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April 4, 2012

ENTERED  
Office of Proceedings  
April 4, 2012  
Part of  
Public Record

Cynthia T. Brown  
Chief of the Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423-0001

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

Dear Ms. Brown:

On April 3, 2012, Union Pacific Railroad Company filed with the Board a letter asserting that North America Freight Car Association had made a “false claim” in its response to Union Pacific’s petition for an order directing the filing of “final briefs.”

The alleged false claim is NAFCA’s assertion that UP’s request for final briefs reneges on a procedural agreement reached with NAFCA. UP alleges that it “never agreed to forego final briefs” and that the parties merely “agreed upon a schedule for the submission of evidence.”

Therein lies what is truly a “false claim.” UP never intended to confine its Reply under the Procedural Schedule agreed by the parties and approved by the Board<sup>1</sup> to merely the “submission of evidence,” and UP did not do so. UP’s assertion that the parties agreed only “upon a schedule for the submission of evidence” is outrageously untrue, as can be seen from UP’s Reply, which is entitled “REPLY ARGUMENT AND EVIDENCE OF UNION PACIFIC RAILROAD COMPANY.” The first section of UP’s Reply is entitled “Summary of Evidence and Argument,” and the Reply thereafter contains 52 pages, largely consisting of argument.

<sup>1</sup> See Decision of August 2, 2011.

UP states that it never agreed to forego final briefs. That, of course, is because UP agreed to a different procedural format under which NAFCA was to file an “Opening Statement,” UP was then to file a “Reply Statement,” and NAFCA could thereafter file a “Rebuttal Statement,” as it did. That format follows what is sometimes referred to as the “modified procedure,” under which an opening statement is filed by the moving party, “a statement responding to an opening statement is referred to as a ‘reply,’ and a statement responding to a reply is referred to as a ‘rebuttal.’ Replies to rebuttal material are not permitted.” 49 C.F.R. § 1112.2. Although the Board did not order “modified procedure” in so many words, the procedural schedule agreed to by the parties and approved by the Board is identical to the order in which statements are filed under the modified procedure. That, in effect, was what the parties agreed to. There are no closing briefs under the modified procedure. Judging from the 52 pages of argument contained in UP’s Reply, it is a pure canard to assert that the parties agreed only on a schedule for the submission of evidence. UP, by its own actions, did not interpret the parties’ agreement in that narrow manner.

The remaining question is whether there is a difference between the statement of “argument and evidence” submitted by UP and a “brief.” So far as NAFCA can see, a statement of argument and evidence is a brief by another name, and a brief is a statement of argument and evidence by another name. A brief contains exactly the type of material contained in UP’s Reply – argument made with reference to facts. When UP agreed to a procedure entailing the filing of “statements,” it was in essence agreeing to the filing of a brief. UP agreed with NAFCA that, as the moving party, NAFCA would make an opening and closing statement, with UP’s Reply in between. By petitioning for an order allowing closing “briefs,” UP is merely asking to file another form of Reply, contrary to what it agreed upon with NAFCA.

NAFCA urges the Board to deny UP’s Petition for closing briefs.

Respectfully submitted,



Andrew P. Goldstein

Attorney for

North America Freight Car Association

cc: Counsel for  
Union Pacific Railroad Company  
(By Electronic Transmission)