

ENTERED
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June 17, 2016
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**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 |) | NOR 42144 |
| CARGILL INCORPORATED, |) | |
| |) | |
| Complainants, |) | |
| |) | |
| v. |) | |
| |) | |
| UNION PACIFIC RAILROAD COMPANY, |) | |
| |) | |
| Defendant. |) | |
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**UNION PACIFIC RAILROAD COMPANY’S REPLY
TO MOTION TO COMPEL DISCOVERY**

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June 17, 2016

analyses our expert witnesses may perform and thus will rely upon, or whether they may rely on certain facts, documents, or analyses that are not in Union Pacific's possession. We also do not know what company witnesses might say in verified statements.

See Ex. A, p. 2. We also explained that Complainants' request was improper because it sought a preview of our reply filing and our potential legal strategies. *See id.*¹

In their motion to compel, Complainants appear to recognize that their discovery request was improper. They have reframed their request so they are no longer asking Union Pacific to identify the material upon which we *intend to rely* in our reply argument and evidence.

Specifically, Complainants' Interrogatory No. 16 actually states:

Identify all facts, documents, and analyses *upon which You intend to rely* to support your claim that the Zero-Mileage Rates charged by You for tank car shipments are or were less than the rates You otherwise would have charged. (Emphasis added.)

However, in their motion, Complainants now say that Interrogatory No. 16 "merely asks UP to identify the facts, documents, and analyses supporting UP's repeated contention in its Answer that 'all other things being equal, the rates it charges for transportation under zero mileage rates are lower than the rates it would charge for the same transportation under rates that provided for the payment of mileage allowances.'" Motion to Compel at 6.

Union Pacific is willing to produce documents responsive to Complainants' reformulated request. *Cf.* 49 C.F.R. § 1114.26(b) (option to produce business records to answer interrogatory).

We explained this to Complainants and asked them to withdraw their motion. *See* Ex. A, p. 2.

¹ Contrary to Complainants' claim, the statement they quote from our Answer is not "at the core of [our] defense." Motion to Compel at 7. Complainants' claims fail for reasons having nothing to do with rate comparisons. In addition, if comparisons between actual zero-mileage rates and hypothetical full-mileage rates were relevant, Complainants would have the burden of proof, not Union Pacific.

Complainants have not withdrawn their motion, but the Board should end this non-dispute by denying the motion.²

Respectfully submitted,

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² Complainants do not advance their cause by citing *Ashley Creek Phosphate Co. v. FS Industries*. See Motion to Compel at 7. The page they cite was not part of the decision in that proceeding. Rather, the page was part of a motion that was attached as an appendix to the decision. See *Ashley Creek Phosphate Co. v. FS Indus.*, ICC Docket No. 40810, 1992 WL 33417, at *50-52 (Defendants' Motion to Compel Answers to Interrogatories).

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June, 2016, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or a more expeditious manner of delivery, on all of the parties of record in NOR 42144

I also caused a copy of the foregoing document to be served by hand on Administrative Law Judge John P. Dring, Federal Energy Regulatory Commission Office of Administrative Law Judges, 888 First Street, N.E., Washington DC 20426.

/s/ Michael L. Rosenthal
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June 6, 2016

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**Re: STB Docket No. NOR 42144, North America Freight Car
Association, et al. v. Union Pacific Railroad Company**

Dear Counsel:

I'm writing regarding the Motion to Compel Discovery filed by Complainants on June 2. I was surprised to see that you filed a motion to compel, because I thought we resolved all the discovery issues you had raised through our correspondence that concluded on June 1. Indeed, Complainants raised an issue with regard to Interrogatory No. 16 only once – in a letter dated April 6, to which I responded on April 13. I assumed my response was satisfactory, because I heard nothing more about Interrogatory No. 16 over the next month and a half as we worked cooperatively to resolve what I took to be all outstanding issues relating to your discovery requests.

Had you told me that my April 13 response was unsatisfactory before filing the motion to compel, I suspect we could have resolved the issue without resorting to motion practice. As I tried to explain through that response, Union Pacific does not object to producing factual information in its possession of the type you appear to be seeking. Rather, Union Pacific's objection was that Complainants asked Union Pacific to identify all facts, documents, and analyses upon which Union Pacific "*intend[s] to rely.*"

As I tried to explain in my letter, in response to Complainants' other discovery requests that seek material in Union Pacific's possession, Union Pacific will be producing information in its possession that you can use to argue about whether what you characterize as Union Pacific's claims regarding zero mileage rates are true. Indeed, much of your discovery appears to be designed to obtain just such factual information.

COVINGTON

Messrs. Wilcox, Donovan, Savage, & Moreno

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However, at this point, we cannot identify all of the “facts, documents, and analyses” we will *rely upon*. Because we do not know what legal theories Complainants will pursue or what evidentiary support you will provide, we cannot yet know whether our reply will even address the claims you are attributing to us. In addition, at this point, we cannot identify what analyses our expert witnesses may perform and thus will rely upon, or whether they may rely upon certain facts, documents, or analyses that are not in Union Pacific’s possession. We also do not know what company witnesses might say in verified statements. And even if we could know all these things several months before Complainants’ opening evidence is even due, your request for a preview of our reply filing or our potential legal strategies would be improper.

In short, Union Pacific will produce discoverable material to which Complainants are entitled. But we cannot identify the portions of that material upon which we intend to rely, and we cannot promise we will not rely upon material not currently in Union Pacific’s possession. If you wish to continue pursuing your motion to compel in the hope of requiring Union Pacific to identify now the material upon which it intends to rely in the future course of these proceedings, we will file our formal reply at the appropriate time. If you do not wish to continue along those lines, then the parties appear not to be in dispute, and I therefore encourage you to withdraw your motion to compel as unnecessary.

Sincerely,



Michael L. Rosenthal