

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

240952

<b>American Fuel &amp; Petrochemical Manufacturers,</b>	)	
	)	ENTERED
	)	Office of Proceedings
	)	June 21, 2016
<b>Complainant,</b>	)	Part of
	)	Public Record
<b>v.</b>	)	<b>Docket No. 42146</b>
	)	
<b>BNSF Railway Company,</b>	)	
	)	
<b>Defendant.</b>	)	
	)	

**BNSF RAILWAY COMPANY’S MOTION TO DISMISS**

Pursuant to 49 U.S.C. § 11701(b) and 49 C.F.R. § 1111.5, BNSF Railway Company (“BNSF”) requests that the Board dismiss the First Amended Complaint, hereafter referred to as the “Amended Complaint,” filed by American Fuel & Petrochemical Manufacturers (“AFPM”) on May 26, 2015.

As described in more detail below, the allegations in AFPM’s newest complaint are virtually identical to allegations that AFPM made against BNSF in a complaint filed with the U.S. District Court for the Southern District of Texas on March 13, 2015.<sup>1</sup> There, as here, AFPM alleged that BNSF violated its obligations as a common carrier by setting its rates for transportation of crude oil in certain tank cars – unjacketed DOT 111 cars – at levels intended to deter the use of those cars. The federal court concluded that “this is a dispute over BNSF’s

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<sup>1</sup> A copy of the district court complaint is included as Attachment A.

rates,” not a dispute over BNSF’s common carrier obligations, and it dismissed the complaint because federal courts do not have jurisdiction over challenges to a railroad’s rates.<sup>2</sup>

The federal court’s decision that AFPM’s allegations must be treated as a challenge to BNSF’s rates subject to the STB’s jurisdiction over rate challenges is binding on AFPM. Under the doctrine of issue preclusion, AFPM is collaterally estopped from pursuing its allegations as anything other than a challenge to BNSF’s rates. The proper characterization of AFPM’s claims was fully litigated and definitively resolved by the federal court and the issue may not be relitigated at the STB. Moreover, the federal court was correct in characterizing AFPM’s allegations as a challenge to BNSF’s rates. Under *Union Pacific Railroad Co. v. I.C.C.*, 867 F.2d 646 (D.C. Cir. 1989), a challenge to a railroad’s conduct that is manifested exclusively in the level of the rate, as here, must be treated as a challenge to rates subject to the limits on the STB’s rate reasonableness jurisdiction under 49 U.S.C. §10701. AFPM’s claim is based solely on the level of BNSF’s challenged rates but it has failed even to try to satisfy the statutory requirements of a rate reasonableness challenge and its Amended Complaint should therefore be dismissed.

AFPM has also failed to state a claim for either a common carrier or unreasonable practices violation. AFPM has not alleged that BNSF failed to provide a rate for rail service or failed to provide transportation under that rate when requested, the two required elements of a common carrier claim. Nor do AFPM’s allegations support an unreasonable practice claim. In *Union Pacific*, the D.C. Circuit ruled that a challenge to a railroad’s rates cannot be converted into an unreasonable practice claim merely by calling the railroad’s rate-related conduct an unreasonable practice.

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<sup>2</sup> *American Fuel & Petrochemical Manufacturers v. BNSF Railway Co.*, Docket No. H-15-682, slip op. at 7 (S.D. Tex. Mar. 11, 2016). A copy of the court’s order dismissing the original complaint is included as Attachment B.

## Background

The dispute in this case concerns BNSF Price Authority 90188, Amendment/Rev: 20, which went into effect on January 1, 2015. That price authority provides common carrier rates for transportation of crude oil (among other commodities) by origin/destination pair and route. Under the price authority, transportation in a certain type of tank car – general purpose DOT 111 tank cars, also referred to as “unjacketed” DOT 111 tank cars – is subject to a rate that is \$1,000 more per car for a given origin/destination pair and route than transportation in other types of tank cars covered by the price authority. AFPM alleges that the \$1,000 higher rate for transportation of crude oil in general purpose DOT 111 tank cars violates BNSF’s obligations as a common carrier and constitutes an unreasonable practice.

AFPM’s district court and STB complaints arise against the background of heightened concern regarding the safety of rail transportation of crude oil. While transportation of crude oil by rail has proven to be efficient and safe, increasing volumes of crude oil movements on rail lines and a few highly publicized derailments have focused attention on the safety of rail operations and, in particular, on the safety of the tank cars used to transport crude oil. Crude oil is currently shipped in tank cars of varying vintages and safety features. The oldest, least safe tank cars currently authorized to haul crude oil are the general purpose DOT 111 tank cars covered by BNSF Price Authority 90188.<sup>3</sup>

Congress, federal regulators, rail carriers, and crude oil shippers have all publicly recognized the need to improve and modernize the national fleet of tank cars so that they can better withstand the effects of derailments and reduce the attendant risk to life and property. In

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<sup>3</sup> In 2014, federal regulators advised “offerors and carriers of Bakken crude oil to avoid the use of older, legacy DOT Specification 111 or CTC 111 tank cars for the shipment of such oil to the extent reasonably practicable.” *Recommendations for Tank Cars Used for the Transp. of Petroleum Crude Oil by Rail*, 79 Fed. Reg. 27,370 (May 13, 2014).

May 2015, the Pipeline and Hazardous Materials Safety Administration (“PHMSA”)<sup>4</sup> and the Federal Railroad Administration (“FRA”)<sup>5</sup> promulgated final rules setting new tank car safety standards.<sup>6</sup> The final rules established new design specifications for tank cars and a time line for retrofitting or phasing-out existing tank cars. The PHMSA rules covered transportation of crude oil on “high-hazard flammable trains” (“HHFT”), defined as trains containing either a consecutive block of 20 or more crude oil cars or 35 or more crude oil cars across an entire train.<sup>7</sup> The PHMSA rules required a phase out of the use of unjacketed DOT 111 cars on HHFT trains by May 1, 2025.<sup>8</sup>

Congress found the final rules too lenient and enacted more stringent requirements. In December 2015, Congress passed the FAST Act, Pub. L. No. 114-94, which, among other things, replaced the retrofit and phase-out deadlines in the PHMSA final rules and clarified some technical specifications for tank cars. Under the FAST Act, Congress eliminated the HHFT threshold for phasing out general purpose DOT 111 cars. The phase out of general purpose DOT 111 cars will occur regardless of the number of crude oil cars in a train. In addition, the FAST Act accelerated the phase out of general purpose DOT 111 cars. Under the FAST Act, general purpose DOT 111 cars will no longer be permitted for use in transportation of crude oil in Class

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<sup>4</sup> PHMSA, a division of the U.S. Department of Transportation, has been delegated responsibility by the Secretary of Transportation to implement various aspects of the Hazardous Materials Transportation Act (“HMTA”), 49 U.S.C. §§ 5101-5128, including developing regulations to “govern safety aspects, including security, of the transportation of hazardous material” under 49 U.S.C. § 5103. 49 C.F.R. § 1.97(b).

<sup>5</sup> The FRA, also a division of the U.S. Department of Transportation, has jurisdiction to regulate the safety of rail operations. 49 C.F.R. § 1.88(a).

<sup>6</sup> Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High Hazard Flammable Trains, 80 Fed. Reg. 26644 (May 8, 2015). The Amended Complaint refers to this as the “Final Rule.” Amended Comp. ¶ 10.

<sup>7</sup> *Id.*, at 26,645.

<sup>8</sup> *Id.*, at 26,648.

3 flammable service (the class of service at issue under the PHMSA regulations and under the Fast Act) after January 1, 2018. FAST Act, §§ 7304(a), (b)(1)(A) (2015).

On March 13, 2015, two months after BNSF Price Authority 90188 Amendment/Rev: 20 went into effect, AFPM filed a complaint in the United States District Court for the Southern District of Texas containing substantially identical allegations to those in its Original and Amended STB complaints. The essence of AFPM's complaint in the district court was that BNSF breached its obligations as a common carrier by charging \$1,000 more for transportation of crude oil in general purpose DOT 111 tank cars than in other tank cars. AFPM asserted that BNSF violated "its common carrier obligation by imposing a financial penalty on shipping crude oil in rail tank cars expressly authorized for such shipments by the Pipeline and Hazardous Materials Safety Administration." Attachment A, ¶ 1.

BNSF moved to dismiss the complaint. BNSF argued that the complaint challenged conduct that was manifested exclusively in the level of the rates charged and therefore constituted a challenge to BNSF's rates that cannot be maintained in a federal court. BNSF also argued that AFPM had failed to allege the elements of a violation of BNSF's statutory common carrier obligation. In response to BNSF's motion, AFPM argued that its allegations were "not about rates," but were about "whether a common carrier can ignore the administrative process and use financial coercion – be it additional costs of \$1,000 or \$1,000,000 – to enforce its private decision to remove an otherwise federally authorized railcar from service."<sup>9</sup> AFPM also argued that it had properly pleaded a common carrier claim.<sup>10</sup>

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<sup>9</sup> Plaintiff American Fuel & Petrochemical Manufacturer's Response to Defendant's Motion to Dismiss at i, ii (filed July 31, 2015). The relevant district court motion pleadings are included as Attachment C.

<sup>10</sup> *Id.*, at iii.

The district court found that notwithstanding AFPM's characterization of its claims as alleging a violation of BNSF's common carrier obligation, AFPM was in fact challenging conduct that was manifested solely in the level of BNSF's rates and that its complaint must therefore be construed as a rate complaint. The court determined that it lacked subject matter jurisdiction because only the Board has jurisdiction to entertain complaints concerning the reasonableness of a railroad's rates.

Not satisfied with the district court's decision, AFPM refiled its challenge to BNSF's Price Authority 90188 with the STB. AFPM filed its Original STB Complaint with the Board on April 22, 2016. This was followed by the Amended Complaint on May 26. Apparently, after reviewing BNSF's Answer, AFPM realized that Congress enacted legislation months before the Original STB Complaint was filed that effectively superseded the PHMSA rules relied on by AFPM, a fact that the Original STB Complaint ignored. AFPM therefore modified its Original STB Complaint by adding scattered references to Congress and the FAST Act that left the core of its complaint unchanged.<sup>11</sup> The allegations in the Amended Complaint are virtually the same as those in the federal court complaint. For example, the Amended Complaint's common carrier count is an almost word-for-word repetition of the common carrier count in the district court complaint.<sup>12</sup> Elsewhere, the Amended Complaint occasionally reorders paragraphs, but the wording and allegations remain the same.<sup>13</sup> The essence of the Amended Complaint is that

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<sup>11</sup> AFPM's cover letter accompanying its Amended Complaint asserts that the new complaint "retains the same cause of action against the same defendant . . . and requests identical relief." According to AFPM, the "continuity of the claims asserted and the relief requested" means that filing of the amended complaint does not prejudice BNSF.

<sup>12</sup> Compare Amended Comp. ¶¶ 20-26 with Attachment A, ¶¶ 22-28.

<sup>13</sup> For example, paragraph 3 of the Amended Complaint essentially repeats paragraph 1 of the district court complaint. Paragraphs 4-7 of the Amended Complaint essentially repeat paragraphs 10-14 of the district court complaint. Compare also Amended Comp. ¶¶ 12-17 with Attachment A, ¶¶ 16-20.

BNSF is using its rates to “prematurely retire” general purpose DOT 111 tank cars (Amended Comp. ¶ 13) by making their use “impractical.” (Amended Comp. ¶ 3). This is precisely the same theory that AFPM pursued in the federal court complaint, which the district court described as follows: “AFPM alleges that BNSF began this practice [charging a \$1,000 rate differential] to indirectly force the DOT 111s into ‘premature retirement’ by making their use ‘financially impractical’ despite still being authorized for use under the new rules.” Attachment B, at 3.

While the allegations and legal theory in the district court and STB complaints are virtually identical, AFPM ignored the federal court’s clear ruling that those allegations must be treated as a challenge to rail rates. Rate challenges have specific statutory requirements, including the requirement that the complainant allege market dominance, that AFPM does not even attempt to meet.

### **Argument**

#### **I. The Amended Complaint Should Be Dismissed Because AFPM Has Failed to Allege Any Facts Supporting the STB’s Jurisdiction over a Rate Challenge.**

As the District Court ruled, AFPM’s complaint is a challenge to the rates contained in a price authority covering transportation of crude oil, BNSF Pricing Authority 90188. However, AFPM has not made any allegation that BNSF has market dominance over the traffic covered by BNSF Price Authority 90118, has not invoked the relevant statutory provisions governing the STB’s authority to review the reasonableness of rates, *see., e.g.*, 49 U.S.C. §§ 10701(c), (d), 10707, and does not purport to rely on any of the Board’s established maximum rate methodologies. AFPM’s failure to attempt to meet any of the prerequisites to a rate reasonableness challenge is fatal to its Amended Complaint.

**A. The Amended Complaint Focuses Exclusively on the Level of BNSF's Rates.**

There is no question that AFPM's Amended Complaint challenges BNSF's rates for crude oil transportation. All of the Amended Complaint's allegations concerning supposed misconduct by BNSF relate to the rates charged by BNSF. On the face of the Amended Complaint, it is clear that AFPM's claim is focused on the level of the rates that BNSF charges for shipments of crude oil in general purpose DOT 111 tank cars.

The first sentence of the Amended Complaint's description of the "Nature of the Action" accuses BNSF of "levying such an onerous financial penalty on crude shipments in [general purpose DOT 111 tank cars] that their use would become impractical." Amended Comp. ¶ 3. Paragraph 9 of the Amended Complaint asserts that BNSF enacted "a \$1,000-per-railcar penalty on each general purpose DOT 111 used to ship crude oil" and that BNSF imposed "a \$1,000 premium above the cost to ship crude oil in general purpose DOT 111s when compared to identical shipments in" other types of tank cars. Paragraph 12 alleges that BNSF "imposes a consistent \$1,000 premium for general purpose DOT 111 shipments . . . regardless of destination or the proportionality of the \$1,000 to the underlying price." The Amended Complaint further takes BNSF to task for failing to consider factors that AFPM apparently believes should be relevant to BNSF's pricing decisions: "The \$1,000 penalty is applied regardless of the route's other characteristics. Factors which might speak to safety, such as distance, climate, or geography, are not reflected in the \$1,000 increase." Amended Comp. ¶ 12.

The Amended Complaint makes clear that it is the rate charged by BNSF that is the root of the claimed violations. According to AFPM, "[e]nacting a monetary penalty . . . is contrary to BNSF's common carrier obligation." Amended Comp. ¶ 25. Similarly, AFPM contends that BNSF's higher rate for transportation in general purpose DOT 111 tank cars amounts to an

unreasonable practice due to the fact that the higher rate applies “regardless of any other factor, such as location or distance moved.” Amended Comp. ¶ 29.

**B. A Federal Court Has Already Found that the Allegations in AFPM’s Amended Complaint Constitute a Challenge to BNSF’s Rates that is Subject to the STB’s Rate Reasonableness Jurisdiction.**

As explained above, the allegations in the Amended Complaint are virtually identical to those contained in AFPM’s complaint in federal court. The district court already determined that these allegations constitute a challenge to BNSF’s rates that must be brought under the STB’s rate reasonableness jurisdiction. That conclusion is binding on AFPM and it cannot be relitigated before the STB.

AFPM may not like the conclusion that the federal court reached, but it cannot ask the STB to revisit the issue resolved by the court. AFPM chose to bring its complaint originally in federal court and the federal court was obligated to determine whether AFPM’s claims were within the scope of the court’s jurisdiction. The court recognized that challenges to a railroad’s rates are exclusively within the jurisdiction of the STB: “The STB has exclusive jurisdiction over ‘transportation by rail carriers and the remedies provided under this part with respect to rates.’” Attachment B, at 6 (citing 49 U.S.C. § 10501(b)). Thus, if AFPM was challenging the level of BNSF’s rates, the court would have no jurisdiction and dismissal on jurisdictional grounds would be required.

The district court determined that AFPM’s allegations must be treated as a challenge to BNSF’s rates that is subject to the STB’s rate reasonableness jurisdiction. As the district court explained:

Because the \$1,000 surcharge is the only BNSF action upon which AFPM rests its allegation, the Court finds AFPM has alleged that BNSF is attempting to avoid its common carrier obligation in a way that is manifested exclusively in the level of rates that customers are charged. Therefore, this is a dispute over BNSF’s rates and thus falls under the exclusive jurisdiction of the STB.

Attachment B, at 7. The Board should accept the district court's decision as the binding law of this dispute.

Indeed, the Board should find that AFPM is collaterally estopped from attempting to pursue its allegations before the Board as anything other than a challenge to BNSF's rates under the Board's rate reasonableness jurisdiction. The STB has recognized that parties are barred from relitigation of matters already decided in prior litigation under the doctrines of claim preclusion and issue preclusion.<sup>14</sup> Under claim preclusion, "a subsequent suit is barred if the claim on which it is based arises from the same incident, events, transaction, circumstances, or other factual nebula as a prior suit that had gone to final judgment."<sup>15</sup> Issue preclusion (often referred to as collateral estoppel) "bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim."<sup>16</sup> The current case presents a straightforward, textbook example for the appropriate application of issue preclusion to AFPM's allegations.

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<sup>14</sup> See, *Brampton Enterprises, LLC v. Norfolk Southern Railway Co.*, STB Docket No. 42118, slip op. at 5, n.6 (served Mar. 16, 2011) (barring NS from relitigating liability for demurrage and consignee status, both of which had been determined in federal court); *Norfolk & Western Railway Co. & New York, Chicago & St. Louis Railroad Co. – Merger, etc.*, STB Docket No. 21510 (Sub-No. 6), slip op. at 5-6 (served Dec. 3, 1996) (barring relitigation of matters determined in prior arbitration before either new arbitration panel or board). See also, *California High-Speed Rail Authority – Petition for Declaratory Order*, STB Docket No. 35861, slip op. at 7 (served Dec. 12, 2014)(recognizing the bar on relitigating decided matters but declining to apply either issue or claim preclusion in face of conflicting court decisions). Other federal agencies also give preclusive effect to federal court decisions. See, e.g., *TSR Wireless, LLC v. U.S. West Communications, Inc.*, 15 F.C.C. Rcd. 11166, 11173-74 (2000)(FCC applied collateral estoppel to preclude relitigation of issues litigated before and decided by the Eighth Circuit).

<sup>15</sup> *Okoro v. Bohman*, 164 F.3d 1059, 1062 (7th Cir. 1999).

<sup>16</sup> *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001)).

All of the elements of issue preclusion as described by the Supreme Court are met here. As noted earlier, the allegations regarding BNSF's conduct in the two complaints are virtually the same, and all focus on BNSF's decision to charge \$1,000 more per carload for transportation of crude oil in general purpose DOT 111 tank cars than in other tank cars. The key issue here as in the district court – whether AFPM was required to pursue its allegations as a challenge to the reasonableness of BNSF's rates – was actively and fully litigated in the district court, as the attached briefs of the parties demonstrate.<sup>17</sup> The court resolved that issue by finding that “this is a dispute over BNSF's rates” given that the challenged conduct “is manifested exclusively in the level of rates that customers are charged.” Attachment B, at 7. Moreover, resolution of that issue was “essential to the prior judgment” because it had to be resolved to determine whether the court had subject matter jurisdiction. It is well settled that, while a jurisdictional decision is not a final decision on the merits, it does preclude relitigation of issues decided that were essential to the jurisdictional decision.<sup>18</sup> “A court has jurisdiction to determine its own jurisdiction. . . . A ruling that it lacks jurisdiction is therefore entitled to preclusive effect.” *Okoro*, 164 F.3d at 1063.

AFPM chose to file its suit the first time in federal district court and it should have to live with the federal court's decision. The federal court found that it lacked jurisdiction over

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<sup>17</sup> See Attachment C.

<sup>18</sup> See, e.g., *National Association of Homebuilders v. EPA*, 786 F.3d 34, 41-42 (D.C. Cir. 2015)(issue preclusion bars relitigation of jurisdictional issues including Article III standing); *Park Lake Resources LLC v. USDA*, 378 F.3d 1132, 1136-37 (10th Cir. 2004)(jurisdictional decision barred relitigation of issues decided as part of jurisdictional determination). Indeed, the principle is black letter law. See, 21 *A Federal Procedure*, §51:262, at 590 (2008)(“A dismissal for lack of subject matter jurisdiction bars those matters that have been actually litigated, particularly the jurisdictional issues which mandated the initial dismissal”); 18A Wright, Miller & Cooper, *Federal Practice and Procedure*, § 4436, at 154 (2d ed. 2002)(“Although a dismissal for lack of jurisdiction does not bar a second action as a matter of claim preclusion, it does preclude relitigation of the issues determined in ruling on the jurisdiction question”).

AFPM's allegations because those allegations must be treated as a challenge to BNSF's rates, not as a challenge to BNSF's compliance with obligations it has as a common carrier. AFPM is not entitled to a second bite of the apple on this issue.

**C. The Court Was Correct that AFPM's Amended Complaint Challenges the Level of a Rate and that Rate Claims Must Be Pursued Before the Board Subject to the Rate Reasonableness Provisions of ICCTA.**

Even if there were some reason not to grant the district court's decision preclusive effect, the district court was clearly correct as a matter of law about the nature of AFPM's claims. The district court, relying on *Union Pacific Railroad Co. v. ICC*, 867 F.2d 646, 649 (D.C. Cir. 1989), correctly concluded that challenges to conduct that is manifested exclusively in the level of a rate charged to rail shippers must be brought before the Board in accordance with the rate reasonableness provisions of ICCTA – none of which have been satisfied by AFPM.<sup>19</sup> Those provisions cannot be avoided by labeling a rate challenge something other than a rate challenge.

In *Union Pacific*, railroads were accused of establishing large rate differentials between movements of nuclear waste in specialized train service and movements in “regular train service” to “avoid their common carrier duty to transport radioactive waste.” 867 F.2d at 649. While the claims were originally brought as challenges to the railroads' rates, the Interstate Commerce Commission did not treat the claims under the rules and procedures applicable to rate cases, including the statutory limitations relating to market dominance. Instead, the ICC treated

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<sup>19</sup> A complaint must clearly identify the “transportation to which a particular rate applies,” 49 U.S.C. § 10701(d)(1), by commodity and origin/destination pair so that the required, jurisdictional market dominance determinations can be made under 49 U.S.C. § 10707. *See also* 49 C.F.R. § 1111.1(a). A complaint must allege that the railroad has both quantitative market dominance (the challenged rates produce at least a revenue-to-variable cost ratio of 180%) and qualitative market dominance (absence of effective competition for the transportation to which a rate applies) as specified in 49 U.S.C. § 10707. In the absence of market dominance, a railroad “may establish any rate.” 49 U.S.C. § 10710(c). And the complainant must specify which rate-reasonableness methodology is to be used to evaluate the challenged rates. 49 C.F.R. § 1111.1(a).

the complaints as alleging an unreasonable practice to avoid common carrier obligations by using rate differentials to influence traffic movements. The United States Court of Appeals for the District of Columbia Circuit reversed the ICC, finding that the ICC had erred by treating the conduct as an unreasonable practice. The challenged conduct related to the level of the railroads' rates, and the challenge therefore had to be treated as a challenge to rates rather than a challenge to the railroads' compliance with their obligations as common carriers. As the court emphasized, where challenged railroad conduct "is manifested exclusively in the level of rates that customers are charged," the challenge must be treated as a challenge to a railroad's rates. 867 F.2d at 649.

The D.C. Circuit in *Union Pacific* was giving effect to Congress's clear intent to allow railroads to set rates free of regulatory interference except where railroads have market dominance over the transportation at issue. The court recognized that the statutory limits on rate regulation could be circumvented easily if rates could be challenged broadly based on allegations of improper intent, and the court declined to create such a huge loophole in the congressional scheme that substantially deregulated rail rates. The court therefore concluded that if a challenge is directed at the rates charged to a railroad's customers, as here, the challenge must be treated as a rate challenge, subject to all of the statutory provisions that govern rate challenges.<sup>20</sup> Because AFPM has failed to allege market dominance or otherwise bring its Amended Complaint within the statutory provisions governing rate complaints, AFPM's Amended Complaint must be dismissed.

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<sup>20</sup> Despite AFPM's preoccupation with PHMSA's authority to authorize the use of certain types of rail cars, AFPM does not assert that PHMSA has any authority with regard to rail rates. It is undisputed that the STB has exclusive jurisdiction over rail rates.

## II. The Amended Complaint Fails to State a Claim for Violation of the Common Carrier Obligation.

Even if it were possible to view AFPM's allegations as something other than a challenge to the reasonableness of BNSF's rates, those allegations would not state a claim for violation of the common carrier obligation. The statutory common carrier obligation has two elements. Section 11101(a) states that a rail carrier "providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request."<sup>21</sup> Section 11101(b) requires the rail carrier to provide its "rates and other service terms" upon request.<sup>22</sup>

The Board has characterized the obligation established in section 11101 as "a statutory common carrier obligation under 49 U.S.C. 11101 to provide transportation for commodities that have not been exempted from regulation pursuant to 49 U.S.C. 10502." *Union Pacific Railroad Co. – Petition for Declaratory Order*, STB Docket No. 35219, slip op. at 3 (served June 11, 2009)(*"UP 2009"*). The Board explained that the statute imposes:

two interrelated requirements. Railroads must provide, in writing, common carrier rates to any person requesting them. 49 U.S.C. 11101 (b). And, they must provide rail service pursuant to those rates upon reasonable request. 49 U.S.C. 11101(a). These requirements are linked, because a rate is a necessary predicate to providing requested service.

*Id.*; see also *Pejepscot Industrial Park, Inc. – Petition for Declaratory Order*, STB Finance Docket No. 33989, slip op. at 8 (served May 15, 2003).

The first prong of the common carrier obligation often arises when a railroad refuses to publish rates for carrying hazardous or dangerous cargo. See, e.g., *UP 2009* (UP required to publish rates for movements of chlorine); *Akron, Canton & Youngstown R.R. Co. v. ICC*, 611

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<sup>21</sup> 49 U.S.C. § 11101(a).

<sup>22</sup> 49 U.S.C. § 11101(b).

F.2d 1162, 1170 (6th Cir. 1979) (affirming the ICC's order mandating that the railroad publish rates for transportation of reactor waste); *Radioactive Materials, Missouri-Kansas-Texas R.R. Co.*, 357 I.C.C. 458,465 (1977) (ordering railroad to establish rates for transportation of radioactive materials). The second prong of the test arises when a common carrier refuses to provide service. See, e.g., *Sherwin Alumina Co., LLC v. Union Pacific Railroad Co.*, STB Docket No. 42143 (served Sept. 29, 2015) (UP justified in refusing service during union work stoppage); *Riffin v. Surface Transp. Board*, 733 F.3d 340 (D.C. Cir. 2013) (railroad had common carrier obligation to transport TIH materials); *Decatur Cty. Comm'rs v. Central R.R. Co. of Indiana*, STB Finance Docket No. 33386, (served Sept. 29, 2000) (alleged unlawful service embargo).

AFPM has not alleged that BNSF failed to perform either element of its common carrier obligation. AFPM's challenge is to a published BNSF price authority, so there cannot possibly be any claim that BNSF failed to publish a rate. Nor has AFPM alleged that BNSF failed to provide service under the published rate when requested to do so. The Amended Complaint instead asserts that BNSF is "effectively levying such an onerous financial penalty on crude shipments in [DOT 111] cars that their use would become impractical." Amended Comp. ¶ 3. AFPM's focus on the "onerous financial penalty" is clear evidence that AFPM is challenging the reasonableness of BNSF rates, not pursuing a common carrier violation. AFPM's contentions lead straight back to *Union Pacific*. Under AFPM's own theory, the alleged common carrier violation results from the level of BNSF's rates, which supposedly make it "impractical" to ship in general purpose DOT 111 tank cars. But challenges to railroad conduct "manifested exclusively in the level of rates that customers are charged" must be treated as challenges to rail rates. 867 F.2d at 649.

Nor can AFPM evade the elements necessary to establish a common carrier obligation by filling its Amended Complaint with spurious allegations concerning PHMSA. The Amended Complaint's common carrier count consists almost entirely of allegations concerning the supposed scope of PHMSA's regulatory authority, as modified by the FAST Act. The allegations regarding PHMSA are irrelevant to AFPM's common carrier claim. ICCTA imposes discrete common carrier obligations on railroads, and AFPM has entirely failed to demonstrate, or even to allege, that BNSF violated those discrete obligations.

### **III. The Amended Complaint Fails to State a Claim that BNSF Engaged in an Unreasonable Practice.**

Like AFPM's common carrier claim, AFPM's unreasonable practices claim is just a game of labels that also leads straight back to *Union Pacific*. AFPM simply restates the same allegations made to support its common carrier claim and asks the Board to treat those allegations as evidence of an unreasonable practice. In both cases, the target of AFPM's challenge is BNSF's price authority that charges \$1,000 more for transportation in general purpose DOT 111 tank cars. In both cases, what AFPM alleges to be unlawful is conduct manifested exclusively in the level of the rates that BNSF charges its customers. The D.C. Circuit in *Union Pacific* made it clear that the label put onto a set of allegations is not dispositive as to its proper treatment under the statute. In fact, the court specifically found that the ICC's attempt to convert a challenge to rates into an unreasonable practices claim by merely changing the label describing the claims was not appropriate. 867 F.2d at 648-49.

The only specific allegation contained in the unreasonable practice count of the Amended Complaint confirms that the Amended Complaint is all about – and only about – BNSF's rates. AFPM complains that the \$1,000 higher rate for transportation in general purpose DOT 111 tank cars is an “unreasonable practice” because it is applied “solely” due to the type of tank car,

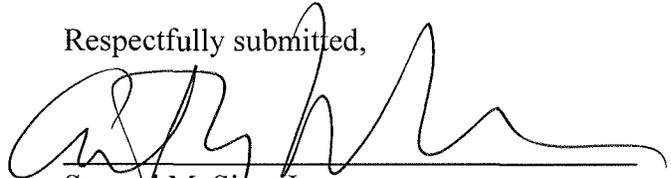
“regardless of any other factor, such as location or distance moved.” Amended Comp. ¶ 29. In other words, AFPM’s supposed unreasonable practice claim is that the *rate* does not appropriately take account of factors that AFPM believes are relevant in setting a *rate*. The unreasonable practice claim is simply another label that AFPM attaches to its complaint about BNSF’s rates.

**Conclusion**

For the foregoing reasons, BNSF requests that the Board dismiss the Amended Complaint in its entirety.

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ATTORNEYS FOR  
BNSF RAILWAY COMPANY

June 21, 2016

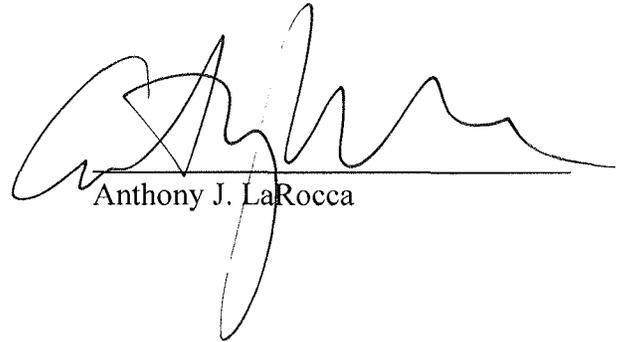
**Certificate of Service**

I hereby certify that on this 21st day of June, 2016, I have served a copy of BNSF

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Anthony J. LaRocca

**ATTACHMENT A**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

AMERICAN FUEL & PETROCHEMICAL	§	
MANUFACTURERS,	§	
	§	
Plaintiff,	§	
	§	Civil Action No. 4:15-cv-682
v.	§	
	§	
BNSF RAILWAY COMPANY,	§	
	§	
Defendant.	§	

**PLAINTIFF’S ORIGINAL COMPLAINT**

Plaintiff American Fuel & Petrochemical Manufacturers (“AFPM”) files this Complaint against Defendant BNSF Railway Company (“BNSF”) and would respectfully show the Court as follows:

**NATURE OF THE ACTION**

1. This is a civil action against BNSF for violating its common carrier obligation by imposing a financial penalty on shipping crude oil in rail tank cars expressly authorized for such shipments by the Pipeline and Hazardous Materials Safety Administration (“PHMSA”). To ensure a national, uniform system of safe transportation by rail, PHMSA administers the Hazardous Materials Transportation Act (“HMTA”), 49 U.S.C. §5101, *et seq.*, The HMTA grants PHMSA exclusive authority over hazardous materials transportation, including the power to set safety standards governing rail tank cars that ship crude oil. PHMSA establishes rail car standards in a public rulemaking process under the protections of the Administrative Procedure Act, 5 U.S.C. § 500, *et seq.* As a common carrier railroad, BNSF is legally obligated to accept

hazardous material such as crude oil that is offered for transportation in compliance with PHMSA's federal safety regulations.

2. Despite PHMSA's comprehensive regulatory regime, BNSF recently imposed a surcharge on using certain PHMSA-authorized rail cars to ship crude oil. Specifically, BNSF charges a \$1,000 more for each "general purpose DOT 111" tank car that ships crude oil. Tens of thousands of general purpose DOT 111s are used to ship crude oil, representing a significant portion of the national crude oil rail car fleet. BNSF does not apply the surcharge to certain other rail cars designated as "jacketed DOT 111s" or "CPC-1232s" that make up the remaining subset of rail tank cars that PHMSA authorized for crude oil transportation.

3. This \$1,000 surcharge on certain PHMSA-authorized rail cars breaches BNSF's common carrier duty to ship hazardous materials under the auspices of PHMSA's comprehensive regime governing hazardous materials transportation. Allowing railroads to penalize companies that ship crude oil in federally-authorized rail cars would circumvent PHMSA's statutory and regulatory process for setting rail car standards for hazardous materials shipments. There can be little doubt of the purpose of BNSF's surcharge to penalize and deter shipments of crude oil in general purpose DOT 111 tank cars. BNSF's surcharge is imposed at the same \$1,000 level regardless of how far a train travels, the geographic conditions of the shipment, or any factor other than the use of federally authorized DOT 111 tank cars. Indeed, BNSF has admitted that it wishes to create a pricing "disincentive" to use DOT 111s.

4. AFPM is a national trade association of more than 400 petroleum refiners and petrochemical manufacturers throughout the United States. AFPM members depend on crude oil for feedstock, including crude oil shipped by rail. BNSF's surcharge should be declared unlawful and/or enjoined because as it violates BNSF's common carrier obligation.

**PARTIES**

5. Plaintiff AFPM is a non-profit national trade association headquartered in Washington, D.C. AFPM members operate 120 U.S. refineries comprising more than 95 percent of U.S. refining capacity.

6. BNSF is a Delaware Corporation with a Regional Hub in Houston, Texas within the Southern District of Texas. BNSF may be served with process by its registered agent for service, CT Corporation System at 1999 Bryan Street, Suite 900, Dallas, Texas 75201.

**JURISDICTION AND VENUE**

7. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, because it arises under the laws of the United States. Defendant's actions run afoul of the Interstate Commerce Commission Termination Act, 49 U.S.C. §§ 11101, 11704(c)(1), and the HMTA, 49 U.S.C. §§ 5101 *et seq.*

8. Venue is proper under 28 U.S.C. § 1391(b)(1) and (d). Defendant is subject to the personal jurisdiction of, and therefore is resident of, the Southern District of Texas. In addition, venue is proper under 28 U.S.C. 1391(b)(2), because a substantial part of property that is the subject of the action is situated in the Southern District of Texas.

9. All conditions precedent to the filing of this cause of action have been satisfied.

**FACTS**

10. BNSF is a major railway and common carrier that provides services throughout the United States. Its network is comprised of almost 400 railroad lines with service in 28 states, including a Regional Hub in Houston, Texas.

11. BNSF is the largest transporter of crude oil in North America, hauling more than 600,000 barrels per day. In the Bakken formation in North Dakota and Montana, BNSF transports more than half of the crude oil produced.

12. AFPM is a trade association that represents the interests of virtually every United States refiner and petrochemical manufacturer in judicial, legislative, and administrative forums. AFPM members own and/or employ rail tank cars to ship crude oil on BNSF lines, including those DOT 111 cars that are subject to the surcharge here at issue.

13. Nation-wide, one of the most commonly used rail tank cars in crude service is the general purpose DOT 111 railcar, which is also referred to as the “unjacketed DOT 111.” The American Association of Railroads (“AAR”), a trade association representing BNSF and other major railroads, recently filed comments with PHMSA estimating that nearly 23,000 general purpose DOT 111s were used to ship crude oil, representing about 28% of the national crude oil rail fleet.

14. PHMSA administers and oversees hazardous materials transportation under the Hazardous Materials Regulations (“HMR”). 49 C.F.R. Parts 105–177. PHMSA’s powers under the HMR include the exclusive authority to approve the specifications and standards for rail tank cars that ship crude oil. 49 U.S.C. § 5103 (b)(1)(A)(iii). PHMSA sets rail tank car standards through rulemaking proceedings under the Administrative Procedure Act. 49 U.S.C. § 5103(b); 5 U.S.C. §§ 500 *et seq.*

15. On October 24, 2014, BNSF announced that it would enact a \$1,000 per railcar surcharge on each general purpose DOT 111 used to ship crude oil. On December 18, 2014, BNSF officially distributed its proposed cost schedule to customers as BNSF Price Authority 90118, Amendment/Rev: 20, effective January 1, 2015. The schedule imposes a \$1,000 higher

cost to ship crude oil in general purpose DOT 111s when compared to identical shipments in jacketed DOT 111 tank cars, CPC-1232 specification tank cars, or “Next Gen” model railcars. BNSF’s reference to “Next Gen” cars is illusory since no such cars actually exist. Jacketed DOT 111s and CPC-1232s are authorized tank cars for crude oil shipments, but PHMSA does *not* mandate their use. Instead, general purpose DOT 111 railcars remain authorized for use in shipping crude oil. *See* 79 Fed. Reg. 45,015, 45,025 (Aug. 1, 2014) (“The DOT Specification 111 tank car is one of several cars authorized by the HMR for the rail transportation of many hazardous materials, including ethanol, crude oil and other flammable liquids.”)

16. BNSF’s price list imposes a consistent \$1,000 premium for general purpose DOT 111 shipments over other rail tank car shipments, despite destination or proportionality of the price. The \$1,000 surcharge is applied regardless of the route’s other characteristics. Factors which might speak to safety, such as distance, climate, or geography, are not reflected in the \$1,000 increase. As such, the flat-rate \$1,000 differential constitutes a surcharge on general purpose DOT 111 railcars.

17. The purpose of the surcharge is to cause shippers to retrofit or retire federally-authorized general purpose DOT 111 railcars. BNSF has admitted that the surcharge is intended to discourage the use of certain DOT 111s. Specifically, BNSF informed the Administrator of PHMSA at a March 19, 2014 meeting that “there needs to be [a] disincentive to use DOT 111,” and thus the company was “looking at pricing” to accomplish that objective. Notes from Administrator’s Meeting with BNSF for Docket PHMSA-2012-0082, Open Rulemaking HM-251 (Mar. 19, 2014) (attached as Exhibit A). Rather than allowing shipments of crude oil in authorized DOT 111 tank cars, BNSF told PHMSA that “crude should move by the ‘next generation’ rail car,” even though DOT does not require such cars, and, in fact, none

have been manufactured yet. *Id.* In October 2014, BNSF announced the surcharge, which was characterized as a fee to encourage shippers to scrap general purpose DOT 111s. Black et al., Berkshire's BNSF to Add Surcharge on Older Tank Cars, *Bloomberg Business* (Oct. 24, 2014). (attached as Exhibit B).

18. BNSF's assertion of unilateral regulatory authority over crude oil tank car standards conflicts with the pending PHMSA rulemaking on such standards. On August 1, 2014, PHMSA proposed a rule on tank car standards and operational controls on rail shipments of crude and ethanol. *See* 79 Fed. Reg. 45,015 (Aug. 1, 2014). The proposal would eventually phase out general purpose DOT 111 tank cars for crude oil shipments by requiring that they be retrofitted or retired. None of the regulatory options under consideration by PHMSA included BNSF's immediate \$1,000 per car surcharge upon the continued use of general purpose DOT 111 tank cars. The certainty provided by PHMSA's exclusive tank car standards, including the retrofit schedule to be announced in the pending rulemaking, would be undermined were BNSF and other railroads allowed to use financial surcharges and penalties to coerce companies to adopt different standards.

19. BNSF's surcharge also deprives companies of the procedural protections afforded to those that are participating in the pending PHMSA rulemaking on rail tank car standards for crude oil shipments. Under the Administrative Procedure Act, PHMSA must afford notice and an opportunity to comment on its proposed rules, which then must be considered in promulgating a final rule. In the pending crude by rail rulemaking, AFPM, AAR, and other interested parties availed themselves of those procedural rights by filing written comments with PHMSA. All of these comments advocate for a multi-year phase out of general purpose DOT 111s because tank car manufacturers are unable to immediately retrofit or replace all DOT 111s due to limitations

on their manufacturing shop capacity and other factors. *See* Excerpts from the Comments to PHMSA, attached as Exhibit C. As a practical matter, BNSF's surcharge on general purpose DOT 111s denies AFPM and other stakeholders the procedural benefits of the rulemaking process with PHMSA: No matter how PHMSA decides to proceed in crafting the schedule for retiring or retrofitting DOT 111s, BNSF has already declared an immediate financial penalty on the continued use of those tank cars.

20. BNSF's actions have a direct impact on AFPM members who ship crude oil in general purpose DOT 111 cars. With each such DOT 111 holding approximately 700 barrels of crude oil, BNSF's \$1,000 per railcar surcharge results in an additional \$1.50 in costs for each barrel of crude oil shipped in a DOT 111 railcar. Given the popularity of the general purpose DOT 111 car and the high volume of crude oil shipment, the financial harm to AFPM members is direct and substantial. AFPM has standing to bring this suit on behalf of its members, because its individual members would have standing to bring this suit on their own behalf to protect their respective financial interests.

21. Further, as the trade association comprised of virtually all major crude oil refiners, AFPM has standing to protect interests germane to its purpose. BNSF's surcharges apply to AFPM members who ship crude oil with BNSF and are subject to the unlawful surcharge on general purpose DOT 111 tank cars.

### **CLAIMS AND CAUSES OF ACTION**

#### **Count I – Declaratory and Injunctive Relief for Breach of BNSF's Common Carrier Obligation**

22. Plaintiff incorporates and re-alleges each and every allegation contained in Paragraphs 1 to 21 of this Complaint as though fully set forth herein.

23. Section 171.1 of PHMSA's HMR provides, in relevant part: "Federal hazardous materials transportation law (49 U.S.C. 5101 *et seq.*) directs the Secretary of Transportation to establish regulations for the safe and secure transportation of hazardous materials in commerce, as the Secretary considers appropriate. . . Regulations prescribed in accordance with Federal hazardous materials transportation law *shall govern safety aspects*, including security, *of the transportation of hazardous materials that the Secretary considers appropriate.*" 49 C.F.R. § 171.1 (emphasis added).

24. Congress mandated that PHMSA "shall carry out" the "duties and powers" of the Secretary of DOT "related to . . . hazardous materials transportation and safety. . . ." 49 U.S.C. § 108(f)(1). PHMSA's authority over hazardous materials transportation "may be transferred" to another part of DOT or another government entity "only if specifically provided by law," 49 U.S.C. § 108(g), but no such transfer has been specifically authorized by Congress.

25. PHMSA's statutory authority includes the power to regulate "package[s], container[s], or packing component[s] . . . sold as qualified for use in transporting hazardous material in commerce." 49 U.S.C. § 5103 (b)(1)(A)(iii). PHMSA's HMR authorize certain rail cars as "bulk packagings" for the transport of hazardous materials, including DOT 111 rail tank cars for the shipment of crude oil and other "Class 3" flammable liquids. 49 C.F.R. §§ 173.241(a) (listing DOT 111 tank cars for the shipment of low-hazard liquids); 173.242(a) (listing DOT 111 tank cars for medium-hazard liquids); 173.243(a) (listing DOT 111 tank cars for high-hazard liquids). *See also* 49 C.F.R. § 172.101, Hazardous Materials Table, Column 8C (listing bulk packaging requirements for hazardous materials). As PHMSA has noted: "The DOT Specification 111 tank car is one of several cars authorized by the HMR for the rail

transportation of many hazardous materials, including ethanol, crude oil and other flammable liquids.” 79 Fed. Reg. at 45,025.

26. PHMSA’s rail tank car standards are exclusive. Section 173.3 of the HMR states, in pertinent part, that “[t]he packaging of hazardous materials for transportation by ... rail must be as specified in this part.” 49 C.F.R. § 173.3(a). Section 173.31 of HMR provides, in relevant part, that “[t]ank cars and appurtenances may be used for the transportation of any commodity for which they are authorized in this part . . .” 49 C.F.R. § 173.31(a)(2). Congress deemed uniformity in rail tank cars so important that it preempted States from enacting their own tank car standards. 49 U.S.C. § 5125(b)(1)(E); 49 C.F.R. § 171.1(f)(1)(iii)(E). Accordingly, PHMSA has exclusive authority to regulate the specifications and standards of rail tank cars used to transport crude oil.

27. BNSF is a common carrier subject to Interstate Commerce Commission Termination Act, and as such must provide rail transportation upon reasonable request. 49 U.S.C. § 11101. That statutory common carrier obligation includes a duty to transport hazardous materials where the appropriate agencies have promulgated comprehensive safety regulations. Here, BNSF is bound by PHMSA’s comprehensive regulatory regime governing the shipment of crude oil, and must accept for transportation those general purpose DOT 111 cars that are authorized for such transportation. Any changes to PHMSA’s regime must be processed through the rulemaking procedures under the Administrative Procedure Act, including the pending rulemaking on standards for rail cars that ship crude oil. Enacting a monetary penalty with the purpose of deterring hazardous materials shipments in authorized rail cars is contrary to BNSF’s common carrier obligation.

28. BNSF's surcharge conflicts with both PHMSA's current standards for railcars in crude service, and its exclusive right to enact and enforce a comprehensive regulatory regime. Despite BNSF's distaste for general purpose DOT 111 railcars, they are authorized bulk packagings for crude service under the HMR. Accordingly, BNSF's surcharge undermines its common carrier obligation to submit to PHMSA's authority under the Hazardous Materials Transportation Act and the Interstate Commerce Commission Termination Act.

**PRAYER FOR RELIEF**

For the above reasons, Plaintiff asks that judgment be rendered in favor of Plaintiff as follows:

- a. A judgment declaring that BNSF's proposed surcharge on movements of crude oil in general purpose DOT 111 railcars is null and void and unenforceable because it constitutes an unlawful attempt to regulate the standards and specifications of railcars used to ship crude oil, which is the exclusive province of PHMSA;
- b. A permanent injunction prohibiting BNSF from imposing the unlawful surcharge; and
- c. Such other and further relief to which AFPM may show itself to be justly entitled.

Respectfully submitted,

AMERICAN FUEL & PETROCHEMICAL  
MANUFACTURERS

By its Attorneys,

HOGAN LOVELLS US LLP

/s/ Bruce D. Oakley

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# EXHIBIT A

Notes from Administrator's Meeting with BNSF  
For Docket PHMSA-2012-0082  
Open Rulemaking HM-251  
March 19, 2014

**Participants:**

**PHMSA:**

Cynthia Quarterman, Administrator  
Magdy El-Sibaie, Associate Administrator, Office of Hazardous Materials Safety  
Ryan Posten, Deputy Associate Administrator, Policy and Programs, Office of Hazardous Materials Safety  
Jeannie Shiffer, Director, Office of Government, International, and Public Affairs  
Vanessa Sutherland, Chief Counsel  
Vasiliki Tsaganos, Deputy Chief Counsel

**FRA:**

Karl Alexy, Staff Director, Hazardous Materials Division

**Industry:**

Gregory Fox, Executive Vice President, Operations, BNSF Railway Company  
Michael Smythers, Jr., Assistant Vice President, Federal Government Affairs, BNSF Railway Company  
Amy Hawkins, Vice President, Federal Government Affairs, BNSF Railway Company  
Patrick M. Brady, Assistant Director Hazardous Materials, BNSF Railway Company

**Preliminary Remarks:\***

PHMSA has an open rulemaking regarding rail cars and, as such, cannot comment on that pending rulemaking; PHMSA will simply listen to comments. The comment period has closed for the ANPRM, but PHMSA may consider late-submitted comments.

**Comments from BNSF Railway Company ("BNSF"):\***

\*BNSF is committed to prevention, mitigation and response.

\*They don't believe that Bakken crude is very different than other crude, but they believe it is more volatile and that is why they are pushing for the new tank car standard. They believe that ethanol and crude should move by the "next generation" rail car. They said that they need certainty with respect to the new tank car standards and for the retrofit issue to be addressed.

\* They are also working on the response side and are training first responders. They are also working on creating hazmat training for first responders.

\*They believe that the voluntary actions have moved the needle in terms of risk reduction and they take risk reduction very seriously.

\* This is a summary of the comments made at this meeting and not a transcript.

\* They are supportive of breaking out the proposed rulemaking into two rulemakings. They would like to see the new tank car rulemaking as soon as possible.

\*They believe the CPC-1232 should be jacketed and with thermal protection for hauling crude and ethanol.

\*They proposed that the DOT 111s can be made equally safe as the CPC-1232 if they are equipped with head protection, valve protection, are jacketed and have thermal protection. They also suggested speed restrictions on the 111 in high volume areas for 5-7 years.

\*They don't distinguish between the older and newer DOT 111s.

\*They said that they spent a lot of time on conditional probability of release (CPR) with the University of Illinois and the calculated CPR for a DOT 111 is 50%.

\*They said that the mistake they made with the consensus standard in 2011 was that the CPC - 1232 car didn't have a jacket. If they knew about crude oil in 2011, they would not have supported the consensus standard.

\*They said that the CPC- 1232 is 76% more crashworthy than an unjacketed DOT 111.

\*The "next generation" car is 85% more crashworthy than the DOT 111. Their concept of a "next generation" car is a shell thickness of 9/16, full-height head shield, thermal protection, head shield, top and bottom valve protection, high capacity pressure relief valve, and jacketed. They basically described it as a 112 tank car with a hinged and bolted manway and bottom outlet valve.

\*They also said that they could see a scenario that a slight modification to the CPC-1232 and DOT 111 could allow Packing Group III to be hauled into the future. They also suggested that Canadian tar sands, asphalt and diesel could be shipped in these cars.

\*They said that they have put out a request for proposal for new tank cars and will have bids back in 60 days. They will be looking for the new tank car standard before they commit \$700 million.

\*They have not changed their tariffs on DOT 111s although Canada has done this. They are concerned that the DOT 111s will come to the U.S. and the CPC-1232s will end up in Canada. They believe that there needs to be disincentive to use DOT 111 and they are looking at pricing as well.

\* This is a summary of the comments made at this meeting and not a transcript.

## EXHIBIT B

<http://www.bloomberg.com/news/articles/2014-10-24/berkshire-s-bnsf-to-add-surcharge-on-older-oil-tank-cars>  
[#news/articles/2014-10-24/berkshire-s-bnsf-to-add-surcharge-on-older-oil-tank-cars](#)

# Berkshire's BNSF to Add Surcharge on Older Oil Tank Cars

Don't Miss Out —

Follow us on:

by Thomas Black Dan Murtaugh Mario Parker

1:06 PM CDT

October 24, 2014

Oct. 24 (Bloomberg) -- BNSF Railway Co. plans to apply a \$1,000 surcharge for each older crude tank car, denting profits for shale drillers in North Dakota.

The railroad owned by Warren Buffett's Berkshire Hathaway Inc. is the first major U.S. operator using fees to encourage shippers to scrap the puncture-prone older cars. The charge, which goes into effect Jan. 1, would add about \$1.50 a barrel to the cost of transporting oil on them.

The Obama administration in July proposed phasing out thousands of the older tank cars within two years and lowering speed limits as part of new rules to reduce the risk of hauling crude by rail. The plan followed a series of fiery accidents, including the derailment and explosion of a crude train last year that killed 47 people in the Canadian town of Lac Megantic.

"Ultimately it's the producer who's going to get impacted," said Andy Lipow, president of Lipow Oil Associates LLC in Houston. "The refiner is going to look at what is the delivered cost versus alternatives" such as imported oil.

The surcharge will pertain to cars known as DOT-111s and won't apply to cars called CPC-1232s that are built to higher standards adopted in October 2011, according to a BNSF notice. Mike Trevino, a spokesman for BNSF, confirmed the notice.

## Shale Fields

The extraction of oil from shale fields with limited pipelines, such as in North Dakota's Bakken, caused U.S. rail carloads of crude to surge to 415,000 last year from 9,500 in 2008, according to the Transportation Department.

Tank cars typically hold about 700 barrels of oil, which means the surcharge would boost the cost of shipping in older cars by \$1.50 a barrel. The cost to ship crude by train to East Coast refineries from North Dakota is \$9 to \$10 a barrel, San Antonio-based Tesoro Corp. said in a September presentation.

Some refiners, such as PBF Energy Inc., Phillips 66 and Tesoro, have already filled their fleets with tank cars compliant with the post-2011 rules.

<http://www.bloomberg.com/news/articles/2014-10-24/berkshire-s-bnsf-to-add-surcharge-on-older-oil-tank-cars>  
[#news/articles/2014-10-24/berkshire-s-bnsf-to-add-surcharge-on-older-oil-tank-cars](#)

BNSF, which operates tracks that connect into the Bakken and other shale oil fields, said in February it plans to order 5,000 new crude tank cars with safety standards higher than the CPC-1232s in an effort to push shippers toward safer cars.

Canadian Pacific Railway Ltd. adopted a \$325 surcharge in March for older crude tank cars in the U.S. that don't meet the CPC-1232 standard, the company said in February. Earlier this year, Canadian National Railway Co. introduced a rate structure to "create an economic incentive" or shippers to use the safer tank cars, Mark Hallman, a company spokesman, said today in an e-mailed response to questions.

## Safety Focus

The American Petroleum Institute, which represents shippers of crude oil, supports more safety upgrades for tank cars beyond what the industry adopted in October 2011, said Brian Straessle, a spokesman for the institute, in an e-mail. The safety focus shouldn't only be on tank cars, he said.

"Because there are limits to what tank car design can achieve, we must take a comprehensive safety approach to prevent accidents before they happen, mitigate any that occur and enhance emergency response," Straessle said.

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# EXHIBIT C



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Manufacturers**

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**COMMENTS OF THE AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS ON THE PIPELINE  
AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION'S ("PHMSA'S") NOTICE OF  
PROPOSED RULEMAKING FOR HAZARDOUS MATERIALS: ENHANCED CAR STANDARDS AND  
OPERATIONAL CONTROLS FOR HIGH-HAZARD FLAMMABLE TRAINS,  
DOCKET NO. PHMSA-2012-0082 (HM-251),  
79 FED. REG. 45,015 (AUG. 1, 2014)**

September 30, 2014

David Friedman  
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## I. INTRODUCTION

The American Fuel & Petrochemical Manufacturers (“AFPM”) appreciate the opportunity to provide comments on the U.S. Department of Transportation (“DOT”), Pipeline and Hazardous Materials Safety Administration’s (“PHMSA’s”) Notice of Proposed Rulemaking for Hazardous Materials: Enhanced Car Standards and Operational Controls for High-Hazard Flammable Trains (“Proposal” or “NPRM”).<sup>1</sup> AFPM members share a deep commitment to safety and strive for opportunities to proactively integrate safety into their operations and management culture. With that strong commitment to safety in mind, AFPM is concerned that the Proposal largely ignores measures that could prevent derailments of crude and ethanol shipments, focusing instead on mitigating the impact of derailments. While AFPM supports appropriate and effective mitigation, several of PHMSA’s proposed measures fail to take meaningful steps toward preventing derailments, risk significantly reducing crude rail capacity, and cost billions of dollars. We respectfully submit these comments to promote further dialogue on how to fashion a final rule that is preventative as well as protective, data-driven, and effective.

### A. AFPM’s Interest in the Proposal

AFPM is a national trade association of more than 400 petroleum refiners and petrochemical manufacturers throughout the United States. AFPM members operate 120 U.S. refineries comprising more than 95 percent of U.S. refining capacity.

AFPM members depend upon a plentiful, affordable supply of crude oil as a feedstock for the transportation fuels and petrochemicals that they manufacture. As manufacturers, AFPM members acquire crude oils from multiple sources, with a growing proportion coming from domestic sources, including oil produced from the Bakken formation. Ethanol is also a critical commodity for refiners because the Renewable Fuel Standard (“RFS”) of the Clean Air Act requires ethanol to be blended into gasoline.

Safe, reliable, and economic transportation of crude oil and ethanol from source to refinery plays a vital role in ensuring the efficient, economical, and continuous operation of our refining and petrochemical operations. Approximately 11 percent of the crude oil processed by AFPM members arrives by rail. Rail shipments are of particular importance for the Bakken formation, which lacks a pipeline infrastructure. As a result of the RFS mandate, AFPM members are also impacted by the transportation of ethanol from plant to terminal, since most ethanol is transported to market by rail.

In order to ship crude and ethanol, AFPM members lease and own tens of thousands of rail tank cars. About 40% of the tank cars used by AFPM members are owned, with the remaining cars leased.<sup>2</sup> Most rail shipments of crude and ethanol are carried in unit trains. The average size of such unit trains is 94 cars, according to an AFPM membership survey.<sup>3</sup>

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<sup>1</sup>Docket No. PHMSA-2012-0082 (HM-251), 79 Fed. Reg. 45,015 (Aug. 1, 2014).

<sup>2</sup>See AFPM Member Tank Car Retrofit Survey, at 5 (Sept. 14, 2014) (“AFPM Retrofit Survey”) (**Exhibit 1**).

<sup>3</sup>Fifteen AFPM members, who collectively own or lease about 29,000 tank cars, responded to the survey.

## **B. AFPM's Unwavering Commitment to Safety**

The refining and petrochemical manufacturing industries are committed to protecting the health and safety of our workers, our contractors, our neighbors, our customers, and the communities through which crude oil and ethanol are shipped. AFPM supports a holistic, preventative approach to improving the safe transportation of crude oil by rail and other modes, and is committed to working with PHMSA on this issue. AFPM and its members work diligently to maintain a safe working environment in our refineries, with a goal of zero incidents. This commitment applies to the safe transportation of crude oil and other feedstocks to refineries, and of refined products to our members' customers.

As part of a longstanding commitment to safety, AFPM members have been proponents of AAR Tank Car Committee's proposed Petition P-1577 recommendations, which were introduced in 2011 as CPC-1232 standard tank cars. AFPM members made an enormous capital investment, now estimated at more than \$3 billion, in tank cars meeting the updated standard because of their good-faith expectation that the standard would soon be adopted as law by the U.S. government. This expectation was supported by the fact that the U.S. DOT and Canadian Transport Ministry were both active participants in the AAR Tank Car Committee. Approximately 25% of the DOT-111 tank cars currently in crude and ethanol service are compliant with the CPC-1232 standard.<sup>4</sup> This number is expected to increase to more than 50,000 cars by the end of 2015. Despite the lack of regulatory certainty, the shipper sector has continued its good-faith, high-cost efforts to meet the CPC-1232 standard.

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<sup>4</sup>See Alltranstek, LLC, "Economic Impact on the North American Tank Car Fleet and Supply with the Implementation of the Anticipated New Tank Car Regulations" (Sept. 30, 2014) ("Alltranstek Technical Analysis") (**Exhibit 2**).

## II. EXECUTIVE SUMMARY OF AFPM'S COMMENTS

Domestic oil and gas production has grown dramatically in recent years, with crude oil projected to soon reach levels last seen in 1970. Rail has played a critical role in facilitating the growth of domestic energy production and manufacturing, spurring the creation of tens of thousands of new jobs. Recent increases in crude oil output are transported mainly by rail. For example, producers in the Bakken formation use rail to ship 70% of crude oil to refineries and midstream companies. Similarly, 70% of ethanol reaches refineries by rail.

Although transportation by rail is very safe – with 99.997% of all hazardous materials moving by rail reaching its destination without incident – our industry is committed to a culture of continuous improvements and focused on zero incidents as the goal. AFPM respectfully submits that any effort to enhance rail safety must begin with addressing the primary root causes of derailments and other accidents: (1) track integrity and (2) human factors. Eighty-eight percent of derailments occur due to track defects. Human error is the predominant cause of other train accidents (*e.g.*, collisions with other trains). Investment in accident prevention would result in the greatest reduction in the risk of rail incidents.

In particular, DOT should consider recommendations made by the National Transportation Safety Board (“NTSB”) to improve track safety standards and reduce human error. Those recommendations include requiring railroads to regularly report track service failure data, so that the Federal Railroad Administration (“FRA”) may review high-stress, at risk areas of track. FRA rejected NTSB’s safety recommendation, deferring to the railroads’ claim that they could not obtain sufficient equipment and personnel to test high-stress areas of track. The Proposal continues the pattern of ignoring accident prevention: Nothing in this rulemaking would require railroads to buy one more piece of track inspection equipment, hire one more qualified inspector or inspect one more mile of track. The Proposal would instead mandate that shippers spend billions of dollars on tens of thousands of new and retrofitted tank cars to mitigate the impacts of accidents.

AFPM supports the “Option 3” specification for new and retrofitted rail tank cars shipping crude and ethanol in unit trains of 75 cars or more. The Option 3 specification tank car is an enhanced CPC 1232 tank car with a 7/16” shell and other enhanced safety features. The Option 1 and 2 tank cars with a 9/16” shell provide only negligible safety benefits at a substantial incremental cost. For example, an independent DOT study in 2009 concluded that shell thickness played a “relatively weak” role in determining whether an accident would result in a tank car puncture and loss of lading.

By comparison, PHMSA’s cost-benefit analysis of the tank car options appears to be results-oriented, unreliable and based on data that PHMSA declined to place in the administrative record. PHMSA did not follow basic Office of Management and Budget procedures, such as preparing a “Statement of Energy Effects” analyzing how the rule may affect the supply of crude, its price, and the ability to meet demand with domestic crude. Indeed, the Proposal would create a significant risk of disrupting gasoline supplies. The numerous procedural and substantive flaws of PHMSA’s cost-benefit analysis make it clear that Options 1 and 2 would cost far more and provide little in the way of additional safety improvements.

PHMSA's proposed three-year schedule for retrofits of existing tank cars is infeasible and would damage the economy. The Proposed Rule represents the largest tank car retrofit in history, affecting more than 67,000 tank cars. AFPM requested that Alltranstek, LLC, a leading rail consulting company, assess the capacity of retrofit shops to perform the retrofits required under the Proposal. Based on that analysis, AFPM concludes that a ten-year retrofit schedule would be achievable. Insisting upon a more aggressive schedule would risk tank car shortages, a significant loss in crude and ethanol rail capacity, higher prices for consumers of petroleum products, and steep opportunity costs for refiners who would no longer be able to maintain current business levels.

Equally infeasible is PHMSA's proposal that the new tank car standards, the retrofit standards, speed restrictions and other requirements of the rule apply to "high-hazard flammable trains" ("HHFT"), *i.e.*, a single train carrying 20 or more carloads of a Class 3 flammable liquid. While the purpose of the Proposed Rule is to regulate crude and ethanol rail shipments, the HHFT definition would have the practical effect of requiring that *all* flammable liquids transported in HHFTs comply with the tank car standards and other obligations of the rule. Shippers sending a manifest train of only a few cars of flammable liquids cannot reasonably predict whether a railroad might gather additional cars down the line, triggering the 20 car threshold for HHFT. Regulating all flammable liquids would require a separate risk assessment and cost-benefit analysis, procedural steps that PHMSA failed to take.

In place of the unworkable HHFT definition, AFPM proposes that PHMSA tie the tank car standards and other requirements of the rule to a definition of "unit train," meaning a train of 75 or more cars in crude or ethanol service. This definition more accurately addresses the purpose of the rule: mitigating risks of release from large, multi-car derailments. An AFPM member survey showed that the smallest unit train in crude and ethanol service was 86 cars. Thus, setting a 75-car threshold for the definition of a unit train should capture all crude and ethanol in unit train service.

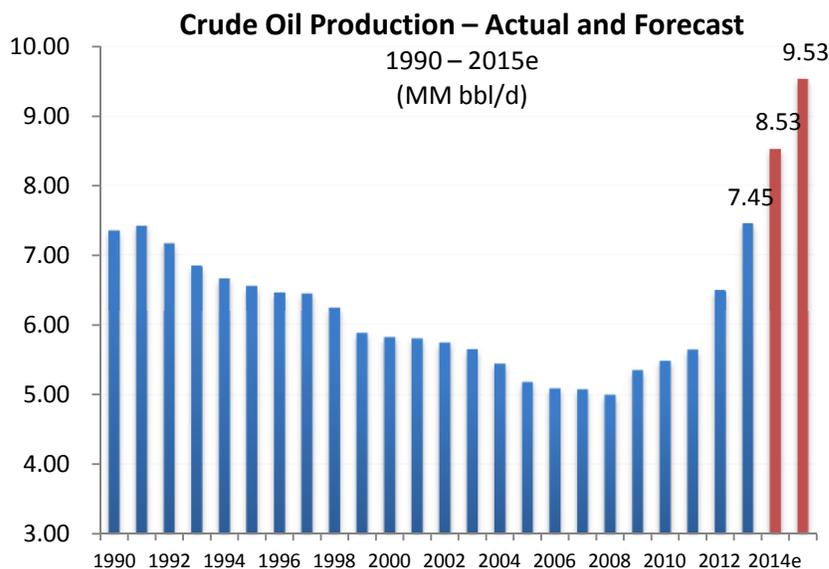
AFPM supports the Option 3 rail speed limit. That option will impose a 40 mph speed limit in high-threat urban areas ("HTUAs") for HHFTs unless all shipments meet the proposed tank car standards. AFPM agrees with the railroads that this is an appropriate speed limit, but suggests that it be tied to AFPM's proposed unit train definition, rather than HHFTs. The other speed limit options under consideration in the Proposal would unduly restrict rail capacity and risk supply disruptions of crude oil and other commodities throughout the rail system.

PHMSA's proposed classification and testing program for crude oil is unnecessary, unduly prescriptive, and burdensome. The properties of crude oil, including Bakken crude, are well understood. However, if PHMSA does decide to go forward with the proposed classification and testing program, these comments provide several suggestions to appropriately tailor the program. Finally, stabilization of Bakken crude is unnecessary and inappropriate because the properties of Bakken fall within the normal range for several other light crudes and stabilization would not reduce the risk of transporting this flammable liquid.

### III. THE IMPORTANCE OF RAIL TO DOMESTIC ENERGY INDEPENDENCE

Domestic oil and gas production has grown significantly in recent years, providing tens of thousands of jobs.<sup>5</sup> U.S. crude oil production is forecasted to increase from an estimated 7.45 million barrels per day (“MM bbl/d”) in 2013 to 8.53 MM bbl/d in 2014 and 9.53 MM bbl/d in 2015, the highest annual average crude oil production since 1970. The amount of domestic crude oil supplied to East Coast refineries and petrochemical facilities has increased with rising domestic production in the Bakken area and expansion of crude-by-rail infrastructure. Hydrocarbon gas liquids (HGL) production at natural gas liquids plants is projected to increase from 2.6 MM bbl/d in 2013 to 3.1 MM bbl/d in 2015—most of this growth is expected to come from additional ethane and propane production. The growth in U.S. petroleum and other liquids production is shown in Figures 1 and 2 below. For the first time since 1995, domestic crude production exceeds imports, reducing our dependence on crude from the Middle East, Africa, and Latin America.<sup>6</sup>

Figure 1



Source: Alltranstek Technical Analysis, at 9.

<sup>5</sup>Unless otherwise noted, this section of the comments is drawn from the Alltranstek Technical Analysis (Exhibit 2).

<sup>6</sup>Congressional Research Service, “U.S. Rail Transportation of Crude Oil: Background and Issues for Congress” at 1-2 (Feb. 16, 2014) (Excerpts at **Exhibit 3**) (“CRS Report”), available at <https://www.fas.org/sgp/crs/misc/R43390.pdf>

cost estimates prepared by Alltrantek, requires PHMSA to reassess the cost-benefit calculation of each of the Option 3 retrofit modifications to demonstrate their individual and combined benefits. Only with this careful reexamination can the most effective use of resources be put to the task of truly providing the improved safety benefit that both AFPM and PHMSA wish to achieve.

### C. The Retrofit Schedule

PHMSA proposes a schedule to retrofit tank cars used in HHFTs based on the packing group of the commodity transported, with cars transporting Packing Group I (“PG”) cars retrofitted by October 2017, PGII cars by October 2019 and PGIII cars by October 2020. *See* 79 Fed. Reg. 45,076. PHMSA proposes to apply the same tank car standards to new and retrofitted cars. Therefore, the agency requests comment on the same Option 1, 2 and 3 alternatives for tank car specifications, except that the agency will not require additional top fitting protection for retrofits due to the costs exceeding the benefits. *Id.* at 79 Fed. Reg. 45,059.

#### 1. Prioritize Retrofits Based on Crude and Ethanol Unit Train Service

AFPM recommends initially focusing on retrofits used in crude and ethanol service in unit trains. It would allow PHMSA to begin with the crude and ethanol fleets that the rule is intended to address.

In contrast, prioritizing retrofits based on PG is inappropriate and disconnected from the purpose of this rulemaking. While PG distinctions may make sense in prioritizing risks from non-bulk shipping containers, taking that approach is illogical when dealing with bulk transport via rail. Regardless of the PG, the risk associated with a train derailment of crude or ethanol risks loss of a large volume of flammable liquid, a fire, and other consequences. Whether a product is PGI, PGII or PGIII makes little difference to the risks posed by the consequences of a breach during a crude oil or ethanol derailment. That common-sense observation was recently confirmed by an FRA study of the consequences of ethanol and crude oil derailments. *See* FRA Ethanol/Crude Analysis. After noting that “[d]enatured alcohol is a packing group II material ... and [c]rude oil from the Bakken shale play is typically a packing group I material,” FRA’s study concluded:

There is little evidence supporting the position that crude oil (especially the extracted crude from the Bakken region) poses a heightened risk of a high energy or explosive event when tank cars containing the material are exposed to pool fire conditions. In fact, the failure rate (due to thermal damage) of tank cars containing denatured alcohol is 1.5x greater than that of a tank car transporting crude oil.

*Id.* at 8.

PHMSA should initially focus the retrofit schedule on crude and ethanol cars in unit train service. It would allow the improved prioritization of limited retrofit shop capacity. As this rulemaking illustrates, retrofits also disrupt the tank shop industry, creating long delays and the

inability to meet customer needs for ongoing maintenance of rail car fleets as they reach requalification deadlines.

## 2. PHMSA Should Set a 10-Year Retrofit Schedule

PHMSA assumes the size of the fleet to be retrofitted is 66,185 cars, broken down between 43,805 unjacketed DOT-111s and 22,380 unjacketed CPC-1232s. PHMSA further assumes that these tank cars can be retrofitted in three years. That would work out to an average of 22,062 tank retrofitted per year. *See* Draft RIA, at 89, 98-99, 105-06.

PHMSA's retrofit schedule is infeasible. The agency claims that its schedule is based on discussions with tank car manufacturers. But RSI, which represents 70% of the tank car market, recently increased its estimate of annual shop capacity to 6,400 tank cars per year, a number that is less than thirty percent of PHMSA's estimated shop capacity necessary to meet its proposed three-year retrofit schedule. Significantly, the RSI estimate of 6,400 cars per year requires a ramp up period. Current capacity is only 2,430 tank cars per year, suggesting that it will take several years to grow to RSI's projected capacity. *See* Alltranstek Analysis, at 19–20.

PHMSA's retrofit schedule ignores a number of real world factors that impact shop capacity. The industry's capacity to repair rail cars today is relatively the same as it was ten years ago when the fleet was 20% smaller and the regulatory environment less volatile. Shop capacity is extremely tight. In fact, many tank car repair shops have become "booked-out" for the next 2-3 years. Furthermore, a heavy requalification wave will start in 2015 as a result of the large number of tank cars built for ethanol service in 2005-2007, exacerbating the tank car repair shop shortage considerably over the next several years. Tank car cleaning and coating/lining capacity is currently constrained and is a critical pressure point in the tank car repair supply chain. *See* Alltranstek Analysis, at 16.

At AFPM's request, Alltranstek prepared an estimate of the size of the potential fleet of existing crude and ethanol tank cars subject to the proposed retrofit options. As of May 1, 2014, Alltranstek estimated that there are about 94,000 crude and ethanol tank cars. *See* Alltranstek Analysis, at 21. The breakdown of this fleet is provided below in Table 1. In analyzing retrofit issues, RSI estimated that approximately 28% of the existing fleet would be scrapped under the Proposal. This scrappage estimate is based on the age of the existing fleet and the feasibility of retrofitting these tank cars to meet the Option 3 retrofit specifications. Applying that 28% scrappage rate to 94,000 cars yields 68,000 crude and ethanol tank cars to be retrofitted, a slightly higher number than PHMSA's estimate of about 66,000 tank cars.

Table 1: Existing Fleet

	Tank car category	Option 3	Option 2	Inventory 5/1/2014	% of Total	Assumptions
1	CPC-1232 Bare tank car - 286k GRL	\$45,900	\$56,900	16,106	17%	
2	CPC-1232 jacketed tank car	\$2,700	\$35,700	7,696	8%	Assume that car can exist with current insulation - 286k GRL
3	DOT pre-CPC-1232 bare tank car	\$68,400	\$79,400	55,485	59%	Assume that PHMSA will accept A-516-70 tank material - 263k GRL
4	DOT pre-CPC-1232 jacketed tank car	\$42,700	\$75,700	3,355	4%	Assume that PHMSA will accept A-516-70 tank and insulation - 263k GRL
5	DOT pre-1996 bare tank car	\$86,900	\$97,900	11,617	12%	Assume that PHMSA will accept A-516-70 tank material - 263k GRL
6	DOT pre-1996 jacketed tank car	\$61,200	\$94,200			Assume that PHMSA will accept A-516-70 tank and insulation - 263k GRL
	Total			94,259	100%	

Source: Alltranstek Analysis at 28

Alltranstek also prepared an analysis of annual shop capacity to perform retrofits. Alltranstek conducted a survey of about 74% of the tank car repair market. Based on the survey, Alltranstek concluded that 54 shops can perform the types of major retrofits required by the NPRM (*e.g.*, jackets, head shields, *etc.*). See Alltranstek Analysis, at 15, 17-18. Alltranstek then looked at two retrofit capacity scenarios, a “base case” and an “investment case.” Both scenarios account for “on the ground” facts such as capacity currently under contract through 2015, upcoming requalification demand and average retrofit turn-around times. The principle difference between the two scenarios is that the investment case assumes 30% growth in the number of shops entering the retrofit market over the first four years of the retrofit schedule. See *id.* at 19-20.

The results of Alltranstek's analysis of shop capacity show that a three-year schedule would impose severe capacity restrictions on crude and ethanol rail service. Annual retrofit capacity for both the base case and investment case are shown below in Figures 6 and 7. See Alltranstek Analysis, at 19-20. Alltranstek estimated that about 10,000 cars could be retrofitted by year three in the investment case, while the base case could result in retrofitting about 8,500 cars. These numbers are nowhere near the 68,000 cars that AFPM estimates would have to be retrofitted within the same time period. As a result, over 50,000 tank cars would be forced off the rails.

Figure 6: Alltranstek Base Case Results for Retrofit Shop Capacity.

<b>Estimated shop capacity for next four years</b>					
<b><u>Base Case</u></b>					
	Year 1	Year 2	Year 3	Year 4	Total
Number of retrofit capable shops	54	56	58	60	
(x) Avg annual retrofit production per shop	45	45	47	49	
(=) Estimated number of annual retrofits	2,430	2,520	2,726	2,940	
(+) Respondent currently planned capacity	0	363	363	363	
(=) Total number of potential annual retrofits	2,430	2,883	3,089	3,303	<b>11,705</b>
Growth in shops providing service		2	2	2	
Growth in production efficiency		0.0%	5.0%	5.0%	

Figure 7: Alltranstek Investment Case for Retrofit Shop Capacity

<b>Estimated shop capacity for next five years</b>					
<b><u>Investment Case</u></b>					
	Year 1	Year 2	Year 3	Year 4	Total
Number of retrofit capable shops	54	59	69	79	
(x) average annual retrofit production per shop	45	50	58	70	
(=) estimated number of annual retrofits	2,430	2,950	4,002	5,530	
(+) Respondent currently planned capacity	0	363	363	363	
(=) Total number of potential annual retrofits	2,430	3,313	4,365	5,893	<b>16,001</b>
Growth in shops providing service		5	10	10	
Growth in production efficiency		10.0%	15.0%	20.0%	

Adopting PHMSA's three-year phase-in would restrict crude and ethanol rail capacity and damage the economy. RSI has estimated that withdrawing 31,000 tank cars from service would be equivalent to reducing the capacity of the crude and ethanol fleet by 20% to 25%, a

huge loss at a time of growing domestic crude production in our nation. *See* RSI TC Comments, at 11. Indeed, AFPM Members face the possibility of paying damages on contracts that involve “take or pay” commitments, another cost PHMSA ignored in the rulemaking.<sup>45</sup> PHMSA’s schedule would also impact domestic energy production. Shortages of tank cars could result in disrupting the gasoline supply if insufficient supplies of ethanol are available for blending operations. Crude deliveries to refiners could also be constricted as 70% of Bakken crude is shipped by rail.

Setting a tight three-year retrofit period poses particular risks because the retrofit data provided by tank car manufacturers has been changing frequently. For example, the RSI estimates of the retrofit fleet have changed substantially over the last eight months by as much as 20,000 cars. The enhanced PRVs and BOVs are still going through testing and trials, with the Tank Car Committee considering the flow rates for the PRVs. Imposing a 36 month retrofit period heightens the uncertainty and risk created by highly dynamic data.

Instead of a three-year retrofit schedule, AFPM recommends a ten-year schedule. Using the more optimistic “investment case,” Alltranstek estimates that about 16,000 tank cars will have been retrofitted by year four of the schedule. That would leave approximately 52,000 tank cars to retrofit. The investment case projects that, by year four, tank car shops will have built up a capacity to perform about 5,900 retrofits per year. Similarly, RSI estimates that, after a period of ramp up, annual shop capacity will reach 6,400 retrofits per year. At 6,400 retrofits a year, the retrofit schedule would extend another eight years, making it 12 years total. However, AFPM believes that additional efficiencies and shop capacity may build up over time to allow the investment necessary to complete retrofits within 10 years. That schedule also accords with the ten year requalification period that tank cars must all undergo.

A ten-year retrofit schedule would be consistent with past precedent. In 1995, the Research and Special Programs Administration (“RSPA”), the predecessor agency to PHMSA, issued a rule requiring the retrofit of tank cars used to ship certain high hazardous materials, including those that are poisonous-by-inhalation, such as chlorine. 60 Fed. 49,048 (1995). In the rule, RSPA determined that a ten year schedule for the retrofit of the existing fleet was appropriate. *Id.* at 49,058, 49,073-74.

In setting a ten-year schedule, it is important that PHMSA prioritize retrofits to further the objectives of the rule. Otherwise, retrofitting will be done purely on a commercial basis without regard to the issues PHMSA seeks to address. Accordingly, AFPM proposes the following retrofit schedule to be accomplished within ten years:

- DOT-111 unjacketed cars December 2020.
- CPC-1232 unjacketed cars by March 2024.

DOT-111 jacketed cars by March 2025.

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<sup>45</sup> In general, a “take or pay” commitment is a contractual obligation to pay for a certain amount of crude oil, regardless of whether the buyer can ship the oil.

Once PHMSA sets a realistic retrofit schedule, PHMSA should commit to have an independent reassessment of the schedule at the mid-point of implementation.<sup>46</sup> The NPRM envisions an unparalleled retrofit mandate, one that is likely infeasible in light of retrofit capacity at tank car shops. To avoid disruptions in rail service of crude, ethanol, and potentially other commodities, the Department of Energy—or another agency independent of DOT—should evaluate the implementation of the retrofit schedule at its midway point to ensure that shippers will still have access to the fleet necessary to move commodities.<sup>47</sup> This midway check can be accomplished by reviewing the Umler database or R-1 filings with AAR to see whether retrofits appear to be on a path toward achieving the schedule.

#### **D. PHMSA'S Draft Cost-Benefit Analysis**

AFPM requests that PHMSA issue a notice of data availability (“NODA”) with a new, supplemental cost-benefit analysis that addresses the numerous deficiencies in the agency’s current analysis.<sup>48</sup> PHMSA’s draft cost-benefit analysis of the tank car retrofit options is riddled with errors. It omits key calculations and assumptions, leaving the regulated community to guess at how the agency arrived at certain values used to justify this multi-billion dollar retrofit mandate. What PHMSA does include in the cost-benefit analysis appears to be inaccurate, unreliable and little more than guess-work, with inadequate studies, testing, and real-world data. The cumulative effect of PHMSA’s errors is to substantially understate the costs of the Proposal. Indeed, the flaws in the cost-benefit analysis all appear to lower the costs of Option 1, suggesting that PHMSA arbitrarily selected that option before going through the rulemaking process.

AFPM’s ability to meaningfully participate in the rulemaking process is substantially prejudiced by the agency’s failure to prepare a complete analysis. Even if the agency fully accepted AFPM’s comments, the resulting cost-benefit analysis would be so fundamentally different that we would have no opportunity to comment fairly and effectively on the agency’s “re-do.” Accordingly, we respectfully request that PHMSA issue a NODA that provides notice and an opportunity to comment upon the revised cost-benefit analysis before the rule becomes final. To the extent that PHMSA declines this opportunity to provide sufficient notice, its final rule would be unreasonable and arbitrary.

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<sup>46</sup> Even before the mid-point of a reasonable retrofit schedule, PHMSA may need to adjust the schedule for particular equipment that remains unproven. In particular, the timeline for the enhanced pressure relief valve and bottom outlet handle continues to slip. As of the writing of these comments, tank car manufacturers continue to work on the flow rate for the pressure relief valves. The design and proving of the bottom outlet handles is ongoing. The retrofitting of tank cars should only begin when the equipment is market ready, including retrofitting jacketed CPC-1232s with the enhanced pressure relief valves and bottom outlet handles. To the extent that these retrofits are not fully designed, tested and proven by the retrofit deadline, PHMSA should adjust the deadline to the next tank car qualification or other major shop event to allow the technology to mature before retrofit.

<sup>47</sup> AFPM opposes having an AAR or RSI committee or working group oversee or determine any adjustment to the retrofit schedule. Railroads and tank car manufacturers work cooperatively with shippers on several issues, but it is still the case that AAR and RSI speak for their own members and interests. Shippers deserve an independent assessment, not one overseen by their commercial counterparties.

<sup>48</sup> While the bulk of our criticisms of PHMSA’s cost benefit analysis appear in this section on retrofits, the criticisms apply more broadly to the entire rule and should not be construed as merely critiquing the retrofit obligations.



AMERICAN PETROLEUM INSTITUTE



**Submitted Electronically**

September 30, 2014

Docket Management System  
U.S. Department of Transportation  
West Building, Ground Floor, Room W12-140  
Routing Symbol M-30  
1200 New Jersey Avenue, S.E.  
Washington, D.C. 20590

**Attention: Docket ID No. PHMSA-2012-0082 (HM-251)**

**Re: Hazardous Materials: Rail Petitions and Recommendations to Improve the Safety of Railroad Tank Car Transportation (RRR)**

The Association of American Railroads (AAR) on behalf of itself and its member companies and the American Petroleum Institute (API) on behalf of itself and its member companies offer the following comments in response to the Department of Transportation (DOT) Pipeline and Hazardous Materials Safety Administration's (PHMSA) request for comments on Docket PHMSA-2012-0082.

AAR's member railroads account for most of the rail transportation of flammable liquids and have a substantial interest in the proposed tank car standards and operating requirements. API represents more than 600 companies involved in all aspects of the oil and natural gas industry including the exploration, production, shipping, transportation and refining of crude oil and has a substantial interest in the proposed rules governing crude by rail.

Our country is in the midst of an energy renaissance that has allowed us to become a global leader in energy production. AAR and API support a rule that enhances the safety of rail transportation in North America while allowing for the continued growth of our oil and natural gas production. The geographic diversity of the railroads, coupled with emerging non-traditional production regions, has led to a mutually beneficial partnership between the oil and rail industries as new resources are produced and transported.

In June, 2014, the combined oil and rail executive leadership agreed to work collaboratively to identify and implement proven practices to prevent, mitigate and respond to risks associated with moving crude oil by rail. As part of that effort, the members of AAR and API have jointly developed a response to PHMSA's proposed rail tank car standards and are providing PHMSA with comments and suggestions directed towards improving PHMSA's recommended tank car design, tank car retrofit design, and implementation schedule.

The oil and rail industries' commitment to safety, efficiency and environmentally responsible operations is reflected in the joint comments. We encourage PHMSA to consider the issues raised in our comments and take a measured, data-based approach as they finalize the rulemaking.

Sincerely,



President and Chief Executive Officer  
American Petroleum Institute



President and Chief Executive Officer  
Association of American Railroads

Attachment

September 30, 2014

**Table 2. AAR Existing Tank Cars and RSI Committed<sup>13</sup> Tank Car Orders**

Car Type / CPR Value	2013	2014 orders	2015 orders	Crude Oil Total	Ethanol	Ethanol and Crude Oil Total
CPC-1232 jacketed (4.57%)	7,685	13,647	9,730	31,062	23	31,085
CPC-1232 non-jacketed (10.3%)	11,364	7,481	1,180	20,025	751	20,776
Legacy-111 jacketed (8.5%)	6,524			6,524	88	6,612
Legacy-111 non-jacketed (19.55%)	22,930			22,930	26,983	49,913
				<b>Total</b>	80,541	27,845 <b>108,386</b>

Note: Excludes 38,000 tank cars in Other Flammables service.

## II. Retrofit Schedule

PHMSA's analysis has led it to conclude that the proposed tank car designs and timelines would not have deleterious impact on the market for tank cars. In particular, PHMSA concludes that no tank cars would be prematurely retired and that the rule would not impact the transportation of crude oil or ethanol. This is not the case. Indeed, PHMSA makes a number of errors regarding what would be involved in retrofitting existing tank cars, the capacity to retrofit tank cars, and the ability of tank cars to be repurposed to Canadian oil sands trade. When these realities are taken into account, it is clear that shortages of retrofit shop capacity

<sup>13</sup> Committed tank car orders are contracted to be built for a specific design and will be completed by the end of 2015

September 30, 2014

would likely lead to premature scrapping of a large part of the existing fleet, jeopardizing the reliable use of rail for crude oil and ethanol transport, with potential associated adverse impacts on crude oil production and ethanol costs.

As part of the agreement on tank car specifications, AAR and API reached an agreement on a retrofit schedule. The schedule was discussed in the context of the transportation of crude oil only. The schedule provided for the retrofit of legacy DOT-111 non-jacketed tank cars within three years, following an estimated six to twelve months needed for the tank car shops to “ramp up.” The schedule provided for an additional three years for the non-jacketed CPC-1232 cars, after the three years required for retrofitting the DOT-111 non-jacketed fleet. AAR and API agreed that this approach should not preclude individual company activities to upgrade their fleets early. AAR and API also agree that the jacketed legacy DOT-111 cars and CPC-1232 cars should be retrofitted at the next shopping or qualification. Finally, AAR and API agreed that if the proposed rule were to include other materials such as ethanol and “other flammable liquids” that the schedule could not be met and that the schedule would need to be extended. This additional time would be required due to limits of shop capacity.

With PHMSA’s proposed rule including crude oil and ethanol and other flammable liquids, AAR and API are recommending that PHMSA take into account the retrofit schedule AAR and API considered for a crude oil only program in establishing a retrofit schedule encompassing additional commodities. As stated, AAR and API would support placing a priority on crude oil and ethanol since they account for most of the unit train service for flammable liquids. Additionally, PHMSA should account for manufacturing capacity, shop capacity for any retrofits that will be undertaken, the number of DOT-111 cars that need to be phased out of flammable liquid service, and the demand for new DOT-111 cars. AAR and API also support consideration of a prioritized schedule that takes into account the commodity transported, the type of tank car, e.g., non-jacketed legacy DOT-111, jacketed DOT-111, and whether commodities are usually transported in unit trains or manifest service.

Another key element of the AAR and API agreement on a retrofit schedule was that as retrofits progressed, there needed to be a review of the ability to meet the suggested timeline. Accordingly, AAR and API recommend the development of a retrofit review program. The review would address available shop capacity, access to sufficient quantities of materials, availability of skilled labor, and actual progress in manufacturing and retrofitting tank cars and consider what, if any, additional time would be necessary to complete the retrofit schedule.

September 30, 2014

### **III. Conclusion**

AAR and API are committed to the safe transportation of crude oil by rail. The associations believe their proposal to enhance tank car specifications for crude oil serve the public interest by taking a significant step to make a safe transportation system even safer while avoiding significant adverse economic effects.

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

American Fuel & Petrochemical Manufacturers

(b) County of Residence of First Listed Plaintiff Washington, D.C. (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) Bruce D. Oakley, Justin A. Savage, Heaven C. Chee Hogan Lovells US LLP (see attachment)

DEFENDANTS

BNSF Railway Company

County of Residence of First Listed Defendant Tarrant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Insurance, Personal Injury, Real Estate, etc.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District, 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 49 U.S.C. §§ 5101 et seq, 11101, 11704(c)(1)

Brief description of cause: Declaratory and injunctive relief sought against Defendant's unlawful transportation surcharge

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE

March 13, 2015

SIGNATURE OF ATTORNEY OF RECORD

[Handwritten Signature]

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

AMERICAN FUEL & PETROCHEMICAL	§	
MANUFACTURERS,	§	
	§	
Plaintiff,	§	
	§	Civil Action No.
vs.	§	
	§	
BNSF RAILWAY COMPANY,	§	
	§	
Defendant.	§	

**PLAINTIFF'S CIVIL COVER SHEET ATTACHMENT**

Question I(c) – Attorneys for Plaintiff American Fuel & Petrochemical Manufacturers:

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**ATTACHMENT B**

**ENTERED**

March 11, 2016

David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

AMERICAN FUEL &  
PETROCHEMICAL  
MANUFACTURERS,

Plaintiff,

v.

BNSF RAILWAY COMPANY,

Defendant.

§  
§  
§  
§  
§  
§  
§  
§  
§  
§

Civil Action No. H-15-682

ORDER

Pending before the Court is Defendant BNSF Railway Company’s Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim Upon Which Relief Can Be Granted and Alternative Motion to Dismiss Under the Doctrine of Primary Jurisdiction (Document No. 12). Having considered the motion, submissions, and applicable law, the Court determines the motion should be granted.

I. BACKGROUND

This case arises from a dispute over the transportation of crude oil. Plaintiff American Fuel & Petrochemical Manufacturers (“AFPM”) is a non-profit national trade association headquartered in Washington, D.C. It is the largest trade organization of crude oil refiners and petrochemical manufacturers in the United

States.<sup>1</sup> Defendant BNSF Railway Company (“BNSF”), the largest carrier of crude oil in North America, transports crude for its customers in several different types of tank cars on its railroad. BNSF does not own the tank cars themselves. Rather, the cars are owned or leased by the shippers of crude oil, including many of AFPM’s members. The specific model of tank car at issue in this case is referred to as a general purpose DOT 111 tank car (“DOT 111”), which BNSF characterizes as the “oldest, least safe tank cars currently authorized to haul crude oil,”<sup>2</sup> while AFPM notes it is “one of the most commonly used railcars . . . represent[ing] approximately 28% of the national fleet of railcars approved to ship crude.”<sup>3</sup>

The Pipeline and Hazardous Materials Safety Administration (“PHMSA”) is a division of the United States Department of Transportation. The PHMSA administers the Hazardous Materials Transportation Act and, as part of that role, sets safety standards governing rail tank cars that ship crude oil. In May 2015, the

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<sup>1</sup> AFPM members operate 120 U.S. refineries comprising more than 95 percent of U.S. refining capacity.

<sup>2</sup> *Defendant BNSF Railway Company’s Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim Upon Which Relief Can Be Granted and Alternative Motion to Dismiss Under the Doctrine of Primary Jurisdiction*, Document No. 12 at 1 [hereinafter *Defendant’s Motion to Dismiss*].

<sup>3</sup> *Plaintiff American Fuel & Petrochemical Manufacturers’ Response to Defendant’s Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim Upon Which Relief Can Be Granted and Alternative Motion to Dismiss Under the Doctrine of Primary Jurisdiction*, Document No. 18 at 1 [hereinafter *Plaintiff’s Response to Defendant’s Motion to Dismiss*].

PHMSA promulgated a new set of rules that called for gradually phasing out the use of DOT 111 cars through May 1, 2025. In January 2015, BNSF began charging \$1,000 for each DOT 111 car used to ship crude oil.<sup>4</sup> AFPM alleges BNSF began this practice to indirectly force the DOT 111 cars into “premature retirement” by making their use “financially impractical” despite still being authorized for use under the new rules.<sup>5</sup>

On March 13, 2015, Plaintiff AFPM filed suit in this Court, bringing one cause of action for “Declaratory and Injunctive Relief for Breach of BNSF’s Common Carrier Obligation.”<sup>6</sup> AFPM alleges BNSF’s \$1,000 surcharge amounts to a violation of its common carrier duty to provide service under the Interstate Commerce Commission Termination Act (“ICCTA”). On June 26, 2015, Defendant BNSF moved to dismiss for lack of subject matter jurisdiction, contending AFPM’s claim is actually a challenge to BNSF’s rates rather than its common carrier obligation. BNSF asserts that this Court lacks subject matter jurisdiction and that the case should be heard by the Surface Transportation Board (“STB”) because the STB has exclusive jurisdiction over railroad rates pursuant to

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<sup>4</sup> Throughout the complaint and its response to the motion to dismiss, AFPM refers to this charge as a “penalty,” “premium,” or “surcharge.” The Court will refer to it as a surcharge.

<sup>5</sup> *Plaintiff’s Original Complaint*, Document No. 1 at ¶¶ 15, 17; *Plaintiff’s Response to Defendant’s Motion to Dismiss*, *supra* note 3 at 1.

<sup>6</sup> *Plaintiff’s Original Complaint*, Document No. 1 at 7.

the ICCTA. BNSF also moves to dismiss for failure to state a claim. Alternatively, if the Court finds it has subject matter jurisdiction, BNSF contends the Court should dismiss in deference to the STB's primary jurisdiction over the dispute.

## II. STANDARD OF REVIEW

Motions filed pursuant to Federal Rule of Civil Procedure 12(b)(1) allow a party to challenge the subject matter jurisdiction of the district court. FED. R. CIV. P. 12(b)(1). "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998). "Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (per curiam). "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Id.*

Rule 12(b)(6) allows dismissal if a plaintiff fails "to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). Under Rule 8(a)(2), a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). Although "the pleading

standard Rule 8 announces does not require ‘detailed factual allegations,’ . . . it demands more than . . . ‘labels and conclusions.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “[A] formulaic recitation of the elements of a cause of action will not do.” *Id.* (quoting *Twombly*, 550 U.S. at 555).

In deciding a Rule 12(b)(6) motion to dismiss for failure to state a claim, “[t]he ‘court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.’” *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Martin K. Eby Constr. Co. v. Dall. Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)). To survive the motion, a plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. “Conversely, ‘when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.’” *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 558).

### III. LAW & ANALYSIS

Under the ICCTA, rail carriers “providing transportation or service subject to the jurisdiction of the Board . . . shall provide the transportation or service on reasonable request.” 49 U.S.C. § 11101(a). This provision is the basis of the

common carrier obligation. Under the common carrier obligation, rail carriers must “transport hazardous materials ‘where the appropriate agencies have promulgated comprehensive safety regulations.’” *Riffin v. Surface Transp. Bd.*, 733 F.3d 340, 346 (D.C. Cir. 2013) (quoting *Eric Strohmeier*, STB Docket No. 35527, 2011 WL 5006471, at \*1 (served Oct. 20, 2011)). Under the common carrier obligation, BNSF cannot outright refuse to transport crude oil in DOT 111 rail cars because transportation of that substance in those cars has been approved by the appropriate agency—the PHMSA.

The STB has exclusive jurisdiction over “transportation by rail carriers, and the remedies provided in this part with respect to rates.” 49 U.S.C. § 10501(b). AFPM agrees that the STB’s “exclusive jurisdiction would preclude any litigation of rate reasonableness in federal court.”<sup>7</sup> Challenges to railroad conduct, including challenges to an “alleged pattern of attempting to avoid their common carrier duty,” that are “manifested *exclusively* in the level of rates that customers are charged” are considered disputes over rates. *Union Pac. R. Co. v. I.C.C.*, 867 F.2d 646, 649 (D.C. Cir. 1989) (emphasis in original).<sup>8</sup>

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<sup>7</sup> *Plaintiff’s Response to Defendant’s Motion to Dismiss*, *supra* note 3 at 7.

<sup>8</sup> AFPM contends *Union Pacific* does not apply to this case in part because it was decided before the ICCTA went into effect and concerned an earlier agency called the Interstate Commerce Commission (“ICC”). See *Plaintiff’s Response to Defendant’s Motion to Dismiss*, *supra* note 3 at 15. However, as AFPM explains in its response to the motion to dismiss, the “ICCTA created the [STB] to assume the same administrative functions over the rail industry as the now-defunct ICC.” *Plaintiff’s Response to*

AFPM contends its challenge to BNSF's \$1,000 surcharge does not fall under the STB's exclusive jurisdiction because AFPM has not attacked the reasonableness of the amount charged. Rather, AFPM asserts its claim is based on BNSF's "effective refusal of service," which "constitutes a violation of BNSF's common carrier obligation . . . The \$1,000 penalty is merely the means employed to achieve this unlawful end."<sup>9</sup> Because the \$1,000 surcharge is the only BNSF action upon which AFPM rests its allegation, the Court finds AFPM has alleged that BNSF is attempting to avoid its common carrier obligation in a way that is manifested exclusively in the level of rates that customers are charged. Therefore, this is a dispute over BNSF's rates and thus falls under the exclusive jurisdiction of the STB. Accordingly, BNSF's motion to dismiss for lack of subject matter jurisdiction is granted and AFPM's claim is dismissed without prejudice.

#### IV. CONCLUSION

Based on the foregoing, the Court hereby

**ORDERS** that Defendant BNSF Railway Company's Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim Upon Which

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*Defendant's Motion to Dismiss, supra* note 3 at 4 (citing 49 U.S.C. § 702). Furthermore, courts in other circuits and the STB itself have cited *Union Pacific* while analyzing the current statute. *See, e.g., DHX, Inc. v. Surface Transp. Bd.*, 501 F.3d 1080, 1087 (9th Cir. 2007); *Cargill, Inc. v. BNSF Ry. Co.*, STB Docket No. 42120, 2012 WL 1899227, at \*2, \*4 (served May 25, 2012); *Kan. City Power & Light Co. v. Union Pac. R.R. Co.*, STB Docket No. 42095, 2008 WL 2091413, at \*10–11 (served May 19, 2008).

<sup>9</sup> *Plaintiff's Response to Defendant's Motion to Dismiss, supra* note 3 at 8.

Relief Can Be Granted and Alternative Motion to Dismiss Under the Doctrine of Primary Jurisdiction (Document No. 12) is **GRANTED** for lack of subject matter jurisdiction. The Court further

**ORDERS** that Plaintiff American Fuel & Petrochemical Manufacturers' claim against Defendant BNSF Railway Company is **DISMISSED WITHOUT PREJUDICE**.

SIGNED at Houston, Texas, on this 11 day of March, 2016.

A handwritten signature in black ink, appearing to read "David Hittner", written over a horizontal line.

DAVID HITTNER  
United States District Judge

**ATTACHMENT C**

**UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

<b>AMERICAN FUEL &amp; PETROCHEMICAL MANUFACTURERS,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	<b>Civil Action No. 4:15-cv-682</b>
<b>v.</b>	)	
	)	
<b>BNSF RAILWAY COMPANY,</b>	)	
	)	
<b>Defendant.</b>	)	
	)	

**DEFENDANT BNSF RAILWAY COMPANY’S MOTION TO DISMISS  
FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR FAILURE  
TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED  
AND  
ALTERNATIVE MOTION TO DISMISS  
UNDER THE DOCTRINE OF PRIMARY JURISDICTION**

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ATTORNEYS FOR DEFENDANT  
BNSF RAILWAY COMPANY

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## CONCISE SUMMARY

BNSF Railway Company (“BNSF”) transports crude oil for its customers in several different types of tank cars. The complaint filed by the American Fuel & Petrochemical Manufacturers (“AFPM”) challenges as unlawful the rates BNSF charges its customers for the transportation of crude oil in a specific type of older model tank car referred to as a general purpose DOT 111 tank car. AFPM characterizes its rate complaint as asserting a violation of BNSF’s common carrier obligation, but the complaint does not allege the elements of a common carrier violation. Plaintiff’s complaint is actually about BNSF’s rates, not BNSF’s common carrier obligation, and a rate challenge can be heard only by the federal Surface Transportation Board (“STB” or “Board”), which has exclusive jurisdiction over railroad rates.<sup>1</sup> The complaint should therefore be dismissed both for lack of subject matter jurisdiction under Fed. R. Civ. Pr. 12(b)(1) and for failure to state a claim on which relief can be granted under Fed. R. Civ. Pr. 12(b)(6). Even if the Court determines that AFPM did state a claim over which this Court has jurisdiction, the complaint should still be dismissed in deference to the primary jurisdiction of the STB over disputes arising under the regulatory statute administered by the STB.

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<sup>1</sup> The STB was established by Congress in 1995 as the successor to the Interstate Commerce Commission by the Interstate Commerce Commission Termination Act, Pub. L. No. 104-88, 109 Stat. 803 (1995). The STB is the sole federal agency with regulatory authority over the commercial practices of railroads, including the rates they charge and the services they provide.

First, the Court lacks subject matter jurisdiction. While purporting to allege a violation of the statutory common carrier obligation, the complaint in language and in substance challenges the level of BNSF's rates for the transportation of crude oil in general purpose DOT 111 tank cars. Such a claim is subject to the exclusive jurisdiction of the STB under 49 U.S.C § 10501(b) and the rate reasonableness provisions of the federal statute governing railroad regulation – the Interstate Commerce Commission Termination Act (“ICCTA”). This Court does not have jurisdiction to adjudicate a challenge to the rates charged by a rail carrier. The governing statute instructs that rate claims are to be addressed by the Board – and *only* the Board – under specified standards and procedures. There is no concurrent jurisdiction in federal courts and the STB for resolving rate-related claims. Only the Board has the authority to address rate claims, including claims for the rate-related injunctive relief sought by AFPM.

Second, AFPM tries to avoid the jurisdictional bar on rate claims in federal court by styling its claim as a violation of BNSF's common carrier obligation, but AFPM fails to state a valid common carrier claim. The complaint alleges only a single cause of action – that BNSF's rates for the transportation of crude oil in general purpose DOT 111 tank cars violate BNSF's common carrier obligation under 49 U.S.C. § 11101. To plead a valid cause of action that a rail carrier has violated its common carrier obligation, a plaintiff must allege that the rail carrier

has failed to “provide the transportation or service on reasonable request.” 49 U.S.C. § 11101(a). The complaint contains no allegation that BNSF refused to provide transportation requested by any AFPM member or anyone else. Therefore, even accepting the allegations in the complaint as true, the complaint does not allege the necessary elements of a violation of BNSF’s statutory common carrier obligation.

Third, even if the Court determines that AFPM has stated a valid claim over which the Court and the Board have concurrent jurisdiction, it would be appropriate to dismiss AFPM’s complaint under the doctrine of primary jurisdiction. AFPM alleges a violation of BNSF’s obligations under the federal statute administered by the STB. “Under the doctrine of primary jurisdiction . . . courts almost invariably defer to the STB’s expertise regarding such disputes.” *Chlorine Inst., Inc. v. Soo Line R.R.*, No. 14-CV-1029, 2014 WL 2195180, at \*2 (D. Minn. May 27, 2014) *appeal docketed*, No. 14-2346 (8th Cir. June 9, 2014). Referral of complaints like AFPM’s to the Board under the doctrine of primary jurisdiction promotes the interests of uniformity and expert administration of the scheme of railroad regulation.

## I. BACKGROUND

AFPM's complaint arises against the background of heightened concern regarding the safety of the rail transportation of crude oil. While the transportation of crude oil by rail has proven to be efficient and safe, increasing volumes of crude oil movements on rail lines and a few highly publicized derailments have focused attention on the safety of rail operations and, in particular, on the safety of the specialized tank cars used to transport crude oil. Crude oil is currently shipped in tank cars of varying vintages and safety features. The oldest, least safe tank cars currently authorized to haul crude oil are those referred to in AFPM's complaint as "general purpose DOT 111" railcars; AFPM distinguishes the older DOT 111s from jacketed DOT 111 railcars and newer CPC-1232 railcars. Comp. ¶ 2.

Federal regulators, rail carriers and crude oil shippers have all publicly recognized the need to improve and modernize the national fleet of tank cars so that they can better withstand the effects of derailments and reduce the attendant risk to life and property. In May 2015, the federal Pipeline and Hazardous Materials Safety Administration<sup>2</sup> and the Federal Railroad Administration<sup>3</sup>

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<sup>2</sup> PHMSA, a division of the U.S. Department of Transportation, has been delegated responsibility by the Secretary of Transportation to implement various aspects of the Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. §§ 5101-5128, including developing regulations to "govern safety aspects, including security, of the transportation of hazardous material" under 49 U.S.C. § 5103. 49 C.F.R. § 1.97(b).

<sup>3</sup> The FRA, also a division of the U.S. Department of Transportation, has jurisdiction to regulate the safety of rail operations. 49 C.F.R. § 1.88(a).

promulgated final rules to set new tank car safety standards.<sup>4</sup> The final rules cover transportation of crude oil on high-hazard flammable trains (“HHFT”) – trains that contain either a consecutive block of 20 or more crude oil cars or 35 or more crude oil cars across an entire train.<sup>5</sup> The final rules establish new design specifications for tank cars and establish a timeline for retrofitting existing tank cars used on HHFTs to comply with the enhanced specifications.<sup>6</sup> The schedule provides for “accelerated risk reduction” by requiring that older, less safe types of tank cars have earlier retrofit deadlines than newer, safer types of tank cars.<sup>7</sup> The general-purpose, unjacketed DOT 111 tank cars that are the subject of the complaint have the earliest retrofit deadline.<sup>8</sup>

BNSF does not own the specialized tank cars that are used in the transportation of crude oil on its railroad. Those cars are owned or leased by shippers of crude oil who include many of AFPM’s members. The complaint alleges that BNSF seeks to “discourage the use of certain DOT 111s” for the shipment of crude oil. The complaint does not allege that BNSF prohibits the use of general purpose DOT 111 tank cars on its railroad. Instead, AFPM complains that BNSF has distinguished shipments of crude oil in general purpose DOT 111

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<sup>4</sup> Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains, 80 Fed. Reg. 26644 (May 8, 2015).

<sup>5</sup> *Id.*, at 26645.

<sup>6</sup> *Id.*, at 26646-47.

<sup>7</sup> *Id.* at 26648.

<sup>8</sup> *Id.*

tank cars from shipments in newer, safer equipment by adding \$1,000 per carload to the rate on shipments in general purpose DOT 111 tank cars.

For purposes of BNSF's motion to dismiss, the Court does not need to address safety issues arising from transportation of crude oil in general purpose DOT 111 tank cars or decide between competing claims concerning the safety of such cars. AFPM does not allege that BNSF has violated any safety regulation or standard promulgated by either FRA or PHMSA, or that BNSF has violated a particular statutory provision of the Hazardous Materials Transportation Act, 49 U.S.C. §5101 et seq. Rather, the complaint asserts a single cause of action for violation of the statute that governs the STB's economic regulation of railroads.

ICCTA (set out at 49 U.S.C. §§10101-11908) is the current version of the federal statute governing railroad regulation that originated in 1887 with the Interstate Commerce Act. A central provision of ICCTA is the requirement in § 11101(a) that common carrier railroads must provide transportation "on reasonable request." ICCTA also contains specific regulatory provisions governing railroad rates (*e.g.*, §§ 10701, 10704, 10707), railroad rules and practices (*e.g.*, § 10702), car service (*e.g.*, §11121), and mergers and abandonments (*e.g.*, §§ 11321, 10903), among numerous other subjects. The STB is tasked by ICCTA to administer this regulatory regime. 49 U.S.C. § 10501(b).

The complaint alleges that BNSF violated its common carrier obligation under § 11101. The first paragraph of the complaint summarizes AFPM’s claim as “a civil action against BNSF for violating its common carrier obligation by imposing a financial penalty on shipping crude oil in rail tank cars expressly authorized for such shipments.” Comp. ¶ 1. According to the complaint, “[e]nacting a monetary penalty with the purpose of deterring hazardous materials shipments in authorized rail cars is contrary to BNSF’s common carrier obligation.” Comp. ¶ 27. The complaint seeks a declaration that BNSF’s “proposed surcharge is . . . null and void” and “a permanent injunction prohibiting BNSF from imposing the unlawful surcharge.” Comp. ¶10.

## II. ARGUMENT

### A. The Court Lacks Subject Matter Jurisdiction Because the STB Has Exclusive Jurisdiction over Complaints about Railroad Rates.

On the face of the complaint, it is clear that AFPM’s claim is focused on the level of the rates that BNSF charges for shipments of crude oil in general purpose DOT 111 railcars. The first sentence of Paragraph 1 of the complaint accuses BNSF of “imposing a financial penalty on shipping crude oil in rail tank cars expressly authorized for such shipments.” Paragraph 2 complains that “BNSF charges a \$1,000 more [sic] for each ‘general purpose DOT 11’ tank car that ships crude oil.” Paragraph 2 calls the charge a “surcharge,” and Paragraph 3 says “BNSF’s surcharge is imposed at the same \$1,000 level regardless of how far a

train travels, the geographic conditions of the shipment, or any factor other than” the use of DOT 111 tank cars.

The complaint goes on to allege that the BNSF pricing authority that establishes rates for such shipments, BNSF Price Authority 90118, Amendment/Rev: 20, “imposes a \$1000 higher cost to ship crude oil in general purpose DOT 111s when compared to identical shipments in jacketed DOT 111 tank cars, CPC-1232 specification tank cars, or ‘Next Gen’ model railcars,” Comp. ¶ 15, and that “BNSF’s price list imposes a consistent \$1000 premium for general purpose DOT 111 shipments over other rail tank car shipments, despite destination or proportionality of the price.” Comp. ¶ 16. The complaint asks that the Court enjoin BNSF from charging its published rate. Comp. ¶10.

Because AFPM’s complaint is a challenge to the reasonableness of BNSF’s rates, it falls within the exclusive jurisdiction of the Board. The statutory provision setting out the Board’s jurisdiction over railroads provides that

(b) The jurisdiction of the Board over –

- (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
- (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b). Under the first sentence, the Board’s jurisdiction over “transportation by rail carriers, and the remedies provided in this part with respect to rates . . . [and] practices . . . is exclusive.” Under the second sentence, the remedies provided by the statute are also exclusive. In other words, a complaint challenging the reasonableness of a railroad rate may only be brought before the Board, and the only remedies for unreasonable rates are established by the provisions that govern Board review of rates. Among the remedies available to the Board are the powers to order the carrier to stop charging unreasonable rates and to prescribe maximum reasonable rates. 49 U.S.C. § 10704(a)(1).

Notwithstanding the “exclusive jurisdiction” language of 49 U.S.C. § 10501(b), several courts have held that 49 U.S.C. § 11704, another provision of ICCTA, indicates that Congress intended to create concurrent jurisdiction over some ICCTA claims in both the Board and the federal courts. Section 10704(c)(1) provides that “[a] person may file a complaint with the Board under § 11701(b) of this title or bring a civil action under subsection (b) of this section to enforce liability against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.” Section 11704(b) – the referenced “subsection (b)” that defines the scope of claims that a person may bring under section (c) in court –

provides that a railroad “is liable for damages sustained by a person as a result of an act or omission” that violates the statute.

The courts have reasoned that since Congress gave private parties the right to bring civil actions “for damages sustained” as a result of a violation of the statute, Congress must have intended to allow at least some alleged violations of ICCTA to be heard by federal courts. *See, e.g., Elam v. Kansas City Southern Railway Co.*, 635 F.3d 796 (5th Cir. 2011) (negligence claims against railroad); *Pejepscot Indus. Park, Inc. v. Maine Cent. R. Co.*, 215 F.3d 195 (1st Cir. 2000) (claim that railroad’s refusal of service violated common carrier obligation).

However, there are two reasons why § 11704(c) does not apply to the rate-related claims brought by AFPM here. First, § 11704(c) does not provide a right to ask courts to address matters that the statute delegates exclusively to the Board. For this reason, there has not been a single case since Congress adopted the current rate reasonableness scheme in 1980 where a court has analyzed the reasonableness of a rail rate. Second, § 11704(c) does not give courts jurisdiction over claims for injunctive relief, which is the only relief sought by AFPM.

**1. ICCTA specifies that only the Board may hear rate challenges.**

Some provisions of ICCTA establish railroad obligations without specifying how challenges to rail conduct alleged to violate the obligation must be addressed, or in what forum (STB or court) the challenge must be brought. Thus, under

§ 11704(c), some federal courts have determined that an alleged violation of a railroad's common carrier obligation could be asserted in federal court (although, as discussed below, those courts invariably refer such claims to the Board under the doctrine of primary jurisdiction).

However, the statutory provisions governing railroad rates and challenges to rail rates make clear that only the Board has jurisdiction to address such claims. *See* 49 U.S.C. §§ 10501(b), 10701, 10707. The rate reasonableness regime set out in ICCTA contemplates very specific procedures and standards to be administered by the Board in determining the reasonableness of rail rates. The statute makes no reference to court application of these procedures and standards.

In ICCTA, Congress purposefully circumscribed the rate review procedures and standards that could be applied in challenges to railroad rates while making it clear that only the STB was authorized to engage in such rate regulation. In the first instance, a railroad “may establish any rate for transportation or other service provided by the rail carrier.” 49 U.S.C. § 10701(c). A rate reasonableness challenge may proceed only after “the *Board* determines under § 10707 of this Title, that the rail carrier has market dominance over the transportation to which a rate applies.” 49 U.S.C. § 10701(d)(1) (emphasis added). The market dominance

inquiry is a threshold jurisdictional determination that Congress entrusted to the Board.<sup>9</sup>

The *Board* may only find a rate “unreasonable if it exceeds a reasonable maximum for that transportation” after the *Board* has concluded that the railroad has market dominance. 49 U.S.C. § 10707(c). The *Board* determines rate reasonableness in accordance with rigorous economic standards set out in ICCTA and in Board decisions. The *Board* is required to take account of various statutory factors when determining whether a rate is reasonable, including the extent to which traffic does not contribute to going concern value or contributes only marginally to coverage of fixed costs, and whether certain types of traffic account for an unreasonable share of revenue. 49 U.S.C. § 10701(d)(2). The Board has adopted standards for determining the reasonableness of rail rates that include a complex and economically rigorous methodology for estimating rates that would be set in competitive markets.<sup>10</sup>

The statutory framework that provides for agency determinations of rate reasonableness was initially established by the Staggers Rail Act of 1980, and

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<sup>9</sup> Under § 10707, there are two elements to that determination: (1) a quantitative element as to whether the challenged rate produces a revenue to variable cost ratio in excess of 180 percent, and (2) a qualitative element as to whether there is an absence of effective competition for the transportation to which the rate applies. 49 U.S.C. §§ 10707(a), (d)(1)(a). The statutory provision setting out these elements specifies that “the *Board* shall determine” the existence of the elements. 49 U.S.C. § 10707(b) (emphasis added).

<sup>10</sup> See, e.g., *E.I. DuPont de Nemours & Co. v. Norfolk Southern Railway Co.*, STB Docket No. NOR 42125 (served Mar. 24, 2014; updated Oct. 3, 2014).

modified by ICCTA in 1995. We are unaware of any instance in the 35 year period from 1980 to the present when a federal district court has undertaken a determination of market dominance and rate reasonableness.

The only federal courts that have addressed the matter of federal district court jurisdiction over challenges to rail rates in the 35 years since the passage of the Staggers Rail Act have concluded that federal district courts lack jurisdiction over challenges to rail rates brought after the effective date of the Staggers Act. *See McCarty Farms, Inc. v. Burlington Northern, Inc.*, 787 F. Supp. 937, 947 (D. Mont. 1992) (predecessor section to 10501(b), section 10501(d), “did . . . divest this court of jurisdiction over challenges to the reasonableness of rail rates in effect on or after the effective date of the Staggers Rail Act, *i.e.*, October 1, 1980”); *McCarty Farms, Inc. v. Surface Transportation Board*, 158 F.3d 1294, 1299-1300 (D.C. Cir. 1998) (agreeing with district court analysis that Staggers Act divested district courts of jurisdiction to hear challenges to rail rates). That some courts, like the *Elam* and *Pejepscot* courts, have found concurrent agency and court jurisdiction over certain rail issues not involving rates is no reason to question the exclusivity of STB jurisdiction over rail rates—no court has suggested that federal district courts have concurrent jurisdiction with the Board to consider challenges to the reasonableness of a railroad’s rates.<sup>11</sup> Every single rail rate challenge brought

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<sup>11</sup> The courts have recognized in other areas that the STB’s exclusive jurisdiction over certain

since the passage of the Staggers Rail Act has proceeded before the STB or its predecessor, the ICC. In other words, litigants have universally recognized what ICCTA itself makes clear – the jurisdiction of the STB over rail rates is exclusive.

**2. Section 11704(c) creates no right to seek injunctive relief.**

There is a second fundamental jurisdictional problem with AFPM’s complaint because AFPM seeks only injunctive relief. Indeed, an association like AFPM would not have standing to seek damages, so the only relief AFPM could ask for in a judicial proceeding is injunctive relief.<sup>12</sup> However, § 11704(c) expressly limits the jurisdiction of federal courts to actions for damages.

Section 11704(c) defines the scope of claims that can be brought in a civil action by reference to § 11704(b). Section 11704(c)(1) states that “[a] person may file a complaint with the Board under § 11701(b) of this title or bring a civil action *under subsection (b)* of this section to enforce liability against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.” (emphasis added). Section 11704(b) provides that a railroad “is liable *for damages* sustained by a person as a result of an act or omission” that violates the statute and

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types of claims precludes federal court actions involving those claims. *See Kraus v. Santa Fe Southern Pacific Corp.*, 878 F.2d 1193, 1198 (9<sup>th</sup> Cir. 1989) (no right to bring a claim in federal court to assert a violation of the merger provisions of the statute).

<sup>12</sup> *See Warth v. Seldin*, 422 U.S. 490, 515 (1975) (association lacks standing to pursue damage claims “not common to the entire membership, nor shared by all in equal degree”); *Self-Insurance Inst. of Am. v. Koriath*, 53 F.3d 694, 695-696 (5<sup>th</sup> Cir. 1995) (association “does not enjoy standing to seek damages for monetary injuries peculiar to individual members where the fact and extent of injury will require individualized proof”).

“for amounts charged that exceed the applicable rate for the transportation.” (emphasis added). As the First Circuit explained in *Pejepscot*, “[t]he most natural reading of this language is that it authorizes a person who has suffered damages as a result of a rail carrier’s violation of the ICCTA either to file a complaint with the STB or to bring a civil action.” 215 F.3d at 202. *See also Elam*, 635 F.3d at 809 (quoting *Pejepscot* interpretation as “correct”).

This jurisdictional limitation on court-ordered injunctive relief is consistent with the strong exclusivity language of § 10501(b), which states that the jurisdiction of the Board over a broad range of regulatory matters “is exclusive.” Even if federal courts are authorized to award damages in appropriate cases to persons injured by rail carriers, federal court orders that compel specific rail conduct would intrude further into the area of rail regulation and would be inconsistent with the grant of exclusive authority to the Board to regulate railroads. *See Blanchard Sec. Co. v. Rahway Valley R.R.*, 2004 US Dist. LEXIS 25647 at \*20 (D. NJ 2004), *aff’d* 2006 U.S. App. LEXIS 16690 (3rd. Cir. 2006) (injunctive relief “is within exclusive capacity of the STB”). Moreover, the statute contains a provision specifically authorizing orders “to compel compliance with this part,” but that authority is given only to the Board. 49 U.S.C. § 11701(a).

Thus, under the scheme of regulation established by ICCTA, only the Board has the power directly to regulate rail conduct through orders requiring railroads to

take specific measures to ensure compliance with ICCTA requirements. Parties injured by railroad violations of ICCTA (in areas other than rates and mergers) may be able to recover damages in federal court, but they cannot ask a federal court to regulate railroad conduct through injunctive remedies.

**B. Plaintiffs Have Failed to State a Claim that BNSF Violated Its Common Carrier Obligation.**

The Court does not need to address the merits of AFPM's complaint if it dismisses the complaint for lack of jurisdiction. However, if the Court concludes that it has concurrent jurisdiction with the STB over the claims made by AFPM notwithstanding that the claims relate directly to the rates charged by BNSF, the Court should dismiss those claims for failure to state a valid claim for violation of the common carrier obligation of ICCTA set out in 49 U.S.C. § 11101, which is the stated basis for AFPM's complaint. The common carrier obligation is codified as a core provision of ICCTA and is central to the STB's economic regulation of freight railroads. AFPM purports to rely on the common carrier obligation as the legal fulcrum of its case, but its reliance is unsound. The complaint fails to state a claim that BNSF has violated its common carrier obligation under 49 U.S.C. § 11101.

Section 11101(a) states that a rail carrier "providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request." Section 11101(b) requires the rail carrier to provide its "rates and other service terms" upon request. The Board has

characterized the obligation established in § 11101 as “a statutory common carrier obligation under 49 U.S.C. 11101 to provide transportation for commodities that have not been exempted from regulation pursuant to 49 U.S.C. 10502.” *Union Pacific Railroad Co. – Petition for Declaratory Order*, STB Docket No. FD 35219, 2009 WL 1630587, at \*2 (served June 11, 2009) (“*UP 2009*”). The Board explained that the common carrier obligation imposes:

two interrelated requirements. Railroads must provide, in writing, common carrier rates to any person requesting them. 49 U.S.C. 11101(b). And, they must provide rail service pursuant to those rates upon reasonable request. 49 U.S.C. 11101(a). These requirements are linked, because a rate is a necessary predicate to providing requested service.

*Id.*; see also *Pejepscot Industrial Park, Inc.—Petition for Declaratory Order*, STB Finance Docket No. 33989, 2003 WL 21108198, at \*4 (served May 15, 2003).

Notably § 11101 says nothing about the *level* of the rate that a common carrier railroad must provide in response to a request for a rate. The determination of rate levels is left to the railroad in the first instance. As noted previously, the statute provides that “a rail carrier providing transportation subject to the jurisdiction of the Board under this part may establish any rate for transportation or other service provided by the rail carrier.” 49 U.S.C. § 10701(c). If the shipper is dissatisfied with the rate level, its sole recourse is to file a complaint with the STB. 49 U.S.C. §§ 10704(b), 11701(a), (b).

Challenges to railroad conduct under § 11101 are typically based on either: 1) refusal to provide any rate for a requested common carrier transportation service; or 2) refusal to provide service pursuant to an existing rate. The first type of § 11101 case often arises when a railroad refuses to publish rates for carrying hazardous or dangerous cargo. *See, e.g., UP 2009* (UP required to publish rates for movements of chlorine); *Akron, Canton & Youngstown R.R. Co. v. I.C.C.*, 611 F.2d 1162, 1170 (6th Cir. 1979) (affirming the ICC's order mandating that the railroad publish rates for transportation of reactor waste); *Radioactive Materials, Missouri-Kansas-Texas R.R. Co.*, 357 I.C.C. 458, 465 (1977) (ordering railroad to establish rates for transportation of radioactive materials).

Section 11101 claims arise under the second prong of the test when a common carrier refuses to provide service. *See, e.g., Riffin v. Surface Transp. Bd.*, 733 F.3d 340 (D.C. Cir. 2013) (rejecting a common carrier application that included a stated refusal to transport hazardous products); *Pejepscot Indus. Park, Inc. v. Maine Cent. R. Co.*, 215 F.3d 195 (1st Cir. 2000) (referring to the STB for review of railroad plans to remove line that would eliminate service); *Decatur Cty. Comm'rs v. Central R.R. Co. of Indiana*, STB Finance Docket No. 33386, 2000 WL 1456905 (S.T.B. 2000) (alleged unlawful service embargo).

AFPM's complaint contains no allegation that BNSF failed to establish a rate for movements of crude oil, failed to provide rail service, or restricted the level

of service in DOT 111 cars. The complaint is instead directed at the *level* of BNSF's published rates – the \$1,000 per carload increment that supposedly makes the rate applicable to shipments in DOT 111 tank cars “punitive” vis-à-vis rates for newer tank cars. Unlike the cases finding violations of § 11101 for failure to publish rates, AFPM acknowledges that BNSF has established rates for the transportation of crude oil in general purpose DOT 111 cars. Comp. ¶¶ 15-16. AFPM objects to the *amount* of the rate, which AFPM alleges makes it “punitive.”

AFPM cannot base its common carrier claim on an allegation that the underlying *objective* of BNSF's rate is to discourage the use of DOT 111 tank cars. According to AFPM, charging more for transportation in DOT 111s “with the purpose of deterring hazardous materials shipments in authorized rail cars is contrary to BNSF's common carrier obligation.” Comp. ¶ 27. As discussed below, established case law rejects the argument that a railroad's use of its rate-setting prerogative to discourage or penalize disfavored freight movements amounts to a violation of the railroad's common carrier obligations. Instead, challenges to a railroad's rates must be brought under the statutory provisions relating to rate regulation – subject to all of the limits on such challenges – and not as challenges to a railroad's common carrier obligation.

In *Union Pacific Railroad Co. v. ICC*, 867 F.2d 646, 649 (D.C. Cir. 1989), railroads were accused of establishing large rate differentials between movements

of nuclear waste in specialized train service and movements in “regular train service” to “avoid their common carrier duty to transport radioactive waste.” While the claims were originally brought as challenges to the railroads’ rates, the Interstate Commerce Commission did not treat the claims under the rules and procedures applicable to rate cases. Instead, the ICC treated the complaints as alleging an unreasonable practice to avoid common carrier obligations by using rate differentials to influence traffic movements. The United States Court of Appeals for the District of Columbia Circuit reversed the ICC, finding that the ICC had erred by treating the allegations as a challenge to the railroads’ compliance with common carrier obligations. The challenged conduct related to the railroads’ rates, and the challenge therefore had to be treated as a challenge to rates rather than a challenge to the railroads’ compliance with their common carrier obligations. As the court emphasized, where challenged railroad conduct “is manifested *exclusively* in the level of rates that customers are charged,” the challenge must be treated as a claim about rate reasonableness. 867 F.2d at 649.

The distinction between a rate challenge and an alleged violation of a railroad’s common carrier obligations was critical in the *Union Pacific* case, and it is critical here. There are very specific statutory requirements for assessing complaints about the level of a railroad’s rates. Moreover, as discussed above, federal courts have no jurisdiction over rate claims, even though they may have

some concurrent jurisdiction over claims involving common carrier obligations. A plaintiff cannot circumvent those legal requirements by artful pleading that portrays a challenge to railroad rates as a common carrier complaint. AFPM cannot transform its rate complaint into a common carrier complaint simply by using the common carrier label. Because AFPM does not state a claim for violation of BNSF's common carrier obligations under § 11101, AFPM's complaint should be dismissed.

**C. Even if AFPM Had a Valid Common Carrier Claim, the Doctrine of Primary Jurisdiction Would Warrant Dismissal.**

AFPM may have sought to style its rate-related complaint as a challenge to BNSF's conduct under § 11101 in order to invoke federal court jurisdiction, since rate challenges are not subject to federal court jurisdiction. But even if AFPM had alleged the elements of a § 11101 claim, which it did not do, the courts "almost invariably defer to the STB's expertise" under the doctrine of primary jurisdiction in disputes over common carrier obligations. *Chlorine Institute*, 2014 WL 2195180, at \*2.

The doctrine of primary jurisdiction applies when both the courts and a specialized agency would have jurisdiction over a particular matter, but the agency is "better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure" to decide the matter. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 304 (1976). As the Fifth Circuit explained

in *Elam*, “[t]he doctrine of primary jurisdiction attempts to maintain ‘proper relationships between the courts and administrative agencies’ by suspending judicial process pending the ‘referral’ of certain issues to an administrative agency for its views.” 635 F.3d at 809.

Courts routinely refer claims that railroads have violated their statutory common carrier obligations to the Board under the doctrine of primary jurisdiction. The First Circuit followed this course in *Pejepscot*, referring claims that a railroad had failed to fulfill its common carrier obligation to the STB because “the STB’s expertise is clearly involved in the question of whether Guilford’s actions constitute unlawful refusal to ‘provide . . . service on reasonable request,’ 49 U.S.C. § 11101(a), and the agency’s determination would materially aid the district court. Furthermore, referral to the STB will promote uniformity in the standards governing refusals to provide service.” *Pejepscot*, 215 F.3d at 205-06.<sup>13</sup>

Referral to the STB of the issues raised in AFPM’s complaint (if a valid cause of action had been stated) would be particularly justified in light of the attention that is currently being given by a range of federal agencies to the development of policies governing transportation of crude oil by rail. Similar

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<sup>13</sup> See also *DeBruce Grain, Inc. v. Union Pacific Railroad Co.*, 149 F.3d 787, 789-90 (8th Cir. 1998) (“district court properly concluded” that, under the doctrine of primary jurisdiction, claims that UP car supply practices violated its common carrier obligation “should be left to the STB in the first instance due to its greater expertise with rail policy and the need for a uniform response to maintain regulatory uniformity”).

policies were at issue in the *Chlorine Institute* case, which involved claims relating to a railroad's refusal to handle certain older car types because of the safety of the transportation in those cars. The court there found that the STB is in a far better position to grapple with the policy issues raised by the complaint, in part because the procedural flexibility of STB proceedings allows the STB to consult with other agencies. As the court noted: "Unlike this Court, the STB has the institutional tools and expertise to consider the problem from a national perspective." *Chlorine Institute*, 2014 WL 2195180, at \*3. If AFPM's complaint stated a valid common carrier claim – and it has not – the same considerations would lead to a referral of AFPM's claims to the STB.

The referral of AFPM's allegations to the Board under the doctrine of primary jurisdiction would leave nothing for the Court to decide. Therefore, if AFPM had stated a valid claim, it would be appropriate to dismiss the complaint without prejudice to allow the Board to address the claim. *See Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993) (district court "has discretion either to retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice").

### **III. CONCLUSION**

For the reasons stated above, the complaint should be dismissed under either Rule 12(b)(1) or (6), or alternatively under the doctrine of primary jurisdiction.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule 5.1 on the 26th day of June, 2015.

/s/ Craig Smyser

Craig Smyser

**UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

<b>AMERICAN FUEL &amp; PETROCHEMICAL MANUFACTURERS,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	<b>Civil Action No. 4:15-cv-682</b>
<b>v.</b>	)	
	)	
<b>BNSF RAILWAY COMPANY,</b>	)	
	)	
<b>Defendant.</b>	)	
	)	

**ORDER**

Pending before the Court is Defendant BNSF Railway Company’s Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim on which Relief can be Granted and Alternative Motion to Dismiss under the Doctrine of Primary Jurisdiction. The Court grants the Motion. Accordingly is is ORDERED that Plaintiff’s Complaint is DISMISSED

\_\_\_\_\_ for want of subject matter jurisdiction.

\_\_\_\_\_ for failure to state a claim on which relief can be granted.

\_\_\_\_\_ under the doctrine of primary jurisdiction.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 2015.

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The Honorable David Hittner  
UNITED STATES DISTRICT COURT  
JUDGE

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

AMERICAN FUEL &	§	
PETROCHEMICAL	§	
MANUFACTURERS,	§	
	§	
Plaintiff,	§	
	§	Civil Action No. 4:15-cv-682
v.	§	
	§	
BNSF RAILWAY COMPANY,	§	
	§	
Defendant.	§	

**PLAINTIFF AMERICAN FUEL & PETROCHEMICAL  
MANUFACTURERS' RESPONSE TO DEFENDANT'S MOTION TO  
DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR  
FAILURE TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED  
AND  
ALTERNATIVE MOTION TO DISMISS UNDER THE DOCTRINE OF  
PRIMARY JURISDICTION**

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## CONCISE SUMMARY

Plaintiff American Fuel & Petrochemical Manufacturers (“AFPM”) opposes Defendant BNSF Railway Company’s (“BNSF”) motion to dismiss and/or transfer this matter to the Surface Transportation Board (the “Board”) because the motion rests on the mistaken notion that AFPM is merely attacking BNSF’s rates. This case is not about rates. It is about packaging regulations for crude oil shipped by rail—the exclusive purview of the Department of Transportation’s Pipeline and Hazardous Materials Safety Administration (“PHMSA”).

Congress entrusted PHMSA with setting and enforcing safety standards for the transportation of hazardous materials. PHMSA promulgates an exhaustive list of railcar models authorized for safe shipment of crude oil by rail. The general purpose DOT 111 railcar is one of the most popular PHMSA-authorized models, often employed to ship crude on the nation’s largest crude carrier, BNSF. Railroads such as BNSF are common carriers obligated to provide service on reasonable request for all commodities that are offered for transportation in accordance with PHMSA’s requirements for transporting flammable hazardous materials as set forth in the Hazardous Materials Regulations (“HMR”). As such, BNSF’s common carrier obligation requires the railroad to transport crude oil in authorized railcars, including the DOT 111 railcar.

An outright ban on these authorized cars would functionally indicate a refusal of service in violation of BNSF's common carrier obligation under the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 11101(a). To avoid the consequences of explicit action, BNSF turned to indirect methods of accomplishing its illicit goal: financial coercion. On January 1, 2015, BNSF imposed a \$1,000 penalty on each DOT 111 car used to ship crude on its lines. This \$1,000 penalty is merely the enforcement mechanism enlisted to cause the de facto refusal of service to DOT 111 railcars by rendering their use a financial impracticability.

BNSF's motion disregards this regulatory context and over-simplifies AFPM's claim. First, BNSF claims that this Court lacks subject matter jurisdiction to hear this case because the Board holds exclusive jurisdiction over rate reasonableness disputes. But AFPM does not seek to litigate whether \$1,000 is a reasonable surcharge. AFPM seeks to litigate whether a common carrier can ignore the administrative process and use financial coercion—be it additional costs of \$1,000 or \$1,000,000—to enforce its private decision to remove an otherwise federally authorized railcar from service. Federal courts retain original jurisdiction over common carrier violations, including BNSF's novel attempt to block and frustrate the use of a federally authorized rail car by means of a financial penalty.

Next, BNSF argues AFPM's complaint should be dismissed for failure to state a valid common carrier claim, because it has failed to allege BNSF's outright refusal of service on reasonable request. However, AFPM properly pled a common carrier claim. Though its means are indirect, BNSF's admitted intent and the ultimate effect of the pricing regime nonetheless constitute a refusal of service, just as overt refusals would.

In the alternative, BNSF urges the Court to defer to the Board's jurisdiction under the doctrine of primary jurisdiction. However, AFPM's complaint raises a narrow legal question: does a railroad violate its common carrier obligation to ship hazardous materials in federally-authorized railcars by imposing a penalty intended to prevent the use of those authorized railcars? The answer to that question lies in PHMSA's statutory and regulatory authorities. Indeed, PHMSA just completed a complex rulemaking, four years in the making, that sets forth technical standards for railcars used to transport flammable liquids and enacted a 10-year retirement or retrofit schedule for the DOT 111 railcars at issue. The Board had no role in this technical rulemaking and has no expertise on the subject matter. As such, the Court should retain jurisdiction over AFPM's claim and reject BNSF's attempt to use the doctrine of primary jurisdiction in such a way that merely creates unnecessary expenses and delay.

Accordingly, BNSF's Motion to Dismiss must be denied.

## BACKGROUND

### i. Factual Background

Plaintiff American Fuel & Petrochemical Manufacturers (“AFPM”) is the nation’s largest trade organization of crude refiners and petrochemical manufacturers. Complaint, ¶ 12. AFPM brought this claim against Defendant BNSF, because BNSF breached its common carrier obligation to provide service when it decided to reject PHMSA’s regulations and substitute its own judgment on the safety of DOT 111 railcars shipping crude. As one of the most commonly used railcars, DOT 111s represent approximately 28% of the national fleet of railcars approved to ship crude. *Id.* at ¶ 13. BNSF is a common carrier and the largest carrier of crude in North America, transporting more than 600,000 barrels daily, including shipments in DOT 111 railcars. *Id.* at ¶ 11.

Under federal regulations, the DOT 111 railcar was and remains an authorized model for the shipment of crude and other hazardous materials. *Id.* at ¶¶ 15, 25; 49 C.F.R. §§ 173.241(a), 173.242(a), 173.243(a). Nonetheless, in October 2014, BNSF announced a \$1,000 penalty on each DOT 111 railcar used to ship crude. *Id.* at ¶ 15. BNSF has since acknowledged that its goal is to force DOT 111s into premature retirement and, further, that it would accomplish this goal by using “pricing” to render the use of DOT 111s financially impractical. *Id.* at ¶ 17. The penalty became effective on January 1, 2015. *Id.* at ¶ 15.

BNSF's chosen pricing mechanism—a uniform \$1,000 premium on *any* crude shipment in a DOT 111 railcar, regardless of distance, climate, geography, or the popularity of the destination—reveals that this penalty is not meant to recover costs. Its sole purpose is to create a barrier to the continued use of the DOT 111 in crude service by rendering such use financially impractical. *Id.* at ¶ 16. Because AFPM's members were subjected to this coercion to end their federally authorized use of DOT 111s, AFPM filed this action on March 13, 2015. AFPM seeks a declaration that BNSF's surcharge is null and void and unenforceable, and an injunction against the surcharge's enforcement. Complaint, D.E. 1.

BNSF's "heightened concern" and apprehension towards the age and safety of DOT 111s are revealed even in its Motion to Dismiss. D.E. 12 at 1–2. Citing consensus among rail carriers, crude shippers, and federal regulators, BNSF highlights "the need to improve and modernize the national fleet of tank cars." *Id.* at 1. As well-intentioned as these concerns were, BNSF lacks the authority to unilaterally decide that DOT 111 tank cars are unfit for crude service. BNSF's independent decision disregarded current federal safety standards and the rulemaking process to alter such standards. This unlawful effort to avoid shipping federally permissible commodities in federally permissible containers constitutes a violation of BNSF's common carrier obligation and must be enjoined. Taken to the logical extreme, BNSF could eventually use financial penalties to refuse

transporting nuclear waste to the nation's repository, medical waste from a viral outbreak, or any other commodity that it simply chooses to avoid. BNSF's assertion of this authority under the guise of incentivizing safety directly undermines its common carrier obligation.

**ii. Statutory and Regulatory Background**

Despite BNSF's attempt to frame this complaint as a simple rate case outside of the Court's jurisdiction, BNSF's violation stems from the intersection of three statutory sources: the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. §§ 10101 *et seq.*, the Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. §§ 5101 *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 500 *et seq.*

AFPM brings this claim under the ICCTA's common carrier provision, because BNSF has failed to fulfill its common carrier duty to provide service to deliver a commodity, specifically crude, that has not been statutorily exempted. 49 U.S.C. §§ 11101, 10502. *See also Riffin v. Surface Transp. Bd.*, 733 F.3d 340, 346 (D.C. Cir. 2013) (affirming that "the common carrier obligation requires a railroad to transport hazardous materials where the appropriate agencies have promulgated comprehensive safety regulations"). However, the severity and impropriety of BNSF's actions may only be understood in the context of all three statutes, their

corresponding administrative bodies and regulations, and their respective roles in the comprehensive regulatory regime.

The ICCTA was enacted in 1995 in the wake of large-scale deregulation of rail transportation. The Interstate Commerce Commission (“ICC”)—an agency originally established in 1887 to regulate prices, protect shippers from unfair practices, and prevent monopolistic abuse from railways—was to be apportioned into smaller adjudicative and enforcement bodies. 24 Stat. 379, 49 U.S.C. 1, *et seq.*, 49 U.S.C.A. § 1, *et seq.* The ICCTA created the Surface Transportation Board to assume the same administrative functions over the rail industry as the now-defunct ICC. 49 U.S.C. § 702 (“[T]he Board shall perform all functions that, immediately before January 1, 1996, were functions of the Interstate Commerce Commission.”). The Board was, therefore, never intended to be the comprehensive author or arbiter of regulations surrounding transportation by rail, and the Board never held authority to set safety standards for the transportation of hazardous material.

In 2004, Congress created a separate agency within the DOT to fulfill that role. The Pipeline and Hazardous Materials Safety Administration (“PHMSA”) is the agency of DOT that administers HMTA, assesses risks, and promulgates safety standards for the transportation of hazardous materials by rail. 49 U.S.C. § 108. Petroleum crude oil is classified as a hazardous material over which PHMSA has

regulatory power. 49 C.F.R. 172.101 (Table of Hazardous Materials Descriptions). Thus, PHMSA holds *exclusive* power to authorize or reject certain models of railcars for the transportation of crude. 49 U.S.C. §§ 5101, 5103(b)(1)(A)(iii). PHMSA’s authority may be transferred to another DOT agency or another government entity “only if specifically provided by law.” 49 U.S.C. 108(g). To date, Congress has passed no law specifically transferring away PHMSA’s exclusive power to authorize tank cars for flammable liquid transportation to any other government agency, including the Board.

Further, as a federal administrative agency, PHMSA is subject to the requirements of the Administrative Procedure Act (“APA”). Thus, before PHMSA can alter its regulations, it must comply with the procedural safeguards set forth in the APA. 5 U.S.C. § 500, *et seq.* Prior to any rule change, PHMSA must give public notice. The public, including industry stakeholders, is then entitled to submit comments on the proposed rules. 5 U.S.C. § 552. These comments are taken under consideration in PHMSA’s final rule determination.

Recently, both AFPM and the American Association of Railroads—the trade association of which BNSF is a member—used the opportunity to submit input to PHMSA’s August 1, 2014 request for comment on Enhanced Tank Car Standards.<sup>1</sup>

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<sup>1</sup> Although BNSF did not independently submit comments to the proposed rule, it did have a meeting with PHMSA administrators and counsel on March 19,

Complaint, ¶ 13. PHMSA’s proposed rule would enact heightened safety standards for future railcars and impose a retirement schedule for other now-authorized models of railcars. Notice of Proposed Rulemaking, 79 Fed. Reg. 45015 (August 1, 2014). Over 3,200 public comments from over 182,000 stakeholders were submitted in response to that notice and request for comment. PHMSA “carefully considered each comment” and determined that DOT 111s should be gradually phased out of service over the next ten years. The Final Rule provides that crude oil that qualifies under PHMSA regulations as Packing Group III may be shipped in general purpose DOT 111s until May 1, 2025. Crude oil that qualifies for Packing Groups I and II may be shipped in DOT 111s until January 1, 2018 and May 1, 2023, respectively. Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains, 80 Fed. Reg. 26648, 26738 (May 8, 2015). PHMSA’s Final Rule on Enhanced Tank Car Standards went into effect on July 7, 2015.

## **ARGUMENT**

**i. The Court has subject matter jurisdiction over AFPM’s common carrier claim.**

BNSF challenges the Court’s subject matter jurisdiction over this claim on two fronts. First, BNSF characterizes this claim as a pure rate case, which must be

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2014, prior to PHMSA’s open comment period. *See* D.E. 1, Ex. A (“Notes from Administrator’s Meeting with BNSF”).

adjudicated before the Board. Alternatively, BNSF argues that the Court cannot decide the merits of this claim, because it cannot grant the equitable relief requested. Neither of these arguments is meritorious.

**1. AFPM’s claim does not challenge the reasonableness of BNSF’s \$1,000 penalty.**

BNSF argues that AFPM is “focused on the level of the rates BNSF charges for shipments of crude” and thus “AFPM’s complaint is a challenge to the reasonableness of BNSF’s rates.” D.E. 12 at 4–5. Citing the Board’s exclusive jurisdiction over “transportation by rail carriers, and the remedies provided in this part with respect to rates,” BNSF contends that the Court lacks subject matter jurisdiction over this claim. *Id.* at 5, 49 U.S.C. § 10501(b). AFPM acknowledges that the ICCTA’s exclusive jurisdiction would preclude any litigation of rate reasonableness in federal court. However, this principle is moot, because this case is not about rate reasonableness.

AFPM does not attack BNSF’s \$1,000 penalty on DOT 111 railcars as unreasonable, nor does it ask the Court to make any ruling regarding the cost’s reasonableness. AFPM brings this suit, because BNSF has usurped PHMSA’s exclusive authority to set safety standards and to reject certain railcars from transporting crude oil. BNSF has made its own safety determination that DOT 111 cars should not be shipping crude on its lines—wholly disregarding the then-ongoing rulemaking process through which PHMSA was considering public

comments, assessing risk and safety standards, and investigating the nation-wide crude oil supply implications of phasing DOT 111s out of service. Furthermore, BNSF's decision disregards the regulatory reality that DOT 111s were and will remain authorized to ship crude oil, with the first phase out occurring on January 1, 2018. 80 Fed. Reg. 26648, 26738 (May 8, 2015). Accordingly, AFPM challenges BNSF's process through which it has bypassed the regulatory framework to achieve an unlawful goal of refusing service to DOT 111 cars. This effective refusal of service constitutes the violation of BNSF's common carrier obligation that lies at the heart of this claim. The \$1,000 penalty is merely the means employed to achieve this unlawful end.

There can be no question that BNSF lacks the authority to effectuate the end of DOT 111 crude service. That authority belongs to PHMSA alone and would not transfer to BNSF even if the penalty were as low as \$100 per railcar, or as starkly revealing of the underlying coercive intent at \$1,000,000 per railcar. As such, AFPM's common carrier claim stands wholly independent from any dispute over the reasonableness of BNSF's additional charge, and Board's exclusive jurisdiction under 49 U.S.C. 10501(b) is not implicated.

Federal courts have acknowledged that they may exercise original jurisdiction over claims arising out of the ICCTA where the Board's jurisdiction is not exclusive. *Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796, 810 (5th Cir. 2011)

("[T]he basic purpose of the ICCTA is to federalize the regulation of rail transportation, not deprive the federal courts of jurisdiction."). *See also Pejepscot Indus. Park, Inc. v. Maine Cent. R. Co.*, 215 F.3d 195, 204 (1st Cir. 2000) (analyzing the legislative history of the Board's general jurisdiction to conclude that "Congress intended only to preempt state law and remedies, not to give the STB exclusive jurisdiction over ICCTA claims"). Accordingly, the Court has subject matter jurisdiction over this action.

**2. The Court may grant injunctive relief over AFPM's common carrier claim.**

Alternatively, BNSF claims that this Court lacks jurisdiction, because it lacks authority to grant the relief sought by AFPM. D.E. 12 at 11–13. BNSF argues that the language of two clauses of the ICCTA precludes the Court's authority to grant declaratory and injunctive relief. Specifically, BNSF interprets 49 U.S.C. § 11704(b)–(c) and 49 U.S.C. § 11701 to mean that only claims for damages may be heard in federal court. These subsections state, respectively, that plaintiffs may bring a civil action against railroads in federal courts "for damages . . . for amounts charged that exceed the applicable rate for the transportation" and that the Board "shall take appropriate action to compel compliance" with the ICCTA. Neither case law nor the plain language of those statutes supports a reading of these statutes that indicate federal courts are stripped of their power to grant equitable and declaratory relief when exercising original jurisdiction over a

claim arising out of federal law. Accordingly, this Court retains its “inherent power to grant appropriate relief,” including the power to grant injunctive and declaratory relief “[a]bsent such generally expressed prohibition” in the relevant federal statute. *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 894 (5th Cir. 1970).

BNSF cites a single case to support its argument that these subsections should be interpreted to greatly restrict the authority of federal courts. D.E. 12 at 12 (citing *Blanchard Sec. Co. v. Rahway Valley Railroad*, 2004 US Dist. LEXIS 25647 (D.N.J. 2004)). *Blanchard* is easily distinguished. As a preliminary matter, this case arose out of a landowner’s attempt to enjoin the reactivation of an old railroad line that ran through its property. But further, the plaintiff’s relevant claims were state law causes of action. The *Blanchard* court found that, by seeking an injunction against future railroad activity on its land, the plaintiff sought “to regulate the rehabilitation and operation of [a] rail line . . . through the remedy of injunctive relief.” *Id.* at \*20. Because the power to regulate railroad routes operations is within the jurisdiction of the Board pursuant to 49 U.S.C. 10501(b), the counts were dismissed. *Id.* AFPM’s claim is unrelated to the regulation of rail routes. It does not challenge the location or frequency of railroad activity and thus does not fall within the Board’s exclusive jurisdiction and remedies under 49 U.S.C. § 10501(b). AFPM’s claim is solely based on BNSF’s attempt to supplant

federal regulations authorizing specific tank cars used to transport hazardous materials with its own. Therefore, granting AFPM's request for injunctive relief will not enable unlawful attempts to regulate railroads; it will protect against them.

Because BNSF cannot identify case law or a relevant clause in the ICCTA that would strip the Court of its inherent powers to grant injunctive and declaratory relief, its argument that the Court lacks jurisdiction under Fed. R. Civ. P. 12(b)(1) is unmeritorious.

**ii. AFPM has stated a valid claim that BNSF violated its common carrier obligation.**

Next, BNSF argues AFPM's claim should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6), because it fails to state a claim that BNSF has violated its common carrier obligation under 49 U.S.C. § 11101. Specifically, BNSF claims that AFPM's complaint does not allege that BNSF "refus[ed] to provide service pursuant to an existing rate." D.E. 12 at 15.

Although BNSF has not enacted an outright embargo on crude shipments in DOT 111 cars, AFPM has pled that BNSF made clear that its ultimate goal is to remove DOT 111 railcars from their lines. This allegation, which must be taken as true, reveals that BNSF seeks to avoid its common carrier obligation to provide service to authorized railcars by making it financially impractical for shippers to use those railcars. *Grynberg v. BP P.L.C.*, 855 F. Supp. 2d 625, 638 (S.D. Tex. Mar. 27, 2012) (Hittner, J.) (stating that facts in the pleadings must be accepted as

true). These acts conflict with existing PHMSA regulations and procedures and ultimately constitute a refusal to service DOT 111 cars. In BNSF's view, however, this complaint would be properly pled only if AFPM alleged that its members requested service for DOT 111 cars shipping crude, and BNSF blatantly refused.

BNSF should not reap the benefit of having the wherewithal to know how to avoid common carrier challenges by implementing coercive economic incentives to deny service, rather than doing so outright. Instead, its actions must be construed as what they are: artful and strategic maneuvering to avoid its common carrier obligations, masked behind the guise of encouraging safety through "pricing."

**1. BNSF lacks authority to directly regulate the types of railcar that transports crude oil on its lines, and therefore lacks the authority to indirectly regulate through alternative means.**

As a common carrier under the ICCTA, BNSF is obligated to "provide the transportation or service on reasonable request." 49 U.S.C. § 11101. This obligation requires that BNSF ship all commodities, provided that they have not been exempted pursuant to federal regulations. This obligation to ship includes hazardous materials, such as crude, that are offered for transportation in accordance with HMR. 49 U.S.C. § 10502; 49 C.F.R. §§ 105, *et seq.* See also *Riffin*, 733 F.3d at 346. The DOT 111 model is authorized for crude service until at least January 1, 2018, and thus shippers are entitled to use them to ship crude.

BNSF is obligated to provide the corresponding service to these shippers on reasonable request. 49 C.F.R. § 173.31(a)(2) (“Tank cars and appurtenances may be used for the transportation of *any* commodity for which they are authorized.”) (emphasis added). See also 49 C.F.R. §§ 173.241(a), 173.242(a), 173.243(a) (designating the DOT 111 railcar as authorized containers for hazardous liquids); 80 Fed. Reg. 26648, 26738 (May 8, 2015). However, due to “heightened concerns” about the DOT 111’s safety, BNSF sought alternative methods to avoid PHMSA’s and the ICCTA’s requirement that it continue to accept these cars for crude service. Likely aware of the consequences of overtly refusing service to shippers using the DOT 111s for crude, BNSF has admitted that it turned to pricing to achieve the same effect. Complaint, ¶ 17.

This intermediate step—the use of pricing—is the shield behind which BNSF seeks to hide its unlawful attempts to set its own safety standards for railcars on its lines, in total disregard of PHMSA’s comprehensive regulation of this subject matter. However, it is axiomatic in administrative law that an entity cannot regulate indirectly what it lacked authority to regulate directly. See *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 328, 81 S. Ct. 1611, 1620, 6 L. Ed. 2d 869 (1961) (holding that an agency cannot have the “the power to do indirectly what it cannot do directly”); *Strickland v. United States*, 61 Fed. Cl. 689, 691 (2004) (same). BNSF is aware of the proper rulemaking process through

which railcars are authorized or retired; it participated in that process by meeting with PHMSA and submitting comments through its trade organization shortly before imposing this penalty. BNSF knew it could not directly ban DOT 111 railcars from shipping crude on its lines, so it sought an alternative enforcement mechanism to achieve the same end. Therefore, “even [though it] does not seem regulatory on its face,” BNSF’s \$1,000 penalty is impermissible, and indicates BNSF’s unlawful attempt to set standards on the types of cars it provides service to. *Waubay Lake Farmers Ass’n v. BNSF Railway Co.*, 2014 WL 4287086, at \*5 (D.S.D. Aug. 28, 2014).

Put together, BNSF’s obligations under the ICCTA and PHMSA’s exclusive authority over the hazardous material safety regulations dictate that BNSF has violated its common carrier obligation. BNSF cannot use indirect means—its rate-making prerogative—to achieve the improper ends of regulating alongside PHMSA and granting itself de facto exemptions from transporting DOT 111s in crude service. PHMSA’s right to vet and promulgate railcar standards is exclusive, and, as the authorities above indicate, not even state or local governmental agencies share rulemaking authority. 49 U.S.C. §§ 5101, 5103(b)(1)(A)(iii). BNSF is no exception.

AFPM’s allegations of BNSF’s actions to avoid its duty to transport DOT 111s are sufficient to state a claim that BNSF has refused to provide service on

reasonable request. Accordingly, BNSF's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) must be denied.

**2. Case law does not support BNSF's contention that it may use pricing to regulate safety or eliminate certain movements on its lines.**

BNSF's argument to the contrary—that a common carrier claim cannot be based on an “underlying objective”—is unavailing. To support its broad contention that railroads can never face common carrier challenges when they use their rate-setting prerogative “to discourage or penalize disfavored freight movements,” BNSF relies on a single opinion issued *before* the ICCTA was enacted. D.E. 12 at 16. As such, *Union Pacific Railroad Co. v. ICC*, 867 F.2d 646, 649 (D.C. Cir. 1989) proceeded under different statutory framework and under a now-defunct administrative body in the ICC. But more importantly, *Union Pacific* did not address the distinction between a rate case and a common carrier case, as BNSF contends it did. Instead, the court addressed the ICC's wrongful conflation of unreasonable rates and unreasonable *practices*. *Id.* at 649 (The first subheader of the discussion is actually named “Unreasonable Practice or Unreasonable Rates?”).

Therefore, there is a false analogy suggested in BNSF's “established case law.” To the extent that BNSF is implying that an allegation of an unreasonable practice is fungible with an allegation of the common carrier obligation, that notion must be rejected. The unreasonable practice statute at issue in *Union Pacific* has

changed under the ICCTA.<sup>2</sup> But even if the current version read the same, it would stand apart from the common carrier obligation imposed by 49 U.S.C. § 11101. Any attempt to equate the two statutes would either be misleading or would render one subsection redundant.

In any event, *Union Pacific* did not hinge upon—or even discuss—the principle that railways can use rates to regulate activity on its lines. The District of Columbia Circuit observed that all five complaints had alleged only unreasonable rates, that the ICC’s analysis had focused exclusively on rate reasonableness, and that the ICC ultimately granted relief in the form of prescribed rates. *Union Pacific*, 867 F.2d at 649. The “unreasonable practice” litigated was Union Pacific’s use of “cost additives” on the transportation of nuclear and radioactive materials, to recover costs of delays, costs of clean-up, and costs incurred in switching operations. *Id.* at 648. The court made a case-specific holding that “form must yield to substance,” and found that the case was truly about rate reasonableness when the pleadings, analysis, and relief granted were all rate-focused. The

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<sup>2</sup> The former 49 U.S.C. 10701(a) provided, in relevant part, that “. . . practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable.”

In comparison, the current 49 U.S.C. 10701(a) of the ICCTA provides: “A through route established by a rail carrier must be reasonable. Divisions of joint rates by rail carriers must be made without unreasonable discrimination against a participating carrier and must be reasonable.”

“unreasonable practice” had only been nominally acknowledged. *Id.* Again, as AFPM makes no challenge to the reasonableness of the amount of the \$1,000 penalty and does not seek rate adjustments as a remedy, this case offers little precedential value.

**iii. The Court is within its discretion to retain jurisdiction over the case.**

Finally, BNSF urges the Court to defer to the Board’s “expertise” under the doctrine of primary jurisdiction. D.E. 12 at 18.

The Supreme Court has stated that “[n]o fixed formula exists for applying the doctrine of primary jurisdiction.” *United States v. Western Pac. R. Co.*, 352 U.S. 59 (1956). Referral under the doctrine is discouraged when it would result in “an expensive and merely delaying administrative proceeding when there are no substantial issues for the agency to decide.” *Elam*, 635 F.3d at 811 (5th Cir. 2011) (quoting *Local Union No. 189 v. Jewel Tea Co.*, 381 U.S. 676, 686, 85 S.Ct. 1596, 14 L.Ed.2d 640 (1965)) (internal quotation marks omitted). Courts consider “the benefits of obtaining the agency’s aid against the need to resolve the litigation expeditiously and may defer only if the benefits of agency review exceed the costs imposed on the parties.” *Wagner & Brown v. ANR Pipeline Co.*, 837 F.2d 199, 201 (5th Cir. 1988). Ultimately, federal courts retain their original jurisdiction over common carrier claims regardless of whatever jurisdiction the Board may

have, and primary jurisdiction is merely a “flexible doctrine to be applied at the discretion of the district court.” *Id.*

Here, AFPM’s complaint raises a narrow legal question: does a railroad breach its common carrier obligation to ship hazardous materials in federally-authorized railcars by imposing a penalty intended to prevent the use of those authorized railcars? The ICCTA expressly permits AFPM to raise this question with this Court. 49 U.S.C. § 11704(c)(1) (enabling plaintiffs to “bring a civil action . . . to enforce liability against a rail carrier providing transportation subject to the jurisdiction of the Board”). The authorization for rail car specifications lies in PHMSA’s exclusive jurisdiction, and it is reflected in that agency’s regulations.<sup>3</sup> Thus, there is no basis for transferring this case to the Board. *Cf. Wilbert Family Ltd. Partnership v. Dallas Area Rapid Transit*, 2012 WL 246091, at \*5 (N.D. Tex. Jan. 26, 2012) (declining to transfer a case to the Board under the primary jurisdiction doctrine).

Further, there are few facts in controversy, and none would require the economic expertise or the fact-finding capacity of the Board. AFPM does not ask the Court to make any rulings on the reasonableness of the \$1,000 penalty to recover costs, nor does it ask the Court to analyze the relative costs of shipping

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<sup>3</sup> To the extent that BNSF disputes the allegation that its surcharge is intended to retire the use of DOT 111s—an allegation that must be taken as true for purposes of the motion to dismiss—that factual dispute should be resolved in the ordinary course of discovery, motions practice, and trial.

DOT 111 railcars compared to other permissible containers. Further, AFPM does not ask the Court to consider the merits of additional BNSF-specific safety regulations. BNSF's distaste for DOT 111 railcars may be somehow rooted in safety, but its policy to enact a \$1,000 penalty is not. BNSF's actions do not seek to improve safety within PHMSA's bounds of crude shipping. Its actions seek to *end* certain crude shipping. *Compare Chlorine Inst., Inc. v. Soo Line R.R.*, No. 14-2346, 2015 WL 4032056, at \*6 (8th Cir. July 2, 2015) (deferring to the Board's ability to "address fact-intensive questions" when railway enacted additional safety standards on shipments of toxic inhalation hazard materials).

Accordingly, there is little benefit from referral to the Board, while there is considerable burden on AFPM to shoulder costs of renewed, and delayed, litigation. The Court should reject BNSF's request that the claim be referred.

### **CONCLUSION**

WHEREFORE, for the foregoing reasons, AFPM respectfully requests that the Court deny Defendant's Motion to Dismiss. In the event that its claim is deemed deficient pursuant to Fed. R. Civ. P. 12(b)(6), AFPM respectfully requests it be given the opportunity to amend the Complaint to cure the deficiency. *See* Fed. R. Civ. P. 15(a)(2).

Dated: July 31, 2015.

Respectfully submitted,

/s/ Bruce D. Oakley

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**CERTIFICATE OF SERVICE**

On July 31, 2015, Plaintiff American Fuel & Petrochemical Manufacturers filed the foregoing Response to Defendant's Motion to Dismiss using the Court's CM/ECF system. Notice of this filing will be sent electronically to counsel of record using the Court's electronic notification system. Parties may access this filing through the Court's Electronic Case Filing System.

/s/ Bruce D. Oakley  
Bruce D. Oakley

UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS,	)	
	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 4:15-cv-682
v.	)	
	)	
BNSF RAILWAY COMPANY,	)	
	)	
Defendant.	)	
	)	

DEFENDANT BNSF RAILWAY COMPANY’S REPLY IN SUPPORT OF ITS MOTION  
TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR  
FAILURE TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED  
AND  
ALTERNATIVE MOTION TO DISMISS  
UNDER THE DOCTRINE OF PRIMARY JURISDICTION

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ATTORNEYS FOR DEFENDANT  
BNSF RAILWAY COMPANY

This case is about BNSF's rates. AFPM objects to the rates that BNSF charges for transportation of crude oil in general purpose unjacketed DOT 111 railcars, asks the Court to declare that BNSF's rates for crude oil transportation in those railcars are unlawful, and seeks injunctive relief ordering BNSF to modify its rates for crude oil transportation. To claim, as AFPM does in its Response Brief, that "[t]his case is not about rates" defies credulity. *See* AFPM's Response to BNSF's Motion To Dismiss ("AFPM's Opp. Brief") at i.

AFPM's challenge to BNSF's rates does not belong in federal court. The statute – the ICC Termination Act ("ICCTA") – expressly provides that only the Surface Transportation Board ("STB") can address challenges to the rates that are charged by railroads to their customers. AFPM argues that the STB is not the proper forum for its claim because AFPM is not challenging the reasonableness of BNSF's rates but rather BNSF's alleged attempt, through its rates, to render the use of general purpose DOT 111 railcars a "financial impracticability." AFPM Opp. Brief at ii. But AFPM's challenge unmistakably is to BNSF's rates, which AFPM claims are the mechanism used to achieve BNSF's alleged objective. In *Union Pacific Railroad Co. v. Interstate Commerce Commission* ("ICC"), 867 F.2d 646 (D.C. Cir. 1989), the U.S. Court of Appeals for the D.C. Circuit ruled that a challenge to railroad conduct that is manifested exclusively in the level of rates

charged – regardless of the railroad’s intent – must be treated as a challenge to rail rates.

AFPM cannot succeed in repackaging its challenge to BNSF’s rates as a common carrier claim. AFPM argues that BNSF’s rates for transportation of crude oil in DOT 111 railcars violate BNSF’s common carrier obligation because they amount to an effective refusal to provide service – *i.e.*, the rates are supposedly so high that they effectively deny service. *See* AFPM Opp. Brief at iii, 1. But this argument proves too much: if it were true, it would demonstrate beyond any doubt that AFPM’s complaint is in fact about the level of the rates and must therefore be dismissed under *Union Pacific*.

Even if AFPM could get around the clear ruling of *Union Pacific*, AFPM’s claims would still not belong in this Court. AFPM does not cite a single case holding that an *effective* refusal of service through the level of rates charged can amount to a common carrier violation. AFPM has failed to state a valid common carrier claim, which must be based on an overt refusal to provide service.

Moreover, even if BNSF had overtly refused to provide service in DOT 111 railcars (rather than charging a rate for such service that AFPM dislikes), a challenge to such a denial of service would belong at the STB. The Eighth Circuit recently found that a claim based on an overt denial of service is subject to the STB’s primary jurisdiction, noting the STB’s expertise in addressing fact-intensive

questions about the reasonableness of a railroad's conduct and its particular expertise in addressing claims, like those raised here, that a railroad has violated regulations of other federal agencies, specifically PHMSA. *Chlorine Institute, Inc. v. Soo Line R.R.*, No. 14-2346, 2015 WL 4032056 (8th Cir. 2015).

In short, whether AFPM's claim is treated as a rate challenge or as a common carrier claim, AFPM's complaint should be dismissed.

**I. AFPM Cannot Demonstrate that this Court Possesses Subject Matter Jurisdiction Over Its Complaint.**

**A. Allegations of Improper Intent Cannot Convert A Challenge To Rates Into a Common Carrier Claim.**

AFPM concedes that challenges to the reasonableness of a railroad's rates are subject to the STB's exclusive jurisdiction and cannot be entertained in a federal court. AFPM's Opp. Brief at 7. But AFPM argues that the clear statutory delegation of exclusive jurisdiction over rate claims to the STB does not apply to its claims here because AFPM is not challenging the reasonableness of BNSF's rates but only BNSF's use of its rates as a financial penalty to discourage shippers' use of DOT 111 railcars. *Id.* The argument is unavailing. By claiming that BNSF's rates amount to a financial penalty, AFPM is undeniably complaining about the level of BNSF's rates.

The fact that DOT 111 railcars have been authorized by PHMSA regulations promulgated under the Hazardous Materials Transportation Act, 49 U.S.C. §§ 5101

et seq. (“HMTA”) is irrelevant. Notwithstanding the numerous references in AFPM’s Brief to the PHMSA regulatory scheme under the HMTA, AFPM has not brought a claim under the HMTA (nor could it, since the HMTA does not provide a private cause of action<sup>1</sup>). The essence of AFPM’s complaint is that BNSF has violated its common carrier obligations *under ICCTA* by imposing a financial penalty on the use of PHMSA-approved DOT 111 rail cars. The question here is whether AFPM’s claims should be treated as a challenge *under ICCTA* to the level of BNSF’s rates or as a challenge *under ICCTA* to BNSF’s compliance with its common carrier obligations.

On that question, the courts have already spoken. In *Union Pacific*, the D.C. Circuit ruled that a challenge to railroad conduct that is manifested exclusively in the level of the rates charged must be treated as a challenge to the railroad’s rates subject to the statutory restrictions on such claims. 867 F.2d at 649. In the ICC decision that was the subject of the court’s decision, the ICC had concluded that the railroads were using their rates “to attempt to avoid their common carrier obligation to transport radioactive materials,” and on that basis treated a challenge to the railroads’ rates as an unreasonable practice claim (not subject to the

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<sup>1</sup> See, e.g., *Casey-Beich v. U. Parcel Serv., Inc.*, 295 Fed. App’x. 92, 94 (7th Cir. 2008) (unpublished) (“But these regulations cannot establish federal question jurisdiction because neither these regulations, nor their enabling legislation, the [HMTA], provide a private right of action.”) (internal citation omitted); *Borough of Ridgefield v. N.Y. Susquehanna & W. R.R.*, 810 F.2d 57, 59-61 (3d Cir. 1987) (same).

jurisdictional limits on regulation of rail rates) rather than as a challenge to the rates themselves. *Commonwealth Edison Co. v. Aberdeen & Rockfish R.R. Co.*, 2 I.C.C.2d 642, 642 (1986).<sup>2</sup> The D.C. Circuit found that the ICC's characterization of the claims as unreasonable practice claims rather than rate claims was improper. The court concluded that it was irrelevant that the railroads were supposedly charging rates that would allow them to avoid their common carrier obligations. If the railroads' conduct was "manifested *exclusively* in the level of rates that customers are charged," the challenge to that conduct must be treated as a rate challenge, subject to the statutory limits on such challenges. *Union Pacific*, 867 F.2d at 649.

The *Union Pacific* decision is on all fours here, and it requires dismissal of AFPM's complaint. The D.C. Circuit in *Union Pacific* was giving effect to Congress's clear intent to allow railroads to set rates free of regulatory interference except where railroads have market dominance over the transportation at issue. The court recognized that the statutory limits on rate regulation could easily be circumvented if rates could broadly be challenged based on allegations of improper

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<sup>2</sup> The railroads had previously sought to refuse service altogether, which was found to be a violation of their common carrier obligation. *See Akron, Canton & Youngstown R.R. Co. v. I.C.C.*, 611 F.2d 1162, 1170 (6th Cir. 1979). After being denied the right to refuse service, the railroads then adopted new and higher rates for the disfavored service, which the ICC concluded was simply an extension of the "railroads' ongoing effort to avoid transporting radioactive materials." *Commonwealth Edison Co. v. Aberdeen & Rockfish R.R. Co.*, 2 I.C.C.2d 642, 647-48 (1986).

intent, and the court declined to create such a huge loophole in the congressional scheme that substantially deregulated rail rates. The court therefore concluded that if a challenge is directed at the rates charged to a railroad's customers, as here, the challenge must be treated as a rate challenge, subject to all of the statutory provisions that govern rate challenges.

Recognizing the jurisdictional problem that *Union Pacific* raises for its complaint, AFPM unsuccessfully tries to distinguish the decision. First, AFPM argues that *Union Pacific* can be ignored because it was decided under a prior version of the governing statute. *See* AFPM's Opp. Brief at 15. But the current statute has the same jurisdictional limitations on rate regulation as the prior statute.<sup>3</sup> Indeed, the STB has recognized the continued validity of the *Union Pacific* decision under the current statute.<sup>4</sup>

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<sup>3</sup> As evidence of a supposed change in the underlying statute, AFPM claims that ICCTA "changed" the unreasonable practice statute. AFPM Opp. Brief at 16 n.2. But apart from renumbering the provision from Section 10701 to 10702 and reordering the clauses, the provisions before and after ICCTA are substantively identical. Compare former 49 U.S.C. § 10701(a) (a "practice related to transportation or service provided by a carrier ... must be reasonable"), with current 49 U.S.C. § 10702(2) ("A rail carrier providing transportation or service ... shall establish reasonable rules and practices on matters related to that transportation or service."). Moreover, ICCTA did not modify the limitations on the agency's regulation of rail rates. Both before and after ICCTA, the statute limited the agency's authority to regulate a railroad's rates only where it finds that the railroad has "market dominance over the transportation to which a particular rate applies." (Compare prior 49 U.S.C. § 10701a(b)(1) with current 49 U.S.C. § 10701(d)(1)). Moreover, ICCTA reinforced the agency's exclusive jurisdiction over transportation, including rail rates, by adding Section 10501(b)(1), which

Second, AFPM argues that *Union Pacific* is an “unreasonable practice” case while AFPM alleges a common carrier violation. *See* AFPM’s Opp. Brief at 15. This is a distinction without a difference. Both cases involve the identical question whether the provisions governing regulation of rates can be avoided by claiming that the railroad sought to use its rates to avoid common carrier obligations. The D.C. Circuit ruled that a railroad’s supposed objective to avoid common carrier obligations was not relevant if the challenged conduct was manifested in the level of the rate charged.

Third, AFPM wrongly claims that the court in *Union Pacific* did not “even discuss . . . the principle that railways can use rates to regulate activity on its

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provides the STB with “exclusive” jurisdiction over the “remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers.” *Id.*

<sup>4</sup> *See, e.g., Kan. City Power & Light Co. v. Union Pac. R.R. Co.*, STB Docket No. 42095, at 10-11, 2008 WL 2091413 (served May 19, 2008) (In response to a shipper’s challenge to a railroad’s imposition of higher rates on certain shipments as an unreasonable practice and as “skirt[ing] UP’s common carrier obligation,” the Board found that the shipper’s claim “is essentially a challenge to a higher rate for service . . . [and] what is essentially a rate dispute should not be addressed via a claim of unreasonable practice,” citing *Union Pacific*); *W. Fuels Ass’n, Inc. & Basin Elec. Power Coop. v. BNSF Ry. Co.*, STB Docket No. NOR 42088, at 5, 2007 WL 2590251 (served Sept. 10, 2007) (In response to a shipper challenge to a rail carrier’s mechanism for increasing rail rates as an unreasonable practice, the STB cited *Union Pacific* and rejected the shipper’s argument because “rate disputes should not be addressed via a claim of unreasonable practice,” and the shippers’ challenge to “BNSF’s rate adjustment procedures is a challenge to the increases in the level of the overall rate.”).

lines.” AFPM’s Opp. Brief at 16. In fact, the *central issue* in the case was whether the ICC could avoid the limits on rate regulation by claiming that the railroads improperly sought to use their rates to discourage disfavored traffic – precisely the issue raised by AFPM’s complaint. *Union Pacific* stands directly for the proposition that when a plaintiff claims that a railroad has used its rates to discourage disfavored traffic, those claims must be treated as rate challenges subject to the statutory provisions that limit the regulation of rail rates.

**B. The Court Does Not Have Authority To Grant The Relief Sought By AFPM.**

Regardless of how AFPM’s claims are characterized, the Court does not have authority to provide the relief requested, *i.e.*, to enjoin BNSF from charging the rates it has established for transportation of crude oil in DOT 111 railcars. As BNSF explained in its Motion to Dismiss, Congress expressly limited the jurisdiction of federal courts to actions arising under ICCTA involving damages, and it did not give federal courts the power to issue injunctive relief. The use of injunctive remedies intrudes too far into the regulation of railroad conduct (particularly in a case involving a challenge to a railroad’s rates), which was expressly granted exclusively to the STB. *See* 49 U.S.C. § 10501(b).

AFPM’s argument that federal courts have “inherent” authority to grant equitable relief ignores the statute. Congress created concurrent STB and federal court jurisdiction over some ICCTA claims (not including rate claims), but where

it gave federal courts jurisdiction, it limited that jurisdiction to damages actions. *See* BNSF Motion to Dismiss at 11-13. As AFPM itself recognizes, the federal courts’ “inherent” authority to grant appropriate relief cannot supersede Congress’s express limitations on the authority granted to federal courts over particular federal questions. *See* AFPM Opp. Brief at 10.

**II. AFPM Cannot Establish A Valid Common Carrier Claim By Alleging That BNSF Effectively Denied Service Through The Rates It Charges.**

AFPM argues that it has stated a valid common carrier claim because BNSF’s rates amount to an effective denial of service. According to AFPM, “BNSF knew it could not directly ban DOT 111 railcars from shipping crude on its line, so it sought an alternative enforcement mechanism [*i.e.*, its rates] to achieve the same end.” AFPM’s Opp. Brief at 14. By making it “financially impractical for shippers to use those railcars,” BNSF allegedly violated its common carrier obligations. *Id.* at 11.

The first problem with this argument is that it leads straight back to *Union Pacific*. Under AFPM’s own theory, the alleged common carrier violation results from the level of BNSF’s rates, which supposedly make it “financially impractical” to ship in DOT 111 rail cars. But challenges to railroad conduct “manifested *exclusively* in the level of rates that customers are charged” must be treated as challenges to rail rates. 867 F.2d at 649.

In addition, AFPM fails to cite a single case where a railroad was found to have violated its common carrier obligation through an “effective” denial of service rather than through an outright refusal to provide a requested service or a refusal to quote any rate for the service requested. AFPM’s only argument is that a railroad should not be able to do indirectly (through rates) what it cannot do directly (through an outright refusal to provide service). *See* AFPM’s Opp. Brief at 13. But the argument is beside the point. AFPM has alleged a violation of a specific provision of the statute – Section 11101 – and the cases establish that such a claim can be made only where there has been an outright refusal to provide service. *See* BNSF’s Motion to Dismiss at 15 and cases cited therein.

**III. Even If BNSF Had Overtly Refused To Provide Service In DOT 111 Railcars, A Challenge To Such Conduct Would Be Subject To The STB’s Primary Jurisdiction.**

As noted above, AFPM claims that BNSF violated its common carrier obligations by “effectively” refusing to provide service in railcars that have been authorized by PHMSA for such transportation. In a very recent case brought in federal district court in Minnesota, the plaintiffs alleged that a railroad violated its common carrier obligations by expressly refusing to provide transportation in PHMSA-approved railcars. As BNSF noted in its Motion to Dismiss, the district court dismissed the claims under the doctrine of primary jurisdiction, noting that courts “almost invariably defer to the STB’s expertise” in cases involving alleged

violations of the common carrier statute. *See Chlorine Institute*, 2014 WL 2195180 at \*2.

After BNSF filed its Motion to Dismiss, the Eighth Circuit upheld the district court's primary jurisdiction finding, reiterating the STB's expertise in assessing claims relating to the reasonableness of a common carrier's practices. The court rejected the plaintiffs' claims that the STB has no special expertise in addressing a railroad's compliance with regulations adopted by PHMSA relating to rail car safety, claims also made by AFPM here. As the Eighth Circuit explained, "the STB, with its expertise in the industry, is better equipped than federal courts to address fact-intensive questions of whether a particular safety requirement [imposed by a rail carrier] beyond the [PHMSA] regulations is consistent with the regulations and national policy." *Chlorine Institute, Inc. v. Soo Line R.R.*, No. 14-2346, 2015 WL 4032056 (8th Cir. 2015).

The principal difference between the allegations in the *Chlorine Institute* case and the allegations here is that BNSF's supposed violation of the common carrier statute in this case results indirectly from BNSF's rates rather than directly through an outright refusal to provide service. Even if an alleged indirect refusal to provide service could support a common carrier claim, such a claim would present an even stronger case for a primary jurisdiction referral to the STB than the allegations in the *Chlorine Institute* case, given the potentially complex and fact-

intensive issues relating to the justifications for rates charged and the impact of rates on rail shippers.

### CONCLUSION

For the reasons set forth above and in BNSF's Motion to Dismiss, AFPM's complaint should be dismissed under either Rule 12(b)(1) or (6), or alternatively under the doctrine of primary jurisdiction.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule 5.1 on the 7th day of August, 2015.

*/s/ Craig Smyser*

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Craig Smyser