

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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NORTH AMERICA FREIGHT CAR)
ASSOCIATION; AMERICAN FUEL &)
PETROCHEMICALS MANUFACTURERS;)
THE CHLORINE INSTITUTE; THE)
FERTILIZER INSTITUTE; AMERICAN)
CHEMISTRY COUNCIL; ETHANOL)
PRODUCTS, LLC D/B/A POET ETHANOL)
PRODUCTS; POET NUTRITION, INC.; and)
CARGILL INCORPORATED,)
)
Complainants,)
)
v.)
)
UNION PACIFIC RAILROAD COMPANY,)
)
Defendant.)
_____)

ENTERED
Office of Proceedings
June 6, 2016
Part of
Public Record

NOR 42144

**UNION PACIFIC RAILROAD COMPANY'S MOTION
TO HOLD PROCEDURAL SCHEDULE IN ABEYANCE**

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**UNION PACIFIC RAILROAD COMPANY’S MOTION
TO HOLD PROCEDURAL SCHEDULE IN ABEYANCE**

Union Pacific Railroad Company hereby requests that the Board hold the procedural schedule in abeyance so the parties can negotiate a revised schedule that reflects a realistic deadline for completing document discovery. Union Pacific further requests that the Board instruct the parties to file a status report, including a proposed revised schedule, within 10 days of the issuance of an order by the Administrative Law Judge assigned to this case resolving the discovery disputes currently set for hearing on June 23-24, 2016.¹

¹ Counsel for Union Pacific consulted with counsel for Complainants prior to filing this motion and was advised that Complainants would not consent to the relief requested in this motion.

Under the current schedule, document discovery was to be completed by June 10, 2016. *See* Decision served Feb. 11, 2016. Document discovery will not be completed by June 10. Indeed, no party has yet produced any documents.

Many discovery issues took significant time to resolve, and many other issues remain to be resolved. On May 17, Union Pacific filed a motion to compel discovery from the Association Complainants (*i.e.*, North American Freight Car Association, American Fuel & Petrochemicals Manufacturers, The Chlorine Institute, The Fertilizer Institute, and the American Chemistry Council) and a petition for subpoenas to be served on tank car companies that are members of Complainant North America Freight Car Association (*i.e.*, Union Tank Car Company, GATX Corporation, Trinity Industries, Inc., and American Railcar Industries, Inc.). On May 25, Union Pacific filed a motion to compel discovery from the Individual Complainants (*i.e.*, Ethanol Products LLC, Poet Nutrition, Inc., and Cargill Incorporated). A hearing on these matters is scheduled for June 23 and June 24. *See* Decision served May 27, 2016. In addition, after the hearing was scheduled, Complainants filed a motion to compel discovery from Union Pacific.

At this point, Union Pacific does not know when document discovery will be completed. Until the Administrative Law Judge addresses the outstanding disputes, the parties cannot know how long it will take to complete the document production phase of this case, because they do not know the scope of the production that will be required. Moreover, until the parties seeking discovery obtain the documents to which they are entitled, they cannot review the documents to determine whether to conduct depositions, identify deponents, and prepare for depositions. Thus, not only is the June 10 deadline for completing document discovery unrealistic, but the July 25, 2016, deadline for completing deposition discovery has also become unrealistic, which in turn affects the schedule for submitting argument and evidence. Under these circumstances, Board

precedent supports holding the procedural schedule in abeyance. *See, e.g., BNSF Ry.—Terminal Trackage Rights—Kansas City S. Ry. & Union Pac. R.R.*, FD 32760 (Sub-No. 46), slip. op at 1 (STB served Feb. 25, 2015) (holding proceeding in abeyance pending resolution of discovery disputes).

Based on discussions with Complainants' counsel, we believe Complainants may suggest allowing the document discovery period to expire and adjusting only the subsequent dates in the procedural schedule. But a specific end-date for document discovery is critical to the schedule. As discussed above, it ensures that parties have a specified amount time to review the material produced in discovery before conducting depositions.

In addition, as Union Pacific explained in our May 17 motion to compel, unless the Association Complainants are ordered to provide discovery regarding their members, we will have to depend on the subpoena process, and we will not know whether the four companies we initially subpoenaed are sufficiently representative of those members until we review material produced in response to those subpoenas. *See Motion to Compel* at 4 & n.3. We do not believe the parties' document discovery deadline would preclude us from filing petitions for additional non-party subpoenas, but it would be inefficient to negotiate a new schedule now and then seek further extensions if we must serve additional subpoenas. (And, if the current deadline would preclude the filing of additional subpoenas, that is all the more reason to hold the schedule in abeyance until outstanding discovery disputes are resolved.)

To be clear, Union Pacific is not proposing to suspend the proceedings in this case. We will move forward in good faith to produce the documents we have agreed to produce, and we expect the same from Complainants. At this point, however, the current schedule is plainly unrealistic, and the most practical approach, consistent with Board precedent, is to hold the

schedule in abeyance until the pending discovery disputes have been resolved and to order the parties to provide a status report, including a proposed revised schedule, within 10 days of the issuance of an order resolving the discovery disputes.

Respectfully submitted,

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Attorneys for Union Pacific Railroad Company

June 6, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June, 2016, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or a more expeditious manner of delivery, on all of the parties of record in NOR 42144

I also caused a copy of the foregoing document to be served by hand on Administrative Law Judge John P. Dring, Federal Energy Regulatory Commission Office of Administrative Law Judges, 888 First Street, N.E., Washington DC 20426.

/s/ Michael L. Rosenthal
Michael L. Rosenthal