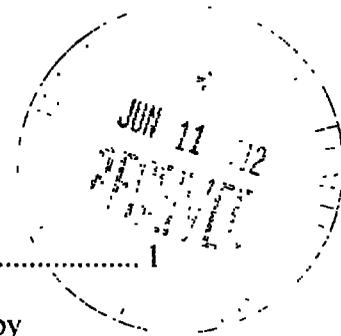
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June 11, 2012

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FINAL BRIEF OF UNION PACIFIC RAILROAD COMPANY

I. Introduction

The Board should dismiss NAFCA's challenge to Item 200-B of Tariff 6004-C. Item 200-B requires a shipper or receiver releasing a railcar to UP to remove lading residue that spills on the railcar during loading or unloading and ensure the car is properly secured to prevent leakage. UP established Item 200-B to mitigate the safety hazards arising from the presence of lading residue on the exterior of railcars, including over-speeding cars in classification yards and contaminated safety appliances. Item 200-B addresses the hazards at their source by requiring shippers and receivers to fulfill their responsibility to load and unload railcars so they can be transported safely. NAFCA fails to show that the provision is unreasonable.

Item 200-B is a reasonable means of advancing legitimate safety and operating objectives. Over-speeding railcars can injure railroad employees, damage customer and railroad property, and disrupt railroad operations. Contaminated safety appliances also endanger railroad personnel. Item 200-B supplements UP's other safety processes by encouraging shippers and receivers, whose loading and unloading activities are responsible for the presence of lading residue on railcars, to identify and remedy unsafe loading and unloading practices.

Item 200-B's requirement that customers remove lading residue that spills on a car's exterior during loading or unloading is consistent with rules established by other railroads, as well as guidelines published by the AAR and car owners. Discovery showed that Item 200-B is consistent with practices followed by NAFCA members. NAFCA has not identified a single instance in which a member contends that UP has stopped a car because it applied its standards unreasonably. This absence of complaints about UP's application of Item 200-B is telling, because UP has operated under Item 200-B or its predecessor since November 2008.

Nonetheless, NAFCA attacks UP's motive for adopting Item 200-B based on a significant misunderstanding of the provision. Contrary to NAFCA's apparent belief, Item 200-B does *not* make shippers strictly liable for damages if an accident is caused by lading residue on a railcar's exterior, and UP is *not* trying to change state law to avoid the consequences of failing to perform FRA-mandated inspections on railcars. Rather, UP designed Item 200-B to prevent accidents from occurring, and the provision does not change the laws that apply if an accident occurs. Moreover, FRA regulations require railroads to inspect cars for many defects unrelated to lading residue, so UP would still face potential liability for damages and FRA penalties if it failed to perform required inspections. NAFCA's claims regarding UP's motives are thus illogical, as well as baseless.

NAFCA's complaints about Item 200-B are based almost entirely on the false premise that the provision changes state law and allows UP to avoid inspecting railcars, so we begin with that point in Part II. Part III then steps back to address the legal standards that apply to this case, Part IV discusses the evidence that Item 200-B is a reasonable means of achieving a reasonable objective, and Part V shows that Item 200-B is consistent with Board precedent.

II. Item 200-B does not affect state law regarding liability for accidents caused by lading residue on the exterior of railcars.

NAFCA misunderstands Item 200-B. Item 200-B helps prevent accidents from occurring. Under Item 200-B, if UP discovers a railcar in an unsafe condition due to a shipper's or receiver's failure to remove lading residue from the car's exterior or to secure and seal the car properly, UP may reject the car or set it out for cleaning or securing, depending on where the unsafe condition is discovered, and assess the party that released the car a \$650 surcharge.

Item 200-B does *not* address the allocation of liability for damages from accidents caused by lading residue on the exterior of railcars. Item 200-B does *not* absolve UP of liability

for its own negligence, impose absolute liability on the shipper, or limit the shipper's defenses. Nor does Item 200-B reduce UP's own responsibility to inspect railcars for unsafe conditions.

NAFCA incorrectly asserts that Item 200-B changes the operation of state tort law through the provision's last sentence. In fact, the last sentence says the provision is *not* intended to change state law by waiving the customer's duty to safely load and unload a car simply because UP does not discover a loading or unloading problem before accepting the car:

UP's acceptance of a railcar that is later determined to be leaking or to have lading residue on its exterior will in no way relieve the consignor, consignee, or agent of its obligations herein, and shall not constitute a waiver by UP of the consignor's, consignee's or agent's obligation to tender railcars suitable for safe movement.

As NAFCA observes, allocation of liability for damages from a customer's loading or unloading errors in civil tort cases often turns on questions of facts. (NAFCA Reb. at 16.) Item 200-B's last sentence simply makes clear that the provision does not change that law by transforming UP's acceptance of a car into a waiver of the customer's duty to safely load or unload the car.

NAFCA's misunderstanding of Item 200-B is reflected in its erroneous assertion that "Item 200-B is unnecessary in light of established state law governing torts" because state tort law is sufficient "to apportion responsibility for 'unsafe' cars." (NAFCA Reb. at 15, 16.) NAFCA fails to grasp that Item 200-B serves an entirely different purpose than state tort law. State tort law addresses the question of who should compensate parties injured in accidents. Item 200-B does *not* address that issue; rather, it sets forth the actions UP will take upon discovering an unsafe condition to prevent accidents from occurring in the first place.

III. NAFCA misstates the legal standards that govern this case.

NAFCA's erroneous claims regarding the legal standards that apply to this case are largely irrelevant, because the record overwhelmingly shows that Item 200-B is reasonable. Nonetheless, the Board should apply the correct standards.

NAFCA does not dispute that railroads have a right to establish reasonable rules for loading and unloading railcars. *See, e.g., Ark. Elec. Coop. Corp. – Petition for Declaratory Order*, FD 35305 (STB served Mar. 3, 2011) (“*Coal Dust*”); *Consignees’ Obligation to Unload Rail Cars in Compliance With Carriers’ Published Tariffs*, 340 I.C.C. 405 (1972); *M. Longo Fruit Co. v. Ill. Traction Sys.*, 38 I.C.C. 487, 489 (1916). But NAFCA incorrectly asserts that UP bears the burden of demonstrating that Item 200-B is reasonable, misplacing reliance on *Consolidated Rail Corp. v. ICC*, 646 F.2d 642 (D.C. Cir. 1980). (NAFCA Reb. at 10.) As the Board has explained, “the *Conrail* decision was premised ... on a statutory scheme predating the Staggers Act.” *N. Am. Freight Car Ass’n v. BNSF Ry.*, NOR 42060 (Sub-No. 1), slip op. at 8 (STB served Jan. 26, 2007), *pet. for review denied sub nom. N. Am. Freight Car Ass’n v. STB*, 529 F.3d 1166 (D.C. Cir. 2008). Under current law, the party seeking relief has the burden of proof. *Coal Dust* at 4; *N. Am. Freight Car* at 5 (“[T]he burden is clearly on Complainants to prove their claims”).

NAFCA also incorrectly asserts that the Board’s reasonableness analysis does not start from a presumption that a railroad’s operating rules are reasonable. (NAFCA Reb. at 7-8.) The case on which NAFCA relies, *North American Freight Car Association v. BNSF*, says only that the presumption does not require a complainant to “bear a higher standard of persuasion” than it would otherwise bear. *N. Am. Freight Car* at 5. The presumption of reasonableness is embodied in the placement of the burden of proof on the party seeking relief: the challenged rule is presumed reasonable unless a complainant presents sufficient evidence to meet its burden.¹

¹ As the party with the burden of proof, NAFCA filed opening and rebuttal evidence, while UP filed only reply evidence.

Finally, NAFCA incorrectly asserts that the Board must micro-manage railroad decision-making, rather than determine whether rules are “reasonable.” (NAFCA Reb. at 8-10.) NAFCA claims there is otherwise a risk that a railroad could “penalize shippers and car owners, even if they are blameless, so long as the railroad was arguably pursuing a generally meritorious goal, such as safety or efficiency.” (*Id.* at 9-10.) But there is no such risk, because the *means of achieving the goal* also must be reasonable. Accordingly, when the Board finds that a railroad is pursuing a “reasonable objective,” its role is not to second-guess the railroad’s approach, but rather to make sure the railroad has chosen a “reasonable solution[.]” *Coal Dust* at 14.

IV. Item 200-B is a reasonable means of achieving a reasonable objective.

UP established Item 200-B under its broad authority to establish operating rules that promote safe, efficient, reliable service. The record in this proceeding shows that lading residue on railcars creates genuine safety hazards and the potential for operational disruptions, and that UP established Item 200-B to reduce the risk of accidents related to lading residue. The record also shows that Item 200-B simply requires the parties in control of the loading or unloading processes to do what they are supposed to do: load or unload cars safely. In sum, the record shows that Item 200-B is a reasonable means of achieving a legitimate objective.

NAFCA fails to show that UP is pursuing an illegitimate objective or is pursuing a legitimate objective unreasonably. Instead, NAFCA relies on rank speculation, fueled by its misinterpretation of Item 200-B, misrepresentations of the record, and misstatements regarding the law, to claim that the challenged provision imposes unreasonable burdens on shippers.

NAFCA does not come close to meeting its burden of proof.

A. UP is pursuing the reasonable objective of reducing safety hazards and operational disruptions caused by lading residue on the exterior of railcars.

NAFCA falsely asserts that UP established Item 200-B to shift the obligation to inspect railcars, and the consequences of failing to inspect railcars. from railroads to shippers. NAFCA's claim is baseless. NAFCA does not offer a shred of evidence that UP is failing to perform FRA-mandated pre-departure inspections of railcars. NAFCA's claim also has no logical coherence. UP cannot shift its legal duty to conduct FRA-mandated inspections to shippers, and Item 200-B does not affect the legal principles that would be used to allocate liability between UP and a shipper if an accident occurs. If UP fails to conduct mandated inspections, it faces FRA penalties; if an accident occurs, it faces liability for damages.

UP presented abundant evidence of its reasons for establishing Item 200-B. Wayne L. Ronci, UP's Director, Damage Prevention Field Services, explains that UP "became aware that there was an increasing number of preventable incidents caused by the presence of lading residue on railcar wheels." (Ronci V.S. at 2.)² He explains how UP tracked the source of the problem to customer loading and unloading practices and conditions at customer facilities. (Ronci V.S. at 10-15.)³ He also explains why UP concluded it would be unsafe and inefficient to rely solely on its own railcar inspections to prevent accidents. (Ronci V.S. at 18-20.) Mark S. Barnum, UP's Senior Director of Operating Practices and Rules, explains the FRA's pre-

² Mr. Ronci's testimony refutes NAFCA's false assertion that Item 200-B responds to a non-existent problem. (NAFCA Reb. at 17-19 (discussing "safety hazards *allegedly* created by product residue") (emphasis added).)

³ Mr. Ronci's testimony refutes NAFCA's assertion that UP never studied whether shipper loading practices caused overspeed incidents. (NAFCA Reb. at 16.)

departure inspection rules and why train crews who comply with those rules often will be unable to detect lading residue on railcar wheels. (Barnum V.S. at 2-5.)⁴

NAFCA offered no evidence on these points. Instead, NAFCA tries to impugn UP's motives by misrepresenting the evidence regarding UP's efforts to address lading residue problems through its own inspection processes. For example, it falsely suggests that UP does not perform pre-departure inspections (NAFCA Reb. at 5), ignoring Mr. Barnum's statement that "a UP crew conducts a pre-departure inspection of each railcar placed in a train." (Barnum V.S. at 2; *see also* UP Reply at 45 & n.29.) It also falsely asserts that UP does not try to stop cars with lading residue problems until after overspeeds occur. (NAFCA Reb. at 24, 31.) NAFCA ignores (i) Mr. Ronci's testimony that employees who observe cars with unsafe conditions are instructed to stop the cars and that they commonly identify problems before incidents occur, (ii) his exhibit showing cars that were stopped for cleaning, and (iii) the Damage Prevention database that UP produced in discovery, which contains many more examples of cars that were stopped before accidents could occur. (Ronci V.S. at 16-17 & Ex. 3; UP Discovery documents UP000001 to UP002547.)⁵

⁴ NAFCA incorrectly states that FRA rules expressly require railroads to inspect for "hazardous substances." (NAFCA Reb. at 29 n.10.) As Mr. Barnum explains, lading residue may fall under the FRA's catch-all requirement to inspect for "any other apparent safety hazard," but only if it is "readily discoverable by a train crew in the course of a customary inspection." (Barnum V.S. at 3, quoting 49 C.F.R. Pt. 215, App. D.)

Similarly, NAFCA's false assertion that FRA rules "are unambiguous" in requiring railroads to detect "product residues ... so severe as to jeopardize safety" (NAFCA Reb. at 36), ignores the point that, unfortunately, some safety hazards are not "apparent" – that is, they are not "readily discoverable ... in the course of a customary inspection" (49 C.F.R. Pt. 215, App. D).

⁵ Contrary to NAFCA's assertion (NAFCA Reb. at 20 n.5), all of the photographs in Exhibits 2 through 6 of Mr. Ronci's statement were produced in discovery. The Bates numbers of all the photographs in each exhibit are provided at the end of the exhibit (or before the next heading within an exhibit).

NAFCA also tries to impugn UP's motives by making baseless claims that UP is responsible for the presence of lading residue on the exterior of railcars. For example, NAFCA asserts that lading residue gets on railcars because of "jolts or impacts due to track conditions" and that conditions at customer facilities cannot be the cause because "product residue on the ground is promptly cleaned up." (NAFCA Reb. at 22.) But NAFCA provides no evidence to support either claim.⁶ By contrast, Mr. Ronci explains how UP tracked the source of lading residue problems to loading and unloading issues at customer facilities. He even provides pictures of conditions UP found at several customer facilities. (Ronci V.S. at 10-12 & Ex. 6.)

Finally, NAFCA tries to impugn UP's motives by falsely asserting that Item 200-B has not reduced safety hazards. NAFCA relies solely on a numerical comparison of the FRA-reportable accidents in the four years before and after UP established Item 200-B's predecessor. (NAFCA Reb. at 3 & Ex. 1.) Thus, NAFCA ignores non-reportable accidents and, even more important, the overall reduction in risk level.⁷ As Mr. Ronci explains, incidents that involve minimal or no property damage can still cause significant operational disruption, and the risk of serious harm exists whenever lading residue is present on railcar wheels or safety appliances. (Ronci V.S. at 3-7, 8-9.)⁸ Item 200-B provides an incentive for customers to address unsafe loading and unloading practices at their facilities, and customers have responded by making

⁶ NAFCA similarly asserts for the first time on rebuttal the unsupported claim that lading residue might be getting on railcar exteriors through "an Act of God." (NAFCA Reb. at 29.)

⁷ NAFCA's comparison also uses the wrong time periods. NAFCA incorrectly assumes that Item 200-B's predecessor took effect on January 1, 2008. Item 200-A actually took effect ten months later, on November, 1, 2008. (UP Reply, Counsel's Ex. B.)

⁸ NAFCA acknowledges the risk of injury when it states that shipper employees ordinarily wear work gloves to avoid slippage and that "more and more shippers" avoid using the "sometimes slippery catwalks." (NAFCA Reb. at 19.) Even if UP employee accidents may be "avoidable (continued...)"

changes to their practices. Accordingly, Item 200-B has helped UP prevent accidents, injuries, and operational disruptions, as established by Mr. Ronci's testimony. (*Id.* at 2, 16, 20-23.)

B. Item 200-B is a reasonable response to problems caused by lading residue on the exterior of railcars.

NAFCA fails to show that Item 200-B is unreasonable in placing responsibility on shippers and receivers to remove lading residue from the exterior of railcars and secure their cars before releasing them to UP. NAFCA incorrectly asserts that customers have no legal obligation to tender cars in a safe condition, ignores railroad industry rules and practices that confirm the reasonableness of the requirements in Item 200-B, and makes baseless claims about UP's application of Item 200-B and alternatives for addressing customers' unsafe loading and unloading practices.

1. Customers have a duty to load and unload cars so they can be transported safely.

Item 200-B is consistent with shippers' and receivers' legal obligation to load and unload cars so they can be transported safely. NAFCA incorrectly asserts that customers have no such obligation and that any efforts to "ship clean, properly secured cars" are undertaken simply "as a matter of good business practices." (NAFCA Reb. at 33.)⁹ "The duty of loading and of unloading carload shipments rests upon the shipper or consignee." *Penn. R.R. v. Kittaning Iron & Steel Mfg. Co.*, 253 U.S. 319, 323 (1920); *see also Am. Foreign Ins. Ass'n v. Seatrains Lines of P.R., Inc.*, 689 F.2d 295, 300 (1st Cir. 1982) ("[Shipper] had a duty to load the goods properly.").

through the actions of the employees themselves" (*id.*), it is reasonable for UP to take steps to help employees avoid coming into contact with a risky situation at all.

⁹ In practice, when UP has applied Item 200-B to stop cars, no customer has claimed that it had no duty to release cars in a safe condition. Rather, customers have generally acknowledged the problem and arranged for the car to be cleaned. (Ronci V.S. at 22.)

If the shipper “improperly loads the shipment, the shipper is liable therefor.” *Minneapolis. St. Paul & Sault Ste. Marie R.R. v. Metal-Matic, Inc.*, 323 F.2d 903, 906 (8th Cir. 1963). In fact, unless a defect is patent or apparent from ordinary observation, a rail carrier “has no liability for loss resulting from the act of the shipper in furnishing a defective car or in loading a car in an improper manner.” *Lever Bros. v. Baltimore & O.R.R.*, 164 F.2d 738, 739 (4th Cir. 1947) (shipper responsible for tallow leak from improperly sealed tank car); *see also Ass'n of Md. Pilots v. Baltimore & O.R.R.*, 304 F. Supp. 548 (D. Md. 1969) (shipper responsible for derailment caused by negligent loading). As courts explain, the liability rules recognize that the “shipper usually knows better than the carrier” the manner in which its cars were loaded. *Seeden v. Great N.R.R.*, 65 N.W.2d 178, 183 (Minn. 1954); *see also Am. Foreign Ins. Ass'n*, 689 F.2d at 300 (explaining that the shipper had “opportunities” to identify loading problems that were “not available to [the carrier]”). Finally, NAFCA’s claim that shippers have no legal duty to secure their cars for movement is belied by its acknowledgment that the FRA can fine shippers if their cars are not properly sealed. (NAFCA Op. at 16-17.)¹⁰

2. Rail industry rules and practices show it is reasonable to require customers to load and unload cars so they can be transported safely.

Item 200-B is also consistent with other rail industry rules and practices. NAFCA ignores BNSF’s rule requiring shippers to clean lading residue from the wheels and exterior of tank cars, falsely claiming that BNSF rules apply only to hopper cars. (*Compare* NAFCA Reb.

¹⁰ NAFCA erroneously relies on a case involving the apportionment of responsibility for an accident that had nothing to do with unsafe customer loading or unloading practices. (NAFCA Reb. at 34, citing *Torres v. S. Pac. Transp. Co.*, 584 F.2d 900 (9th Cir. 1978) (holding that the “operating carrier” as opposed to the “originating carrier” had responsibility for discovering the mechanical defect on a car that caused an accident).) Item 200-B involves the duties of shippers and receivers to follow safe loading and unloading practices.

at 24 *with* UP Reply at 17 & Counsel's Ex. D.)¹¹ NAFCA also falsely asserts that BNSF's rules do not excuse the railroad from liability when it accepts an unsafe car. (NAFCA Reb. at 24.) In fact, BNSF's tank car rule expressly requires customers to indemnify BNSF "from all property damage, personal injury or death ... even if [BNSF] does not detect that a railcar has lading residue on wheels, car exterior or lading leakage at the time of release." (UP Counsel's Ex. D.) If NAFCA does not object to BNSF's rule, it has no basis for complaining about Item 200-B, which contains no liability-shifting terms. *See* pp. 2-3, *supra*.¹²

NAFCA also ignores the significance of the evidence in the record that NAFCA members have policies requiring their employees to inspect railcars and remove exterior lading residue before releasing cars to UP. (UP Reply at 19-23 & Counsel's Ex. H.) NAFCA's claim that its own members adopted these requirements voluntarily proves UP's point: Item 200-B does not impose unreasonable burdens on shippers or receivers.

3. UP applies Item 200-B to both shippers and receivers that release railcars in a condition that makes them unsafe for transportation.

Item 200-B applies to loaded cars released by shippers and empty cars released by receivers. NAFCA falsely asserts that the provision is unreasonable because UP uses it to hold *shippers* responsible for lading residue left on railcars by *receivers*. (NAFCA Reb. at 34-35.)

¹¹ NAFCA also falsely states that BNSF's hopper rule took effect *after* Item 200-A, when it actually took effect on September 1, 2006, two years *before* UP's. (*Compare* NAFCA Reb. at 24 *with* [http://newdomino.bnsf.com/website/prices.nsf/5dd4bbc6694ee4d686256b68006e1af2/06ecd9cf4e97fe27862575a5004dfe2c/\\$FILE/6100-A%20rev%2083.pdf](http://newdomino.bnsf.com/website/prices.nsf/5dd4bbc6694ee4d686256b68006e1af2/06ecd9cf4e97fe27862575a5004dfe2c/$FILE/6100-A%20rev%2083.pdf).)

¹² NAFCA also attempts to distinguish CSX's safety guidebook, claiming that CSX's rule "contains no provisions that might be construed as displacing civil law remedies." (NAFCA Reb. at 24.) However, Item 200-B contains no provision that displaces civil law remedies. *See* pp. 2-3, *supra*.

NAFCA provides no evidence that has ever happened.¹³ The record shows that UP applies the provision to receivers. (Ronci V.S. at 13-14, 18 & Ex. 5.) NAFCA also incorrectly asserts that UP lacks incentive to determine whether lading residue on railcar exteriors comes from loading or unloading problems. (NAFCA Reb. at 35.) UP has a strong incentive to identify the source of any problem because lading residue on empty cars creates the same risks as it does on loaded cars. Indeed, the record shows that UP personnel visit loading *and* unloading facilities to help customers identify and remedy problematic conditions. (Ronci V.S. at 20-22.)

NAFCA is also wrong in asserting that Item 200-B is unlawful under *Liability for Contaminated Hoppers*, 10 I.C.C.2d 154 (1994). (NAFCA Reb. at 34, 40.) Unlike the tariff at issue in *Contaminated Hoppers*, Item 200-B does hold shippers responsible for inspecting and cleaning empty railcars for lading residue left by receivers. Item 200-B makes receivers responsible for cleaning spills that occur during the unloading process.¹⁴

NAFCA is again wrong in asserting that Item 200-B is unreasonable because it may lead to disputes over responsibility for lading residue and “unreasonably tilts the scales in favor of UP.” (NAFCA Reb. at 35.) As discussed above, Item 200-B does not change the law used to resolve disputes over liability for accidents; thus, it does not tilt any scales in favor of

¹³ As UP explained on reply, NAFCA’s alleged “evidence” that a “majority” of empty cars UP places for loading “already have product residue on them” (NAFCA Reb. at 34) appears to relate to one shipper’s complaint about the presence of grain residue on the roof of hopper cars, not the safety issues addressed by Item 200-B. (See UP Reply at 42.)

¹⁴ Item 200-B thus complements the UP tariff item that requires receivers to remove all lading material from the inside of railcars to ensure that they are in proper condition for receiving the next load. (See UP Reply, Counsel’s Ex. L. p. 10.)

UP.¹⁵ Nor does Item 200-B tilt any scales in disputes between shippers and receivers over responsibility for car cleaning charges, contrary to NAFCA's claims. (NAFCA Reb. 34-35.) If UP cannot identify the source of lading residue, it pays to clean the car. (Ronci V.S. at 16-18.)¹⁶

Finally, NAFCA is wrong in asserting that Item 200-B is unreasonable because it would hypothetically allow UP to place the blame for lading residue on an "innocent shipper" whose car follows behind a leaking car. (NAFCA Reb. at 18.) Item 200-B applies only to the party that releases a railcar in an unsafe condition. Thus, it would not apply to an innocent shipper whose car is contaminated by lading residue from another shipper's leaking car.¹⁷

4. UP reasonably determined that its own inspections alone cannot sufficiently protect against the safety risks associated with lading residue on the exterior of railcars.

Item 200-B reasonably supplements UP's inspection process by giving customers an incentive to prevent lading residue problems from arising in the first place. NAFCA asserts that UP could achieve the same outcome by increasing its inspections of railcars and retarders. (NAFCA Reb. at 29-31.) But NAFCA offers no evidence that UP's approach is unreasonable. Moreover NAFCA never attempts to show that its suggestions are even practicable, much less that they would be more efficient or more effective at reducing the risk of accidents.

¹⁵ Thus, there is no basis for NAFCA's concern that UP can use Item 200-B to hold a shipper liable for damages arising from retarder failures caused by track lubricants or UP's failure to clean product that leaks from another shipper's car. (NAFCA Reb. at 22-23.)

¹⁶ As Mr. Ronci explains, when an overspeed connected to lading residue occurs, UP obtains a laboratory analysis to help identify the residue that caused the overspeed. (Ronci V.S. at 11 n.7.)

¹⁷ As discussed above, if the overspeed causes damage, the shipper's liability would be resolved in court under established tort law, which is not affected by Item 200-B. With regard to cleaning costs under Item 200-B, UP does not bill the shipper if it cannot determine the source of the lading residue, as also discussed above.

NAFCA's failure to do more than assert that UP should increase its inspections of retarders is not surprising: increased inspections would not stop the railcars with lading residue on their wheels that slide through the retarders. Moreover, railcars pass through retarders at a rapid pace during the sorting process. (Ronci V.S. at 7.) Even if UP could practicably station employees around the clock at each retarder in each of its classification yards, those employees could not spot lading residue on retarders through visual inspections in the time between passing cars, and they would be in near-constant danger from moving railcars.¹⁸

NAFCA does no better with its assertion that UP should increase its inspections of railcars. NAFCA never explains how UP could more effectively or more efficiently address unsafe loading or unloading practices through additional inspections than by enforcing Item 200-B. NAFCA cannot explain why UP employees are better able to detect whether a car had lading residue spilled on the exterior or was not properly sealed than the customers who load or unload the cars.¹⁹ In fact, NAFCA acknowledges that additional inspections by UP "might well cause some disruption in UP operations" (NAFCA Reb. at 31), but it never claims, much less proves, that compliance with Item 200-B disrupts customer operations. Indeed, the evidence shows that

¹⁸ NAFCA asserts without any basis that UP employees could "make at least a cursory inspection [of retarders] between cars." (NAFCA Reb. at 31 n.12.) Mr. Ronci's exhibit showing a retarder in UP's Bailey Yard illustrates why an employee could not conduct a meaningful inspection in the available time. (Ronci V.S., Ex. 1.) A retarder is a lengthy device with four surfaces that grip a car's wheels. An employee could not identify oil or tallow or similar substances on a retarder with a "cursory" glance.

¹⁹ NAFCA observes that railroad employees might be better positioned than customer personnel to detect railcars that leak after they are released (NAFCA Reb. at 22), but it never explains why. When UP detects such a leak, UP cannot reasonably require the party responsible for improperly securing the car to pay for cleaning.

most NAFCA members voluntarily follow the safe loading and unloading practices required by Item 200-B. (UP Reply at 19-23.)²⁰

By contrast, the record shows why UP cannot address lading residue problems by increasing its inspections of railcars. UP witnesses explain that (i) lading residue is difficult to detect through railroad inspections – the hazard often will not be apparent (Barnum V.S. at 2-5; Ronci V.S. at 18-19); (ii) relying solely on the railroad to address lading residue problems by stopping cars for cleaning after customers release them is inefficient and disruptive to railroad operations (Ronci V.S. at 18); and (iii) customers that load and unload cars are in a far better position than railroad personnel to discover lading residue problems because they will know whether product spilled on the car or whether the car used customer tracks contaminated by lading residue (*id.* at 19-20).

Finally, NAFCA ignores that UP does more to address lading residue issues than perform FRA-mandated inspections and enforce Item 200-B. As the record shows, UP uses Item 200-B as one element of a broad effort to encourage customers to address safety hazards created by their loading or unloading processes. UP focuses substantial effort on addressing loading and unloading practices because that is the place in the chain where problems arise: if products are properly loaded and unloaded or any spills are cleaned, and if loading and unloading tracks are kept clear of lading residue, cars with unsafe lading residue will never enter the transportation

²⁰ NAFCA suggests that UP could address lading residue problems by providing work gloves to its employees, and it even found a witness to expound on the benefits of gloves. (NAFCA Reb. at 19 & Martin Reb. V.S.) However, NAFCA provides no evidence that UP employees do not wear appropriate equipment. Nor does it explain how gloves would prevent overspeeds. Rather, the sufficiency of gloves to avoid employee accidents is belied by NAFCA’s own statements that (despite using gloves) “more and more shippers” avoid “sometimes slippery catwalks” in favor of platforms. (NAFCA Reb. at 19.)

system. (Ronci V.S. at 18.) UP thus spends its own money to visit customers' loading and unloading facilities to help identify problems and avoid future issues. (*Id.* at 20-22 & Ex. 6.)

* * *

In sum, UP's motive for Item 200-B is not to shift inspection costs or liability to shippers and receivers. UP's objective is to avoid accidents. Item 200-B reasonably advances that objective by ensuring that those responsible for loading and unloading railcars help to prevent unsafe cars from entering the transportation system.

V. Item 200-B is consistent with Board precedent.

Item 200-B is consistent with Board precedent that gives railroads wide latitude to establish rules to help ensure safe loading and unloading of railcars.

A. Item 200-B is consistent with precedent establishing that reduction of accident risk and operational disruptions is a legitimate objective.

NAFCA claims that Item 200-B is inconsistent with Board precedent because UP has experienced relatively few FRA-reportable accidents attributed to lading residue on railcar wheels. (NAFCA Reb. at 37.) However, Board precedent does not require railroads to suffer a certain number of serious accidents before they can adopt a rule designed to prevent accidents. Rather, as the *Coal Dust* decision makes clear, a rule has a sufficiently "solid foundation" if it addresses risks that "could contribute to future accidents." *Coal Dust* at 8; *see also id.* (BNSF could seek to reduce coal dust through a loading rule "[w]hether or not coal dust contamination of ballast was a substantial factor in the 2005 [Powder River Basin] derailments").

UP's evidence shows that Item 200-B responds to the very real risk of accidents: UP observed an increasing number of incidents attributable to lading residue on the exterior of railcars and tracked the problem to loading and unloading practices. (Ronci V.S. at 10-15.)²¹

Indeed, NAFCA does not dispute that lading residue on the exterior of a railcar creates a risk of accidents. NAFCA acknowledges the FRA accident data (NAFCA Reb. at 37), and its own witnesses explains that lading residue on railcar wheels can produce overspeed incidents (NAFCA Op., Grossman V.S. at 1) and can create a risk of injury to people using safety appliances on railcars (NAFCA Reb., Martin Reb. V.S. at 1 & Wallace Reb. V.S. at 2).²²

Under Board precedent, prevention of accidents caused by lading residue on the exterior of railcars is a legitimate objective.

B. Item 200-B is consistent with precedent establishing that railroads may adopt rules to supplement their own safety efforts.

NAFCA claims that Item 200-B is inconsistent with Board precedent because UP could address lading residue problems by increasing its own inspections of railcars and retarders. (NAFCA Reb. at 29-31.) However, Board precedent allows railroads to adopt reasonable rules to supplement their own safety efforts. In *Coal Dust*, the Board rejected shipper arguments that BNSF could not adopt a coal dust containment rule because problems created by coal dust could be addressed through railroad maintenance alone. *See Coal Dust* at 9. The Board found that BNSF could reasonably choose to adopt a containment rule "appropriately calculated to produce

²¹ UP's evidence also explains why a review of FRA-reportable incidents does not provide a complete picture of the risks. (*Id.* at 3-7, 8-9.)

²² NAFCA also complains that the Item 200-B is not "properly tailored" because it is not limited to certain commodities. (NAFCA Reb. at 20.) But, UP's experience is that problems arise from a wide variety of commodities. (Ronci V.S. at 7-8.) Indeed, NAFCA is mistaken when it says salt and potato flakes have not been a major cause of problems. (*Id.* at 7-8 & Exs. 2 & 6.)

reliable and efficient service,” rather than rely solely on maintenance activities that “consume resources and decrease capacity.” *Id.*

UP’s evidence shows that Item 200-B supplements its existing inspection efforts, which UP reasonably concluded are not sufficient alone to address the risks created by lading residue. (Ronci V.S. at 18-20.) UP also reasonably concluded that a rule designed to prevent customers from introducing unsafe cars into the transportation system in the first place was a more efficient and effective approach than incurring operational disruptions associated with setting out and returning rejected cars to customers for cleaning after railroad inspections. (*Id.*)

NAFCA provides no evidence that UP inspections alone could address lading residue problems more efficiently and effectively than customer compliance with Item 200-B. NAFCA also provides no evidence that the provision has led UP to reduce its pre-departure inspections, which is no surprise because such inspections are required by FRA rules.²³

Under Board precedent, Item 200-B reasonably places responsibility for safe loading and unloading of railcars on shippers and receivers.

C. Item 200-B is consistent with precedent establishing that customers must be able to assure they comply with a rule’s requirements.

NAFCA claims that Item 200-B is inconsistent with *Coal Dust* “because even after safe loading of a car tendered to UP, shippers cannot ‘be certain that [UP] would move their commodity without penalty.’” (NAFCA Reb. at 38, quoting *Coal Dust* at 12.) NAFCA is wrong. The problem in *Coal Dust* was that, even if cars were loaded correctly, coal dust could escape during transit and violate BNSF’s IDV rule. *Coal Dust* at 12. The Board said that a

²³ In *Coal Dust*, the Board did not credit naked assertions by coal shippers that “implementation of [a containment] tariff could prompt BNSF to reduce maintenance below acceptable levels.” *Coal Dust* at 9.

reasonable loading rule would allow shippers to take steps so “they could be certain that the carrier would move their commodity without penalty.” *Id.*

Here, shippers and receivers can take steps to assure themselves of complying with Item 200-B: if they load and unload railcars correctly, lading residue should not be on the exterior of the cars, and it will not escape in transit.²⁴ Even if product spills on the cars or pools under the wheels during the loading or unloading process, the customer can avoid incurring a surcharge under Item 200-B simply by cleaning the car before tendering it to UP. NAFCA members say that they routinely clean cars before releasing them (UP Reply at 19-22), and NAFCA presents no evidence that UP has ever stopped a railcar tendered by a shipper or receiver that cleaned the car after loading or unloading.

NAFCA also says that Item 200-B does not provide sufficient guidance about how much exterior lading residue makes a car unsafe, so “customers have to make the choice between leaving a ‘little’ amount of non-white glove residue on a car exterior or leaving an ‘unsafe’ amount.” (NAFCA Reb. at 38.) But there is no dilemma: Item 200-B does not tell customers they should leave a little lading residue on their cars; Item 200-B tells customer to “remove lading residue from the railcar’s exterior.”

Moreover, NAFCA provides no evidence that customers do not understand the term “unsafe.” UP has described its concerns in presentations to customers. (Ronci V.S. at 21-22 & Ex. 8.) When UP stops a car for cleaning, it provides the customer with pictures to help explain its concern. (*Id.* at 17.) NAFCA provides no evidence of any disagreements over UP’s

²⁴ As discussed above (*see* p. 8, *supra*), NAFCA provides no evidence to support its claim that product can escape from properly secured cars due to “jolts or impacts due to track conditions” (NAFCA Reb. at 22). As also discussed above, Item 200-B does not penalize an “innocent shipper” that has its car contaminated with another shipper’s product. *See* p. 13, *supra*.

application of Item 200-B. In sum, NAFCA does not show that UP's use of the term "unsafe" to addressing the range of hazards created by lading residue on the exterior of railcars is unreasonable.

D. Item 200-B is consistent with precedent establishing that railroads can use surcharges to discourage violations.

A customer that releases a car in violation of Item 200-B is required to pay for the lading residue to be cleaned from its car, which is no more than it should have done in the first place, and it is also subject to a surcharge. If there were no surcharge, some customers might ignore the risks they would be creating for others and try to save money by paying for cleaning only when the railroad stops their cars. Similar surcharges appear in many railroad tariffs, and NAFCA provides no evidence that UP's surcharge is unreasonable here.²⁵

VI. Conclusion

For the reasons described above, NAFCA has not shown that Item 200-B is unreasonable. Item 200-B is a reasonable response to a real problem. Moreover, the provision does not shift UP's responsibilities or liabilities to shippers or receivers; rather, it reasonably requires the parties responsible for loading and unloading railcars to tender cars in a safe condition. Accordingly, the Board should dismiss NAFCA's complaint.

²⁵ Examples of other tariffs appear in UP Counsel's Exhibits D, K & L. See generally *Nat'l Grain & Feed Ass'n v. Burlington N.R.R.*, 8 I.C.C.2d 421, 434 (1992), *rev'd in part on other grounds sub nom. Nat'l Grain & Feed Ass'n v. United States*, 5 F.3d 306 (8th Cir. 1993).

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of June, 2012, I caused a copy of the Final Brief of Union Pacific Railroad Company to be served by hand on:

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