

**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

NOR 42144

vs.

UNION PACIFIC RAILROAD
COMPANY

**REPLY TO MOTION TO COMPEL DISCOVERY
OF MEMBER INFORMATION FROM INDIVIDUAL COMPLAINANTS**

Complainants Ethanol Products, LLC d/b/a POET Ethanol Products (“POET Ethanol”) and POET Nutrition, Inc., (“POET Nutrition”) (together, the “POET Entities”) hereby reply to the “Motion to Compel Discovery of Member Information from Individual Complainants” (“Motion to Compel”) filed by Defendant Union Pacific Railroad Company (“UP”) on May 25, 2016. The Motion to Compel addresses certain discovery that UP seeks to compel from the POET Entities and from co-Complainant Cargill Incorporated (“Cargill”). This Reply addresses the Motion to Compel to the extent it seeks to compel discovery from the POET Entities. Cargill is replying separately.

I. FACTUAL BACKGROUND

An extensive review and summary of the background of the applicable law and this case has recently been supplied to the Board by the Association Complainants¹ in this case in Part I of their Reply to “Union Pacific’s Motion to Compel Discovery of Member Information from Association Complainants,” filed June 6, 2016 (“Motion to Compel Member Information”). As additional background, POET Ethanol and POET Nutrition are rail customers of UP, and each maintains a fleet of leased rail tank cars that they supply to UP for transportation of ethanol and primarily corn oil, respectively. Both POET Entities are members of NAFCA, but they are also individual Complainants in this case. Both were the subject of discovery requests separate from those propounded on NAFCA as an Association Complainant, yet identical or similar in many respects.

In its Motion to Compel, UP seeks to compel the discovery of certain information from the POET Entities that it has also sought from Association Complainants’ members in the Motion to Compel Member Information. Specifically, UP seeks to compel the production of documents from POET Ethanol and Poet Nutrition in two general categories. First, UP seeks the production of information and documents that refer or relate to POET Ethanol’s and POET Nutrition’s interactions with railroads other than UP. Second, UP seeks production of information and documents related to the ownership and maintenance costs that POET Ethanol and Poet Nutrition incur in connection with their respective tank car fleets.

¹ North America Freight Car Association (“NAFCA”); American Fuel and Petrochemicals Manufacturers; the Chlorine Institute; the Fertilizer Institute; and the American Chemistry Council.

II. APPLICABLE LEGAL STANDARDS

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.” Docket No. FD-35557, *Reasonableness of BNSF Rwy. Co. Coal Dust Mitigation Tariff Provision*, 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.” Docket No. FD-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)). 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).

III. UP’S MOTION TO COMPEL ADDITIONAL DISCOVERY FROM THE POET ENTITIES SHOULD BE DENIED

A. Information About “Other Railroads” is Irrelevant.

Several of UP’s discovery requests seek information from the POET Entities about their interactions with railroads other than UP – information that simply is not relevant to the issues in the Complaint. Motion to Compel at 10-13 and 22-25. The requests referenced in the Motion to Compel that seek such information, in whole or in part, are Interrogatory Nos. 16 and 18 and Document Request Nos. 26, 34, and 35. The arguments advanced by UP for seeking such information from the POET Entities are identical to arguments UP has raised in its Motion to Compel Member Information regarding the discovery of information pertaining to other railroads. These arguments are generally summarized as follows: (1) because the Complainants have challenged UP’s Item 55-C as an unreasonable practice under 49 U.S.C. §10702, the practices of other railroads are relevant; and (2) Complainants conceded the relevance of

information related to other railroads in their reply to UP's motion to dismiss the Complaint "by arguing . . . that the Board's *IHB-II* precedent does not apply because Union Pacific does not make a disproportionate number of repair moves as compared to other railroads." Motion to Compel at 12; citing Complainants Reply to Motion to Dismiss at 9.

In the parties' discussions about discovery, the POET Entities have responded to UP's requests for information pertaining to other railroads with the same arguments that are now set forth in the Association Complainants' reply to this aspect of UP's Motion to Compel Member Information, which the POET Entities adopt and incorporate by reference.² More specifically, UP has distorted the issues in this case to manufacture a need for discovery of facts about "other railroads." First, 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. Motion to Compel at 11. However, there is no need to debate UP's "everyone else is doing it too" defense for the purpose of this discovery dispute.³ All of the 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. Moreover, all of the Complainants are also willing to stipulate that certain other Class I railroads have begun to charge for tank car repair movements after UP did so. Furthermore, most of these facts are available from the other railroads' publically available tariffs, just as the challenged UP actions also are evident in its public tariffs. Thus, even if this information were relevant, there is no justification for the

² See Reply to Motion to Compel Member Information at Part II.B.2.

³ 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.

detailed and voluminous information UP is attempting to obtain from the POET Entities, when the information UP claims to need is equally available to UP.

Second, UP's claim that the Complainants themselves have made information about all other railroads relevant because they argued in their reply to UP's motion to dismiss the Complaint that "Union Pacific does not make a disproportionate number of repair moves as compared to other railroads" is incorrect and based on a misleading reading of Complainants' reply.

As a preliminary matter, UP's statement is factually inaccurate. Nowhere on page 9 of their reply to UP's motion to dismiss, or anywhere else in that pleading or their Complaint, 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. *Id.* 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.

Thus, far from inviting a comparison with all other railroads today, Complainants' statements in their reply to UP's motion to dismiss invited only a comparison of today's UP with the defendant terminating railroads in the *IHB-II* decision.⁴ 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. This part of the reply to UP's motion to dismiss was directed solely to that issue. For example, immediately

⁴ *General American Transp. Corp. v. Indiana Harbor Belt Railroad Co.*, 3 I.C.C. 2d 599 (1987).

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 Interstate Commerce Commission 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 *Charges to Movement of Empty Cars, Buffalo & Pittsburgh RR, Inc.*, 7 I.C.C. 2d 18 (1990) at 25. Compls.’ 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. In its discovery motions in this case, UP has 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 requires discovery pertaining to “other railroads” today.⁵

⁵ Complainants also 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.” Compls.’ Reply to Mot. to Dismiss at 14. 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 requires discovery of information regarding “other railroads.”

B. Tank Car Ownership and Maintenance Costs.

In Interrogatory Nos. 30-32 and 35, and Document Request Nos. 18-20, UP has requested a considerable amount of information relating to the POET Entities' tank car ownership and maintenance costs. Motion to Compel at 16. UP has sought to compel the production of very similar information from each of the Association Complainants' members through its Motion to Compel Member Information, and it raises in its Motion to Compel the same arguments for production of car ownership and maintenance costs from the POET Entities that it has made in its other motion. For the same reasons set forth in the Association Complainants reply to the Motion to Compel Member Information,⁶ costs the POET Entities incur to maintain their leased tank car fleets are not relevant to either Counts I or II of the Complaint.

Specifically, 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. Motion to Compel at 19. 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 19-20. But UP appears to misapprehend the nature of the POET Entities' claim under Count II. They are not seeking to recover their actual ownership and maintenance costs in Count II; they are seeking to recover the mileage allowances each is due pursuant to the formula approved by the Board in Ex Parte No. 328, *Investigation of Tank Car Allowance System*, 3 I.C.C. 2d 196 (1986) ("Ex Parte 328"). More to the point, the formula for calculating

⁶ See Motion to Compel Member Information at Part II.C.6.

mileage allowances under Ex Parte 328 does not depend in any way on the ownership or maintenance costs incurred by either POET Entity.

Mileage allowances under the Ex Parte 328 agreement are based not on the costs of each individual tank car owner or lessee for each individual tank car, but rather on nationwide average costs measured by cost data submitted by the three largest tank car lessors in North America. Indeed, 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, id.*, 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 nation-wide tariff, RIC-6007, to which all of the major railroads, including UP, subscribe. Neither of the POET Entities submits ownership or maintenance cost data to Railinc. Thus, their actual costs of ownership are irrelevant to their Count II claim for mileage allowances.

C. Complying With UP’s Additional Requests Would Be Unduly Burdensome.

Finally, UP’s Motion should be denied because it would impose excessive burdens on both POET Entities, each of which has already agreed to produce information to UP in discovery that they believe is of questionable relevance to the issues presented by the Complaint. In particular, for the POET Entities to expand their search for and produce a broad range of documents pertaining to their business relationships with railroads other than UP would be a time-consuming undertaking. These requests, and the others covered by UP’s motion as it pertains to the POET Entities, reveal an effort by UP to harass these complainants and pressure them to abandon their challenge of UP’s Tariff Item 55-C and their claim for compensation from UP for its use of their tank cars.

IV. CONCLUSION

The Board should deny UP's motion to compel POET Nutrition and POET Ethanol to produce the information and documents described in this Reply.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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