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their control. Each Association Complainant is a trade association with anywhere from 30 to 400 members. Although those members are not parties to this proceeding, UP seeks to compel each Association Complainant to produce responsive information from each of their individual members.² The Board may not order discovery of non-parties in a proceeding through a motion to compel directed at parties to the proceeding that have no ability to mandate compliance with such an order.³ For this reason alone, the Board should deny UP's Motion to Compel the Association Complainants to produce information from their members. Apart from the procedural deficiencies in UP's Motion, the Board also should deny the Motion on the merits because it seeks irrelevant and burdensome discovery that UP has threatened to pursue through subpoenas if this Motion is denied.

Nearly all of UP's discovery requests seek information that is irrelevant to either of the two central issues in this case: (1) whether UP is compensating tank car providers for its use of their private cars in accordance with the statute; and (2) whether the facts and circumstances underlying the Interstate Commerce Commission ("ICC") decision in *General American Transp. Corp. v. Indiana Harbor Belt Railroad Co.*, 3 I.C.C. 2d 599 (1987) ("*IHB-IP*"), justify UP's imposition of charges for transporting tank cars to and from repair facilities. Although UP justifies many of its discovery requests as relevant to whether the challenged repair move charge for empty tank cars encourages greater efficiency in tank car fleet management, such information does not inform either of the foregoing issues. Neither do UP's numerous requests for

² The sole exceptions are the Individual Complainants which are members of NAFCA and which are the subject of a separate UP motion to compel.

³ UP tacitly has recognized this fact by simultaneously filing a Petition for Subpoenas against four non-parties, three of which are NAFCA members, which is the proper procedure for seeking relevant discovery from non-parties. The Association Complainants demonstrate in their separate "Reply to Petition for Subpoenas" filed contemporaneous with this Reply that UP has not met the applicable standards for such extraordinary action.

information pertaining to railroads other than itself. While UP alleges that statements made by Complainants and the Board in response to UP's previously-denied Motion to Dismiss show that UP's discovery is appropriate, UP misrepresents the content, scope, and breadth of those statements, and fails to connect any of its discovery requests to those discovery subjects. Complainants also demonstrate that each of the nine categories of information in UP's Motion are irrelevant. Furthermore, Complainants have offered to stipulate several facts about which UP asserts a need for discovery, which UP has refused to accept as sufficient for its discovery needs.

Next, UP vastly understates the burden of responding to its discovery requests for both the Association Complainants and their members. UP literally has requested millions of pieces of data from hundreds of Association members and wants the Associations to coordinate the identification, assembly, and production of that data to UP on pain of sanctions. Even if the Association Complainants somehow managed to accomplish this, UP does not begin to attempt to explain how it would or could make meaningful use of disparate, incomplete, and duplicative data from hundreds of different Association members to generate cogent, much less relevant, evidence. UP's purported need for this information is particularly disingenuous because much of the information UP seeks is available from Railinc, which markets itself as the most comprehensive and uniform source of information on all rail cars.

It is far more likely that UP's true objective in seeking discovery of Association Complainant members is to squelch this challenge by casting a discovery net over hundreds of non-party rail shippers and tank car leasing companies for information that is so impractical and burdensome for Association members that they will pressure the Association Complainants to drop this Complaint. Although any individual tank car provider could have brought this action without opening up every other similarly-situated tank car provider to discovery, UP is

exploiting the fact that several trade associations are the complainants to pursue discovery of non-parties to which it otherwise clearly would not be entitled. If UP succeeds, this will have a prejudicial chilling effect upon not just this proceeding, but all future challenges to unreasonable rail practices.

I. FACTUAL BACKGROUND

UP's abbreviated description of the subject matter of this case and the nature of the discovery disputes glosses over or completely disregards critical facts and misrepresents the Complainants' claims, all in an effort to justify casting an extremely broad and burdensome discovery net over non-parties and irrelevant subject matter.

A. Historical Background

1. Railroad obligations to compensate tank car providers.

Railroads, pursuant to their common-carrier obligations, must provide an adequate supply of railcars suitable for the transportation services that they offer. 49 U.S.C. §§ 11101 and 11121. Notwithstanding their statutory duty to provide railcars, railroads do not maintain an adequate fleet of railroad-owned tank cars, but instead rely almost exclusively upon privately owned rail tank cars provided by shippers or other third parties. When relying upon others to provide tank cars, the statute, as currently codified at 49 U.S.C. § 11122, requires that railroads fulfill their common-carrier obligations to make available such cars by paying car providers their costs of owning and maintaining these cars through a variety of means, which historically have included the payment of mileage allowances and offsets on line-haul freight rates. *See Gen. Am. Transp. Corp. v. I.C.C.*, 872 F.2d 1048, 1050 (D.C. Cir. 1989).

This statutory compensation requirement, which originated nearly a century ago,⁴ currently provides:

The rate of compensation to be paid for each type of freight car shall be determined by the expense of owning and maintaining that type of freight car, including a fair return on its cost giving consideration to current costs of capital, repairs, materials, parts, and labor. In determining the rate of compensation, the Board shall consider the transportation use of each type of freight car, the national level of ownership of each type of freight car, and other factors that affect the adequacy of the national freight car supply.

49 U.S.C. § 11122(b).

Shortly after Congress enacted this requirement, the ICC observed:

As a general principle, a shipper of traffic over the railroads of the country ought not to be requested to deal with any other than the carrier. If the carrier has not the kind of car in general use that is demanded by a shipper, the most simple and direct method is for the former to secure it from some source and furnish it, but custom has been otherwise with respect to certain kinds of cars. In many cases, shippers are under compulsion to furnish cars by reason of the carriers' failure to supply them upon request. In practice, the shipper either buys the cars used by him, or rents them from concerns engaged in the business of supplying cars....So far as the carrier is concerned it can make no difference whether the shipper is owner or lessee. So far as the shipper, or the relation of one shipper to another is concerned, there may be a marked difference between an owner and a lessee.

In the Matter of Private Cars, 50 I.C.C. at 673-74.

While the *Private Cars* decision was written nearly one hundred years ago, the facts stated in that decision have not substantially changed. Rail carriers, including UP, still do not supply certain private cars – insofar as is relevant to this case, tank cars – and shippers therefore either must buy or lease such cars to move their products. Now, as then, it is wholly immaterial to UP whether the shipper is the owner or lessee of such cars. UP's obligation under the statute,

⁴ The ICC noted in *In the Matter of Private Cars*, 50 I.C.C. 652, 672 (1918) that in an amendment to section 1 of the Act, approved May 29, 1917, Congress provided: "The Commission shall, after hearing, on a complaint or on its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service, including the classification of cars, compensation to be paid for the use of any car not owned by any such common carrier, and the penalties or other sanctions for nonobservance of such rules."

now as then, is to compensate the provider of the private car for its ownership and maintenance costs.

2. Recurring litigation and the Ex Parte 328 Agreement.

Following both the 1917 amendment to the Interstate Commerce Act and the *Private Cars* decision, there were numerous litigations before the ICC concerning the appropriate level of private car, particularly tank car, compensation. Some of these cases focused on the possibility of illegal rebates if carriers paid more in car compensation than the cars actually cost the car supplier, *see, e.g., Allowance for Privately Owned Tank Cars*, 258 I.C.C. 371-78 (1944), while others addressed whether the car allowances properly compensated the car supplier for its costs in supplying and maintaining the tank cars, *see, e.g., Tank Car Allowances, Southern Ry. System*, 329 I.C.C. 466 (1967).

In *Manufacturing Chemists Assn., Inc. v. A. & R. R. Co.*, 350 I.C.C. 886 (1975), the ICC increased allowances paid by rail carriers for their use of private tank cars and made certain other adjustments in the allowance structure to update the allowance and account for inflation. This solution was viewed as temporary, and on July 14, 1976, the ICC instituted Ex Parte No. 328, *Investigation of Tank Car Allowance System*, under 49 U.S.C. §§ 11122 and 10747, to examine the tank car mileage allowance system or to devise an alternative form of compensation for tank car providers. *See* Ex Parte No. 328, *Investigation of Tank Car Allowance System*, slip op. (served July 14, 1976).

Under ICC authorization, the interested parties formed a “joint negotiating committee composed of representatives of the railroads, tank car leasing interests, and shipper interests to collect and evaluate tank car cost and utilization data and to submit proposed solutions for the issues enumerated by our [ICC] Notice.” Ex Parte No. 328, slip op. at 1 (served June 15, 1979)

(citing order served Sept. 16, 1976). The Committee reached a compromise Agreement after nearly 3 years of negotiations and submitted that Agreement for adoption by the ICC. *Id.*

The Ex Parte 328 Agreement addressed two issues. First, it adopted a formula and inputs for the annual calculation of mileage allowance rates. Payment of the applicable allowances determined by that formula would constitute *de facto* compliance with the statutory car compensation requirement. Second, the Agreement addressed mileage equalization, which is the flip side of the mileage allowance coin. Whereas mileage allowances are mileage payments made by railroads to tank car providers (on loaded miles only) as compensation for the use of private tank cars, mileage equalization consists of mileage payments by tank car providers to railroads when tank cars move an excessive number of empty miles relative to loaded miles annually. Based upon a study of empty tank car movements, the joint negotiating committee agreed that mileage equalization charges should be assessed for every empty mile by which all the cars in a tank car fleet⁵ exceeded loaded miles by 106%. This threshold recognized that returning empty tank cars to their origin after a loaded movement (i.e., 100% of loaded miles) typically is included in the charge for the loaded movement and that a reasonable empty-repair move mileage, for which no charge is permitted (*see* Part I.A.3., *infra*), is 6% of loaded miles based upon the committee's study of empty tank car movements. *See Gen. Am. Transp. Corp.*, 872 F.2d at 1054, n.12 (affirming *IHB-II*). Empty tank car miles above 106% of loaded miles, whether for repair moves or other reasons, would be subject to a mileage equalization charge determined by the Ex Parte 328 Agreement. The ICC found this Agreement to be "reasonable and otherwise in accordance with [the statute]," adopted the Agreement, and retained continuing

⁵ All of the tank cars registered under a single reporting mark constitute a "fleet" for the purpose of mileage equalization.

jurisdiction for the purpose of securing compliance with its terms and updating allowances. Ex Parte No. 328, slip op. at 19 (served June 15, 1979).

On July 20, 1982, the Association of American Railroads (“AAR”) filed a petition seeking (1) suspension of the annual update provision of the Agreement, and (2) authority to renegotiate the Agreement. Of particular note, the railroads recognized that they were bound by the Agreement and could not unilaterally revise or fail to comply with its terms without the express authorization of the ICC. The ICC refused such authorization, holding: “Based on the evidence presented we cannot conclude that petitioners have justified the extraordinary relief sought....” Ex Parte No. 328, *Investigation of Tank Car Allowance System*, 367 I.C.C. 48, 50 (1982). The ICC further declared:

In its emphasis on competitive market forces the Staggers Rail Act of 1980 envisions reducing government regulation in favor of negotiated settlements. As noted earlier, the Agreement was the product of almost 3 years of cooperative efforts by a joint committee authorized by this Commission and composed of representatives of the railroads, tank car leasing interests, and shipper interests. While there may be deficiencies in the agreed formula, we are most reluctant to intervene at all, or to delay operation of the formula that has been so carefully negotiated. It is more appropriate that the formula be operational while the parties be given an opportunity to renegotiate. Moreover, we are concerned that premature intervention on our part may create an erroneous impression that negotiated settlements are neither lasting nor binding, and may be overturned by one party’s unilateral recourse to this Commission. Such regulatory fallback is at odds with Congress’ and the Commission’s efforts to promote negotiated settlements and would significantly reduce the incentives for diligent pursuit of the negotiation process. *Id.*

The Joint Negotiating Committee subsequently filed a revised Agreement with the ICC for its adoption on July 1, 1985. That petition reflected the results of an additional three year period of negotiations. The ICC described the major changes to the Agreement:

The compromise agreement retains the basic structure and many of the individual factors used in the 1979 formula. The changes are designed: (a) to compress the mileage allowance scales, so as to reduce the disparity in compensation between newer and older cars and curb a tendency of the 1979 formula to encourage

overinvestment in the former, and (b) to ensure that mileage allowances will more accurately track conditions of tank car supply and demand than the existing formula, *i.e.*, will generate proportionately higher allowances during times of tank car shortage and high demand; and proportionately lower allowances during periods of tank car surplus and slack demand. No one opposes these formula changes....

Ex Parte No. 328, *Investigation of Rank Car Allowance System*, 3 I.C.C. 2d 196, 197 (1986).

The renegotiated Agreement did not modify the mileage equalization rules. *Id.* at 199.

The new Agreement contained a provision that is particularly relevant to the instant litigation. Section 3, Maintenance and Operating Costs, provides that lessor maintenance costs are to be based upon the experience of four major tank car companies, and that “[a]ny charges assessed for moving or storing cars en route to or from car repair facilities shall be included in maintenance costs.” *Id.* at 206 (§ 3(a)). Thus, charges for the transportation of empty tank cars to or from repair facilities, when permitted (*see* Part I.A.3., *infra*), must be included in the maintenance costs for which the railroads are obligated to pay tank car providers through the mileage allowance provisions of the Agreement.

3. Empty car repair move charges.

At virtually the same time that the ICC sought to resolve the issue of appropriate tank car compensation for those supplying tank cars to the railroads in Ex Parte No. 328, it was grappling with a separate but related issue in litigation regarding the equitable allocation of costs for the movement of empty tank cars to and from repair facilities. In 1977, the ICC held that rail carriers moving empty tank cars to and from repair facilities could not charge for those movements if the rail carrier involved had received more than a *de minimis* amount of revenue from the loaded movement of rail tank cars. *Gen. Am. Transp. Corp. v. Indiana Harbor*, 357 I.C.C. 102 (1977) (“*IHB-I*”). In February 1987, a scant six months after approving the revised

Mileage Allowance Agreement in Ex Parte No. 328, the ICC reversed *IHB-I* in *IHB-II*,⁶ and permitted railroads to charge for tank car repair movements under certain circumstances. The ICC did not reverse or otherwise modify the Ex Parte 328 Agreement.

In both *IHB-I* and *IHB-II*, the defendants were terminating railroads that had established charges for tank car movements to and from repair facilities on their lines. As terminating carriers with limited opportunities to benefit from loaded revenue movements, the defendant railroads bore a responsibility for empty repair movements that was disproportionately greater than their participation in loaded revenue movements:

The carriers in their comments have made it clear that under the [*IHB-I*] rule the costs of the repair movements have unfairly been placed on certain railroads who make a disproportionate number of repair moves. Most often the railroads that bear the costs of repair movements are terminating roads. The effect is that these carriers are subsidizing other carriers who have benefitted from the use of loaded private cars. A carrier may not even have participated in loaded movements at all as to many of the cars it is called on to transport to repair sites.

IHB-II at 604. The small geographic footprint of these terminating railroads meant that they had few, if any, opportunities to handle tank cars in revenue service. But the presence of one or more repair facilities on their lines meant that they handled large numbers of repair movements. Consequently, the burden of handling repair movements without charge significantly exceeded the benefit from revenue movements. In both the *IHB-I* and *II* decisions, the agency sought a solution to this problem of “misallocation and cross subsidization” of repair movements among railroads while still ensuring that the rail industry, not tank car providers, remained ultimately responsible for this cost through the payment of mileage allowances. *Id.* at 603-06; *IHB-I* at 127.

Concluding that *IHB-I* did not adequately address this problem, the ICC, in *IHB-II*, permitted those rail carriers that bear a disproportionate responsibility for tank car repair

⁶ *General American Transp. Corp. v. Indiana Harbor Belt Railroad Co.*, 3 I.C.C. 2d 599 (1987) (“*IHB-II*”).

movements without a comparable benefit in revenue from loaded tank car movements to establish separate charges for repair moves, even if their revenue exceeded the *de minimis* threshold established in *IHB-I*. *IHB-II*, 3 I.C.C. 2d at 604-06. The Commission held that those “[r]ailroads may charge initially for moving private cars to and from repair shops,” *id.* at 620 (emphasis added), but that “[t]hese [empty movement charges] are more properly considered a cost of repair to be included in the computation of mileage allowances that the railroads pay the shippers,” *id.* at 599. Thus, even though the defendants in *IHB-II* were allowed to charge “initially” for the movement of empty cars to repair facilities, those charges were not to be ultimately borne by the shippers or providers of private tank cars. Instead, these “initial” repair move charges are supposed to be borne by the railroads through mileage allowances paid to private car providers on revenue movements.

B. The Subject Matter of the Complaint.

Complainants have presented two matters for resolution in their Complaint. In Count I, the overarching issue is whether UP may charge for transporting empty tank cars to and from repair facilities. In Count II, the issue is whether UP is compensating tank car providers for its use of their private tank cars to provide transportation services. Although each Count exists independent of the other, they also are connected in that the failure of UP to compensate tank car providers under Count II necessarily means that UP may not charge for transporting empty tank cars under Count I, because the statute only permits repair move charges when those charges ultimately are born by the railroad through the payment of compensation for use of the tank cars.

A central issue posed by both Counts I and II thus is whether UP is compensating tank car providers. UP cannot dispute that the statute requires it to compensate tank car providers. Nor can UP contest the fact that Ex Parte No. 328 provides for compensation through the payment of mileage allowances as prescribed by the agency in that docket. Furthermore, UP

admits that it does not pay mileage allowances at all to most tank car providers. Answer to First Amended Complaint, ¶ 17. Rather, UP argues that it compensates tank car providers through “zero-allowance”⁷ transportation rates that UP claims are lower than the rates UP otherwise would charge if it paid a mileage allowance. *Id.*, ¶¶ 33-35. In other words, UP claims that its zero-allowance rates have been reduced to compensate tank car providers in lieu of paying a mileage allowance. The fundamental factual dispute pertinent to this question, therefore, is whether or not UP is reducing its zero-allowance rates below rates that UP otherwise would, and could,⁸ charge if it paid mileage allowances. Such facts are primarily, if not exclusively, within the knowledge and possession of UP.

A second fundamental issue posed only by Count I is whether the facts and circumstances underlying the ICC’s decision in *IHB-II* to allow terminating carriers to impose repair move charges justify UP’s imposition of the repair move charges challenged in this proceeding. This has both a legal and a factual component. The legal dispute between the parties is over the proper interpretation and application of *IHB-II*, specifically, whether that decision permits all rail carriers to charge for repair movements or only those carriers that bear a disproportionate responsibility for repair movements relative to their revenue from loaded movements. If the Complainants prevail on that legal question, the relevant factual inquiry is whether UP bears a disproportionate responsibility for repair movements relative to its revenue from loaded

⁷ UP uses the term “zero-mileage” rather than “zero-allowance.” Although both terms are interchangeable and have been used by the STB, the Complainants use “zero-allowance” because that term most accurately reflects the fact that the transportation rate does not include payment of an allowance.

⁸ It is imperative that UP also could charge the higher rate it claims it would charge. Otherwise, UP can assert, any time after the occurrence of a tank car movement, that it would have charged a rate that mathematically would yield the same net revenue to UP under either a zero-allowance or a full-allowance rate scenario, even though UP already was charging the maximum market-based rate.

movements. On the other hand, if UP prevails on the legal question, the relevant factual inquiry is whether changes in the rail industry in the three decades since *IHB-II* nevertheless merit the more narrow holding advocated by Complainants. These facts are primarily in the knowledge or possession of UP and/or in the public domain.

II. THE BOARD SHOULD DENY UP'S MOTION TO COMPEL.

Parties may seek discovery of non-privileged, relevant material. 49 C.F.R. § 1114.21(a). But “[a]ll discovery requests entail the balancing of the relevance of the information sought against the burden of producing that information.” Finance Docket No. 35557, *Reasonableness of BNSF Rwy. Co. Coal Dust Mitigation Tariff Provision*, slip op. at 4 (S.T.B. served June 25, 2012). “[D]iscovery may be denied if it would be unduly burdensome in relation to the likely value of the information sought.” Finance Docket No. 30186, *Tongue River R.R. Co. – Rail Constr. & Operation – In Custer, Powder River & Rosebud Counties, Mont.*, slip op. at 4 (S.T.B. served Sept. 10, 2014) (citing 49 C.F.R. § 1114.21(c)). And any request for discovery against non-parties requires an especially “strong foundation” to overcome the inherent surprise and expense foisted on the non-party. I.C.C. Docket No. 40121, *Asphalt Supply & Servs., Inc. v. Union Pac. R.R. Co.*, 1987 WL 98155, at *1 (I.C.C. Mar. 27, 1987). The Board has broad discretion to limit discovery that would be irrelevant, unduly burdensome, or otherwise objectionable. *See* 49 C.F.R. § 1114.21(c).

UP attempts to justify its discovery of non-parties by creating factual disputes around irrelevant issues and then claiming it will be prejudiced without such discovery. UP's logic is flawed on multiple levels. First, as addressed in subpart A, it is procedurally improper for UP to seek discovery of non-parties through a motion to compel directed at the parties. Second, as addressed in subpart B, the issues that UP raises are irrelevant to the claims presented in this case and misrepresent various statements made by Complainants and the Board in response to UP's

prior Motion to Dismiss. Third, as addressed in subpart C, UP cannot meet its high burden to obtain discovery of non-parties for any of the discovery categories described in its Motion. Fourth, as addressed in subpart D, UP understates the burden of compelling the Association Complainants to pursue discovery of hundreds of their members and the corresponding burden upon the members themselves. Fifth, as addressed in subpart E, UP's attempted non-party discovery in this case is unfair and prejudicial and would have a significant chilling effect upon future unreasonable practice complaints.

A. UP Cannot Obtain Discovery of Non-Parties Through a Motion to Compel.

UP's Motion seeks an order from the Board compelling each of the Association Complainants to produce information and documents that are not in the possession, custody or control of each association, but of each association's respective member companies. Neither the Board, nor the ICC before it, has ever issued such an order, and to do so in this proceeding would be contrary to judicial and STB precedent holding that an association may not be compelled to produce information and documents that are not available to it because they are in the custody and control of the association's members.

UP served its first and second sets of discovery requests on the Association Complainants pursuant to the Board's rules governing party discovery set out in 49 C.F.R. Part 1114 (Subpart B). These rules, which are patterned after the Federal Rules of Civil Procedure governing discovery in federal cases,⁹ provide that "any party may serve on any other party a request...[t]o produce any designated documents...which are in the possession, custody, or control of the party

⁹ See, STB Ex Parte No. 646 (Sub-No. 1), *Simplified Standards for Rail Rate Cases*, slip op. at 68 (served Sept. 5, 2007) ("our discovery rules follow generally those in the FRCP."); STB Ex Parte No. 527, *Expedited Procedures for Processing Rail Rate Reasonableness, Exemption, and Revocation Proceedings*, 1 S.T.B. 754, 765 ("our rules are patterned after the Federal Rules of Evidence and the Federal Rules of Civil Procedure").

upon whom the request is served. 49 C.F.R. § 1114.30. Similarly, the rules provide that “any party may serve upon any other party written interrogatories to be answered by the party served...who shall furnish such information as is available to the party.” *Id.* at §1114.26. Under STB precedent, information is deemed to be “available to [the] party only if the party has “possession, custody, or control” over the information. ICC Docket No. 40411, *Farmland Industries v. Gulf Central Pipeline Co., et al*, 1992 WL 67306 (I.C.C.) (April 2, 1992). Documents are deemed to be in a party’s “possession, custody or control” if a party possesses them, or if it has the legal right to obtain them. ICC Docket No. 37931, *Metropolitan Edison Co. v. Consolidated Rail Corp.*, 1987 WL 9887, at 4 (served July 8, 1987), *citing*, *U.S. v. International Business Machine Corp.*, 477 F. Supp. 698 (S.D.N.Y. 1979). The information from Association Complainants’ members that UP seeks through its Motion to Compel is not in the “possession, custody or control” of the Association Complainants, and none of them have the legal right to require their members to provide the information upon request.

In *Farmland*, the ICC denied an attempt by a complainant to force an association that had intervened and was a party to the case to produce information and documents from its individual members. The ICC, through an appointed administrative law judge, found that

a party served with interrogatories is required to furnish only such information as is available to that party. The information here sought, I am convinced, except as previously indicated is not in the possession, custody or control of AOPL. Nor does it appear that AOPL has such control over its members as to be able to require such members to gather such information or to provide that information to AOPL at its request. *Farmland* at 3.

This conclusion is consistent with federal court precedent holding that the Federal Rules of Civil Procedure governing discovery permit discovery to be directed only to parties to an action. *University of Texas at Austin v. Vratil*, 96 F.3d 1338, 1340 (10th Cir. 1996). As the court in that case observed, where discovery is served on an association party to a case, the Federal

Rules (namely FRCP 37) “contain no procedure for requiring responses from unserved nonparty members of the association.” *Id.* Nor do the STB discovery rules contain such procedures. In *Vratil*, the Tenth Circuit, on appeal, held that the district court’s order compelling such discovery was unauthorized by, and in contravention of, the federal rules governing discovery.

In filing both a Motion to Compel and Petition for Subpoenas, UP is following the course of action taken by BNSF Railway in Finance Docket No. 35557, *Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions*. In that proceeding, BNSF Railway attempted to obtain discovery from the members of an industry association—the Western Coal Traffic League (“WCTL”)—through the filing of both a Motion to Compel on WCTL and an alternative Petition for Subpoenas. WCTL objected to the Motion to Compel for the reasons raised by Association Complainants in response to UP’s motion in this proceeding. Possibly in recognition of the precedent summarized above, and that an order compelling the discovery of nonparty association members would be contrary to the Board’s discovery rules, the Board did not address the merits of the motion to compel. Rather, in a Decision served on February 27, 2012 in FD 35557, it found that grounds existed for issuing subpoenas on the non-party WCTL members, and then denied BNSF’s motion as moot. This decision confirms that discovery from nonparty association members, particularly a formal complaint proceeding such as this, may only be sought through a petition for subpoenas pursuant to 49 U.S.C. § 721(a). While this is UP’s only avenue for pursuing discovery from the Association Complainants’ members, the Association Complainants nevertheless demonstrate in their separate reply to UP’s Petition for Subpoenas that the Board has no reason to issue subpoenas directed to the four non-parties named in UP’s Petition, three of which are members of NAFCA.

B. UP Creates Irrelevant Issues To Justify Its Discovery Requests Of Non-Parties.

UP weaves a few core arguments throughout its Motion to justify multiple discovery requests of non-parties that would be irrelevant even as to the Association Complainants.¹⁰ UP also misrepresents statements made both by Complainants and the Board in response to UP's Motion to Dismiss to justify its discovery requests of non-parties without actually connecting those statements to any of the discovery requests that are the subject of this Motion to Compel. In this Part II.B., Complainants respond to those issues that span several of the discovery categories in UP's Motion rather than repeat them in response to each discovery category in which they appear. The Board should reject UP's attempt to invoke these irrelevant arguments to obtain such an unprecedented scope of non-party discovery.

1. UP's "efficiency" arguments are irrelevant.

Throughout its Motion, UP claims that many of its discovery requests are relevant because they will provide information on the impact of its repair movement charges upon incentives to manage tank car fleets efficiently. Def.'s Mot. to Compel at 13-14, 17-18, 20, and 35. UP invokes this efficiency argument to justify the following discovery requests either in whole or in part: Interrogatory Nos. 3-10, 14, and 20-23; Doc. Req. Nos. 14-17, 26-28, and 33-35. Regardless of whether or not UP's claim that its repair movement charge fosters greater

¹⁰ The assertions in UP's Motion that only AFPM raised relevancy objections to several discovery requests should be discounted. *See, e.g.*, Def.'s Mot. to Compel at 13, 16, 19, 22, 24, 28, and 34. UP ignores the fact that each of the Association Complainants clearly and unambiguously objected to the relevance of UP's discovery requests through a general relevance objection that was expressly incorporated by reference into all of their discovery responses. *See* Def.'s Mot. to Compel Ex. 6 at 2-3, 5-6; Ex. 7 at 2, 4-6; Ex. 8 at 2, 4-6; Ex. 9 at 2, 4-6; Ex. 10 at 1, 3-4, 6-8. They did not always repeat their relevance objections as to each specific request because, regardless of relevance, they were able to represent that they did not possess or control any responsive information or they were willing to produce responsive information because it was not burdensome for them to do so.

efficiency is accurate, that fact inquiry is wholly irrelevant to the fundamental issue that underlies both Counts I and II, which is whether UP is compensating tank car providers. *See* Part I.B., *supra*. If there is no compensation, even the strongest efficiency argument will not allow UP to prevail.

UP's efficiency argument hangs upon a thin thread from *IHB-II*. Def.'s Mot. to Compel at 5-6, *quoting IHB-II* at 611. That quote, however, is part of a paragraph that explains multiple reasons why the agency was reversing *IHB-I*, including a determination that *IHB-I* promoted inefficiency. The ICC's willingness to permit empty repair move charges in *IHB-II* expressly was contingent upon its assumption that railroads ultimately would be responsible for those charges through the payment of mileage allowances. *IHB-II* at 607-08, 610, & 613-16. If that assumption is inaccurate, UP's repair move charge violates the statute, which requires railroads to bear ultimate responsibility for the costs of tank car ownership. No matter how strong the efficiency justification, it cannot trump the statutory compensation requirement.¹¹

For that very reason, the Complainants offered to stipulate that any person faced with dramatically higher charges from a supplier of services will seek to avoid those charges if possible. (Def.'s Mot. to Compel, Ex. 28 at 6) This is a common sense argument that does not require any discovery to demonstrate, much less discovery of non-parties. The most telling evidence of this fact is that the ICC was able to reach that conclusion in *IHB-II* without citing any evidence.¹²

¹¹ In affirming, *IHB-II*, the D.C. Circuit recognized the preeminent nature of the compensation argument. *See, Gen. l Am. Transp. Corp.*, 872 F.2d. at 1055 (briefly mentioning the "efficiency" rationale in a footnote to the core compensation issue in the main text).

¹² UP's efficiency argument is a red-herring for other reasons too. Tank car providers have ample incentives, apart from the payment of transportation charges for repair movements, to manage the repair and maintenance of their tank car fleets efficiently. The longer cars spend travelling to and from, or in, a repair facility, the longer those cars are not in revenue service.

2. UP's discovery requests pertaining to "other railroads" are irrelevant.

Several of UP's discovery requests seek information from Association members about their interactions with railroads other than UP that simply is not relevant. Def.'s Mot. to Compel at 2, 18, and 27-28. Those discovery requests that seek information pertaining to "other railroads" either in whole or in part are Interrogatory Nos. 14, 16-18, 25, 27 and 34, and Document Request Nos. 11 and 13. UP distorts the issues in this case to manufacture a need for discovery of facts about "other railroads."

UP misleadingly claims that the Association Complainants themselves have made information as to "other railroads" relevant by quoting their reply to UP's motion to dismiss out of context. Specifically, UP claims that:

the Association Complainants are asking the Board to reexamine long-established, industry-wide precedent based on arguments that Union Pacific "is far differently situated" than other railroads, that "the railroad industry has changed considerably," and that the Board should "reevaluate" its precedents "in the context of...today's rail marketplace." Complainants' Reply to Motion to Dismiss at 9, 14.

Def.'s Mot. to Compel at 2 (underline added). Each of the underlined quotes, when placed in their full context, exposes UP's mischaracterizations of Complainants' position.

First, the Complainants stated that UP "is far differently situated than the short line railroads in *IHB II*." Compls.' Reply to Mot. to Dismiss at 9 (underline added). UP omitted the underlined phrase from its quote. Far from inviting a comparison with all other railroads today, this statement invites only a comparison of today's UP with the defendant terminating railroads

This means that the lessee is not paying rent to the lessor and the lessee requires more tank cars due a lower utilization rate. In addition, the mileage equalization payments adopted in the Ex Parte 328 Agreement impose charges for excess empty miles precisely to provide an additional cost incentive to manage tank car fleets efficiently. UP's discovery is merely an attempt to argue that its higher repair move charge provides an even greater efficiency incentive, which Complainants were willing to stipulate.

in the *IHB-II* decision. As explained more fully above, the defendant terminating railroads in *IHB II* – unlike today’s UP – bore a disproportionate burden of moving tank cars to repair facilities relative to the revenue they derived from loaded tank car movements. The above-quoted language is directed solely to that issue.

Second, immediately following their statement that “the railroad industry has changed considerably since 1987,” the Complainants explained that:

[i]n that year, there were 17 Class I railroads operating in the United States, and scores of short line railroads, with far greater potential for disproportionate allocation of repair-movement responsibility relative to loaded revenue movements even among Class I carriers. Consequently, the ICC in *IHB II* was grappling with the reality that “the carrier that performs the repair moves (and that recovers under the repair move tariffs) is often different from the carrier who uses the tank car equipment for revenue producing moves.” See *Buffalo & Pittsburgh*, 7 I.C.C.2d at 25.

Complts.’ Reply to Mot. to Dismiss at 9-10. In the next paragraph, the Complainants noted that just four railroads control over 90% of the U.S. rail traffic today and that UP is the largest of those railroads and receives over \$1.5 billion of revenue from tank car shipments annually, which does not implicate the inter-railroad cross-subsidy and averaging concerns that the ICC sought to address in *IHB-II*. *Id.* at 10. UP completely ignored this context, which again, far from inviting a comparison with all other railroads today, draws a comparison of the key industry circumstances underlying the 1987 *IHB-II* decision with those of today, and particularly those of UP. None of those facts require discovery pertaining to “other railroads” today.

Third, the Complainants stated that: “it would be both appropriate and necessary for the Board to reevaluate the relevance of *IHB II* in the context of UP’s practices and empty-repair movement burden in today’s rail marketplace.” Complts.’ Reply to Mot. to Dismiss at 14 (underline added). The ellipses in UP’s quotation omitted the entire underlined text above, which enabled UP to misrepresent Complainants’ actual statement. Instead of referring to “other

railroads,” the quote focused solely upon UP. Furthermore, this was the concluding sentence to a paragraph that discussed the three key rail industry changes since *IHB-II* that Complainants consistently have identified as the basis for their claims: industry consolidation, stronger financials, and the near complete cessation of mileage allowance payments. *Id.* at 13-14. None of these contentions require discovery of information regarding “other railroads,” much less information from Association members.

UP also wrongly contends that discovery pertaining to “other railroads” is relevant since Complainants have argued that *IHB-II* “does not apply because [UP] allegedly does not have disproportionately more empty moves to or from repair shops than other railroads as a result of changes in the railroad industry.” Def.’s Mot. to Compel at 18 (underline added), *citing* Complts.’ Reply to Mot. to Dismiss at 9-10. That statement is factually inaccurate. Nowhere on the cited pages, or anywhere else in their Complaint or Reply to UP’s Motion to Dismiss, have Complainants alleged that comparing the number of empty tank car movements on UP with other railroads is relevant to determining whether UP may charge for tank car repair movements. Rather, Complainants consistently have identified the issue as whether UP bears a disproportionate responsibility for repair movements relative to its participation in revenue movements. Complts.’ Reply to Mot. to Dismiss at 9 (*quoting* 872 F.2d at 1051); and 10 (referencing “a disproportionate allocation of repair-movement responsibility relative to loaded revenue movements”). All of the data required for this inquiry is in the possession of UP.

Finally, UP claims that discovery as to “other railroads” is relevant because, if other railroads are engaged in the same practices as UP, that is evidence that UP’s practices are reasonable. Def.’s Mot. to Compel at 10-11, 27-28. There is no need to debate UP’s “everyone

else is doing it too” defense for the purpose of this discovery dispute.¹³ Complainants have offered to stipulate UP’s main contention that other railroads also charge zero-allowance rates and do not pay mileage allowances for tank car movements. (Def.’s Mot. to Compel , Ex. 30 at 1) Moreover, Complainants also would be willing to stipulate that certain other Class I railroads have begun to charge for tank car repair movements after UP did so. Furthermore, the practices of other railroads are evident in their publically available tariffs, just as the challenged UP practice also is evident in its public tariffs. In light of these facts, regardless of the relevance of UP’s discovery pertaining to “other railroads,” there is no need for discovery of Association members for UP to obtain responsive information.

3. UP misrepresents statements made by Complainants and the Board in response to UP’s Motion to Dismiss to justify broad discovery of non-parties.

UP relies heavily upon statements made by both Complainants and the Board in response to UP’s “Motion To Dismiss Complaint or Make Complaint More Definite,” which the Board denied (“Def.’s Mot. to Dismiss”). UP, however, attempts to justify its discovery requests based upon selective and misleading quotes from the Complainants’ reply and the Board’s decision, accusing Complainants of “pulling a bait-and-switch.” Def.’s Mot. to Compel at 3, 7-9. A careful reading of both documents plainly debunks UP’s accusation.

While the Complainants opposed UP’s motion to dismiss, in part, on grounds that discovery was necessary to develop relevant facts, those assertions referenced discovery that the Complainants required of UP. *See* “Reply to Motion to Dismiss Complaint or to Make

¹³ This defense is particularly ironic in light of a highly concentrated rail industry today in which UP and the next three largest railroads, which collectively control 90% of the rail transportation market in North America, are defending an antitrust class action complaint in which they are charged with collusion in their establishment of fuel surcharges. *See* Complaint, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, No. 1:07mc-489/MDL No. 1869 (D.D.C. Apr. 15, 2008), ECF No. 93.

Complaint More Definite (“Complts.’ Reply to Mot. to Dismiss”), filed June 1, 2015, at 5 (“This [zero-mileage rate] defense requires development of facts through discovery and the presentation of evidence.”); 15 (“Whether UP complies with its statutory common carrier obligation to compensate for its use of private tank cars through zero-mileage rates presents a question of fact that can only be resolved after discovery and the presentation of evidence.”). In denying UP’s primary request to dismiss the Complaint, the Board cited to the first of the above two quotes when it concluded that “whether UP is complying with that [*IHB-II*] precedent and whether that precedent is applicable here” is “fact-specific and, as such, can only be sufficiently addressed after the development of a full record.” Dec. 21 Decision, slip op. at 3.

The only reference made by Complainants or the Board to discovery by UP occurred in the context of UP’s alternative request to make the Complaint more definite. Complts.’ Reply to Mot. to Dismiss at 22; Dec. 21 Decision, slip op. at 5. UP requested that Complainants make their Complaint more definite as to four specific issues. *Id.* The Board concluded “that information sought in the motion to make the amended complaint more definite is relevant to the proceeding and the underlying issues.” *Id.* (underline added). That conclusion thus is limited to discovery needed to address the four specific issues raised in UP’s requests for more definite statements.

As to Count I, UP argued that the Board “should require Complainants to make more definite any allegations that they or their members have been improperly charged for movements of empty cars to or from repair facilities in connection with transportation provided under common carrier rates,” as opposed to contract rates. *Id.*, quoting Def.’s Mot. to Dismiss at 21. In response to the motion to dismiss, Complainants explained that Count I of the Complaint encompasses common carrier transportation. *See, e.g.*, Complts.’ Reply to Mot. to Dismiss at

17-20. To the extent that any individual shipper seeks reparations for unlawful common carrier repair move charges in a subsequent case, and UP contends such transportation is the subject of a contract, that would be a subject for discovery between UP and that shipper as to their specific transportation arrangement. No fact discovery of Association members on this subject is relevant to this proceeding, which challenges UP's repair move tariff only for common carrier transportation to and from repair facilities.

As to Count II, UP requested that Complainants make more definite allegations in three respects:

1. "Make more definite any allegation that UP failed to pay mileage allowance in situations where [Complainants] or their members ship traffic under common carrier rates that are not zero-mileage rates." (Id. at 22.)
2. Make more definite any allegation that "UP refused reasonable requests to establish rates that include a mileage allowance." (Id.)
3. Require Complainants "to identify the specific rates, routes, tank car types, car ownership costs, and car ownership conditions as to which they allege that UP is not adequately compensating them or their members for supplying tank cars." (Id. at 3, 22)

Dec. 21 Decision, slip op. at 5, *quoting* Def.'s Mot. to Dismiss at 3, 22 (underline added).

Complainants have not asserted any allegation associated with UP's first two requests to make Count II more definite. In fact, as to the first request, the Complainants have alleged precisely the opposite circumstance, *i.e.*, that UP's employment of zero-mileage rates, purportedly in lieu of paying mileage allowances, is unlawful. As to the second request, Complainants have not alleged that UP has violated the statute by refusing any request to establish rates that include a mileage allowance. In fact, Complainants have offered to stipulate that no Association member has requested a mileage allowance, because Complainants contend that UP's tank car compensation obligation is not contingent upon such a request. Def.'s Mot. to Dismiss, Ex. 28 at 3. In the absence of any allegations that implicate UP's first two requests to

make Count II more definite, the Board's decision does not provide any basis for discovery connected to such allegations.

As to UP's third request to make Count II more definite, Complainants have alleged that UP is not compensating any shipper for supplying tank cars as to all tank car shipments for which UP claims to compensate them through zero-allowance rates rather than by paying mileage allowances. Thus, UP has no need for discovery to ascertain these facts. Nor has UP pointed to any discovery request directed to this request for more definite statement.

Finally, although UP quotes various statements made by Complainants in their reply to the motion to dismiss to justify certain discovery of Association members, it fails to connect those statements to any information that those members are likely to possess. Specifically, UP quotes Complainants' allegations that changes in the rail industry since *IHB-II* render that decision inapposite to this case. Def.'s Mot. to Compel at 7-8. UP does not explain why Association members that are not railroads are likely to possess any information that UP requires to identify changes in the rail industry, in which UP itself is the largest U.S. railroad. Moreover, Complainants have identified rail industry consolidation, enhanced financial strength, and the substitution of zero-allowance rates for mileage allowance payments as the principal changes underlying this allegation. *See* Complts.' Reply to Mot. to Dismiss at 13-14. None of these are matters about which Association members are likely to possess much, if any, information at all, much less information that UP does not possess itself or cannot obtain from public sources.

C. UP Has Not Demonstrated The Relevance of the Discovery Categories Described In Its Motion.

UP groups its discovery requests into nine discrete categories for purposes of its Motion. In the following subparts, Complainants respond to UP's arguments based upon the same groupings presented in the same order as in UP's Motion. To the extent a response relies upon

the arguments in the preceding subpart II.B., Complainants cross-reference the relevant arguments rather than repeat them.

1. Tank car leases

UP has moved to compel Association members to respond to 7 interrogatories and 4 document requests pertaining to tank car leases entered into by them either as lessors or lessees.¹⁴ Def.'s Mot. to Compel at 12-15. As noted above, the ICC stated in *In the Matter of Private Cars*, 50 I.C.C. 652, 674 (1918): "So far as the carrier is concerned it can make no difference whether the shipper is owner or lessee [of a rail tank car.]" That observation is as true today as it was nearly 100 years ago. The lease arrangements between car lessors and car lessees are of no concern to the railroad using the car in its revenue service. A railroad's obligation under the statute is to pay compensation to the car provider for the use of each rail tank car that it does not own; how that car provider may or may not share, allocate or pass on railroad payments is of no concern to the railroad.

Notwithstanding the historical irrelevance of the lessor/lessee relationship to the railroad involved, UP claims that understanding the division of responsibility between the lessor and the lessee for directing tank cars to repair facilities and paying UP's charges is relevant to understanding the impact of those charges on incentives to manage the tank car fleet efficiently. Def's Mot. to Compel at 13-14. As addressed in Part II.B.1. above, UP's efficiency arguments are not relevant to the compensation issue that controls the outcome of this proceeding. Furthermore, as the ICC discussed in *Private Cars*, 50 I.C.C. at 674, it is plainly in the interest of

¹⁴ The discovery requests are Interrogatory Nos. 3-10 and Document Request Nos. 14-16 and 13.

the car lessors and car lessees to manage the tank car fleet as efficiently as possible.¹⁵ Plainly, both car lessors and car lessees have incentives to manage their tank car fleets efficiently, regardless of whether or not UP charges for repair movements.

UP also claims that the leases will reveal whether a particular lessee was free to negotiate a zero-allowance rate. Def's Mot. to Compel at 14. The issue, however, is not whether a particular lessee could negotiate a particular type of rate with UP; the issue is whether UP is compensating either the lessor or lessee for its use of their cars as required by the statute. Complainants have not alleged that tank car lessees lacked the authority to negotiate a zero-allowance rate; rather, they contend that zero-allowance rates do not compensate the tank car provider for use of its tank car. That issue is not informed by the lessor/lessee relationship.

UP's claim that lease terms "will provide relevant information regarding current conditions in the tank car market" and "the changing, market-based nature of lease rates" also is incorrect. Def's Mot. to Compel at 14. As to the former contention, UP wrongly asserts that Complainants made tank car market conditions relevant when they alleged that industry conditions have changed since 1987. *Id.* The "industry conditions" to which UP cites in Complainants' reply to UP's motion to dismiss, however, pertain to the railroad industry, not the tank car industry. As to the latter contention, "the market-based nature of lease rates" between lessors and lessees says nothing about whether UP, which is not party to the lease transaction, is compensating either the lessor or lessee for the tank car. At most, the leases reveal how individual lessors and lessees have chosen to allocate between themselves in their specific lease

¹⁵ The ICC described how car owners would have employees "whose duty it is to keep posted as to the location of all cars, so that demands of patrons may be most expeditiously and economically met." Today, that duty is aided by Railinc, the wholly owned for-profit subsidiary of the AAR through its RailSight Track and Trace; RailSight Monitor; and RailSight Demand Trace programs that provide the real time location of every tank car on the North American rail system.

transaction the mileage allowances owed by UP initially to the lessor. That fact is irrelevant to whether UP is providing such compensation in the first instance.

Finally, UP's own transportation rates for tank car shipments confirm that the tank car leases between lessors and lessees are irrelevant to the compensation question because UP itself makes no distinction in those rates as to whether the shipper owns or leases the tank car moving the product involved. Stated differently, the fact that UP charges the same transportation rate regardless of whether the shipper leases or owns the tank car belies UP's assertion that the lessor/lessee relationship is relevant to whether UP is compensating either one for their tank cars. UP does not compensate anyone, whether owner/lessor, shipper/lessee, or shipper/owner, for use of the tank car.

2. Loaded and empty tank car moves and repair work.

UP has requested an enormous amount of data from the non-party Association members regarding every loaded and empty movement on UP, and all other railroads, of every tank car that they owned or leased since 1987. Def's Mot. to Compel at 15-19. This information includes every single loaded mile, empty mile, repair movement mile, repair facility destination, and repair work performed. *See* Interrogatory Nos. 14-18. Nearly all of this discovery, to the extent it even is relevant, is available from other far more comprehensive and uniform sources or already is possessed by UP itself.

There are two sources of extensive information on tank cars from which UP can obtain much of this requested information. First, R.E.R. Publishing Corporation publishes *The Official Railway Equipment Register* which contains the ownership and mechanical details of every rail car, including tank cars, in North America. The current edition, available by subscription, contains over 1000 pages of rail car listings.

Second, Railinc compiles extensive information regarding tank cars, their ownership, their specifications, their location, their history of movement, their current status, their loaded and empty mileage records and nearly all other responsive information, whether relevant or irrelevant to the issues in this proceeding. Railinc is a wholly owned, for-profit subsidiary of the AAR. UP sits on the Board of Directors of both the AAR and Railinc.

Railinc maintains the UMLER® system, which is an electronic resource for critical data on transportation equipment in North America.¹⁶ As of January 1, 2015, there were 371,854 privately owned tank cars and 867 railroad-owned tank cars operating in North America.¹⁷ Before a rail tank car can be offered for service or interchanged by railroads, its ownership and any lessee of the car, car number, reporting marks, and specifications, among other data, must be reported to Railinc. That information is the basis for Railinc's database used in connection with Tariff RIC 6007-O, and the Railinc Tracking and Tracing services.¹⁸

Railinc publishes Tariff RIC 6007-O¹⁹ and has published predecessors to that Tariff since Railinc's creation in 1999, and before that as a Division of the AAR dating back to the initial negotiated Agreement in Ex Parte No. 328. This tariff implements the Ex Parte 328 Agreement for both mileage allowance and mileage equalization charges. As indicated by Item 180 of Tariff RIC 6007-O, the information supplied to Railinc is the basis for the reporting marks assigned to a rail tank car and thus the basis for mileage allowance payments (governed by Item 185) owed

¹⁶ See *The Umler® System*, Railinc.com, <https://www.railinc.com/rportal/umler-system> (last accessed June 5, 2016) (describing UMLER); *UMLER Data Specification Manual*, Railinc.com, pp. 83-84,), <https://www.railinc.com/rportal/documents/18/260655/UmlerDataSpecs.pdf> (last accessed June 5, 2016) (identifying the multitude of tank car data captured by UMLER).

¹⁷ See ProgressiveRailroading.com, <http://www.progressiverailroading.com/pdf/a45023-NAFreightTypeAge.pdf> (last accessed June 6, 2016) (chart of all N.A. freight cars by type and age sourced to UMLER).

¹⁸ See notes 32 and 33, *infra*.

¹⁹ See http://www.nationaltariffs.com/RIC_6007-O.htm (last accessed June 5, 2016).

to the person holding those reporting marks. Mileage allowance payments are based on the loaded miles moved by a rail tank car as reported by the handling railroad and compiled by Railinc through its various IT systems and programs. Pursuant to Item 187, Railinc also tallies the empty mileage travelled by each tank car for purposes of assessing mileage equalization charges to the holder of the reporting marks and distributing that revenue across railroads in proportion with their handling of those empty miles.

Thus, UP's Motion to Compel seeks a substantial amount of information that it, and/or Railinc, already compiles in a far more uniform and comprehensive manner than UP ever could obtain from hundreds of Association members.²⁰ This constitutes only a portion of the many publications, data sources, and volumes of rail tank car information that Railinc possesses and is available to UP.²¹ Therefore, before the Board even considers authorizing UP to obtain any of this information through non-party discovery of Association members, it should require UP to demonstrate that it cannot obtain the millions of pieces of information it seeks through Railinc. It appears that UP has made no inquiry of Railinc or the AAR to determine what information is available, and that is simply not appropriate discovery practice.

²⁰ It is difficult to conceive how UP could obtain any useful or meaningful data from hundreds of Association members because, to the extent those members maintain the requested information at all, it will be incomplete, duplicative because lessors and lessees may report on the same tank car, and in different formats that UP would find difficult, if not impossible, to reconcile and consolidate. The fact that most of this information is compiled and consolidated by Railinc, yet UP refuses to pursue that source, supports Complainants' contention that UP's requests are intended to burden and harass rather than to obtain relevant information in a form that would be far more useable for the purposes UP postulates. *See* Part II.D., *infra*.

²¹ In notes 32 and 33, *infra*, Complainants have provided links to additional web-site publications of Railinc. These publications indicate the vast quantity of information Railinc possesses, as well as the vast amount of information that UP and other railroads also possess and supply to Railinc for its use. Thus, if UP is entitled to this information, it should come from the best, most comprehensive, and most economical source of that information, Railinc, and not from the several hundred members of the Complainant Associations, no one of which can have more than a fraction of the requested information.

The primary, and perhaps only, information UP seeks that may not be available from Railinc pertains to the identification of repair facility movements and the work performed at those facilities. But repair facility movements are only relevant when they occur on UP, not other railroads, and the repair work performed is not relevant at all. Furthermore, UP should be able to identify repair movements on its own rail network from its own traffic movement data by identifying all movements where either the origin or destination was a repair facility.

Repair facility movements are only relevant when they occur on UP, as opposed to other railroads, for the reasons set forth in Part II.B.2. above. Specifically, repair movements on UP are relevant to evaluating whether UP bears a disproportionate responsibility for such moves relative to the revenue it receives from loaded tank car movements, such that UP is eligible to charge for repair movements pursuant to *IHB-II*. UP has attempted to confuse the issue by claiming that the proper comparison is against repair movements performed by other railroads. Def.'s Mot. to Compel at 18.

Nevertheless, even if repair movements on other railroads were the relevant factual inquiry that UP claims, UP does not attempt to explain how its discovery of disparate, incomplete, duplicative, and piecemeal movement data from hundreds of non-party Association members will provide it with usable and meaningful information about all of the repair movements on other railroads.²² It would be extremely laborious, costly, and time-consuming for UP to harmonize and consolidate all of the data it receives into a format that could serve any meaningful purpose in this case, assuming it would be possible at all. If UP truly needs this

²² The data will be: (a) disparate because hundreds of members inevitably will maintain it in different formats and with different degrees of detail; (b) incomplete because every member may not maintain the same data, if it maintains any at all, and Association members do not represent the entire universe of tank cars; (c) duplicative because the Association members include both tank car lessees and lessors which may maintain information on the same tank car; and (d) piecemeal by definition because the sources will be hundreds of Association members.

information, the most comprehensive and complete source of movements on “other railroads” will be those other railroads. Yet, rather than pursue non-party discovery of those railroads, UP has pursued it against Association members, which is further evidence that UP’s true intent is to harass and discourage Complainants.

UP does not require discovery of repair moves on its own rail system at all. UP is being disingenuous when it claims that it did not collect this data prior to adopting its repair move tariff charge in 2015. *Id.* at 19. UP clearly had the ability to discern this information in 1987 when it presented comments in *IHB-II*, 3 I.C.C.2d at 605 (citing UP estimate of lost revenue from its inability to charge for repair moves). Even if UP does not expressly label an empty movement as a repair movement, it reasonably can discern this information based upon whether the origin or destination on the waybill is a repair facility. UP also cannot credibly assert that it adopted its repair movement charge due to inefficient repair movement practices by tank car providers if UP did not distinguish repair moves from other empty moves prior to implementing the tariff charge in Item 55-C. Moreover, UP unquestionably has at least a full year of repair movement data since it began charging for repair moves on January 1, 2015; otherwise, UP could not have charged for those movements if it was unable to identify them in the first instance.

Finally, UP claims that the work performed at repair facilities is relevant to determine the impact of its repair move charge “on incentives to manage the nation’s tank car fleet efficiently.” Def.’s Mot. to Compel at 17. In Part II.B.1. above, Complainants have debunked the relevance of UP’s efficiency argument.

3. Empty mileage charges paid or received.

In Interrogatory Nos. 19-21 and Document Request No. 23, UP requests the amount of mileage equalization charges that each Association member has been billed and has paid, including the allocation of payment responsibility between tank car lessors and lessees. UP

offers two reasons why it believes this information is relevant: (a) the Complainants asked UP for similar information; and (b) the allocation of payment responsibility is needed to analyze the impact of UP's repair move charge on incentives to manage efficiently the nation's tank car fleet. Def.'s Mot. to Compel at 20. Neither reason establishes the relevance of this information.

First, the parties have not requested the same information. The Complainants asked UP for the total amount of mileage equalization revenue it has received annually from Railinc. That information is relevant to UP's potential defense that it must charge for repair movements because it is not adequately compensated by the mileage equalization revenue it receives under the Ex Parte 328 Agreement. In contrast, UP has requested how much each of the hundreds of Association members have paid in mileage equalization charges, and how tank car lessors and lessees have allocated that payment responsibility among themselves. Such information has no relevance to the question underlying Complainants' discovery requests.

Second, Complainants already have demonstrated the irrelevance of UP's "efficiency" argument in Part II.B.1., above. In any event, UP cannot defend its empty repair move charges in this proceeding by arguing that such charges discourage inefficient repair move practices. UP is compensated for inefficient empty moves under Ex Parte 328 through mileage equalization payments.²³ Furthermore, as addressed in Part II.C.1. above, with respect to UP's requests for tank car leases, STB precedent holds that the lease arrangements between car lessors and car lessees are of no concern to the railroad using the car in its revenue service.

4. Information relating to adoption of Item 55-C.

In Interrogatory Nos. 22-23 and Document Request No. 17, UP has asserted broad requests for every document from each Association member that refers or relates to UP's repair

²³ To the extent UP wishes to argue that the equalization payments it receives pursuant to Ex Parte 328 agreement are inadequate, it must do so by seeking to reopen Ex Parte 328.

move charge in Item 55-C and for all changes in the behavior of each member's practices related to transporting tank cars to repair facilities. UP offers three reasons why it believes this information is relevant: (a) the Complainants asked UP for similar information; (b) changes in transportation practices relate to the impact of UP's repair move charge on incentives to manage efficiently the nation's tank car fleet; and (c) the information is needed to respond to claims about the impact of Item 55-C on Association members. Def.'s Mot. to Compel at 22-23. None of these reasons establishes the relevance of this information.

First, the information requested by Complainants is not similar or analogous to the information UP is seeking from the Association members. Complainants have requested information from UP relating to the factors underlying UP's decision to adopt repair move charges nearly 30 years after UP claims the ICC authorized such charges and whether those factors are consistent with those that caused the ICC to permit the repair move charges in *IHB-II*. In contrast, changes in behavior of the Association members, if any, in response to UP's repair move charges have no bearing on whether UP meets the requirements of *IHB II* or any other issue in this case.

Second, Complainants already have demonstrated the irrelevance of UP's "efficiency" argument in Part II.B.1., above.

Third, the only impact of Item 55-C on Association members that Complainants have alleged, and that UP has cited in its Motion, is the financial impact of paying for a transportation service that previously was provided without charge. The proof of that fact is purely a mathematical exercise that only becomes relevant in an action for damages by an Association member, and only as to that member. In addition, UP already possesses this information itself based upon the charges that it has billed to each Association member since Item 55-C became

effective on January 1, 2015. Furthermore, there are far more precise ways for UP to explore this issue than to request every document that refers or relates to Item 55-C.

5. Requests for payment of mileage allowances or reduced line-haul rates.

Through Interrogatory Nos. 24-27 and 34, and Document Request Nos. 10-13, UP has requested information about requests by any Association member, directed to UP or any other railroad, for mileage allowances or rate reductions in lieu of receiving allowances, and a detailed break-out of every tank car movement that did or did not receive a mileage allowance.

Complainants contend that this information is irrelevant both as to the subject matter generally and as to railroads other than UP in particular. Such information as to UP may become relevant only in an action by a specific customer to determine whether UP has any liability to that customer based upon the negotiations that occurred between UP and that customer. In contrast, the Association Complainants are seeking a prospective determination by the STB that UP's reliance upon zero-allowance rates, in lieu of paying allowances, violates UP's statutory duty to compensate tank car providers, regardless of whether or not UP's customer requested either form of compensation or any compensation at all. Therefore, discovery of any such request is irrelevant to this proceeding.²⁴

UP has misconstrued the Complaint as alleging that UP violated the statute by refusing a request for compensation in the form of either a mileage allowance or reduced line-haul rate.

²⁴ The relevance of these discovery requests also depends upon whether a request for either a mileage allowance or a reduced rate is a necessary predicate to UP's statutory duty to compensate tank car providers. UP offers no support for its claim that there is such a predicate. Def.'s Mot. to Compel at 27. Nevertheless, even if such a predicate exists, the presence or absence of the alleged predicate would only be pertinent to UP's liability to an individual customer that may assert a claim against UP in a different proceeding from this one. That is insufficient to justify UP's requested discovery of non-parties who are members of the Association Complainants.

Def.'s Mot. to Compel at 26-27. Complainants' arguments, however, are not predicated upon any specific UP historical transaction with any individual customer. Rather, Complainants challenge the reasonableness of UP's overall practice of offering only zero-allowance rates instead of paying mileage allowances, and seek an end to that practice, because there is no support for UP's claim that it has reduced zero-allowance rates below the rates that UP otherwise would, and could, have charged if it had paid mileage allowances. In other words, UP is not discounting its zero-allowance rates, cannot show that it is doing so, and has no economic incentive to do so. For those reasons, Complainants contend that it is unreasonable, and thus unlawful, for UP to fulfill its statutory duty to compensate tank car providers through zero-allowance rates in lieu of paying a mileage allowance.

Complainants are surprised and disappointed to see these particular discovery requests in UP's Motion because Complainants had offered to enter into stipulations of fact that would remove any doubt that UP might have as to their position. Indeed, the parties appeared to be close to reaching agreement on a series of reciprocal stipulations that would obviate the need for this discovery by UP and certain discovery of UP by Complainants. Exhibit 30 to UP's motion is the Complainants' last correspondence on this subject, to which UP has not replied other than to file its Motion to Compel.²⁵ The entire correspondence history on this subject is attached as Exhibits 26-30 to UP's Motion.

To the extent that UP seeks information regarding requests made by Association members directly to UP for mileage allowances or rate reductions, and to identify which tank car movements on UP did or did not receive allowance payments, UP possesses that information without resorting to non-party discovery. Even if UP were to argue that it wants non-party

²⁵ The parties have reached agreement on other stipulations that pertain to Complainants' discovery of UP.

discovery to confirm its own records or identify potential gaps, that would not be a sufficient basis to justify such extensive and burdensome discovery of non-parties. If it were, non-party discovery would become the norm in a multitude of STB proceedings that are dependent upon railroad traffic data, which often is incomplete or inaccurate in some respect.

Finally, although UP does not possess data pertaining to “other railroads,” UP’s request for such information is irrelevant for all the same reasons addressed above as to UP. In addition, it is irrelevant for the reasons addressed in Part II.B.2., above. Furthermore, Complainants have offered stipulations with respect to other railroads that are comparable to the stipulations they offered with respect to UP. *See* Def.’s Mot. to Compel, Ex. 30.

6. Tank car ownership and maintenance costs.

UP has requested information on tank car ownership and maintenance costs, much of it quite granular in detail, from Association members. Although UP claims that such costs are relevant to both Counts I and II of the Complaint, they are not relevant to either claim in this proceeding.

As to Count I, Complainants have alleged that UP may not charge for transporting tank cars to and from repair facilities. The only tank car cost that is relevant to this claim is UP’s new transportation charge in Item 55-C. UP attempts to argue otherwise based upon two quotations from Complainants’ reply to UP’s motion to dismiss. Def’s Mot. to Compel at 30. But the “costs” referenced in both quotes are UP’s repair move charges, nothing more.

As to Count II, UP contends that tank car ownership and maintenance costs are relevant to whether its zero-allowance rates properly compensate tank car providers for their costs of ownership. *Id.* at 31. The relevant costs, however, are not the costs of each individual tank car owner or lessee for each individual tank car, but the nationwide average costs measured by the Ex Parte 328 Agreement. A major objective of the Ex Parte 328 Agreement was to develop a

national mileage allowance system that eliminated the need for such individualized determinations. *See, Investigation of Rank Car Allowance System*, 3 I.C.C. 2d at 199 (the Agreement “will foster adherence to a national allowance system unless departures are shown to be justified by special circumstances in particular cases.”). Railinc, a wholly-owned subsidiary of the AAR which administers the Agreement, publishes the prescribed allowances in a nationwide tariff, RIC-6007, to which all of the major railroads, including UP, subscribe. Those allowances are calculated from the cost inputs and formulas in the Agreement. Those costs are the only relevant tank car costs in this proceeding.

UP, nevertheless, asserts a right to discover individualized tank car costs from Association members to support its own legal theory “about the significance to the rail industry of changes in actual car ownership costs as compared with the formula adopted in Ex Parte No. 328....” Def’s Mot. to Compel at 32. That theory essentially argues that the cost inputs and formulas in Ex Parte No. 328 do not accurately reflect today’s tank car ownership costs and that its zero-allowance rates provide more accurate compensation for those costs. The problem with UP’s theory, however, is that it may not make that argument in this proceeding, but instead must petition to reopen Ex Parte No. 328.²⁶ Ex Parte No. 328 was a rulemaking proceeding that cannot be overturned through adjudication. *See, e.g., Marseilles Land & Water Co. v. FERC*, 345 F.3d 916, 920 (D.C. Cir. 2003) (“an administrative agency may not slip by the notice-and-

²⁶ The prescribed Agreement provides only three means to depart from the payment of mileage allowances: departure tariffs published by individual railroads in accordance with specified procedures, private contracts, or a petition to modify the Ex Parte No. 328 order. *Investigation of Rank Car Allowance System*, 3 I.C.C. 2d at 199. Of particular note, “[a] carrier may not justify departure solely on grounds that the departure tariff provides an allowance which covers the costs of ownership on the cars used for the particular movement[.]” *Id.* Although UP has claimed that its zero-allowance rates in contracts are a permissible departure, those contracts are not at issue in this proceeding as to any of the Association members from which UP seeks to compel discovery. Furthermore, such detailed cost information could only be relevant, if at all, to the calculation of damages sustained by those members.

comment rule-making requirements needed to amend a rule by merely adopting a *de facto* amendment to its regulation through adjudication.”); *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 100 (1995) (an agency interpretation that “adopts[s] a new position inconsistent with...existing regulations” must follow APA notice and comment procedures).

UP’s rationale for obtaining discovery of Association member tank car costs also is not credible. If UP’s zero-allowance rates have been set at a level designed to reflect the actual tank car costs that UP believes are more accurate than those in Ex Parte No. 328, then UP must already know those costs. The fact that UP does not have such information in its own possession belies its claimed legal theory and demonstrates that UP either is on a fishing expedition, engaging in harassment, or both. Neither objective warrants such intrusive and burdensome discovery of non-parties.

Finally, as previously noted, Railinc collects and maintains tank car ownership and maintenance costs for the purpose of calculating mileage allowances under the Ex Parte 328 Agreement. The three largest tank car lessors in North America report their costs annually to Railinc pursuant to the Agreement. *See* Ex Parte No. 328, *Investigation of Rank Car Allowance System*, 3 I.C.C. 2d at 206 (Section 3(a)).²⁷ Complainants previously represented to UP that all three companies, which are NAFCA members, are willing to produce to UP the same data that they have provided annually to Railinc. *See* Def.’s Mot. to Compel, Ex. 26 at 2. UP rejected that offer, insisting that it required greater detail and more sources. *Id.*, Ex. 27 at 2. As noted above, absent a reopening of Ex Parte No. 328, the only potentially relevant tank car cost data is the data used by Railinc to calculate mileage allowances pursuant to the Ex Parte 328 Agreement.

²⁷ Although Section 3(a) refers to four major tank car companies, Union Tank Car Company subsequently acquired General Electric Railcar Services.

7. Studies of compensation for tank car ownership costs or zero-mileage rates as compared with rates providing for mileage allowance payments.

In Document Request Nos. 6-8, UP seeks discovery from individual Association members regarding tank car ownership costs and comparisons of zero-allowance rates and full allowance rates. These requests involve precisely the same issues as those referred to in the preceding subpart, II.C.6., dealing with tank car ownership costs and maintenance costs, and they must be denied for precisely the same reasons. Specifically, if UP seeks to challenge the appropriateness of the current mileage allowance or mileage equalization formulas, the method for doing that is for UP to petition to reopen the Ex Parte No. 328 docket.

Furthermore, members of Association Complainants are not parties to this proceeding and non-parties are not subject to discovery. If this action were brought by just a single UP customer, whether or not an Association member, these several hundred non-parties would not be subject to any discovery in that proceeding. Also, according to 49 U.S.C. § 11701(b), no complaint may be dismissed by the Board “because of the absence of direct damage to the complainant.” Thus, even if an uninjured party had brought this Complaint, that uninjured party would be allowed to prosecute the Complaint, and UP scarcely would be permitted to seek discovery from every car owner, car lessor, car lessee and shipper in the Nation. And yet, that is exactly what UP is seeking here.

8. Reasons for moving tank cars to repair facilities.

In Documents Request Nos. 25-28 and 34-35, UP seeks detailed information from hundreds of Association members regarding their contracts and negotiations with repair shops, reasons for selecting repair shops, communications between tank car lessors and lessees about repair moves, and plans for retrofitting tank cars. UP claims that these discovery requests “will provide information about industry conditions that led [it] to adopt Item 55-C...especially its

impact on shippers' incentives to manage the nation's tank car fleet efficiently." Def.'s Mot. to Compel at 35. This is the same "efficiency" argument that Complainants already have addressed in Part II.B.1. above.

In addition, UP's alleged rationale for this discovery is not credible; indeed, it is circular. UP cannot simultaneously claim that it adopted the Item 55-C repair move charge over 18 months ago to encourage efficient tank car fleet management, and also claim that it needs discovery from hundreds of Association members to demonstrate inefficient repair movement practices prior to UP's implementation of Item 55-C. If UP's first claim is true, it must already have facts to show why it chose to substitute significantly higher empty repair charges for the mileage equalization charges it otherwise would receive under the Ex Parte 328 Agreement. UP's discovery requests appear to be a fishing expedition for facts that UP hopes will support its *post hoc* justification for Item 55-C.²⁸ Even if UP contends that it merely seeks to corroborate facts already in its possession, this is insufficient to warrant broad and burdensome discovery of hundreds of non-parties.

As to tank car retrofit movements in Document Request No. 25, discovery is not required to know that the regulatory actions of the U.S. Department of Transportation have had, or will have, an impact on the movement of empty tank cars. Tank car inspection requirements first adopted in 1996, and several retrofit orders in succeeding years, have required tank car providers to send their cars to repair facilities for inspections and retrofitting. The resulting increase in repair movements clearly creates more transportation responsibility for railroads and increases transportation costs for tank car providers, whether it be through mileage equalization charges or

²⁸ Also as discussed in Part II.C.1. above, tank car lessors and lessees already have ample economic incentives to manage the tank car fleet efficiently, because neither stands to profit from an idle tank car. Thus, the lessor or lessee will rationally choose to send the tank car to a repair facility only when necessary and then for the least amount of down time possible.

UP's repair movement charge. Moreover, UP would bear these and other retrofit costs directly if it were to supply tank cars instead of relying upon private cars. To the extent that UP believes the added responsibility it incurs for repair movements renders the mileage equalization compensation that it receives under Ex Parte No. 328 inadequate, UP's remedy is to reopen that docket, not to abrogate the terms of Ex Parte No. 328 unilaterally by imposing a new charge for repair movements. No amount of non-party discovery in this proceeding will change that fact.

9. Communications between lessors and lessees regarding mileage allowances.

In Document Request No. 29, UP seeks discovery of all communications regarding mileage allowances by hundreds of Association members as either a tank car lessor or lessee. UP claims that this non-party discovery "may shed light on the reasons why shippers negotiate zero-mileage rates rather than rates that provide for the payment of mileage allowances, and thus whether [UP's] use of zero-mileage rates is reasonable." Def.'s Mot. to Compel at 37. UP does not explain what it expects to find and how that information will inform its theory of the case. Rather, this has all the appearance of another "fishing expedition" by UP to justify its zero-allowance rates. Lessor/lessee communications regarding allowances will not and cannot prove or disprove whether UP is compensating either the lessor or the lessee for the use of the tank car as it is required to do under the statute. These non-party communications are not relevant and are not permitted under the Board's discovery rules.

D. UP Vastly Understates the Cumulative Burden Its Discovery Would Place on the Association Complainants and Their Members.

The irrelevance of the information sought by UP is reason enough to deny its motion to compel, as is the unprecedented procedural mechanism for forcing non-parties into discovery. But the disproportionate burden of UP's proposed discovery is yet another ground for denying its motion. "[D]iscovery may be denied if it would be unduly burdensome in relation to the likely

value of the information sought.” Finance Docket No. 30186, *Tongue River R.R. Co. – Rail Constr. & Operation – In Custer, Powder River & Rosebud Counties, Mont*, at 4 (S.T.B. served Sept. 10, 2014) (citing 49 C.F.R. § 1114.21(c)). Discovery requests must therefore be “narrowly drawn” lest they create excessive costs. Docket No. NOR-42051, *Wisc. Power & Light Co. v. Union Pac. R.R. C*, at 4. (S.T.B. served June 21, 2000). Similarly, a discovery request creates an inherently disproportionate burden when it requires production of redundant information or information readily accessible to the requesting party. See Finance Docket No. 35081, *Canadian Pac. Rwy. Co. – Control – Dakota Minn. & E. R.R. Corp.*, at 3 (S.T.B. Mar. 26, 2014) (rejecting a motion to compel responses that were “duplicative of other document requests”); I.C.C. Docket No. 38239S, *Amstar Corp. v. The Ala. Great S. R.R.*, 1989 WL 238989, at *6 (I.C.C. July 14, 1989).

UP’s sweeping discovery demands run afoul of each of these basic rules as they apply both to the Association Complainants and to their members.²⁹ The Board therefore should deny UP’s motion to compel or, alternatively, grant the Association Complainants a protective order precluding UP from seeking to compel discovery of information held by Complainants’ members, *see* 49 C.F.R. § 1114.21(c).

1. The Motion must be denied due to the burden of forcing Association Complainants to conduct industry-wide third-party discovery on behalf of UP.

To understand the full import of what UP seeks to impose on the Association Complainants, the Board must recognize the truly breathtaking scale of UP’s discovery demands. UP served two sets of discovery requests on each of the five Association Complainants. (*See*

²⁹ Each of the Association Complainants raised general objections along these lines and incorporated those objections by reference into specific objections to individual requests. *See* Def.’s Mot. to Compel Ex. 6 at 2-3, 5-6; Ex. 7 at 2, 4-6; Ex. 8 at 2, 4-6; Ex. 9 at 2, 4-6; Ex. 10 at 1, 3-4, 6-8.

generally Def.’s Mot. to Compel Exs. 1-5, 11-15.) The first set served on each Association Complainant included at least 36 Interrogatories and 23 Document Requests. (*See generally id.* Exs. 1-5.) The second set served on each Association Complainant included at least 3 Interrogatories and 13 Document Requests. (*See generally id.* Ex. 11-15.) Each Association Complainant thus received at least 39 Interrogatories and 36 Document Requests from UP. And the instructions for each of these requests made clear that each Interrogatory and Document Request applied to both the Association Complainant itself and each of its members, which were defined as “any entity of any kind that is a member [of the Association Complainant], including any subsidiary or affiliate of that entity.” (*See, e.g., id.* Ex. 1 at 2-3 (defining “You” and “NAFCA Member”).) By default, UP demanded all responsive information from January 1, 1987 to the present. (*See id.* at 3.)

Collectively, the Association Complainants have several hundred current member entities. NAFCA has roughly thirty members, and TCI, ACC, and TFI each comprises 150 or more members. AFPM alone has approximately 400 member entities. Taking the sum of those figures as an estimate of total membership, UP would have 880 entities each respond to 75 separate discovery items, resulting in approximately 66,000 responses.³⁰ And each of those

³⁰ Even this count vastly underestimates the total number of items to which the Association Complainants would need to respond. Many of UP’s Interrogatories and Document Requests call for separate responses for each tank car or reporting mark as to several sub-categories of information. Interrogatories 30 and 31, for instance, together ask for each car’s (i) car number, (ii) the year that the car was built, (iii) the year the car was acquired, and several types of cost and movement data for a ten-year period. *See, e.g.,* Def.’s Mot. to Compel Ex. 1 at 11-12. Complainants’ counsel estimates that there are 312,000 tank cars; a response to (i), (ii), and (iii) would therefore require 371,000 data points each. And each of the cost and movement data categories would generate at least 3.71 million data points (371,000 x 10 years) and probably far more than that. Other Interrogatories would entail similarly enormous responses. *See, e.g., id.* at 7 (Interrogatory 17, which requires responses to five categories of data “[s]eparately for each NAFCA Member that is a Car Owner, and separately by each car reporting mark . . . and separately for each year from 1987 through 2014”).

responses would cover nearly 30 years' worth of information, meaning that UP seeks nearly 200,000 individual responses if disaggregated by year. All of that information, as UP would have it, must be discovered, collected, organized, and produced by the five Association Complainants.

UP dismisses the enormity of this task in a single sentence: “But coordinating with members is part of what trade associations do.” (*See id.* at 11-12.) That cavalier response is grossly insufficient. Managing simultaneous, time-sensitive discovery across hundreds of institutions of varying sizes, structures, business lines, legal jurisdictions, and technological sophistication is not something that trade associations (or other entities) simply “do.” Nor is it something that any entity typically does. UP further ignores the implications of its own concession that the Association Complainants would have to “coordinat[e]” discovery: Because they do not have the responsive information in their own possession, custody, or control, they must first conduct an extensive investigation simply to ascertain what responsive information might exist. *Cf. I.C.C. Docket No. 38239S, Amstar Corp. v. The Ala. Great S. R.R.*, 1989 WL 238989, at *6 (I.C.C. July 14, 1989) (“Defendants cannot provide what they do not possess.”).) That process alone would be difficult to complete before opening statements are due on August 24, 2016, and its sheer scale far outweighs any utility to the Board’s decision in this case. (*See Procedural Schedule at 2.*) So, too, a review of every member by each Association Complainant would create significant redundancies in coordination and production of information from members of more than one association. And, finally, it should be clear that UP’s motion to compel—which does not even attempt to identify a subset of members that would satisfy its need—cannot be narrowly tailored when it includes the “subsidiar[ies] or affiliate[s]” of every member, without regard to their relationship to the case, and when it seeks every bit of

information from three decades.³¹ (*See, e.g.*, Def.’s Mot. to Compel Ex.1 at 2.) UP instead seeks the antithesis of narrowly tailored discovery: a blanket survey of all or nearly all of several industries.

The burden of this search should not surprise UP. Indeed, it has admitted in its own motion that it could not hope to coordinate discovery of all members. (*See, e.g., id.* at 4.) Yet it would require the Association Complainants to do just that on pain of sanctions. Worse still, the Association Complainants could not even rely on the authority of a Board subpoena to coerce compliance. *See* I.C.C. Docket No. 40411, *Farmland Indus., Inc. v. Gulf Cent. Pipeline Co.*, 1992 WL 67306, at *5 (I.C.C. Apr. 2, 1992) (denying a motion to compel against an association where the association had no “control over its members . . . to require such members to gather that information”). They would instead face the prospect of members refusing to cooperate or exiting the associations altogether, and even that scenario omits the loss of potential members deterred from joining. UP also inevitably would dispute the reasons for Association Complainants’ inability to force any expected information from any particular member. The federal courts have recognized these serious problems with compelling trade associations to conduct discovery on their members on behalf of another litigant. *Cf. Thermal Design, Inc. v. Am. Soc’y of Heating, Refrigeration and Air-Conditioning Eng’rs, Inc.*, 755 F.3d 832, 836, 838-39 (7th Cir. 2014) (affirming denial of a motion to compel discovery of information held by volunteer non-party member organizations not obligated to cooperate with the association). The Board should do the same and deny UP’s motion as disproportionately burdening the Association Complainants.

³¹ UP has not addressed the additional problem of searching for information once held by former members of the Association Complainants who existed sometime between 1987 and the present.

2. The Motion must be denied due to the burden imposed on non-party Association members.

Like the burden imposed on the Association Complainants, the burden of full discovery on the Association Complainants' members far exceed the value of the information sought. Most obviously, UP offers no justification whatsoever why it must have the same thirty years' worth of information from each of several hundred entities. Surely the marginal benefit of member information declines; it strains credibility to claim that UP can only mount a defense when it has information from the 400th member, not the 399th. Yet the cost of production to each member does not decline; each member must take the time and expense to search its own records. Thus the aggregate burden of member discovery will outstrip its benefit—and will do so with even a small number of members. *See* Docket No. AB-124-2, *Waterloo Rwy. Co. – Adverse Abandonment – Lines of Bangor & Aroostook R.R. Co. & Van Buren Bridge Co. in Aroostook Cty., Me.*, at 3 (S.T.B. served Nov. 14, 2003) (denying a motion to compel where “the likely value of the information in assessing the public interest would be small in relation to the burden involved in its production”).

UP simply ignores the aggregate burden in its motion to compel and quickly moves on to a bald assertion that “[t]he burden on each individual member would be low.” (Def.’s Mot. to Compel at 16.) To the contrary: The Board cannot assume, as UP does, that it is trivial to produce information responsive to 75 separate discovery items, most of which date back to 1987. *Cf.* Finance Docket No. 35731, *Ballard Terminal R.R. Co. – Acquisition & Operation Exemption – Woodinville Subdivision*, at 4 (S.T.B. Aug. 22, 2013) (denying a motion to compel production of information beyond a useful time period). And even if the individual burden is “low” in some sense, UP overlooks the fact that the probative value of discovery against any individual member is even lower. UP cannot justify the full scope of the discovery it demands.

UP further contends that “[r]ail transportation issues likely account for a small fraction of [members’] business[es], so responsive information should be easy to locate and produce.” (Def.’s Mot. to Compel at 12.) Putting aside the fact that the size of the member company has little bearing on the litigation value of its information, UP’s contention amply demonstrates its failure to narrowly tailor discovery. UP has assumed that all members would have equally valuable and equally accessible information, despite the fact that members of the Association Complainants have operated in different industries at different times. UP has further assumed that the many smaller member entities devote only a “small” fraction of their resources to transportation, vague as that modifier may be. And even for the largest members UP unfairly assumes that producing information on a “small” fraction of very large economic operations will not be costly. The unnecessary breadth of UP’s discovery requests thus require the Board to deny its motion to compel.

UP’s greatest oversight, however, flows from the availability of the same information from sources other than members. *See* Finance Docket No. 35081, *Canadian Pac. Rwy. Co. – Control – Dakota Minn. & E. R.R. Corp.*, at 3 (S.T.B. Mar. 26, 2014). Much of the information UP seeks can be more easily obtained through Railinc.³² *See* Parts II-C.2. and 6., *supra*. The data available through Railinc includes at least loaded and empty tank car movements

³² *See RailSight Technical Overview*, Railinc.com (last accessed May 31, 2016) (“RailSight’s robust CLM data engine easily integrates with business and logistics systems . . . to add critical equipment (characteristics, health, inspections), shipment (status, trip details, ETAs/ETIs) and rail network (location, mileage) data.”), https://www.railinc.com/rportal/documents/18/260635/RailSight_TechSpecs.pdf; *see also RailSight™ Demand Trace*, Railinc.com (2016) (“RailSight™ Demand Trace gives you access to the complete lifecycle of your shipments and equipment[.]”), <https://www.railinc.com/rportal/railsight-demand-trace>; *RailSight™ Monitor*, Railinc.com (2016) (noting the ability to “[m]anage loaded and empty equipment”), <https://www.railinc.com/rportal/railsight-monitor>.

(information that UP likely possesses about its own business in any event).³³ Railinc also collects information on mileage equalization charges.³⁴ UP knows of that information but still seeks to extract it from Complainants' members. Railinc further provides UP with a much more efficient means of organizing this information; it can provide a more complete picture of the universe of tank car shipments from a single source and in a uniform format. To the extent that any of the information UP seeks can be more readily obtained from Railinc, UP's motion to compel must be denied or limited. *See Amstar Corp. v. The Ala. Great S. R.R.*, 1989 WL 238989, at *6 (I.C.C. July 14, 1989) ("Defendants need not answer this interrogatory since Amstar can obtain the information independently and defendants have identified a source.").

E. UP's Discovery Requests of Association Complainant Members is Unfair and Prejudicial.

In a transparent attempt to preempt the fairness and prejudice claims that the Complainant Associations' members understandably would assert, UP claims that it will be prejudiced by its inability to obtain the requested discovery because the Associations are "stalking horses" for their members, who seek to "shield themselves from discovery of relevant information by acting through the veneer of their trade associations." Def.'s Mot. to Compel at 2-3. As discussed in the preceding sections of this Reply, the information that UP seeks is not relevant and, in any event, can be obtained from alternative sources, many of which are public, and Railinc, which is an AAR subsidiary that collects this information for the rail industry in a

³³ *See* Railinc Corp., Guide for Railroads 37-9 (2013) (describing the RailSight™ system for tracking rail movements), *available at* <https://www.railinc.com/rportal/documents/18/260641/GuideforRailroads.pdf>; *see also id.* 41 (describing the TRAIN II® System Tracing, which includes "Load/Empty status" among other information); *RailSight™ Track & Trace*, Railinc.com (2016) ("The only comprehensive, single-source shipment-tracking service available . . . tracking railcars and intermodal equipment on more than 530 rail carriers[.]"), <https://www.railinc.com/rportal/railsight-track-trace>.

³⁴ *See* Guide for Railroads, *supra* note 33, at 25.

comprehensive form that is far more useful than the disparate and incomplete information that UP might obtain from hundreds of individual shippers. In reality, UP is not prejudiced at all, but instead has opted to forego the obvious sources of the information it claims to need in order to harass, and potentially discourage, the Complainants from pursuing a legitimate challenge to the lawfulness of a brand new charge for tank car repair movements, which is a cost that ultimately is UP's responsibility by law, but which UP is foisting upon tank car providers without compensation.³⁵

It is indisputable that any single tank car provider, regardless of whether or not that provider is a member of any Association Complainant, could have filed the very same complaint in its own name and as the sole complainant. UP would have access to even less information through discovery of that complainant than it will obtain in this case from five trade associations and three individual customers. Clearly UP would have no basis in such a proceeding to obtain discovery of all the same Association members that it seeks in this proceeding, yet the alleged prejudice to UP would be the same in both scenarios. Thus, if the Board were to accept UP's logic for obtaining discovery of non-parties in cases such as this, it would have to grant discovery of nearly every railroad customer whenever even a single customer challenges a railroad practice that applies to all other similarly-affected customers of that railroad.

Indeed, it is particularly instructive that *IHB-II*, which UP cites as permitting it to charge for repair movements, was filed by three individual car leasing companies. *See IHB-II*, 3 I.C.C. 2d at 602 n. 9. There is no indication in that decision or any of its progeny that the parties

³⁵ UP's "stalking horse" claim also is a red-herring. The results of this case, whether favorable or unfavorable, will establish precedent for any successive litigation by individual UP customers seeking reparations. In other words, this case has the potential to be used as a shield by UP just as much as a sword by subsequent complainants. Moreover, this proceeding cannot resolve UP's potential defense that any subsequent individual complainant is party to a contract with UP that contains different terms potentially requiring different results.

conducted any discovery at all, much less the broad scope of discovery that UP seeks from hundreds of non-parties to this proceeding, even after the ICC solicited comments from the general public. *Id.* at 602. If these issues could be adequately addressed in *IHB-II* without such broad discovery of non-parties, there is no basis for UP's prejudice claims in this proceeding on the same subject.

The only difference between this action brought by Association Complainants and the same action brought by an individual UP customer is that the Associations can only obtain prospective relief whereas an individual customer may pursue reparations and damages for past UP conduct. Several of UP's objectionable discovery requests might be relevant to the calculation of damages in a proceeding where an individual customer seeks damages, and then only as to that customer as opposed to every other UP customer, but that is not the case here. The fact that the Association Complainants are parties to this proceeding should not expose all of their members to discovery any more than they would be subject to discovery if a single member had filed the same complaint in its own name.

UP's true objective in seeking discovery of Association Complainant members is to squelch this challenge by casting a discovery net over hundreds of non-party rail shippers and tank car leasing companies for information that is so impractical and burdensome for Association members that they will pressure the Association Complainants to drop this Complaint. Any such discovery requirement would be prejudicial not only to the Complainants in this case, but to all future challenges to unreasonable rail practices, because it would open up many other individual railroad customers to discovery in unreasonable practice cases brought by just one individual rail customer.

III. CONCLUSION.

The Board should deny UP's motion to compel the Association Complainants to respond to discovery requests for information from their members that is not in the possession, custody or control of the Association Complainants. In addition to denying UP's Motion based upon the foregoing procedural infirmity, the Board should deny UP's motion on grounds that the discovery it seeks is not relevant to the issues in this proceeding and is unduly burdensome to both the Association Complainants and their members, so as to avoid the necessity of relitigating these issues should UP attempt to obtain this discovery through subpoenas of Association Complainant members.

Respectfully submitted,



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June 6, 2016

CERTIFICATE OF SERVICE

I do hereby certify that on this 6th day of June, 2016, I have served a copy of the accompanying Reply of Association Complainants to Union Pacific Railroad Company's Motion to Compel Discovery of Member Information From Association Complainants.

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