

44998  
DO

SERVICE DATE – FEBRUARY 11, 2016

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: February 10, 2016

On June 2, 2015, North America Freight Car Association, American Fuel & Petrochemicals Manufacturers, The Chlorine Institute, Inc., The Fertilizer Institute, and American Chemistry Council, along with Ethanol Products, LLC d/b/a POET Ethanol Products, POET Nutrition, Inc., and Cargill Incorporated (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 tanks 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.

Also on June 22, 2015, UP moved to dismiss the amended complaint or make that complaint more definite. Complainants opposed UP's motion. In a decision served on December 21, 2015, the Board denied the motion and directed the parties to meet and confer and to submit (either jointly or individually) a proposed procedural schedule by January 4, 2016. On January 4, 2016, the parties, who were unable to resolve certain issues, filed separate proposed procedural schedules. On January 27, 2016, the Complainants filed a reply in opposition to UP's procedural schedule.

DISCUSSION

The parties' proposed procedural schedules differ slightly in a number of respects. UP's proposed schedule totals 330 days, including 75 days to file reply evidence and arguments, and proposes that the parties submit simultaneous final briefs. In support of the proposed 75-day reply period, UP argues that while a 60-day reply period is typical, it believes that it will need 75 days due to the complexity of this proceeding. In support of its request for final briefs, UP

argues that it is more efficient to require them at the outset of the proceeding than to require the parties to request them after the close of the evidentiary period.

UP also notes that the parties have a number of outstanding discovery issues. To address the timely resolution of these disputes, UP proposes that the parties should have 30 days from the date the Board adopts a procedural schedule to file motions to compel relating to any currently outstanding discovery requests and 10 days after the date of service of discovery responses to file motions to compel for any future discovery requests.

The Complainants' proposed schedule totals 270 days and provides 45 days for UP to file reply evidence and arguments. Complainants argue that UP overstates the complexity of the underlying case in order to justify its request for 75 days to file reply evidence and arguments. Complainants note that they did not propose the submission of final briefs and argue that the Board should not prejudge the necessity of final briefs prior to the development of the record. Complainant further argue that UP's discovery-related requests are not needed because the Board's discovery rules found at 49 C.F.R. § 1114.31(a) are controlling, and further that the parties already have a mutual understanding about the Board's discovery regulations as it applies in this case.

The Board will adopt the procedural schedule outlined below. The schedule provides 60 days for UP to file reply evidence and arguments, which is consistent with the Board's prior practices and procedures. Although the schedule does not require the parties to file final briefs, the Board may order final briefs at a later time if it believes they are necessary based on the development of the evidentiary record.

In a concurrently served decision, the Board is referring all discovery issues to Administrative Law Judge John P. Dring. The Board will therefore not act on UP's proposals regarding deadlines for motions to compel, as discovery matters will be addressed by Judge Dring.

The following procedural schedule is adopted:

June 10, 2016	Completion of document discovery
July 25, 2016	Completion of deposition discovery
August 24, 2016	Complainants' opening evidence and argument
October 24, 2016	Defendant's reply evidence and argument
November 22, 2016	Complainant's rebuttal evidence and argument

It is ordered:

1. The procedural schedule described above is adopted.
2. This decision is effective on its service date.

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