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June 2, 2015

VIA E-FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Re: STB Docket No. NOR 42144, *North America Freight Car Association, et al. v. Union Pacific Railroad Company*

Dear Ms. Brown:

Accompanying this letter for filing on behalf of the Complainants in the captioned docket is Complainants' First Amended Complaint. As explanation, this Amended Complaint modifies the Request for Relief section of the original Complaint to comport with Association Complainants' decision to not pursue reparations or damages on behalf of their members in this proceeding. *See*, Complainants' Reply to Motion to Dismiss Complaint or to Make Complaint More Definite, filed June 1, 2015 at 20. It also amends paragraph 26 of the original Complaint.

Sincerely,

Thomas W. Wilcox
for Complainants

Enclosures

cc: Counsel for Defendant

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**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**

vs.

**UNION PACIFIC RAILROAD
COMPANY**

Docket No. NOR 42144

FIRST AMENDED COMPLAINT

COME NOW the North America Freight Car Association ("NAFCA") 17884 Westhampton Woods Drive, Wildwood, MO, 63005; the American Fuel & Petrochemical Manufacturers ("AFPM") 1667 K Street, N.W., Washington, DC 20006; The Chlorine Institute, Inc. ("CI"), 1300 Wilson Blvd., Suite 525, Arlington VA 22209; The Fertilizer Institute ("TFI"), 425 Third Street, S.W., Suite 950, Washington, DC 20024; the American Chemistry Council ("ACC"), 700 Second St., N.E. Washington, DC 20002; Ethanol Products, LLC d/b/a. POET Ethanol Products ("Poet Ethanol Products"), 3939 North Webb Road, Wichita, KS 67226; POET Nutrition, Inc., ("Poet Nutrition") 4506 North Lewis Ave, Sioux Falls, SD 57104; and Cargill Incorporated ("Cargill"), 15407 McGinty Road West, Wayzata, MN 55391 (together "Complainants") and file this First Amended Complaint against Defendant Union Pacific

Railroad ("UP"), 1400 Douglas Street, Omaha, NE 68179. Complainants bring this Complaint pursuant to 49 U.S.C. §§ 10702, 11101, 11121, 11122, 11701, and 11704, and 49 C.F.R. Part 1111. In support of this Complaint, Complainants state the following:

THE PARTIES

1. NAFCA is an unincorporated association made up of 35 members, 33 of whom are owners, manufacturers, lessors or lessees of private railcars, and two of whom are associate members who supply administrative services to NAFCA member companies. NAFCA's members collectively represent the owners or lessees of over 680,000 private railcars operating in North America, a significant percentage of which are railroad tank cars. Many of NAFCA's members ship and receive loaded rail tank cars on the UP, and since UP does not provide rail tank cars, those NAFCA members must provide rail tank cars to UP if their products are to move by rail.

2. AFPM is a national trade association of more than 400 companies that refine and manufacture virtually the entire U.S. supply of gasoline, diesel, jet fuel, and home heating oil, as well as the petrochemicals that are used as building blocks for thousands of vital daily life functions, ranging from computers to medicine to parts used in all modes of transportation. Many of AFPM's members ship and receive loaded rail tank cars on the UP, and since UP does not provide rail tank cars, those AFPM members must provide rail tank cars to UP if their products are to move by rail.

3. CI is a 195 member, not-for-profit trade association of chlor-alkali producers worldwide, as well as packagers, distributors, users and suppliers. CI's North American producer members account for more than 95 percent of the total chlorine production capacity in the U.S. and offer for transportation approximately 40 percent of the toxic-inhalation-hazard-

("TIH") materials moved by rail each year. CI members both own and lease the rail tank cars that are required for the movement of many of the commodities that CI members ship and receive by rail, including chlorine, sodium hydroxide, sodium hypochlorite, hydrogen chloride and anhydrous hydrogen chloride. Many of CI's members ship and receive loaded rail tank cars on the UP, and since UP provides no rail tank cars, those CI members must provide rail tank cars to UP if their products are to move by rail.

4. TFI is the national trade association of the fertilizer industry. TFI members rely heavily on rail transportation for the safe and efficient movement of various fertilizer products. Many of TFI's members ship loaded rail tank cars on the UP, and since UP provides no rail tank cars, those TFI members must provide rail tank cars to UP if their anhydrous ammonia is to move by rail.

5. ACC represents the leading companies in the business of chemistry. ACC's 145 members manufacture a wide variety of products, including products moving in rail tank cars, and depend on railroads, including the UP for the safe, efficient and secure transportation of these essential products. ACC members both own and lease the tank cars that are required for the movement of many of the chemical commodities that are shipped by rail. Many of ACC's members ship and receive loaded rail tank cars on the UP, and since UP does not provide rail tank cars, those ACC members must provide rail tank cars to UP if their products are to move by rail.

6. POET Ethanol Products is a South Dakota limited liability company with its principal place of business in Wichita, Kansas. POET Ethanol Products is engaged in the business of marketing ethanol and other biorefined products. As such, POET Ethanol Products relies extensively on the rail system, including the UP, to transport fuelstocks and feedstocks to

market. POET Ethanol Products requires rail tank cars to transport its products, and since UP does not provide rail tank cars, POET Ethanol Products must provide rail tank cars to UP if its products are to move by rail.

7. POET Nutrition is a South Dakota limited liability company with its principal place of business in Sioux Falls, South Dakota. POET Nutrition is engaged in the business of marketing ethanol co-products such as distillers grains and corn oil to livestock and bio-fuels producers. As such, POET Nutrition is dependent on the rail system, including the UP, to transport its products to destination markets and export facilities throughout the USA. POET Nutrition requires rail tank cars to transport its products, and since UP does not provide rail tank cars, POET Nutrition must provide rail tank cars to UP if its products are to move by rail.

8. Cargill is a Delaware corporation with its principal place of business in Wayzata, Minnesota. Cargill is an international producer and marketer of food, agricultural, financial, and industrial products and services. Cargill requires rail tank cars to transport products on the UP, and since UP does not provide rail tank cars, Cargill must provide rail tank cars to UP if its products are to move by rail.

9. NAFCA, AFPM, CI, TFI, and ACC are each hereafter referred to as an "Association Complainant" and Poet Ethanol Products, Poet Nutrition, and Cargill are each hereafter referred to as an "Individual Complainant" (Association Complainants and Individual Complainants collectively "Complainants").

10. UP is a common carrier railroad engaged in the transportation of freight in interstate commerce. UP is subject to the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. § 10101, et seq., and to the jurisdiction of the Surface Transportation Board (the "Board"). As further described herein, UP regularly and extensively provides rail transportation

in rail tank cars that it does not own, but requires shippers and receivers to either own directly or obtain from car owners on a leased basis.

NATURE OF THE ACTION

11. This is an action brought by Association Complainants on behalf of their member companies who own or lease rail tank cars, and by the Individual Complainants, who own or lease rail tank cars.¹ In aggregate, the tank cars owned or leased by Association Complainants' members and the Individual Complainants comprise the majority of the tank cars in service in the United States today, many of which tank cars are provided to UP, the nation's largest freight railroad, for use in loaded revenue service.

12. On information and belief, UP collects over \$1.5 billion in revenues each year from its customers who ship their commodities by rail tank car.

13. UP does not provide the rail tank cars necessary for it to meet its common carrier obligation to move commodities offered for transportation by Association Complainants' members and the Individual Complainants. Instead, UP relies almost entirely upon tank cars supplied to it by Association Complainants' members and the Individual Complainants to fulfill its common carrier obligation.

14. Pursuant to 49 U.S.C. §§ 11121 and 11122, as interpreted by the precedent of this agency and the courts, UP must either supply the tank cars necessary for its provision of transportation services or compensate tank car owners for the tank cars that they supply. The rate of compensation must be determined by the expense of owning and maintaining tank cars and must consider factors that affect the adequacy of the national freight car supply.

¹ The Individual Complainants are also members of one or more of the Association Complainants, but are referred to as Individual Complainants in this complaint because they are also seeking particularized relief.

15. In Ex Parte No. 328, *Investigation of Tank Car Allowance System*, 3 I.C.C.2d 196 (1986), the Interstate Commerce Commission adopted a negotiated agreement for the calculation and payment of mileage allowances by railroads to tank car owners as compensation for the use of private tank cars in accordance with the statute.

16. Upon information and belief, even though well over 90% of tank car shipments are made by UP using private tank cars provided to it for this transportation, UP does not pay mileage allowances on shipments. Those shipments instead move under so-called “zero-mileage” rates where, pursuant to a contract or tariff, UP does not pay mileage allowances to the car owner or car lessee in exchange for UP's use of their private tank cars. For most of its transportation service in private tank cars, UP does not offer an alternative to zero-mileage rates that gives Association Complainants' members and the Individual Complainants the option to receive mileage allowance payments.

17. UP's refusal to provide railroad tank cars for service to its customers has increased the need for private non-railroad investment in such cars over the past 30 years. While the cost of owning and maintaining tank cars also has increased during this time, UP has systematically all but ceased to pay any compensation to those entities supplying the rail tank cars that UP uses to meet its common carrier obligation.

18. The lack of compensation for UP's use of private tank cars is exacerbated by UP's recent adoption of Tariff UP 6004, Item 55-C, effective January 1, 2015 (attached as exhibit A to this Complaint), which shifts the cost of transporting empty tank cars to and from repair facilities from UP to the providers of private tank cars, including Association Complainants' members and the Individual Complainants, without compensating them for UP's use of their cars. UP previously provided this transportation service without charge, just as it does for rail cars that UP

itself leases or owns. However, UP has not implemented measures to ensure that the parties providing them with tank cars are compensated for this additional expense associated with UP's use of their tank cars.

JURISDICTIONAL ALLEGATIONS

19. The Board has jurisdiction to require that UP provide the rail tank cars that are reasonably necessary to furnish safe and adequate transportation of commodities that must be transported in rail tank cars under 49 U.S.C. §§ 11101 and 11121.

20. The Board has jurisdiction to encourage the purchase, acquisition and efficient use of rail tank cars under 49 U.S.C. § 11122(a), and to establish the rate of compensation to be paid for UP's use of private rail tank cars under 49 U.S.C. § 11122(b).

21. The Board has jurisdiction to prohibit UP from charging for the movement of empty rail tank cars to repair facilities under 49 U.S.C. §§ 10702, 11101, 11121 and 11122.

22. The Board has jurisdiction to award damages to Association Complainants' members and Individual Complainants pursuant to 49 U.S.C. § 11704(b).

COMPLAINT COUNT I **UP's New Repair Facility Charge**

23. Complainants re-allege and incorporate by reference the allegations in the foregoing paragraphs.

24. UP Tariff 6004, Item 55-C, effective January 1, 2015, applies per car and mileage based charges to all empty rail tank car moves by UP to and from repair facilities except: (1) empty movements immediately preceded by loaded line-haul revenue movements on UP; (2) if UP's Mechanical Department removes a defective car from service and waybills the defective car under AAR Interchange Rule 1; or (3) if UP damaged the car. The tariff defines "Repair

Facilities” as “any facility that cleans, lines, relines, maintains, modifies repairs, or retrofits tank cars.”

25. The new charges, as published in UP Tariff 4703, are calculated as follows:

1-250 miles	\$1,317 per car
251-500 miles	\$1,477 per car
501 miles or greater	\$2.96 per mile

Thus, a minimum round trip charge for a movement to and from a repair facility is \$2,634 for a one mile movement.

26. Prior to January 1, 2015, UP provided the transportation services covered by Tariff 6004, Item 55-C, without charging a line-haul rate for those services.

27. UP Tariff 6004, Item 55-C, requires Association Complainants’ members and the Individual Complainants to pay UP for a service that UP otherwise would provide for itself, without charge, if UP were to provide the tank cars.

28. The publication of UP Tariff 6004, Item 55-C, was not accompanied by any measures to compensate Association Complainants' members or the Individual Complainants for the use of their tank cars, including UP’s repair facility transportation charges. UP Tariff 6004, Item 55-C, imposes a new cost of ownership upon private car owners that is not part of any compensation owed to tank car owners.

29. UP's implementation of the January 1, 2015 modification to Tariff 6004, Item 55-C, namely the adoption of separate tariff charges for the movement of empty tank cars to "Repair Facilities" as defined by UP, is (a) an unreasonable practice in violation of 49 U.S.C. § 10702, and (b) a violation of UP's statutory obligations to compensate private car owners for the use of their tank cars set forth in 49 U.S.C. § 11122(b).

COMPLAINT COUNT II
UP's Refusal to Compensate Tank Car Owners

30. Complainants re-allege and incorporate by reference the allegations in the foregoing paragraphs.

31. UP generates approximately \$1.5 billion per year in revenues using private tank cars, including cars supplied by Association Complainants' members and the Individual Complainants.

32. UP does not pay mileage allowances for its use of most, if not all, of Association Complainants' members' rail tank cars, or the Individual Complainants' rail tank cars, whether the transportation is pursuant to common carrier tariffs or contracts.

33. UP does not offer or negotiate reduced line-haul rates on movements using Association Complainants' members' rail tank cars, or the Individual Complainants' rail tank cars, in lieu of paying mileage allowances, in order to compensate for such use as required by law.

34. Association Complainants' members and the Individual Complainants have no choice except to provide their own tank cars for use by UP, without compensation, to enable their products to be transported by rail to and/or from locations served by UP.

35. UP's practice of requiring Association Complainants' members and the Individual Complainants to acquire rail tank cars and supply them to UP in order to receive any tank car rail service from UP, coupled with UP's refusal to compensate Association Complainants' members and the Individual Complainants for such use, whether through mileage allowances or reduced line haul rates, constitutes an unreasonable practice under 49 U.S.C. § 10702, and a violation of 49 U.S.C. §§ 11101, 11121, and 11122.

REQUEST FOR RELIEF

WHEREFORE, Complainants pray that the Board require that Defendant, UP, answer the charges alleged herein, and after a hearing and investigation conducted pursuant to 49 U.S.C. § 10704(a)(1) and the Board's implementing regulations, the Board:

(1) as to Count I, find that UP's implementation of Tariff 6004, Item 55-C is an unreasonable practice under § 10702, and that it also violates 49 U.S.C. §§ 11121 and 11122;

(2) as to Count I, order UP immediately to rescind Tariff 6004, Item 55-C effective January 1, 2015;

(3) as to Count I, order UP, pursuant to 49 U.S.C. § 11704(b), to pay reparations to any Individual Complainants who have been assessed the tariff charges adopted by UP after January 1, 2015; and

(4) as to Count II, find that UP's failure to compensate the Association Complainants' members and the Individual Complainants for the use of their tank cars is a violation of 49 U.S.C. § 10702; and also a violation of 49 U.S.C. §§ 11121 and 11122;

(5) as to Count II, order UP immediately to begin paying mileage allowances, in accordance with Ex Parte No. 328, *Investigation of Tank Car Allowance System*, 3 I.C.C.2d 196 (1986), on all shipments in private tank cars;

(6) as to Count II, award damages to Individual Complainants pursuant to 49 U.S.C. §11704(b) for all mileage allowances not paid by UP in accordance with Ex Parte No. 328, *Investigation of Tank Car Allowance System*, 3 I.C.C.2d 196 (1986), as required by 49 U.S.C. §11122(b);

(7) grant to Complainants such other and further relief as the Board may deem proper based on the record.

Respectfully submitted,



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*Counsel for The Fertilizer Institute and the
American Chemistry Council*

June 2, 2015

EXHIBIT A



TARIFF UP 6004-C

Cancels UP 6004-B

(Revision 1)

Applying On

ACCESSORIAL SERVICES - RULES AND CHARGES

**Governed, except as otherwise provided herein, by UFC 6000-series and
OPSL 6000-series.**

Issued By:

**E. A. HUNTER - MANAGER PRICING SERVICES
B. A. ROMMEL - MANAGER PRICING SERVICES**

**Union Pacific Railroad Company
1400 Douglas Street Omaha, NE 68179**

**Issued: March 26, 2008
Effective: April 1, 2008**

UP 6004-C



UP 6004-C

Item: 55-C
MOVEMENT OF EMPTY TANK CARS WITH PRIVATE MARKINGS

MOVEMENT OF EMPTY TANK CARS

[i]

Empty tank car movements provided below are subject to Union Pacific line-haul charges, as provided in UPRR 4703-series, for the portion of the empty movement that occurs on Union Pacific:

- A. New tank cars moving prior to their first loaded move in commercial service (STCC 3742213);
- B. Restenciled tank cars moving prior to their first loaded move in commercial service (STCC 3742213);
- C. Tank cars moving for dismantling, sale, or scrap (STCC 3742293); and
- D. Empty tank cars moving to and from Repair Facilities (STCC 3742217) except that (i) empty movements that are immediately preceded by a loaded line-haul revenue movement on Union Pacific will move free of charge to Repair Facilities, (ii) empty tank cars taken out of service by Union Pacific inspection and waybilled by Union Pacific's Mechanical Department under Rule 1 of the Association of American Railroads Interchange Rules will move free of charge to and from Repair Facilities, and (iii) empty tank cars damaged by Union Pacific will move free of charge to and from Repair Facilities.

For purposes of this Item, the capitalized term "Repair Facilities" means any facility that cleans, lines, relines, maintains, modifies, repairs, or retrofits tank cars.

CERTIFICATE OF SERVICE

I do hereby certify that on this 2nd day of June, 2015, I have served a copy of the foregoing *First Amended Complaint* via electronic mail and regular mail to counsel for Defendant at the following address:

Michael Rosenthal
Carolyn F. Corwin
Covington & Burling, LLP
One CityCenter
850 10th Street, NW
Washington, DC 20001

And by regular mail to:

Louise A. Rinn
Union Pacific Railroad Company
1400 Douglas Street
Omaha, NE 68179


Thomas W. Wilcox