



**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

NORTH AMERICAN FREIGHT CAR ASSOCIATION,	)	
	)	
Complainant,	)	Docket No. 42119
	)	
v.	)	
	)	
UNION PACIFIC RAILROAD COMPANY,	)	
	)	
Defendant.	)	
	)	

**UNION PACIFIC RAILROAD COMPANY’S REPLY  
TO MOTION TO STRIKE**

The Board should deny NAFCA’s motion to strike portions of UP’s Final Brief. NAFCA’s Rebuttal Statement contained many false assertions, which UP attempted to identify and correct in its Final Brief. NAFCA’s motion highlights two of those assertions and their falsity, but it offers no valid basis for striking any portion of UP’s Final Brief.

**A. NAFCA’s false assertion that UP does not try to stop cars with product residue problems until after overspeed incidents occur.**

In its Rebuttal Statement, NAFCA falsely asserted that UP does not try to stop cars with product residue problems until after overspeeds occur. (NAFCA Reb. at 24, 31.) In its Final Brief, UP explained that NAFCA ignored three pieces of information related to that issue: (i) the reply verified statement of Wayne L. Ronci, UP’s Director, Damage Prevention Field Services, which discussed UP’s efforts to stop cars before overspeeds occur; (ii) an exhibit to Mr. Ronci’s statement showing a sample of cars that UP stopped before overspeeds occurred;

and (iii) UP's Damage Prevention database, which UP produced to NAFCA in discovery and which contains records regarding cars with product residue problems. (UP Final Brief at 7.)

Mr. Ronci testified that "UP personnel who observe a car with an unsafe condition are instructed to stop the car." (Ronci V.S. at 16.) He also testified that UP personnel have in fact stopped cars before overspeed incidents occur:

UP has stopped and set out cars for unsafe product residue conditions at each point along a car's route – at origin, upon arriving at a classification yard, or after an incident traced to lading residue. (*Id.*)<sup>1</sup>

Mr. Ronci further testified that UP often detects problems before an overspeed incident can occur:

Most commonly, UP stops and sets out cars at classification yards. In many cases, inbound inspections at yards reveal an unsafe condition due to the presence of lading residue on a car wheel or safety appliance. Unfortunately, sometimes UP stops cars only after an overspeed incident has occurred. (*Id.* at 16-17.)

Mr. Ronci's verified statement also contained an exhibit showing cars that UP had stopped because of unsafe product residue on the safety appliances (as opposed to cars that were stopped because of wheel contamination or after overspeed incidents). (*Id.* at 9 & Ex. 3.)

NAFCA asks the Board to strike UP's identification of NAFCA's false assertion and references to Mr. Ronci's testimony and exhibit (which UP placed in the record as part of its Reply Argument and Evidence) because UP also referred to the Damage Prevention database (which UP did not submit in its entirety). NAFCA's request has no merit.

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<sup>1</sup> NAFCA continues its pattern of misrepresenting the record when it asserts that UP's evidence addressed "what UP says it tells its employees to do," but not "what in fact happens." (NAFCA Motion at 3.) As is clear from the portion of Mr. Ronci's verified statement quoted in the text above, Mr. Ronci's statement addressed "what in fact happens."

*First*, NAFCA incorrectly asserts that UP's reference to the Damage Prevention database was an improper attempt to supplement Mr. Ronci's testimony. (NAFCA Motion at 3-4.) UP was not supplementing Mr. Ronci's testimony. UP was pointing out that NAFCA – the party with the burden of proof and thus the opportunity to file rebuttal verified statements – had ignored data it could have used to try to challenge Mr. Ronci's statement, if it had a factual basis to dispute the testimony. UP's observation that NAFCA had ignored the available data was an appropriate observation to make in its Final Brief.<sup>2</sup>

*Second*, NAFCA incorrectly asserts that UP's reference to the Damage Prevention database violated the Board's briefing order because UP was referring to facts not in the record. (NAFCA Motion at 4.) UP's production of the Damage Prevention database to NAFCA and the parties' reliance on information in the database were facts in the record. Mr. Ronci noted UP's production of the database in his statement. (Ronci V.S. at 7 n.4.) NAFCA indicated that it had reviewed the database in its Rebuttal Statement. (NAFCA Reb. at 20 n.6.)<sup>3</sup> Accordingly, UP's reference to its production of the database to NAFCA in its Final Brief to illuminate NAFCA's failure to submit any factual support for its assertion did not violate the Board's briefing order.

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<sup>2</sup> UP also cited the Bates numbers of documents in the database to help refute NAFCA's false assertion that Mr. Ronci's exhibits included photographs that UP did not produce in discovery. (UP Final Brief at 7 n.5.)

<sup>3</sup> Thus, NAFCA once again misrepresents the facts when it asserts in its Motion that "there is a complete absence of documentation" regarding UP's removal of cars from trains because of the presence of product residue. (Motion at 3.) NAFCA knows there is such documentation because UP produced the Damage Prevention database in discovery, as NAFCA acknowledged in its Rebuttal Statement. (NAFCA Reb. at 20 n.6.)

NAFCA also improperly uses its Motion to strike portions of UP's Final Brief to re-argue the merits of the case when it contends that the Board should draw certain inferences from database documents that NAFCA used in Exhibit 8 of its Opening Statement. (NAFCA Motion at 5 n.2.) UP addressed NAFCA's mischaracterization of those documents in its Reply Argument and Evidence. (UP Reply at 32.)

*See* Briefing Order at 2 (“Such briefs ... may refer to exhibits or other material already in the record.”).

Even if NAFCA were correct that UP should not have mentioned the Damage Prevention database in its Final Brief, NAFCA’s proposed remedy would be overbroad. NAFCA asks the Board to strike UP’s entire discussion of NAFCA’s false assertion, rather than striking just UP’s references to the database. But NAFCA does not deny it made the assertion at issue. Nor does NAFCA deny that Mr. Ronci made the statements and sponsored the exhibit that UP cited in its Final Brief. NAFCA’s complaint is with UP’s references to the database, which could be addressed by removing those references only.

NAFCA appears to argue that its proposed remedy is appropriate because there are “no proven NAFCA ‘false assertions’” regarding UP’s efforts to stop cars before overspeeds occur. (NAFCA Motion at 5.) NAFCA apparently believes that Mr. Ronci’s verified statement is entitled to no evidentiary weight, but the Board’s rules say otherwise. In fact, according to the Board’s rules, NAFCA “admitted the truth of material allegations of fact contained in [Mr. Ronci’s verified statement]” because it did not challenge them through rebuttal verified statements. 49 C.F.R. § 1112.6. Even if Mr. Ronci’s testimony is not given conclusive weight, UP’s characterization of NAFCA’s assertion as “false” was well within the bounds of proper argument in the context of UP’s Final Brief.

Finally, a motion to strike is not the proper vehicle for determining whether UP proved that NAFCA made false assertions. Indeed, the Board may never need to resolve the particular dispute: UP was not required to disprove any of NAFCA’s many unsupported assertions. In this proceeding, NAFCA bears the burden of proving that Item 200-B is unreasonable.

In sum, NAFCA provides no valid justification for striking the portions of UP's Final Brief that addressed NAFCA's false assertion regarding UP's efforts to stop cars with product residue problems.

**B. NAFCA's false assertion that BNSF's covered hopper car cleaning rule took effect after Item 200-A.**

In its Rebuttal Statement, NAFCA falsely asserted that a BNSF rule requiring customers to clean lading residue from covered hoppers took effect *after* UP established Item 200-A, the predecessor to the challenged tariff. (NAFCA Reb. at 24.) In its Final Brief, UP observed that NAFCA ignored UP's evidence regarding a BNSF rule requiring customers to remove lading residue from tank cars, and UP also noted that BNSF's web site confirms that BNSF's covered hopper rule took effect *before* Item 200-A. (UP Final Brief at 10-11 & n.11.)

In its Motion, NAFCA does not dispute that its assertion regarding the covered hopper rule was false. However, NAFCA would apparently have the Board ignore the facts because UP confirmed NAFCA's error by citing a BNSF web site. (NAFCA Motion at 5.)

NAFCA offers no valid justification for striking UP's accurate citation to BNSF's web site or treating its own false assertion as true. NAFCA claims that UP previously introduced evidence supporting NAFCA's position, and thus UP used its Final Brief to "impeach its own evidence." (*Id.*)<sup>4</sup> But UP clearly stated in its Reply Argument and Evidence that the covered

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<sup>4</sup> NAFCA also falsely asserts that UP's Final Brief also "impeached" testimony from Mr. Ronci that UP does not impose a "white glove" test when enforcing Item 200-B. (NAFCA Motion at 5.) NAFCA is apparently referring to UP's reaction to NAFCA's claim that "customers have to make the choice between leaving a 'little' amount of non-white glove residue on a car exterior or leaving an 'unsafe' amount." (NAFCA Reb. at 38.) UP's Final Brief pointed out that, contrary to NAFCA's claim, Item 200-B *does not require customers to leave any residue on their cars.* (UP Final Brief at 19.) UP was simply responding to a bizarre claim by NAFCA; it did not change Mr. Ronci's testimony that "UP does not stop and set out a car merely if it is a little dirty" or apply "a 'white glove' cleanliness standard." (Ronci V.S. at 16.)

hopper rule was “originally effective September 1, 2006” – two years *before* Item 200-A’s effective date. (UP Reply at 17 n.9.)<sup>5</sup> UP’s Final Brief is thus entirely consistent with its Reply Argument and Evidence.

UP’s citation to BNSF’s web site was also consistent with the Board’s briefing order. UP was addressing material already in the record – that is, BNSF’s covered hopper rule. UP referenced a publicly available document that confirmed that its prior statement was correct and that NAFCA made a false assertion in its Rebuttal Statement.<sup>6</sup> As the party with the burden of proof, NAFCA was allowed to make the final evidentiary submission in this proceeding, but that does not entitle it to make unsupported, false statements or obligate the Board to accept those false statements as true.

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<sup>5</sup> As part of its Reply Argument and Evidence, UP also provided the then-current version of the rule as part of its Counsel’s Exhibits, and the exhibit showed that the original rule had been recently amended to include a new paragraph. (UP Reply, Counsel’s Ex. D, page 3 of 4.)

<sup>6</sup> Courts often take judicial notice of web site material in comparable circumstances. *See, e.g., Adamson v. Ortho-McNeil Pharm., Inc.*, 463 F. Supp. 2d 496, 500-01 (D.N.J. 2006); *Town of Southold v. Town of East Hampton*, 406 F. Supp. 2d 227, 232 n.2 (E.D.N.Y. 2005), *aff’d in part, vacated in part on other grounds*, 477 F.3d 38 (2d Cir. 2007); *Pollstar v. Gigmania Ltd.*, 170 F.Supp. 2d 974, 978 (E.D. Cal. 2000).

**C. Conclusion**

For the foregoing reasons, the Board should deny NAFCA's Motion to Strike.

Respectfully submitted,

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July 17, 2012

**CERTIFICATE OF SERVICE**

I hereby certify that on this 17th day of July, 2012, I caused a copy of Union Pacific's Reply to Motion to Strike to be served by hand on:

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