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1 BEFORE THE SURFACE TRANSPORTATION BOARD

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3 NORTH AMERICA FREIGHT CAR :
4 ASSOCIATION; AMERICAN FUEL AND :
5 PETROCHEMICALS MANUFACTURERS; :
6 THE CHLORINE INSTITUTE; THE :
7 FERTILIZER INSTITUTE; AMERICAN : Docket Number
8 CHEMISTRY COUNCIL; ETHANOL : NOR 42144
9 PRODUCTS, LLC, d/b/a POET :
10 ETHANOL PRODUCTS; POET :
11 NUTRITION, INC.; and :
12 CARGILL INCORPORATED, :
13 Complainants, :
14 vs. :
15 UNION PACIFIC RAILROAD COMPANY, :
16 Respondent. :
17 ----- x

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11 ORAL ARGUMENT

12

13 Washington, D.C.

14 Thursday, September 29, 2016

15

16 BEFORE: HONORABLE JOHN P. DRING

17 ADMINISTRATIVE LAW JUDGE

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20 REPORTED BY:

21 JULIE BAKER, RPR, CRR

22

1 Oral argument before HONORABLE JOHN P. DRING,
2 on Thursday, September 29, 2016, in Washington,
3 D.C., at the offices of the Federal Energy
4 Regulatory Commission, 888 First Street, Northeast,
5 Hearing Room 1, at 10:04 a.m., when were present on
6 behalf of the respective parties:

7

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16 LLC, d/b/a Poet Ethanol Products, and

17 Poet Nutrition, Inc.

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22 --continued--

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On behalf of Respondent Union Pacific
Railroad Company

1 PROCEEDINGS
2 PRESIDING JUDGE: We're on the record.

3 I'm Administrative Law Judge John Dring
4 and today we have oral arguments on a motion to
5 compel discovery in Surface Transportation Board
6 North American Freight Car Association, et al.
7 versus Union Pacific Railroad Company, Docket Number
8 NOR42144.

9 As the 213 pages of transcript from the
10 last oral arguments clearly show, we've been over
11 this ground in some detail, and it's my thought -- I
12 may be wrong and if I am, please tell me -- but it
13 seems to me that the accomplishments that we made
14 the last time we were together should be able to be
15 used to shorten this -- these oral arguments today
16 for a couple of reasons. Let me finish unless you
17 really need to --

18 MR. MONROE: No, no.

19 PRESIDING JUDGE: Recall the last time
20 that I said -- I expressed my rather expansive view
21 of relevance, and I see no reason that that view
22 should not dictate what we do today in terms of

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1 arguments on relevance.

2 The flip side of that was burden, and I
3 think to my mind, we did a pretty good job on
4 limiting the burden on the nonparty tank car owners.

5 I think that, Mr. Monroe, you can still argue on
6 burden. I'd like to make sure that the burden on
7 you of whatever we do is appropriate and what I
8 order is the least burdensome amount of work you
9 have to do to still give Mr. Rosenthal what he needs
10 to support his theory of the case.

11 You had something you wanted to tell me,
12 Mr. Monroe?

13 MR. MONROE: I did, your Honor. Based
14 upon, I think you said, the 216 pages of the last
15 hearing, I did talk to Mr. Rosenthal, and we tried
16 to -- based upon what either your actual or the
17 sense of what your rulings were on relevance, we
18 tried to work through a lot of these disputed
19 requests.

20 We've basically agreed to give a lot of
21 stuff, putting aside the relevance, and we've tried
22 to narrow it down. When the burden of trying to

6

1 respond to the request would be significant, we
2 tried to narrow that down, so we have made some
3 progress.

4 I do have to say that we have one, I
5 think, major issue that relates to a number of the

6 requests, and that has to do with the issue of

7 costs. We did talk about that --

8 PRESIDING JUDGE: The cost of production?

9 MR. MONROE: No, no, the underlying

10 ownership costs.

11 PRESIDING JUDGE: Oh, I see. Yes.

12 MR. MONROE: We talked about that issue in

13 connection with the car owners, but it's a different

14 issue with respect to Cargill, and I think that's an

15 issue that relates both to burden but it also,

16 frankly, is a relevance issue.

17 PRESIDING JUDGE: I can entertain that,

18 certainly. I see a distinction. Do you want to

19 make that argument now, please?

20 MR. MONROE: Sure. There are a number of

21 these requests that ask for all kinds of cost data.

22 What is the cost to repair the cars? What does it

7

1 cost to maintain them? What does it cost to clean

2 them? What does it cost to buy them? UP is asking

3 for a lot of specific ownership costs for Cargill.

4 Now, with respect to the car owners that

5 were here the last time, those car owners submit

6 their data to Railinc, and that -- those ownership

7 costs are the basis for the development of the

8 mileage allowances rate.

9 PRESIDING JUDGE: May I ask you a
10 question?

11 MR. MONROE: Sure.

12 PRESIDING JUDGE: Forgive my ignorance,
13 but do you own any of your cars?

14 MR. MONROE: Yes.

15 PRESIDING JUDGE: What percentage do you
16 own?

17 MR. MONROE: I don't really know the
18 answers to that. We own and/or lease hundreds of
19 cars.

20 PRESIDING JUDGE: I thought you were
21 attempting to distinguish your ownership of your
22 cars from the ownership that the nonparty tank car

8

1 owners have.

2 MR. MONROE: Well, the distinction is
3 this: Three of those tank car owners are the
4 entities that submit their cost data to Railing.

5 PRESIDING JUDGE: Oh, yes, that's correct,
6 yes.

7 MR. MONROE: We do not.

8 PRESIDING JUDGE: That's correct. I

9 remember. Ms. Kennedy got out Trinity's --

10 MR. MONROE: Exactly. We're in the same
11 position as --

12 PRESIDING JUDGE: Trinity's.

13 MR. MONROE: -- Trinity in that sense.

14 Our costs don't go into the calculation of the
15 mileage allowance.

16 PRESIDING JUDGE: Correct, yes.

17 MR. MONROE: To the extent that's an
18 issue, in other words, that UP wants our costs
19 because they want to show that the mileage
20 allowances somehow don't match up with the costs, we
21 don't believe that's relevant.

22 PRESIDING JUDGE: Is there an intellectual

9

1 inconsistency in allowing -- Mr. Rosenthal, you may
2 want to address this, in treating Cargill and the
3 Poet entities the same way as I treated
4 Ms. Kennedy's Trinity client? Is there a
5 distinction there?

6 MR. ROSENTHAL: I think for a couple
7 reasons, Poet, I believe, is different because I
8 don't believe Poet owns any of their own tank cars,
9 so I think this is a Cargill issue.

10 MR. WILCOX: They don't but they still

11 have costs. UP has asked for ownership costs but

12 also costs of leasing.

13 PRESIDING JUDGE: Mr. Wilcox, do you think

14 this is also a Ms. Kennedy-type problem?

15 MR. WILCOX: Yes. It's the same issue,

16 same relevance issue. These costs don't go into the

17 Ex Parte 328 allowances and Poet is not asking for

18 anything other than allowances.

19 PRESIDING JUDGE: I interrupted

20 Mr. Rosenthal's thought process, and he's a smart

21 guy, so I'm sure he can pick up where he left off.

22 But I didn't mean to do that.

10

1 MR. ROSENTHAL: So your Honor, there are

2 two issues with costs when it comes to Cargill and

3 Poet. One is the issue that Mr. Monroe raised,

4 which is, we would like to show that the costs

5 developed using this Railinc -- it's not a Railinc

6 formula -- negotiated industry wide formula. We

7 want to show that it has done an exceptionally poor

8 job and that's why people don't use mileage

9 allowances.

10 PRESIDING JUDGE: Do you think the Railinc

11 data are ineffective?

12 MR. ROSENTHAL: It's not Railinc data.
13 There's a formula that's used to develop what they
14 call ownership costs and it's based on initial
15 acquisition price and assumptions about depreciation
16 and assumptions about interest rates. These are all
17 sort of assumptions that were made back in--

18 PRESIDING JUDGE: But that was Ex Parte
19 328 that established that.

20 MR. ROSENTHAL: These assumptions were
21 established back in 1987. Some of them were dating
22 back even further.

11

1 PRESIDING JUDGE: Is your complaint really
2 with the work product end result of Ex Parte 328?

3 MR. ROSENTHAL: No. It really goes to an
4 interpretation -- one, it goes to the interpretation
5 of what the parties were doing in Ex Parte 328.
6 They're arguing that Union Pacific has an obligation
7 on all of these cars to pay mileage allowances
8 according to the Ex Parte 328 formula. We don't
9 think that's what the parties agreed to or the ICC
10 ordered in Ex Parte 328.

11 We think what they did was say if you're
12 going to use mileage allowances as part of your
13 ratemaking, use this formula. This is an approved

14 negotiated formula. We don't think they said you
15 had to use it all the time. One argument that we
16 think supports that is showing no one would have
17 bound themselves forever forward into this 1987
18 formula based on all of these factors, so we'd like
19 to show there's a difference.

20 When we came to the tank car owners, when
21 it came to the tank car owners who are nonparties,
22 and we said -- and Ms. Kennedy stood up and started

12

1 arguing that Trinity shouldn't be involved because
2 Trinity doesn't submit the costs, I honestly didn't
3 think it was worth arguing that point because I was
4 going to get costs -- I believe I'll get costs from
5 the other three, and that's fine.

6 Poet and Cargill are parties, and I think
7 they can be expected to bear a little more of a
8 burden, and they're the ones who are asking us to
9 actually -- potentially pay damages based on this
10 formula, so I'd like to see the costs.

11 The second reason why costs are relevant
12 for Poet and Cargill is they are actually asking for
13 damages in this case, and as we said in the brief,
14 our view is under the STB's rules, the Board can't

15 simply say you get damages based on Ex Parte 328,
16 that if we haven't actually compensated for their
17 ownership and maintenance costs, what they get are
18 their actual damages and to get their actual
19 damages, we have to look at what their actual
20 ownership and maintenance costs are, not what these
21 Ex Parte 328 calculations are.

22 PRESIDING JUDGE: I understand.

13

1 MR. ROSENTHAL: It goes -- we'd like their
2 information to build our more general argument, but
3 as long as they're going to pursue damages, we think
4 they have to prove actual damages, and this is our
5 chance to get evidence on issues of damages from
6 parties that are seeking damages.

7 PRESIDING JUDGE: Okay. I understand
8 that. It's fairly straightforward unless Mr. Monroe
9 convinces me that this is just another one of those
10 ugly messes that we have.

11 MR. MONROE: It starts -- UP's position
12 starts with the presumption that EP328 -- Ex Parte
13 328 just doesn't matter. It's kind of a voluntary
14 thing. You can do this if you want or you don't.
15 But that's not the case. EP328 is an industrywide
16 Board-approved, ICC-approved order.

17 So the question is if UP thinks the
18 mileage allowance calculation or the formula or the
19 costs to consider or whatever doesn't make any sense
20 anymore or maybe it never made any sense, then EP328
21 has a procedure for reopening it and challenging
22 that. That's not an issue that can be challenged

14

1 here, we don't believe.

2 In fact, I think the Association's
3 response cited precedent that said if you have a
4 rulemaking, which EP328 was, you can't change that
5 rulemaking through an adjudication. You have to
6 have notice and comment to give --

7 PRESIDING JUDGE: I remember reading all
8 of that.

9 Mr. Rosenthal, why do you think that
10 following EP328 is precatory?

11 MR. ROSENTHAL: I mean, for a couple of
12 reasons. One, because we think the decision
13 actually says if you have a contract, you don't have
14 to pay these mileage allowances.

15 PRESIDING JUDGE: That's true.

16 MR. ROSENTHAL: And I think as we've
17 established through the discovery we've had so far,

18 almost nobody -- just as a practical matter, almost
19 nobody, almost no railroad pays mileage allowances
20 to anybody. Cargill, I don't believe has ever
21 received a mileage allowance payment in the memory
22 of who they have collecting this going back to the

15

1 mid-2000s.

2 PRESIDING JUDGE: Do you feel less
3 comfortable in explaining your theory of the case,
4 how you would present this evidence if you obtain
5 it, how you would present it, toward what end?

6 MR. ROSENTHAL: Again, I just think for
7 this purpose, for the purpose of do we have an
8 obligation to may mileage allowances, not the
9 damages questions, but do we have an obligation to
10 pay mileage, again, I just think it's evidence of
11 why parties never agreed to what they think this
12 Ex Parte 328 agreement says.

13 PRESIDING JUDGE: You never agreed. You
14 mean they have contracts instead of relying on 328?

15 MR. ROSENTHAL: That they never would have
16 agreed that they must pay mileage --

17 PRESIDING JUDGE: Oh, you're talking about
18 the understood intent at the time that the
19 rulemaking took place?

20 MR. ROSENTHAL: The understood intent at
21 the time the ICC approved its agreement. Our basic
22 argument is no one would have agreed to a formula --

16

1 you can also look at the history of these mileage
2 allowance formulas and see how frequently they've
3 changed over time, that there were until 1987 --
4 there were a couple adjustments made afterwards --
5 but there's just no sense that anybody ever meant
6 that this had to be done, that there are ways to get
7 out of it, that you can have contracts. You can
8 have tariffs that have what are called zero mileage
9 rates and you don't have to pay them.

10 PRESIDING JUDGE: Is it your intent to
11 argue before the Board that this rule was actually
12 that flexible? Are you going to do that?

13 MR. ROSENTHAL: If their intent is
14 actually to argue that we must pay mileage
15 allowances on all of our movements regardless of
16 what the contracts or the tariffs say, yes, that
17 would be our argument. Just one more point because
18 I feel bad if I don't make it.

19 In our motion to dismiss -- we filed a
20 motion to dismiss or to require them to state more

21 definitely what their complaints were, one of the
22 things that we asked the Board to do was to require

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1 the Complainants to identify the rates, routes, tank
2 car types, car ownership costs, car conditions to
3 which they allege UP is not adequately compensating
4 them, and the Board said we're not going to grant
5 your motion here, but that the Board concludes that
6 Union Pacific seeks information more appropriately
7 obtained in discovery.

8 PRESIDING JUDGE: I remember seeing that.

9 MR. ROSENTHAL: The motion was denied.
10 The Board does believe the information sought in the
11 motion to make the amended complaint more definite
12 is relevant to the proceeding and the underlying
13 issue. The Board concludes that UPC's information
14 was more appropriately obtained in discovery.
15 That's the Board's order on page 5 from the order
16 served December 21, 2015.

17 So the Board thinks it's relevant for one
18 reason or another, but we'd be asking for the same
19 type of information, whether it's for purposes of
20 damages or our broader argument for interpreting the
21 parties' agreement.

22 MR. WILCOX: First of all, that statement

1 in the decision the Board was responding to, as
2 Mr. Rosenthal said, there's a bunch of issues that
3 the Board was responding to, not just the specific
4 issue of costs. Shoot. My cold is kicking in.

5 PRESIDING JUDGE: I'm channeling you,
6 Mr. Wilcox. I understand. I believe what you're
7 arguing.

8 MR. WILCOX: Go ahead, David. It's
9 DayQuil or whatever.

10 PRESIDING JUDGE: It's very unlike you,
11 Mr. Wilcox.

12 MR. WILCOX: I know.

13 PRESIDING JUDGE: Thank God this is not
14 the first time I've seen you. All right.

15 Mr. Monroe.

16 MR. MONROE: There are two issues and let
17 me address the first one. The first issue is, can
18 they challenge Ex Parte 328 in this proceeding which
19 is essentially what they're saying and I don't think
20 there's anyway that they can do that.

21 Number two, there's a more specific
22 argument they're making, which is well, Cargill is

1 asking for reparations, and so we're entitled -- if
2 they're saying -- Cargill is saying it's entitled to
3 be compensated for its car ownership costs under the
4 statute, which requires the railroads to compensate
5 providers of cars. Therefore, we're entitled to see
6 what their underlying costs are because if we owe
7 them something, that's what we owe them.

8 But that's one, not the case because of
9 Ex Parte 328, but more on a more practical level,
10 Cargill has said and the Complainants have said what
11 we're seeking is the recovery of mileage allowances
12 under 328. We're not seeking to recover our costs,
13 our actual damages. We think we're entitled -- to
14 the extent we're entitled to be compensated, we're
15 entitled to be compensated by the mileage allowances
16 per the Ex Parte 328.

17 We are not in our case -- and we will
18 stipulate -- we are not submitting our costs and
19 saying this cost is this much to buy the cars, costs
20 this much to repair the cars and therefore, you owe
21 us this much. We're saying Ex Parte 328 applies.
22 And if it applies, we're entitled to the mileage

1 allowances times the number of loaded miles on
2 qualifying -- that's it.

3 So we're not submitting -- there's no
4 reason -- if we're wrong, if Ex Parte 328 doesn't
5 apply and they have -- UP has the right to say well,
6 I don't think I want to abide by that industrywide
7 agreement approved by the Board, then we lose.

8 PRESIDING JUDGE: Let me ask you a
9 question. I appreciate what you're saying here, and
10 I wasn't -- I heard everything. I wasn't
11 disregarding you and thinking wonderful thoughts
12 about what I'm going to say right now, but in this
13 building, we take umbrage at parties attempting
14 collateral attacks on either our precedential
15 rulings or on our regulations.

16 I don't know about Board practice, but it
17 sounds to me like you think that what Mr. Rosenthal
18 is propounding here as his theory of the case is a
19 collateral attack on EP328. Is that correct?

20 MR. MONROE: That is correct.

21 PRESIDING JUDGE: What is the standard
22 Board practice when a party like yourself faces what

1 it thinks is a collateral attack on one of the

2 sanctities of the Board like this?

3 MR. MONROE: I'm not sure that there is a
4 practice because it depends upon when that
5 collateral attack is --

6 PRESIDING JUDGE: That's correct.

7 MR. MONROE: This is how it's been
8 presented.

9 PRESIDING JUDGE: This is the way we do it
10 here, too. So at what point do you think it would
11 be appropriate to complain to the Board that we have
12 a collateral attack here on EP328, at what point?

13 MR. MONROE: I think we are doing that
14 right now. In other words --

15 PRESIDING JUDGE: You're not doing it
16 right now because you're before me.

17 MR. MONROE: We view you as the Board's
18 representative --

19 PRESIDING JUDGE: I know, I know. I'm not
20 going there with you. I'm asking you another
21 question. This is clearly discovery. What you're
22 suggesting here, I think, may also be something

1 beyond and above discovery insofar as a collateral
2 attack on EP328.

3 Do you agree that that might be possible
4 and if so, at what point, in what format do you
5 present that objection to the Board?

6 MR. MONROE: I'm not sure. But I guess I
7 would say one avenue is to -- let's assume or let's
8 hypothesize that you were to rule that these costs
9 were relevant. Then we would have the option of
10 appealing that to the Board and presenting the
11 argument that --

12 PRESIDING JUDGE: That it's a collateral
13 attack.

14 MR. MONROE: It's clearly not relevant
15 because of this, this and this and really, the
16 arguments that are being advanced in support of the
17 relevance is really a collateral attack.

18 PRESIDING JUDGE: Let me just offer you
19 some reflection here. I have seen similar
20 situations. I've been involved in similar
21 situations in FERC practice, and I have found that
22 truncating arguments with a successful attack on

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1 those arguments, that they are collateral attacks on
2 Commission policy, serves to shorten the entire
3 process. I think it can have a salutary effect.

4 Do you agree with that?

5 MR. MONROE: Oh, absolutely.

6 PRESIDING JUDGE: Well, I think that
7 adds -- my mind right now -- it's a work in
8 progress -- but my mind is to allow Mr. Rosenthal to
9 get some cost information from you, but it's not
10 going to be an overwhelming burden. Then you can
11 take that to the Board and truncate his arguments by
12 successfully arguing to the Board this is a
13 collateral attack. To me, that sounds effective.

14 MR. MONROE: I don't disagree.

15 PRESIDING JUDGE: I think it might make
16 everyone a little happier at the end because
17 Mr. Rosenthal doesn't have to go all the way down
18 this road and spend a lot of time and resources
19 putting his argument together and presenting it to
20 the Board only to be knocked down at the end because
21 it was a collateral attack. Does that make sense?
22 Are you just shaking your head yes because I'm the

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1 Judge? You can say no.

2 MR. MONROE: No. I understand where
3 you're coming from. I am not surprised --

4 PRESIDING JUDGE: You know --

5 MR. MONROE: -- based on the last hearing.

6 PRESIDING JUDGE: All right. But I have
7 to tell you, I've been at this a while, and I've had
8 some pretty excruciating cases, and I've had several
9 of these issues, these collateral attack issues
10 presented to me in various guises, and I've found
11 them useful in focusing the arguments of the case in
12 a way that we don't get a lot of extraneous
13 materials in the record or have a longer hearing
14 than is necessary, so I'm giving myself a pat on the
15 back for this.

16 I think you know where we're going with
17 this. You've got cost information you want. He
18 doesn't want to give it to you, but I want him to
19 give you something. What's the least you'll be
20 satisfied with and if I agree with you and he kind
21 of begrudgingly shakes his head yes, then we've got
22 a deal. Okay? This is not ex cathedra. I'm trying

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1 to cut a deal here.

2 MR. ROSENTHAL: I understand. Because of
3 the way these arguments have proceeded, I find
4 myself again in the position where I was with the
5 tank car owners, where I can't evaluate the burdens
6 on them. I assume that somebody figures out --

7 PRESIDING JUDGE: I know you can't.

8 MR. ROSENTHAL: So I assume that somebody
9 figures out what are the costs of owning and
10 maintaining these tank cars. I assume it's not a
11 huge thing because even like the tank car companies,
12 I assume the car people at Cargill are a narrow
13 slice of this company.

14 PRESIDING JUDGE: Yes. And would you be
15 satisfied if I ordered Mr. Wilcox and Mr. Monroe to
16 have their clients provide you with the same type of
17 information that the tank car owners I ordered to
18 provide to you?

19 MR. ROSENTHAL: I wouldn't, your Honor --

20 PRESIDING JUDGE: Because you didn't think
21 that was enough either.

22 MR. ROSENTHAL: The tank car owners was

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1 studies, reports and analyses.

2 PRESIDING JUDGE: Right.

3 MR. ROSENTHAL: I think it's more likely
4 in the case of these tank car companies that they
5 would actually have some sorted of study, report or
6 analyses because it's their business. I'm not as
7 convinced that Cargill and Poet would have it.
8 Frankly -- I worry that I'd be getting nothing if it

9 was limited to studies, reports and analyses.

10 Again, I disagree entirely that it's a collateral

11 attack.

12 PRESIDING JUDGE: I understand you're

13 going to disagree with that. I'm trying to move

14 things forward here.

15 MR. ROSENTHAL: Understood. We filed a

16 motion to dismiss. We thought this could be decided

17 as a matter of law so I'm happy to have the Board

18 put in a position where they can say where we're

19 right again.

20 PRESIDING JUDGE: Good.

21 MR. ROSENTHAL: But as far as saying what

22 these documents are, I can only assume that there's

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1 some person, department, collection of people at

2 these companies because they're a business and

3 they're tracking their costs of owning and

4 maintaining these cars. I don't know exactly what

5 the form is. I don't want every single little

6 document that comes in when they do a repair on a

7 car or tighten a bolt or replace something.

8 So I'm asking and our discovery was

9 directed at getting summary data in one form or

10 another. We have -- in our interrogatories, we set

11 out some categories that we thought would apply to
12 individual cars and collective groups of expenses
13 that are allocated. In our document requests, we
14 just talked about documents sufficient to show the
15 costs. I don't know the details, but I don't think
16 it should be -- if we're just going to fight about
17 the yes or no, order the discovery and --

18 PRESIDING JUDGE: What?

19 MR. ROSENTHAL: If the main purpose of
20 this is to get the issue in front of the Board as to
21 whether this is relevant or not, I think we can
22 order the discovery that's asked.

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1 PRESIDING JUDGE: That's not the main
2 purpose. Off the record for just a second.

3 (Discussion off the record.)

4 PRESIDING JUDGE: Back on the record.
5 Mr. Monroe.

6 MR. MONROE: I don't want to get into --
7 we are in an argument. I don't want to be petty
8 about it, but the requests -- you've looked at the
9 requests. It's not -- they're not asking for in
10 some general sense, the accounting sense, this is
11 what your cost of ownership. They're asking for

12 each car, how much do you pay to buy it? How much
13 do you pay to maintain it? What were the taxes?

14 PRESIDING JUDGE: Yeah, Mr. Rosenthal,
15 that's his opening salvo. He does that all the time
16 with everybody and he doesn't get all of it, but he
17 gets some of it.

18 MR. MONROE: I guess this is gratuitous --

19 PRESIDING JUDGE: Let me just,
20 parenthetically, let me state that Mr. Rosenthal, I
21 appreciate why he did it, but he's incorrect that
22 the easy way to do it is just say okay, give them

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1 all the cost data and if this is a collateral
2 attack, the Board can tell us. Because that
3 completely ignores the burden aspect. All right.

4 Continue.

5 MR. MONROE: Perhaps this is a somewhat
6 collateral point as well, but Cargill knows what
7 some of its costs are. Okay. They clearly track
8 some of these costs, but they don't track all of
9 these costs. Whatever we end up giving them is not
10 going to be very useful anyway.

11 PRESIDING JUDGE: Let me just say if you
12 don't have costs and they're not readily aggregated
13 from some other place, I'm not going to order you to

14 do it. I'm generally not disposed to ordering
15 parties to do something that they can't do.
16 So if you have costs, I think it's not an
17 undue burden to inform Mr. Rosenthal what those
18 costs are, but you don't have to create some
19 methodology for discovering costs when you don't
20 normally in the course of business, aggregate those
21 costs and keep them somewhere on your books.
22 MR. MONROE: Let me explain one of my

30

1 problems with providing costs. I think this is
2 right, but I'm not a hundred percent so I don't want
3 to be bound by this because I'm still investigating
4 it, but my understanding is the way Cargill accounts
5 for their costs is that they don't individually
6 account for car costs. They account for
7 transportation costs and so they know what they pay
8 for transportation. Transportation includes car
9 costs. It includes freight rates and whatever -- it
10 includes everything that relates to transportation.
11 Whether they break that out or not into
12 well, these are leasing costs -- we're producing a
13 lease so they can determine what the lease costs
14 are. This is not how much we paid to fix this valve

15 or tighten that bolt or something like that. I
16 don't believe they do. I'm not a hundred percent
17 sure because I haven't traced it down to the last
18 guy yet.

19 PRESIDING JUDGE: I've dealt with Cargill
20 on the other side of your business. And I found,
21 like most large corporations, it has a well ordered
22 corporate mind, if you will. I would imagine that

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1 while you may not have records or books that
2 indicate with that specificity what you paid for a
3 certain bolt for a certain car, there is a certain
4 level of aggregated data I think you would have on
5 costs.

6 It wouldn't simply be an end number on
7 transportation costs which lumps in everything.
8 Logically, it's got to be more granular than that.

9 So what I'm suggesting is that you
10 investigate the level of granularity of your
11 retained records and that's what we would talk about
12 producing as long as somehow that's not an undue
13 burden.

14 MR. MONROE: To the extent -- I think I've
15 described it before. Cargill has an outside
16 consulting firm that processes a lot of its data,

17 its car data so it keeps track of certain things.

18 PRESIDING JUDGE: Right.

19 MR. MONROE: I believe in that database,

20 they can -- there are certain costs that are

21 tracked. So to the extent that we have to produce

22 costs, then we can certainly do that to the extent

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1 it's a pushed button or a standard report.

2 The problem that we have, and we'll

3 probably deal with it in a minute with respect to a

4 specific request here, is that to the extent it's

5 not a standard report, then they put programmers on

6 it. We've got to program this and we've got to do

7 this and we've got to do that which costs a lot of

8 money and I think the last time I quoted last time

9 half a million dollars to come up with one thing.

10 That's the problem.

11 But if it's certain costs that they track

12 that are in this database that we can pull out, then

13 yes, we can do that and that's not going to be a

14 huge burden. But that's not going to be all of the

15 costs unfortunately. I don't want to be in a

16 position of saying okay, I've agreed or at least

17 I've been ordered to produce costs or producing

18 costs, but I don't want it to be bound to the
19 situation that I'm producing all the costs because
20 I'm not. I'm not going through all the invoices.
21 PRESIDING JUDGE: I understand and
22 appreciate your dilemma here. How long would it

33

1 take you to determine what cost data are available,
2 readily available?
3 MR. MONROE: I more or less have
4 determined that. There are some open issues, one of
5 them being whether they could actually just --
6 somewhere, in accounting somewhere, there's a number
7 that says this is how much we pay. We have 500 cars
8 and this is what our costs for those cars were this
9 year. I guess you could divide -- it seems to me as
10 you suggested, it seems to me that it should exist
11 somewhere, but so far, I've been told it doesn't,
12 okay, so -- but I'm still tracking that.
13 I know there are costs -- it's called
14 AllTranstek which is the outside consultant. They
15 have some costs in there. I can produce some of
16 those costs but clearly not on a per-car basis and
17 not with the specificity of we paid this amount of
18 taxes on this car or we paid this amount of
19 maintenance on this car. That would require diving

20 into boxes of documents and invoices.

21 PRESIDING JUDGE: Okay.

22 Mr. Wilcox?

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1 MR. WILCOX: Let me try to speak again as
2 to Poet. We have a spectrum here with these
3 entities, Poet Nutrition. They only lease 158 cars.
4 They use them for corn oil so they're the smallest.
5 In terms of data, they have data. They don't have a
6 lot of boxes and boxes of data. They only have 158
7 cars. They've only been moving them since 2014.
8 There is data and you've heard the relevance
9 argument.

10 As to Ethanol, Ethanol has 2600 cars and
11 it's similar to, as Mr. Monroe described, but
12 they're not as big as Cargill so they may not --
13 they don't use the real treads. They have their own
14 people. I asked, in light of the prior hearing and
15 getting ready for this one, in response to number
16 20, in terms of the costs of maintaining, all the
17 things that UP has asked for.

18 The e-mail back would entail every railcar
19 repair work which would include an extensive e-mail
20 search as well a search of all hard copies and any

21 offsite stored data. In order to compile the
22 information, we would need someone to go through

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1 eight to 10 e-mail boxes which may or not still be
2 available and match that up with all invoices that
3 are available that are able to be found in the
4 accounting archive system.

5 This data will likely only provide totals,
6 not any detail of work performed to find the
7 relevant data. We would need to go through paper
8 invoices which would entail 500 to 2000 invoices per
9 year stored in boxes in two locations and an offsite
10 storage for a limited number of prior years. And
11 it goes on that "the time to do all of this would be
12 a year."

13 What Poet does is they take -- it's
14 similar to what Mr. Monroe described, they have
15 people that are tracking the cars, getting the
16 e-mails and they have a tally, and so it's on an
17 annual basis and it may be on a monthly basis of
18 what their expenses are for their fleet and an
19 aggregate number. It's not broken out by car.

20 You can come up with an average cost per
21 car by taking what cars they've leased, divided by
22 the operating costs that they've calculated based on

1 all this stuff and that's how Poet aggregates, Poet
2 Ethanol. Poet Nutrition would have more granular
3 data because they just don't have as many cars --

4 PRESIDING JUDGE: Would that Poet Ethanol
5 information be of use to you still? I'm not going
6 to order him to go through a year's study.

7 MR. ROSENTHAL: Your Honor, I am not
8 requesting for every e-mail, as I said about the
9 costs of replacing X. But it does sound like from
10 what I heard from Mr. Wilcox, that at some point,
11 the information is compiled and produced. Certainly
12 the top number would be relevant, but I suspect that
13 whoever is compiling them, that there is something
14 below that top level --

15 PRESIDING JUDGE: That was my question to
16 Mr. Monroe as well. There's some level of
17 granularity that's also sensible. We have to find
18 the sweet spot between that's useful and something
19 at the same time is not unduly burdensome.

20 MR. ROSENTHAL: That's right. I
21 understand that depending on how different companies
22 track things, I'm not looking for every paper about

1 every time we sent a car to the shop. What the tank
2 car owners have agreed to produce, their data to
3 Railinc, they actually do and maybe Poet and Cargill
4 don't, and they're different conditions of the tank
5 car owners have a different business.

6 PRESIDING JUDGE: A different rationale,
7 too.

8 MR. ROSENTHAL: Different rationale,
9 exactly. What the tank car owners do is track costs
10 by car and that's some of this Railinc data we
11 agreed to get. That's what I know exists for some
12 companies --

13 PRESIDING JUDGE: As you have
14 acknowledged, these companies are different than the
15 tank car owners.

16 MR. ROSENTHAL: I think that's right.
17 You're also right, your Honor. There's something
18 below that final number that says my car costs for
19 2015 were X million dollars.

20 PRESIDING JUDGE: It would be logical to
21 me at least as an uninformed outsider, that a
22 company of the size we're talking about would have

1 that sort of information somewhere, some level of
2 granularity below the final number.

3 Let me ask you procedurally, you folks
4 have had the pleasure of listening to me a lot now
5 about my philosophy of this case. Are we all adult
6 enough here to work this out with this guidance I've
7 given you today or do you want to sit here and go
8 line by line and work it out that way because the
9 problem with the latter of the alternatives is that
10 doesn't give Mr. Monroe an opportunity to do all the
11 legwork he's suggested that he really needs to do in
12 order to provide me with the appropriate and
13 responsible answer as to what's doable. Does that
14 make sense? I know that was a long compound,
15 complex sentence, but did you get it?

16 MR. MONROE: Your Honor, I think, and I'll
17 let Mr. Rosenthal agree or disagree, but we've
18 already talked. We've already gone through most of
19 these individual things and we either -- except for
20 this big issue of the costs, we've come to some
21 sorts of accommodation, there may be one or two that
22 we may need to talk about here today, but to a

1 certain extent Mr. Rosenthal has been willing to say

2 okay, I understand that's a burden --

3 PRESIDING JUDGE: He knows me now.

4 MR. MONROE: We've tried to say we can do
5 this, but we really can't do this.

6 PRESIDING JUDGE: That's what I'm looking
7 for.

8 MR. MONROE: We've narrowed things down or
9 agreed on most things but the issue is cost.

10 PRESIDING JUDGE: Can you do it on cost?
11 That's what I'm saying. With the discussion we've
12 had today on what's possible, what's not, what
13 should be produced, what shouldn't be, can you do
14 the same thing with costs now?

15 MR. MONROE: Here's what I would propose.
16 What I've asked Cargill is, what can we do. Here's
17 more or less what they've told me. I said can we
18 just figure out what our tank car costs are over the
19 whole fleet and the number of cars? They said we
20 don't think we can do that because it's mixed in
21 with other things. Then I said well, what can we do
22 in terms of actual repair costs and maintenance

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1 costs and things? Do you track some of that? And
2 they said yes.

3 PRESIDING JUDGE: What kind of things is
4 it mixed in with?

5 MR. MONROE: It's mixed it in with all of
6 the other transportation costs. That's what they
7 said.

8 PRESIDING JUDGE: Okay.

9 MR. MONROE: And it's also mixed leased
10 and owned. The second thing I said is we're being
11 asked for 157 different items of costs, which you
12 pay, so at some level somewhere there's an invoice.
13 Is there some easy way -- is there some data that
14 you have? And they said yes, some of our data on
15 some of these things are in this all AllTranstek
16 database.

17 To the extent it's in that database and
18 I've talked to the AllTranstek people and they said
19 there are two ways we can do this. There's the easy
20 way and the hard way. The easy way it will cost you
21 maybe \$10,000 and we can give you this. The hard
22 way is if you really want answers to what they're

41

1 asking, specific answers, then it's going to cost
2 you hundreds of thousands of dollars.

3 We can spit out whatever we have -- and I
4 need to make sure that we're talking \$10,000, not

5 \$100,000, but to the extent they can relatively
6 easily spit out the data of these costs, out of the
7 database, then yeah, we can do that. That will not
8 cover all of the waterfront, unfortunately, but
9 that's what we can do. Pretty much anything else is
10 going to and particularly to match it on a
11 car-by-car basis is going to be diving into --

12 PRESIDING JUDGE: I'm getting the sense
13 that car by car is really not doable, an undue
14 burden.

15 MR. MONROE: It should be matched up by
16 car. That part of it should be car by car.

17 PRESIDING JUDGE: I understand, but the
18 rest of it.

19 MR. MONROE: I'm not sure if it answered
20 your question. I've really gone down this road and
21 I have one or two more steps, but it's not like -- I
22 have a pretty good idea of how this works.

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1 PRESIDING JUDGE: Mr. Rosenthal rises
2 here. Recognizing I'm going to give you some cost
3 information, can you provide something positive,
4 suggestions as to how we're going to do this?

5 MR. ROSENTHAL: I think so, your Honor. I

6 find it passing -- I find it hard to believe but

7 perhaps true --

8 PRESIDING JUDGE: Are you going to say
9 passing strange?

10 MR. ROSENTHAL: I find it hard to believe
11 that Cargill doesn't have this information, but
12 perhaps true. I'm trying to formulate something but
13 perhaps the order is to provide ownership costs and
14 maintenance information that Cargill/Poet possess,
15 except on a -- they said they'd have to go to a
16 car-by-car invoice level, unless that data, the
17 car-by-car data --

18 PRESIDING JUDGE: Is readily available in
19 the database.

20 MR. ROSENTHAL: And if they have no other
21 information, then they have no other information.
22 If they have just paper invoices that are not part

43

1 of the system, I don't want that. But then at least
2 that's the record. That's what they -- in order to
3 give it. If they can't give it, they can't give it,
4 and there's nothing you or I can do about it, but
5 I'd like the record to reflect that's what they've
6 been asked to provide.

7 PRESIDING JUDGE: That sounds reasonable.

8 That's not an undue burdens and it memorializes what
9 you said you can already do.

10 MR. MONROE: If I understood what he said
11 correctly, yes. To the extent we have it in the
12 database in particular, and it's not going to cost
13 an arm and a leg to get it out of there, then yes.

14 PRESIDING JUDGE: Am I going to have my
15 law clerk use this transcript here of what
16 Mr. Rosenthal just said and put that out as an
17 order? Is that all right with you?

18 MR. MONROE: I think so.

19 PRESIDING JUDGE: All right. We will do
20 that.

21 Yes, Mr. Wilcox.

22 MR. WILCOX: As I understand, Poet

44

1 Nutrition we were talking about, they have the
2 actual data. So there's not a lot. For Ethanol, as
3 I understand it, I don't know that there's a level
4 of granularity below -- between the summary and all
5 the other stuff in all the boxes. That may be all
6 that Poet has. I just want to make sure that the
7 order doesn't say you have to break out that summary
8 in some way and do some sort of special study at a

9 level of granularity.

10 PRESIDING JUDGE: The order should say you
11 don't have to do that. What you do is provide what
12 you have.

13 MR. WILCOX: Provide what you have and not
14 break it out.

15 PRESIDING JUDGE: Mr. Rosenthal.

16 MR. ROSENTHAL: We're all working on the
17 wording but it could be -- I think that's it.
18 Provide the ownership --

19 PRESIDING JUDGE: Why don't you folks do
20 the way the tank car owners did and get together,
21 get some suggested language and give it to me and
22 you write your own order. Do you want to do that?

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1 MR. ROSENTHAL: We can do that.

2 PRESIDING JUDGE: That's fine. The last
3 thing I want to do is misapprehend something you all
4 have agreed upon and give you something that nobody
5 likes. If you put it together yourself, I'll issue
6 it. Okay? You know what I want now.

7 MR. ROSENTHAL: I think we can agree on
8 the language.

9 PRESIDING JUDGE: That's fine.

10 MR. MONROE: Yes. No disrespect intended,

11 literally, but we do have the right to appeal the

12 relevance issue or collateral attack issue.

13 PRESIDING JUDGE: Ms. Kennedy said the

14 same thing, and I said of course you do. The same

15 applies to you.

16 MR. WILCOX: I made him stand up and say

17 it.

18 PRESIDING JUDGE: Do you remember when she

19 said that?

20 MR. MONROE: I actually do, right here.

21 PRESIDING JUDGE: That's right.

22 MR. ROSENTHAL: As was the case last time,

46

1 I think once we're through this cost issue, the rest

2 we can roll through fairly quickly. I think it's

3 worthwhile going through them to make sure that the

4 parties are in agreement, and as Mr. Monroe said,

5 there may be one or two issues.

6 PRESIDING JUDGE: That's fine.

7 MR. ROSENTHAL: Getting it on the record

8 would benefit us all so we don't have to write each

9 other long letters.

10 PRESIDING JUDGE: That's fine. Good use

11 of our time, I think. Why don't you proceed. Tell

12 me where we're going with this.

13 MR. ROSENTHAL: What I plan to do is
14 skipping over the cost-related questions because we
15 resolved just running through what was our -- what
16 was our motion -- our first motion --

17 PRESIDING JUDGE: Do you have a place to
18 refer me with this?

19 MR. WILCOX: Yes, your Honor.

20 If I could, Mike, the Poet requests are a
21 subset. You have more issues with Cargill. Are you
22 going to go through and when we hit one that's Poet,

47

1 are you going to talk about that or what?

2 MR. ROSENTHAL: That was my plan, that we
3 address them in the order of the motion.

4 MR. WILCOX: Okay. That's good.

5 PRESIDING JUDGE: Do you intend on giving
6 me one draft order for everything? Is that the way
7 you want to handle it? You're going to just give me
8 costs, or what?

9 MR. ROSENTHAL: I don't think it has to be
10 a draft order because I'm not sure if at the end of
11 the day we're going to require it. I don't know
12 whether at the end of the day we'll have to be
13 compelled. We may have agreed to some.

14 PRESIDING JUDGE: Let's me ask you the
15 more prosaic question, if there is one more possibly
16 prosaic. How long do you need before you get me
17 something? I have my calendar here.

18 MR. WILCOX: I hate to do this, but I
19 agree with Mike. I think we will have -- if we
20 reach agreement on these, and I -- on behalf of
21 Poet, Mr. Rosenthal and I haven't really spoken as
22 they have with Cargill. But I think it's likely,

48

1 and certainly in light of the discussion we had at
2 the last hearing, that we'll reach agreement on
3 these --

4 PRESIDING JUDGE: Do you still have a cost
5 draft order for me?

6 MR. WILCOX: If we require an order, but I
7 agree we may not need an order.

8 PRESIDING JUDGE: I understand.

9 MR. MONROE: I would say by the end of
10 next week. That would give us some time to talk,
11 assuming your schedule is okay, and it will give me
12 some time to chase down those last few issues.

13 PRESIDING JUDGE: The 7th?

14 MR. MONROE: That works for me.

15 MR. ROSENTHAL: That should work.

16 PRESIDING JUDGE: All right. Got it.

17 Let's continue. Mr. Rosenthal, I asked you if you
18 could direct me to a place in one of your filings so
19 you can follow you.

20 MR. ROSENTHAL: I'm looking at the -- May
21 25th Union Pacific's motion to compel discovery to
22 individual complainants, and just starting on page 7

49

1 of that motion.

2 PRESIDING JUDGE: Page 7A is movement of
3 empty tank cars to repair facilities.

4 MR. ROSENTHAL: Exactly. And I think what
5 we've agreed, and correct me if I'm wrong, that we
6 agreed to reduce the time period to 2013 to 2015 and
7 that Cargill would provide information on the dates
8 sent to repair -- cars were sent to repair
9 facilities, the dates the cars were received at
10 repair facilities, the date they were released from
11 the repair facilities, the location of the repair
12 facilities.

13 I think they were going to provide car
14 location data for these cars and they were checking
15 on their ability to provide what we call waybill
16 data, which is identification of the origin, the

17 destination, the rail carriers involved in the moves
18 and the interchange. If they can provide that, I
19 think it's resolved.

20 MR. MONROE: The initial answer is we
21 don't have waybill data but it was clear that the
22 outside consultants were able -- they were able to

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1 do what you want to do, so I wasn't able to get to
2 them yesterday. But we'll have them explain to me
3 what data they would be using to do the analysis you
4 want to do and we will provide that data. If it's
5 in the CLM data, then you'll have it. If it's some
6 other -- if they have waybill data that we don't
7 know about, we'll give you that. One way or the
8 other, if they could do it based upon whatever the
9 data they were going to do it with, you should be
10 able to do it, too, I would think.

11 MR. ROSENTHAL: That makes sense to me.
12 It sounds like we're going to get that data one way
13 or another.

14 MR. MONROE: One way or another.

15 MR. WILCOX: As we go through, you and I
16 have not talked about waybill data for Poet which
17 they do not have, but --

18 MR. ROSENTHAL: My understanding is that
19 number 14 was a Cargill-only issue, that Poet and
20 Nutrition and said they don't have information and
21 that Poet Ethanol said it will produce whatever it
22 has that's responsive to the request. That was the

51

1 response to our document.

2 PRESIDING JUDGE: Okay.

3 MR. WILCOX: Poet is independent of your
4 discussions with Cargill.

5 PRESIDING JUDGE: These types of
6 agreements, do you need an order on these
7 memorializing it, or -- we have the record.

8 MR. ROSENTHAL: I'm satisfied with the
9 record. I wanted to go through them here. I think
10 having the record is sufficient for our purposes.

11 PRESIDING JUDGE: That's fine. Thank you.

12 MR. ROSENTHAL: Interrogatory number 15 is
13 also a Cargill-only issue at least based on the
14 discovery responses. The real issue here is
15 identifying -- from this earlier substantive data,
16 the movements on which Cargill is actually seeking
17 reparations. That seems straightforward enough but
18 perhaps it isn't, or perhaps it is.

19 MR. MONROE: We have two objections to

20 this. One was this question asks for what are we
21 claiming we're entitled to recover as a refund from
22 UP that we're paying UP. We're paying UP because

52

1 they're sending us an invoice. We're paying it to
2 them -- they already -- they know -- they have all
3 of this information.

4 The second part that we objected to in
5 addition to that, they're saying we want to know
6 what work was performed at the repair station, and
7 there's no easy way to do that. There's just no
8 easy way to do that.

9 MR. ROSENTHAL: If I understood his
10 earlier statements about not being able to easily
11 figure out what work has been done, that you'd have
12 to go back to the invoice level, I understand that.
13 The key issue with interrogatory 15 in identifying
14 the cars in which Cargill is going to claim
15 reparations, and I think we discussed that at the
16 last hearing.

17 There are certain cars that are clearly
18 cars Cargill owns. They have a Cargill car mark, an
19 identifier, and UP bills Cargill. There are other
20 cars that Cargill leases and there's a fair chance

21 that Union Pacific has billed the leasing company,
22 that the leasing company may or may not have passed

53

1 the cars on to Cargill. We want to know if Cargill
2 is going to claim. If Cargill says we're not going
3 to claim damages for any non-Cargill marked car, I'm
4 okay, but they have to make that representation.

5 PRESIDING JUDGE: Mr. Monroe, how do you
6 respond to that? It makes sense to me.

7 MR. MONROE: I understand that issue. I
8 don't know the answer, but to the extent we're going
9 to claim damages, that we're going to have to
10 provide the underlying information, so I don't have
11 a problem with that part. It's the work performed
12 part.

13 PRESIDING JUDGE: That's the part he said
14 he feels your pain.

15 MR. MONROE: This is consistent with our
16 discussion.

17 MR. ROSENTHAL: I think it is. There was
18 a little uncertainty about whether you thought you
19 could identify these leased cars, but as long as --

20 MR. MONROE: Whether we can or not, it
21 kind of doesn't matter. This question is saying
22 what are you seeking refunds for?

1 PRESIDING JUDGE: That's a fair question.

2 MR. MONROE: If we can't, we can't.

3 PRESIDING JUDGE: That's a fair question.

4 You have that?

5 MR. ROSENTHAL: I think we're okay there.

6 PRESIDING JUDGE: Page 10?

7 MR. ROSENTHAL: I'm on page 10, yes, your
8 Honor. This was also a general issue that we talked
9 about last week, and this is asking them to identify
10 movements where they have been assessed empty repair
11 charges by other railroads. Last week, you read the
12 subpoena hearing, you found that was relevant and
13 told the parties to work out a way of figuring it
14 out.

15 One way of doing this -- one way of
16 thinking of this is it really is a subset of all
17 these car movements to repair shops. Tell us which
18 ones you paid, which ones you paid Union Pacific,
19 which ones you paid other parties, if that's how
20 they keep the data. If they don't keep the data
21 that way, we have to know in some way whether
22 they're paying these bills to other railroads.

1 They're getting invoices from UP. Presumably,
2 they're getting invoices from other railroads so it
3 seems like something that should be reasonably
4 producible.

5 MR. MONROE: I don't want to burden
6 everybody but I never -- I don't think I understand,
7 and I still don't understand, how this is relevant
8 to Cargill. We're paying other railroads. As we
9 said in our response papers, yeah, those other
10 railroads have tariffs just like UP does, but what
11 does it matter? Why is that will relevant to our
12 case against UP, that we are paying other people for
13 similar charges?

14 PRESIDING JUDGE: And you responded?

15 MR. ROSENTHAL: And I responded it's
16 relevant for two reasons, one because the Board
17 looks to other practices to figure out whether
18 something is a reasonable practice, and two, because
19 we're going to look at this data and try to figure
20 out why these cars may or may not be moving on other
21 railroads, why they may be moving to shops on Union
22 Pacific, and even if we know that, some other

1 railroad has a tariff out there that might impose
2 charges on Cargill, we don't know whether Cargill or
3 Poet in this case might have a contract under which
4 they don't actually pay these charges. They pay a
5 lesser amount. We went through the --

6 PRESIDING JUDGE: We did this.

7 MR. MONROE: The first part, which is
8 everybody does it, so therefore, it's okay, he knows
9 everybody does it. That's public information.
10 We're not challenging the amount of their charge.
11 We're saying you're not allowed to charge, period,
12 regardless of what the amount is. So knowing what
13 we're paying other railroads, they know what other
14 railroads are charging, I don't see how that makes
15 any difference at all.

16 PRESIDING JUDGE: He's going to use it in
17 his theory of the case. Go ahead and give him what
18 you can.

19 MR. MONROE: Okay.

20 MR. ROSENTHAL: I think that one applied
21 to both.

22 MR. WILCOX: We have the same relevance

2 PRESIDING JUDGE: Of course you do.

3 MR. WILCOX: We do have the information.

4 PRESIDING JUDGE: Good. Just give it to
5 him. Thank you.

6 MR. ROSENTHAL: Your Honor, I think we're
7 moving on to page 11, and I think this is one where
8 we have an agreement. This was asking for totals of
9 loaded and empty miles and empty repair miles on
10 Union Pacific and other railroads. My understanding
11 is that Cargill doesn't have these empty repair
12 miles. I understand they don't have this, but that
13 they do have the loaded and empty miles and are able
14 to produce those and that they were willing to
15 produce those.

16 MR. MONROE: This is number 18. To the
17 extent we have this information, and I think you're
18 asking for each reporting mark, we do have that
19 information.

20 MR. ROSENTHAL: We can give you empty
21 loaded miles and it will be by railroad. It's
22 basically equalization data. What we don't have is

1 the last two, the repair station moves, but to the
2 extent you're getting something in 14 that allows

3 you to figure that out, you can figure it out.

4 PRESIDING JUDGE: Understood.

5 MR. MONROE: We did not talk about the

6 time frame.

7 MR. ROSENTHAL: That's what I was going to

8 get to.

9 PRESIDING JUDGE: Time frame.

10 MR. ROSENTHAL: I was going to ask what

11 the time frame is and the data that you have. I

12 know some of the material that you had was back to

13 2007. I think when we were dealing with the tank

14 car owners, we asked for similar data going back to

15 2009. We were going to go to Railinc and get that.

16 If you have a matching, that would be ideal, but if

17 you don't --

18 MR. MONROE: I believe we have the data

19 with one proviso back to 2007, and there's one year

20 in there that we know our data is not correct. The

21 question is can we figure out how to correct it. If

22 we can, we will. If we can't, we'll tell you.

59

1 PRESIDING JUDGE: That's fine. Thank you.

2 MR. ROSENTHAL: That's acceptable.

3 PRESIDING JUDGE: Mr. Wilcox.

4 MR. WILCOX: Poet Ethanol has

5 information -- some of it goes back to 2007
6 archived. For other lessors, it's more recent
7 years, but we do have the empty and loaded miles.
8 They do not have the perfect data on the repair
9 moves but they do have some car tracing data
10 archived that includes wherever the car goes, and it
11 will say it went to a repair shop. That's summary
12 data that can be downloaded and given to them and
13 they can do whatever they want with it.

14 PRESIDING JUDGE: Good. Thank you.

15 MR. MONROE: Your Honor, one thing that we
16 haven't mentioned or addressed but I wanted to put
17 on the record to make sure we're all clear on this,
18 a lot of this data we're talking about is
19 commercially sensitive highly confidential
20 information. To the extent we're agreeing we're
21 producing this, it's going to be under -- as highly
22 confidential.

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1 PRESIDING JUDGE: I would anticipate that.

2 Mr. Rosenthal.

3 MR. ROSENTHAL: We have no problem with
4 that.

5 PRESIDING JUDGE: Yes. Thank you.

6 MR. ROSENTHAL: I believe the next one is
7 number 19 which has to do with empty mileage charges
8 billed by Railinc, mileage equalization charges. It
9 was a Cargill issue, and I believe Mr. Monroe has
10 said they have the data from 2007 to the present and
11 will produce it.

12 MR. MONROE: It's the same data for 18.
13 It has dollars in there.

14 MR. ROSENTHAL: We're on page 14, your
15 Honor. This is identifying the movements for which
16 the individual Complainants are seeking damages.

17 PRESIDING JUDGE: This is contained in a
18 previous one, isn't it?

19 MR. ROSENTHAL: I'm sorry. This is damage
20 under count 2. So the first one was with these
21 movements to shop. The second one is the ones where
22 they'd be claiming mileage allowances, and I believe

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1 Mr. Monroe has said he would -- that Cargill will
2 produce this.

3 MR. MONROE: Again, the question is the
4 time period which we said would be the reparations
5 time period. If we're claiming reparations from
6 1900, then we'll give them data from 1900. If we're
7 claiming two years back, that's what it will be.

8 PRESIDING JUDGE: Okay. I don't take
9 dates like that lightly. I never think an old date
10 is a joke. When I worked for CSX, the CEO had me do
11 a tax study on whether the 999-year leases were debt
12 or equity. Good old Mr. Snow.

13 All right. Continue.

14 MR. ROSENTHAL: We'll skip ahead because
15 the next section involves ownership costs which we
16 said we'll discuss some language, and I think I then
17 move to page 22. The first one involves documents
18 that refer or relate to plans or proposals for
19 retrofitting tank cars. Again, this is a
20 Cargill-only issue. I think we were getting close
21 to an agreement. I don't know if we have precisely
22 agreed.

62

1 MR. MONROE: Let me make it easy. We have
2 no plans because Cargill's cars don't have to be
3 retrofitted.

4 MR. ROSENTHAL: There you go.

5 PRESIDING JUDGE: There you are. Thank
6 you.

7 MR. ROSENTHAL: That's why I suggested he
8 ask the folks at Cargill to cut through this, and

9 I'm glad we cut through it.

10 PRESIDING JUDGE: All right.

11 MR. ROSENTHAL: Number 26, which is on the
12 same page, is documents that refer or relate to
13 communications with persons from whom or to whom you
14 lease tank cars about movements of tank cars to
15 repair facilities. Poet had said it would produce
16 the data from -- the information from 2013 to the
17 present but only relating to moves by Union Pacific.
18 I kind of assume that in light of last week's
19 discussion, maybe Poet would --

20 MR. WILCOX: That's correct, subject to
21 our relevance objection unless you reconsider.

22 PRESIDING JUDGE: Mr. Wilcox, you know me

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1 better than that.

2 MR. WILCOX: Sir --

3 MR. ROSENTHAL: Whether it moves by UP or
4 moves by other railroads.

5 MR. WILCOX: Just sorry to interrupt,
6 Mike. It's just going to be the BNSF. That's the
7 only railroad.

8 MR. ROSENTHAL: That's fine. I don't
9 think that was an issue with regard to Cargill.

10 MR. MONROE: We did have an issue related

11 to the time period. I think we said 2013 forward.

12 MR. ROSENTHAL: Yes, 2013 forward. That's
13 acceptable to us.

14 MR. MONROE: Wait, Mike. There's one more
15 thing we discussed with respect to 26 and that has
16 to do with the appropriate way of developing this
17 information, because again, if you're talking about
18 moving a car to a repair station, there could be all
19 kinds of communications through a lot of people, I
20 think the lessors or lessees, but we talked about
21 whether we could narrow it by searching.

22 We'll pick the appropriate people. There

64

1 are a limited number of people who would be
2 responsible for this, not people out in Podunk who
3 sees the car and says this has a problem, but the
4 guys in the central office. I think we talked about
5 whether we could limit search terms to like 55C and
6 you would give me other search terms that would be
7 relevant to other railroads.

8 MR. ROSENTHAL: Yes, I guess that's right.
9 We certainly understand -- we don't want every
10 communication with the person down the line, and --
11 you can search the group of people who are most

12 likely to make the communications with the lessors
13 or the lessees, which I think is a -- narrower than
14 every communication related to the movement of a
15 car.

16 MR. MONROE: I think we identified this.

17 PRESIDING JUDGE: Good.

18 MR. ROSENTHAL: I don't know if it focused
19 on movements to repair -- the communications with
20 lessors or lessees does enough to focus that
21 particular search because we're not asking for
22 internal communications down the line about

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1 movements. We are not asking about communications
2 with the repair facilities. It seems like it would
3 be a --

4 MR. MONROE: Literally, it does. Your
5 request does ask that because it says everything
6 relating to, so if there's an internal e-mail that
7 says hey, you better call the lessor and ask him
8 where we should send that car, this would be covered
9 by the request. We would -- assuming this is what
10 you're looking for, our communications with the
11 lessors and lessees.

12 MR. ROSENTHAL: I think it will become
13 relevant later on -- I think it becomes relevant --

14 sorry, your Honor. I'm looking to see if we can
15 kill two birds with one stone here. If we focus on
16 limiting it to communications that also refer -- or
17 that mention -- will come up with the search terms,
18 item 55C or similar charges by other railroads, and
19 we'll talk about coming up with some search terms
20 that identified how to capture that, which is I
21 think what we agreed to do for the tank car owners.
22 We'll focus this not on any movements anywhere but

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1 focus it by talking about item 55C or similar
2 charges and narrow the search in that way.

3 PRESIDING JUDGE: How do you search
4 similar charges? It's not very specific.

5 MR. MONROE: He's going --

6 MR. WILCOX: It's in the BNSF tariff.

7 MR. ROSENTHAL: We'll have a list of other
8 tariff numbers. We've looked at a lot of these
9 documents and we know the terminology that's used,
10 so it's a matter of coming up with search terms like
11 you'd search Westlaw and/or words near another word.

12 PRESIDING JUDGE: Okay. You all
13 understand what these are.

14 MR. WILCOX: Yes.

15 MR. ROSENTHAL: We'll work together to
16 come up with a sensible search. Maybe jumping out
17 of numerical order but sticking with the conceptual
18 order in this motion, number 34 is communications --

19 PRESIDING JUDGE: Where is that?

20 MR. ROSENTHAL: It is on page 22 as well.
21 Communications discussing the reasons for selecting
22 a repair facility, and I think for Poet, Poet agreed

67

1 to produce responsive information but again have
2 limited it to cars transported by Union Pacific. I
3 suspect Poet is --

4 MR. WILCOX: Sure. It's the same thing.

5 MR. ROSENTHAL: Willing to broaden it.

6 MR. WILCOX: Yes.

7 MR. ROSENTHAL: For Cargill, I think I
8 would propose to address this in the same way, that
9 they'll do an appropriately defined search of e-mail
10 for e-mails relating to items 55C or other similar
11 charges and we'll agree how to go about that.

12 MR. MONROE: Again, if we're going to
13 limit it to 55C or something similar to that, then I
14 think we can live with that because the guy in
15 Podunk doesn't probably know about 55C, or cares. I
16 don't want to have to search the entire potential

17 network of everybody's e-mail to find stuff. What
18 we talked about is does Cargill -- does Cargill have
19 a policy for where it sends its cars? No. We don't
20 have a policy. If we have a policy, let's do it as
21 quickly and cheaply as we can. It's not --
22 PRESIDING JUDGE: I understand.

68

1 MR. MONROE: There are a limited number of
2 people who are involved in actually sending cars --
3 put it this way, authorizing cars to repair
4 stations. We can search their e-mails, but it needs
5 to be limited in some reasonable way.

6 PRESIDING JUDGE: Right.

7 MR. ROSENTHAL: Absolutely. It's the same
8 thing, I mean. We trust them to pick the
9 appropriate group within Cargill to conduct the
10 search. We're not saying do a search for terms
11 companywide. It's the same idea as figuring out who
12 the people who are likely to have these documents
13 and searching them.

14 PRESIDING JUDGE: That's fine.

15 MR. MONROE: Again, it's the 595C part of
16 it. Otherwise there's going to be thousands and
17 thousands of e-mails, car number 3 has to go here.

18 MR. ROSENTHAL: I'm agreeing to both.
19 It's the limitation to 55C and similar charges and
20 we're agreeing you should apply that to the right
21 people at Cargill who are likely to have these types
22 of communications, who are responsible for directing

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1 cars in general, not every --

2 MR. MONROE: Have we talked about a time
3 frame?

4 MR. ROSENTHAL: Same time frame of 2013 to
5 present. And I think that also should cover 35
6 because these are the same -- number 35 was asking
7 for a specific type of movement that we see and we
8 think is particularly inefficient, but that would be
9 the right group of people to search. We'd be
10 willing to limit it to the same terms so we're all
11 working within the same set of documents.

12 PRESIDING JUDGE: That's fine.

13 MR. MONROE: You skipped 29 and 30.

14 MR. ROSENTHAL: It was just the order of
15 the motion. Now we're on page 25 which deals with
16 document request number 29 which involves
17 communications with lessees or lessors regarding
18 mileage allowances, and I think Mr. Monroe said that
19 Cargill would perform a reasonable search of people

20 who would have engaged in these types of

21 communications.

22 MR. MONROE: Right.

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1 PRESIDING JUDGE: Okay, good.

2 MR. ROSENTHAL: Number 31, documents

3 related to decisions to request zero mileage rates,

4 I believe Mr. Monroe said the same thing. They

5 would do a reasonable search of the people who would

6 be -- types of people who would engage in these

7 communications if they occurred.

8 Is that correct?

9 MR. MONROE: That's correct -- let me make

10 it clear. There's a limited number of people who

11 are going to be dealing with the railroads for

12 negotiating rates. Those people basically searched

13 their e-mail related to zero mileage rates or full

14 mileage rates or whatever, mileage allowances. We

15 know there's going to be no documents because there

16 hasn't -- nobody has seen a mileage allowance since

17 2001.

18 MR. ROSENTHAL: However you can come to

19 that conclusion, as long as you can tell me --

20 MR. MONROE: What's the time frame on this

21 one?

22 MR. ROSENTHAL: It's the -- I think we've

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1 agreed you're going to do a reasonable search of the

2 e-mail.

3 MR. MONROE: We may have said in our

4 supplemental response, we said 2013 and on. I'm not

5 sure -- I frankly don't remember whether we said

6 that because that would essentially be the

7 reparations period, or because that was the limit of

8 our retention policy anyway. But --

9 MR. ROSENTHAL: Right. This goes back to

10 does anybody ever actually use these things or ask

11 for these things, and I think our only point was I

12 think your time period was based on the retention

13 policy. My experience is people don't always follow

14 e-mail retention policies.

15 Do a search of the e-mail. Whatever is

16 retained is retained. What isn't retained isn't

17 retained. I wouldn't limit it by the retention

18 policy. I'd limit it to the search of the e-mail of

19 the people who have had these communications.

20 MR. MONROE: That's fine. We'll do it.

21 We've already answered a request for admission that

22 says that no one who now exists that we would be

1 searching anyway --

2 MR. ROSENTHAL: That's fine. Again, I
3 don't want to insist on a formality. I just don't
4 want the record to say that we asked and you
5 objected and there's some hint that maybe there is
6 something floating out there. If you send me
7 something that says we have done our due diligence
8 with regard to document request number X and there
9 are no documents --

10 MR. MONROE: That's fine. We're not going
11 to suddenly spring a document on you.

12 MR. ROSENTHAL: I want to make sure we
13 wrap up everything at the end and there's nothing
14 like that. And I believe the last issue are the
15 requests for admissions which Cargill had initially
16 objected to because some of them involved other
17 railroads, and I think we've agreed after hearing
18 all the discussions about other railroads that
19 Cargill will respond to those requests --

20 MR. MONROE: Yes.

21 MR. ROSENTHAL: -- as it responded to the
22 request related to UP.

1 MR. MONROE: Right.

2 MR. ROSENTHAL: Good.

3 PRESIDING JUDGE: Is that it?

4 MR. ROSENTHAL: I believe that is

5 everything. As we said, the only thing that might

6 need to be ordered is the issue related to costs.

7 PRESIDING JUDGE: Costs. And you folks

8 will get that to me.

9 Folks, I appreciate all the hard work you

10 continue to put into this. I actually look forward

11 to these little get-togethers. I know they're

12 painful for you, but I'm having fun.

13 We're off the record.

14 (Discussion off the record.)

15 (Whereupon, at 11:25 a.m., the oral

16 argument was concluded.)

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1 CERTIFICATE OF NOTARY PUBLIC & REPORTER

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3 I, JULIE BAKER, the officer before whom the
4 foregoing deposition was taken, do hereby certify
5 that the witness whose testimony appears in the
6 foregoing deposition was duly sworn; that the
7 testimony of said witness was taken in shorthand and
8 thereafter reduced to typewriting by me or under my
9 direction; that said deposition is a true record of
10 the testimony given by said witness; that I am
11 neither counsel for, related to, nor employed by any
12 of the parties to the action in which this
13 deposition was taken; and, further, that I am not a
14 relative or employee of any attorney or counsel
15 employed by the parties hereto, nor financially or
16 otherwise interested in the outcome of this action.

17

18 JULIE BAKER

19 Notary Public in and for the

20 District of Columbia

21

22 My Commission Expires OCTOBER 14, 2017