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April 3, 2012

232154

BY HAND

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

ENTERED
Office of Proceedings
April 3, 2012
Part of
Public Record

Re: *North American Freight Car Association v. Union Pacific Railroad Company*, STB Docket No. 42119

Dear Ms. Brown:

Union Pacific Railroad Company (“UP”) is compelled to respond to the false claim made by North American Freight Car Association (“NAFCA”) in its reply to UP’s petition for final briefs that the petition “reneges on a procedural agreement reached with NAFCA.”

UP never agreed to forego final briefs. As shown in the correspondence regarding the procedural agreement, which is attached hereto, the parties did not discuss briefing.¹ Rather, the parties agreed upon a schedule for the submission of evidence. That is why neither NAFCA’s July 7, 2011, submission of the proposed schedule, nor the Board’s August 2, 2011, scheduling order, address briefing.²

Accordingly, the circumstances in this case are indistinguishable from those in the *Cargill* case, where (i) the parties never agreed either way with respect to final briefs, (ii) the Board’s scheduling order addressed only the timing of the parties’ evidentiary submissions,

¹ UP has redacted portions of the attached e-mails that contain personal information.

² The procedural schedule was later extended, at NAFCA’s request, to allow NAFCA more time to complete its response to UP’s discovery requests. *See North Am. Freight Car Ass’n v. Union Pacific R.R.*, NOR 42119 (STB served Sept. 26, 2011). Again, neither NAFCA’s petition nor the parties’ correspondence regarding the extension addressed the issue of briefing.

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and (iii) the Board ordered final briefs over the objections of the complainant. *See Cargill, Inc. v. BNSF Ry.*, NOR 42120 (STB served Mar. 1, 2012).

UP recognizes that NAFCA has a right to oppose UP's petition. At the same time, UP will not hesitate to respond to false accusations regarding its conduct in this proceeding.

Sincerely,



Michael L. Rosenthal
*Counsel for Union Pacific
Railroad Company*

Attachment

cc: Andrew P. Goldstein
John M. Cutler, Jr.

Rosenthal, Michael

From: Andy Goldstein <apg@mshpc.com>
Sent: Thursday, June 30, 2011 4:06 PM
To: Rosenthal, Michael; 'larinn@up.com'
Subject: RE: Docket 42119, NAFCA v UP

I'll do a draft tomorrow or Tuesday.

From: Rosenthal, Michael [mailto:mrosenthal@cov.com]
Sent: Thursday, June 30, 2011 3:59 PM
To: Andy Goldstein; 'larinn@up.com'
Subject: RE: Docket 42119, NAFCA v UP

Andy,

January 27 would be fine. I agree we should notify the Board and ask for a procedural order.

Mike

From: Andy Goldstein [mailto:apg@mshpc.com]
Sent: Thursday, June 30, 2011 2:26 PM
To: Rosenthal, Michael; 'larinn@up.com'
Subject: RE: Docket 42119, NAFCA v UP

How about Jan 27? I forgot to mention that [REDACTED]

I guess we don't have to wait for the STB but I assume you agree that we need to notify them of what we have agreed to and ask for a procedural order.

From: Rosenthal, Michael [mailto:mrosenthal@cov.com]
Sent: Thursday, June 30, 2011 2:11 PM
To: Andy Goldstein; 'larinn@up.com'
Subject: RE: Docket 42119, NAFCA v UP

I'm not sure why we need new dates (other than the rebuttal date). I'm not sure why we need to wait for the STB. Do you have a proposal for the rebuttal date?

From: Andy Goldstein [mailto:apg@mshpc.com]
Sent: Thursday, June 30, 2011 2:08 PM
To: Rosenthal, Michael; 'larinn@up.com'
Subject: RE: Docket 42119, NAFCA v UP

Got your new tariff today. What new dates do you suggest. If discovery is to start on July 18, we are not giving the Board much time to issue a procedural order.

From: Rosenthal, Michael [mailto:mrosenthal@cov.com]
Sent: Tuesday, June 28, 2011 4:54 PM

To: Andy Goldstein; 'larinn@up.com'
Subject: Re: Docket 42119, NAFC v UP

Lou Anne might be out of the office today. I also think the plan is to have the new tariff published very soon.

Finally, I think we could add a few days to make up for the holidays.

From: Andy Goldstein [mailto:apg@mshpc.com]
Sent: Tuesday, June 28, 2011 03:29 PM
To: Rosenthal, Michael; Louise A. Rinn <LARINN@up.com>
Subject: RE: Docket 42119, NAFC v UP

Seems LouAnne is away. I'd rather wait until I have a tariff publication date before writing the Board with a proposed schedule. Also, I see my rebuttal falls over Christmas and New Year. Any way we can stretch that?

From: Rosenthal, Michael [mailto:mrosenthal@cov.com]
Sent: Tuesday, June 28, 2011 8:54 AM
To: Andy Goldstein; Louise A. Rinn
Subject: RE: Docket 42119, NAFC v UP

Andy,

How about the following schedule:

July 18 - Discovery begins
Sept. 16 - Discovery ends
Oct. 31 - NAFC v UP opening
Dec. 21 - UP reply
Jan. 20 - NAFC v UP rebuttal

This gives us slightly longer than 45 days for reply, but we're likely to have a reply due in a rate case between the time we receive NAFC v UP's opening evidence and the time our reply will be due.

Regards,

Mike

From: Andy Goldstein [mailto:apg@mshpc.com]
Sent: Tuesday, June 14, 2011 1:33 PM
To: Rosenthal, Michael; Louise A. Rinn
Subject: Docket 42119, NAFC v UP

It seems we can't come to a compromise, but I hope we can agree on a procedural schedule. A protective order is in place, but I think the procedural schedule is unset by the Board. We suggest a 60 day discovery period, with 45 days for opening statements, 45 days for replies and 30 days for rebuttal. We are somewhat flexible about when to begin the festivities given that some may have summer vacation plans, so please provide your comments. Best regards, Andy