

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
October 28, 2015
Part of
Public Record

**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)
)
)
v.)
)
UNION PACIFIC RAILROAD)
COMPANY)**

DOCKET NO. NOR 42144

COMPLAINANTS' PETITION TO EXPEDITE PROCEDURE

Complainants the North America Freight Car Association ("NAFCA"), the American Fuel & Petrochemicals Manufacturers ("AFPM"), The Chlorine Institute, Inc. ("CI"), The Fertilizer Institute ("TFI"), the American Chemistry Council ("ACC"), Ethanol Products, LLC d/b/a POET Ethanol Products ("Poet Ethanol Products"), POET Nutrition, Inc., ("Poet Nutrition"), and Cargill Incorporated ("Cargill"), (together "Complainants"), hereby seek relief pursuant to 49 CFR § 1117.1 in connection with the above-captioned proceeding.

BACKGROUND

The Complaint in this matter, filed March 31, 2015, as amended by the First Amended Complaint filed June 2, 2015 ("Complaint"), challenges the lawfulness of two separate practices of the Defendant Union Pacific Railroad Company ("UP").

Count I has challenged UP's implementation and imposition of new tariff charges, effective January 1, 2015, for certain movements of empty rail tank cars supplied to UP by tank car owners or lessees to/from repair facilities. Those tank cars allow UP to fulfill its common carrier obligation to provide safe and adequate car service. These new and unprecedented charges are substantial, providing a minimum charge of \$2,634 for a round trip of just one mile. Count I asks the Board to order UP to rescind the new charges and to pay reparations for those amounts collected by UP from January 1, 2015 to the date of the Board's order setting them aside.

Count II alleges that UP is not fulfilling its statutory obligation to compensate parties who supply it with rail tank cars by either (1) paying mileage allowances in accordance with Ex Parte No. 328, *Investigation of Tank Car Allowance System*, 3 I.C.C.2d 196 (1986); or (2) negotiating reduced line haul transportation rates in lieu of paying mileage allowances. Complainants dispute UP's claim that its so-called "zero allowance rates" contain a discount by which UP fulfills its statutory obligation to compensate private tank car owners for UP's use of their cars, and they ask the Board to declare UP's practice of using "zero allowance rates" does not fulfill its duty to compensate private tank car suppliers and is therefore unreasonable, and to order UP to pay mileage allowances for all shipments in private tank cars.

On April 20, 2015, UP filed its Answer to the Complaint and a Motion to Dismiss the Complaint or to Make Complaint More Definite ("Motion"). In essence, the Motion alleges that Count I of the Complaint must fail because UP interprets 26-year old ICC precedent to permit all railroads to charge for empty tank car moves to repair shops, citing *General American Transp. Corp. v. Indiana Harbor Belt Railroad Co.*, 3 I.C.C. 2d 599 (1987) ("*IHB II*"), and similar cases from that timeframe. In contrast, UP alleges

that Count II should be dismissed because UP compensates car suppliers through discounted “zero-mileage rates” rather than pay mileage allowances. While Complainants disagree with both of these defenses, they recognize that the two counts are distinct and implicate different types of evidence and argument.

REASONS FOR EXPEDITION AND BIFURCATION

Since the January 1, 2015 effective date of the new empty car charges, UP aggressively and consistently has enforced those charges, assessing significant ongoing charges against tank car suppliers. For the first time ever, UP has required shippers to pay significant charges for empty tank car movements that historically have moved without charge on UP. Those charges are not only new, they are substantial and will continue to be assessed unless and until the Board declares them unlawful. Consequently, resolution of Count I has become a priority for Complainants and they seek to expedite the Board’s resolution of Count I, even if the most efficient way to do so would be to bifurcate it from Count II and the potentially lengthy factual discovery that could be associated with that count. The charges that are the subject of Count I are new and substantial while the failure to compensate car suppliers as alleged in Count II is an ongoing, but hardly new, phenomena. Complainants have a far more urgent need to address the hemorrhaging of money associated with Count I than to recoup money that has not been paid for over a decade.

Furthermore, there is a two-year statute of limitations for seeking reparations of overcharges, and UP is assessing the new empty car charges against dozens of rail shippers, many of which are no doubt refraining from filing similar complaints pending the resolution of Count I of this complaint. Further delays in addressing Count I while UP continues to assess these tariff charges could result in rail shippers inundating the

Board with multiple legal actions seeking reparations for these new charges, whereas the Board has the opportunity to address this issue now in a single proceeding, thereby establishing precedent that would foster private commercial resolutions of future individual claims. The Board has just 14 months remaining to resolve Count I before the statute of limitations expires, thereby avoiding having to deal with multiple litigations involving the same legal issue.

In terms of bifurcating Count II in order to expedite the resolution of Count I, as noted above, the UP Motion draws a clear distinction between its defenses to Counts I and II. UP defends against Count I as a purely legal argument based on the *IHB II* case, but defends against Count II based upon a factual allegation that it is properly compensating car providers through discounted “zero mileage rates” rather than through the mileage allowance system. Complainants, however, have alleged issues of law, fact and policy as to Count I. Nevertheless, Complainants acknowledge the issues in Count I and Count II are subject to disparate treatment, and could be handled separately to ensure a timely and proper resolution of both.

In addition, Complainants believe the procedures required by this litigation are quite different with respect to discovery and process involving Count I and Count II. The parties may be able to address the issues under Count I with a minimum amount of discovery. On the other hand, Count II may well involve substantial controversy as to the existence, manner and methods of alleged compensation for the use of tank cars, and whether any identified methods of compensation are proper under the criteria set forth in 49 U.S.C. § 11122. Indeed, Complainants are concerned that emerging disagreements with UP over the proper scope of discovery associated with Count II – which have been alluded to in the status reports filed with the Board to date - not delay the Board’s

consideration of Count I. While Complainants believe the Board should act expeditiously on both counts of the Complaint, they are in favor of the Board expeditiously addressing the allegations and defenses associated with Count I even if that means bifurcating Count I from Count II, since to do so will allow the Board to expeditiously resolve the Count I issues while proceeding more deliberately with respect to Count II.

CONCLUSION

In view of the foregoing, Complainants respectfully submit that the Board should expedite the resolution of Count I in this proceeding, even if that means bifurcating Count I from Count II and establishing a procedural schedule that is limited initially to the development of evidence and argument on Count I only.

Respectfully submitted



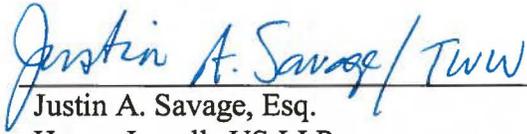
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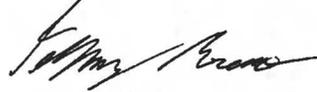
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October 28, 2015

CERTIFICATE OF SERVICE

I do hereby certify that on this 28th day of October, 2015, I have served a copy of the foregoing Complainants' Petition to Expedite Procedures via electronic mail and regular mail to counsel for Defendant at the following address:

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