

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42144

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

v.

UNION PACIFIC RAILROAD COMPANY

Decided: June 10, 2016

On June 2, 2015, North America Freight Car Association (NAFCA), American Fuel & Petrochemicals Manufacturers (AFPM), The Chlorine Institute, Inc. (CI), The Fertilizer Institute (TFI), and American Chemistry Council (ACC), along with Ethanol Products, LLC d/b/a POET Ethanol Products (POET Ethanol), POET Nutrition, Inc. (POET Nutrition), and Cargill Incorporated (Cargill) (collectively, Complainants), filed an amended complaint against Union Pacific Railroad Company (UP) pursuant to 49 U.S.C. §§ 10702, 11101, 11121, 11122, 11701, and 11704, and 49 C.F.R. pt. 1111. In Count I, Complainants challenge the reasonableness of UP Tariff 6004, Item 55-C (Item 55-C), which became effective on January 1, 2015. In Count II, Complainants allege that UP's refusal to compensate Complainants for the use of their tank cars, whether through mileage allowances or reduced line haul rates, constitutes an unreasonable practice under 49 U.S.C. § 10702 and violates 49 U.S.C. §§ 11101, 11121, and 11122. On June 22, 2015, UP filed its answer to the amended complaint.

In a decision served on February 11, 2016, the Board adopted a procedural schedule and directed the parties to complete document discovery by June 10, 2016, and to complete deposition discovery by July 25, 2016. In a concurrently served decision, the Board referred all discovery issues to Administrative Law Judge John P. Dring.¹

Since adoption of the procedural schedule, a number of discovery motions have been filed by parties. On May 27, 2016, Judge Dring, on behalf of the Board, issued a decision directing the parties to participate in a two-day discovery conference on all outstanding discovery matters at FERC headquarters on June 23 and June 24, 2016.

¹ The Board has signed a Memorandum of Understanding with the Federal Energy Regulatory Commission (FERC) to employ the services of FERC administrative law judges on a case-by-case basis to perform discrete, Board-assigned functions such as adjudicating discovery disputes between parties in cases pending before the Board.

On June 6, 2016, UP filed a motion to hold the procedural schedule in abeyance in order to allow “the parties to negotiate a revised schedule that reflects a realistic deadline for completing document discovery.” (UP Mot. 1, June 6, 2016.) UP states that document discovery will not be completed by June 10, 2016, noting the outstanding discovery disputes and the fact that no party has yet produced any documents. UP also requests that the Board order the parties to file a status report within ten days of an order of Judge Dring resolving the outstanding discovery issues currently set for hearing on June 23-24, 2016. (Id. at 2.)

On June 8, 2016, Complainants filed a reply in opposition to UP’s motion, characterizing it as a request for an open-ended abeyance. Complainants argue that the motion is premature and that several of the outstanding issues will be resolved at the discovery hearing. (Complainants Reply 1-2, June 8, 2016.) Complainants contend that the appropriate time to reassess the procedural schedule is after the discovery hearing, when the parties can propose specific new dates. (Id.)

Given these circumstances, the Board will hold the procedural schedule in abeyance pending the resolution of the discovery disputes currently set for hearing on June 23-24, 2016, and further order of the Board. The parties are directed to file a status report, including a proposed revised procedural schedule, if appropriate, by July 1, 2016. The Board encourages the parties to discuss any necessary modifications to the discovery deadlines with Judge Dring.

It is ordered:

1. The procedural schedule is held in abeyance pending resolution of the discovery disputes and further order of the Board.
2. The parties are directed to file a status report, including a proposed revised procedural schedule, if appropriate, by July 1, 2016.
3. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.