

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
CARGILL INCORPORATED

NOR 42144

vs.

UNION PACIFIC RAILROAD
COMPANY

REPLY TO PETITION FOR SUBPOENAS

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REPLY TO PETITION FOR SUBPOENAS

Complainants North America Freight Car Association (“NAFCA”), the American Fuel & Petrochemicals Manufacturers (“AFPM”), The Chlorine Institute, Inc. (“CI”), The Fertilizer Institute (“TFI”), and the American Chemistry Council (“ACC”)(together “Association Complainants”) hereby Reply in opposition to the “Petition for Subpoenas” (“Petition”) filed by the defendant Union Pacific Railroad Company (“UP”) in this proceeding on May 17, 2016. On the same date, UP also filed a “Motion to Compel Discovery of Member Information from Association Complainants” (“Motion to Compel”) that seeks an order compelling the Association Complainants to produce information and documents in the possession, custody and control of its member companies.

I. INTRODUCTION

The Petition asks the Board to issue subpoenas directed to four companies, three of which are members of NAFCA,¹ and their “parents, subsidiaries, affiliates, employees, agents and all others acting (or who have acted) on [their] behalf.”² UP has attached identical proposed subpoenas to its Petition seeking discovery of a broad range of material from each company. UP further asks the Board to grant the Petition in the event that the Board denies the Motion to Compel. Petition at 2. UP asserts that in the event the Motion to Compel is denied, the subpoenas would be an “alternative means of obtaining at least a portion of the discovery to which we are entitled.” *Id.* However, UP’s “portion” of what it claims it is entitled to discover is a massive amount of material relating to rail tank cars and their movements that would be extremely costly and burdensome to collect and produce. Including subparts, UP’s proposed subpoenas would require each of the four companies, as broadly defined by UP, to respond to approximately 40 discovery questions asking for detailed information on each tank car they own, in some cases dating back 15 years.³ And if that was not enough, UP’s proposed requests would require each of the four companies to supply this information for not only UP, but also for *every other railroad* they do business with.

¹ The four targets of UP’s Petition are Union Tank Car Company (“Union Tank”), GATX Corporation (“GATX”), Trinity Industries, Inc., (“Trinity”), and American Railcar Industries (“ARI”). Union Tank, GATX, and ARI are members of NAFCA. Each of the four companies has indicated that they will respond separately to the Petition.

² See, UP’s definition of “You” contained in each subpoena included in Attachment A to the Petition.

³ Association Complainants understand that Trinity Industries, Inc. itself does not own any rail tank cars.

As explained in more detail below, apart from the cost and manpower commitments complying with the subpoenas would entail, the vast majority of the information UP seeks is wholly irrelevant to the issues in this case, and in any event in many instances is information that UP either already has in its possession as a transporter of rail tank cars, or could obtain far more easily from Railinc, a wholly owned, for profit subsidiary of the Association of American Railroads (“AAR”), of which UP is the largest member.

Association Complainants are also responding separately to the Motion to Compel, which should be denied for several reasons, including that the Board has no authority to order an association to produce information and documents from its members that are not parties to a proceeding when the association has no custody or control over such documents, or the ability to obtain them upon request. For the Board’s convenience and to minimize duplication, some of the contents and arguments of the Reply to UP Motion to Compel are incorporated by reference into this Reply to UP’s Petition where indicated. For all the reasons set forth below, UP’s Petition should be denied. However, should the Board nevertheless consider issuing subpoenas in this case, Association Complainants request that the Board substantially narrow their content and scope, either in response to this Reply, or through negotiations under the supervision of the Board and the Administrative Law Judge appointed to hear and decide discovery disputes in this case.

II. BACKGROUND

Association Complainants incorporate by reference into this Reply Part I.A of the Reply to Motion to Compel, which summarizes the factual and legal background of this case. They add the following additional background relating to the issues in the Petition.

As summarized in Part I.A.2 of the Reply to Motion to Compel, in 1985 a joint committee authorized by the Interstate Commerce Commission (“ICC”) and composed of representatives of railroads, tank car leasing interests, and shipper interests – the Joint Negotiating Committee first formed in 1976 - approved a revised industry Agreement that established the mileage allowance formula whereby railroads would compensate car owners and other private tank car providers. Ex Parte No. 328, *Investigation of Tank Car Allowance System*, 3 I.C.C. 2d 197 (1986). The new Agreement contained a provision that is particularly relevant to the instant litigation. Section 3, Maintenance and Operating Costs, provided that lessor maintenance costs used in the formula to calculate mileage allowances would be based upon the experience of four major tank car companies. Further, “[a]ny charges assessed for moving or storing cars en route to or from car repair facilities shall be included in maintenance costs.” *Id.* at 206 (§ 3(a)). Thus, charges for the transportation of empty tank cars to or from repair facilities, when permitted, must be included in the maintenance costs for which the railroads are obligated to pay tank car providers through the mileage allowance provisions of the Agreement.

When the rule was adopted in 1986, these four major car companies were “Shippers Car Line, Division of ACF Industries, General American Transportation Corporation, General Electric Railcar Services, and Union Tank Car Company.” *Id.* Through changes in business and consolidation, most notably the acquisition by Union

Tank in 2015 of all of General Electric Railcar Services tank cars, the four major tank car companies in the Agreement have been reduced to three: American Railcar Leasing (“ARL”) (formerly Shippers Car Line, Division of ACF Industries), GATX (formerly General American Transportation Corporation), and Union Tank. As required by Ex Parte 328, the costs of these three entities, reported and compiled according to Section 3(a) of the Agreement, are used to calculate the “lessor cost” of maintenance used in the mileage allowance compensation formula. No data from Trinity Industries, Inc. or any of its affiliates is considered in the EP 328 mileage allowance calculation process. UP’s statement to the contrary in the Petition is incorrect. *See* Petition at 5 (erroneously stating that Section 3(a) encompasses “the actual cost experience of UTLX, GATX, and Trinity”).

III. THE APPLICABLE STANDARD

The Board’s authority to subpoena witnesses and documents has been exercised only a handful of times since the Board’s creation in 1996. This authority derives from 49 U.S.C. §721(c), which permits the Board to “subpoena witnesses and records related to a proceeding of the Board from any place in the United States, to the designated place of the proceeding.” 49 U.S.C. §721(c)(1). If a witness disobeys a subpoena, the Board or a party to a proceeding before the Board, may petition a district court of the United States to enforce the subpoena. *Id.* Following the language of §721(c), the Board’s regulations refer to petitions for subpoenas in 49 C.F.R. Part §1113, which governs Oral Hearings. These regulations refer to (1) subpoenaing a witness to compel his/her attendance at a hearing, 49 C.F.R. 1113.2(b)(1), and (2) compelling a witness to produce documentary

evidence. *Id.* at §1113.2(b)(2). The ICC interpreted this regulation to apply only to subpoenas associated with compelling “the appearance at a hearing of a witness and his documents.” See *Asphalt Supply & Service, Inc. v. Union Pacific Railroad Co., et al*, ICC Docket No. 40121, 1987 WL 98155 (ICC served March 27, 1987)(denying a petition for subpoena directed to a nonparty for production of documents, and stating “[t]his is discovery” covered by 49 C.F.R. Part 1114).

Despite the foregoing ICC decision and section 721(c)’s and 49 C.F.R. §1113.2’s respective textual limitations, the Board has held that its authority to issue subpoenas is not limited to oral hearings. STB Docket No. 42051, *Wisconsin Power & Light Co. v. Union Pacific Railroad Co.* (STB served June 21, 2000)(holding the Board may draw on its general authority to grant relief not otherwise specifically provided for in its rules, citing 49 C.F.R. §1117.1). To date, the STB has only exercised this authority in a few proceedings. See, e.g., STB FD 35731, *Ballard Terminal Railroad Co. LLC – Acquisition and Operation Exemption – Woodinville Subdivision* (served May 17, 2013)(“*Ballard Terminal*”)(acquisition exemption proceeding pursuant to 49 U.S.C. §10502(b)); STB Docket FD 35557, *Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions* (Served February 27, 2012)(“*Coal Dust*”)(declaratory order proceeding); and see *Coal Dust*, decision served June 25, 2012 (“*Coal Dust Appeal*”) at note 6 (listing several stand-alone cost rate cases).

In deciding whether to issue a subpoena directing a nonparty to produce information and documents, the Board has developed a balancing test that examines “whether the subpoenas could cause undue burden on third parties, especially those with a limited connection to the matter before the Board.” *Coal Dust* at 2; and see *Coal Dust*

Appeal at 4 (holding that “where the information is sought from a nonparty, greater weight should be given to burden and thus a stronger showing of relevance is required.”). Subject to this general balancing test, where the Board determines that a non-party association member has a “clear interest in the proceeding and will obviously be affected by its outcome” then subpoenas are an appropriate means for obtaining “legitimate discovery.” *Id.* In *Coal Dust*, “clear interest” was defined as being directly impacted by the ruling sought by the association that was the party to the case. *See also Ballard Terminal* at 3 (where subpoena for deposition of an individual submitting a letter of support was granted because his testimony was “relevant to a central issue raised” in the proceeding – whether there was a demand for rail service on the line).

Even if the nonparty is shown to have the sufficient level of interest in the proceeding, the discovery sought must still be “legitimate,” meaning it must seek information that is relevant to the subject matter in the proceeding and appears to be reasonably calculated to lead to the discovery of admissible evidence. *Coal Dust* at 3. The discovery sought must also be reasonable in scope and not be unduly burdensome. *See Id.*, and *Coal Dust Appeal* at 7, where the Board determined that even though the non-parties had a sufficient interest in the proceeding, it concluded that BNSF’s proposed discovery directed to the non-parties “was overly broad and burdensome” and declined to issue the subpoenas. It instead directed the parties to meet and negotiate to narrow the scope and burden.

IV. ARGUMENT

A. The Standards for Issuing Subpoenas on Non-Parties have not been met in this Case.

1. This Case is Factually Distinguishable from *Coal Dust*

The Board has determined that “whether the issuance of a particular subpoena is appropriate requires a case-by-case examination.” *Wisconsin Power & Light, supra*, at 3. UP’s Petition, and the facts and circumstances of this case generally, are much different than those presented to the Board in *Coal Dust*. First and foremost, in this proceeding, all of the Association Complainants have objected to the relevancy of UP’s discovery requests,⁴ and disputes over the purported relevancy of the information UP has sought to discover from Association Complainants and their members have been a prominent feature of the parties’ numerous “meet and confer” sessions. In sharp contrast, in *Coal Dust* neither the association nor its member companies contested the relevance of any of BNSF’s requests, which likely affected the Board’s decision to favor the issuance of subpoenas in that case.

Second, *Coal Dust* was a proceeding where the Board was assessing the legality of a tariff that clearly and unambiguously directly applied to all of the association’s

⁴ The assertions in UP’s Petition that any of the Associations failed to raise a relevancy objection to any request propounded by UP are unfounded. UP ignores the fact that each of the Association Complainants clearly and unambiguously objected to the relevance of UP’s discovery requests, both through specific objections but also through a general relevance objection that was expressly incorporated by reference into all of their discovery responses. As one example, Exhibit 6 of UP’s Petition is a copy of the Responses and Objections of NAFCA to UP’s first discovery requests. General Objection 4 (of 18) states that “NAFCA objects to the production of any information, documents, data or other materials that are not relevant to the subject matter involved in this proceeding or calculated to lead to the discovery of admissible evidence in this proceeding.” General Objection 18 expressly incorporated all of the General Objections “into each of the specific objections and responses that follow.”

members. *Coal Dust Appeal* at 5. In this proceeding, UP states vaguely that the four companies it seeks subpoenas for “are among the entities that Union Pacific is charging for empty repair moves under Item 55-C,” Petition at 9, but UP provides no evidence demonstrating that this is in fact true for any of the four companies. Moreover, UP falsely states that Association Complainants “admit that companies such as UTLX, GATX, Trinity and ARI are expected to file individual claims for reparations should Complainants prevail under Count I’”. *Id.* at 17. Association Complainants did nothing of the sort. *See* Complainants’ Petition to Expedite at 3-4, cited by UP as support for its statement at Petition, note 37 (referring only to potential claims of “rail shippers” who were being charged by UP under its new Tariff Item 55-C). UP has not, and cannot show the same level of interest in this case as the association members were found to have had in *Coal Dust*.

Finally, while the Board found that the requisite degree of relevance and interest were present in *Coal Dust*, the Board did not actually grant the petition of BNSF and issue the subpoenas as proposed. Rather, it concluded that the requests in the proposed subpoenas were overly broad and unduly burdensome, directed the parties to negotiate to try and reach agreement, and scheduled a technical conference to resolve any remaining disputes. As the parties eventually reached agreement, the technical conference was cancelled and the subpoenas were never issued. Thus, *Coal Dust* provides no authority or precedent for issuing the subpoenas proposed by UP as written.

2. The Subpoenas Proposed by UP Must be Denied Because They Generally Seek Information that is Wholly Irrelevant to the Issues in this Case

As explained in more detail in Section II.B. of the Reply to Motion to Compel, which section Association Complainants hereby incorporate by reference into this Reply to Petition, UP's Motion to Compel attempts to rely on several tenuous relevance arguments to justify requests to Association Complainants seeking information that is simply irrelevant to the issues in this case. UP has raised those same arguments in its Petition seeking the issuance of subpoenas to the four car owners. The Board should reject UP's attempt to also invoke these arguments to obtain such an unprecedented scope of non-party discovery through the subpoena process.

a. UP's "Efficiency Arguments" are Not Relevant to the Issues in This Proceeding

In the Petition, as in its Motion, UP claims that its discovery requests in the proposed subpoenas are relevant because they will provide information on the impact of its repair movement charges upon incentives to manage tank car fleets efficiently. *See* Petition at 11 (RFPs 5 and 6 would require production of documents that refer to or relate to decisions to direct tank cars to repair facilities on efficiency promotion theory). Regardless of whether or not UP's claim that its repair movement tariff fosters greater efficiency, that fact question is wholly irrelevant to whether UP is compensating tank car providers. If there is no or insufficient compensation, even the strongest efficiency argument will not allow UP to prevail. *See* Reply to Motion to Compel at II.B.1 (summarizing the legal infirmities of UP's efficiency argument under *IHB-II*). Also, Complainants offered UP a common sense stipulation that would have avoided any discovery on the "efficiency theory," namely that any person faced with dramatically

higher charges from a supplier of services will seek to avoid those charges if possible. (Petition, Ex. 28, at 6). This self-evident assertion does not require any discovery to demonstrate, much less discovery of non-parties, but UP rejected Complainants' offer.

b. UP's Requests Pertaining to "Other Railroads" Seek Irrelevant Information

Several of the discovery requests included in the proposed subpoenas seek information from the four companies about their interactions with railroads other than UP that also simply is not relevant to the issues in this case. Petition at 11-13, (RFPs 3-7, and 9). Moreover, as explained in detail in Part II.B.2 of the Reply to Motion to Compel, which is hereby incorporated by reference, UP has greatly distorted the issues and Complainants' statements in this case to manufacture a perceived need for discovery of facts about "other railroads."

UP also claims that discovery as to "other railroads" is relevant because, if other railroads are engaged in the same practices as UP, that is evidence that UP's practices are reasonable. Petition at 13. Leaving aside the implications associated with a claim from one participant in an extremely concentrated market that its behavior is reasonable because the few other participants in that concentrated market are doing the same thing, Complainants have offered to stipulate to UP's main contention that other railroads also charge zero-allowance rates and do not pay mileage allowances. (Petition, Ex. 30, p. 1) Moreover, Complainants also would be willing to stipulate that certain other Class I railroads have begun to charge for tank car repair movements *after* UP did so. Furthermore, most of these facts are available from the other railroads' own publicly available tariffs, just as the challenged UP actions also are evident in its public tariffs. In light of these facts, even if UP's discovery pertaining to "other railroads" were relevant,

there would still be no need for burdensome discovery of the four nonparties for UP to obtain responsive information.

3. Other Categories of Requests also seek Information that is Irrelevant, Already in UP's Possession, Unduly Burdensome to Produce, and/or More Readily Obtainable from Another Source

a. Requests Pertaining to Tank Car Movements and Repairs (RFP 3, 4, 6, 7, and 9)

UP's proposed subpoenas contain numerous requests that would require the four targeted companies to search for and produce a massive amount of data on the loaded and empty movement of tank cars on the systems of UP and all other railroads. RFP 3, 4, 7, 9. In some cases, the requested data spans the 15-year period from 2001 to the present. *See, e.g.*, RFP 4 and 9. UP has also sought information relating to all movements of the tank cars to repair facilities, the repair work performed on each railcar, the reasons for directing the car to a facility, and other information. RFP 3⁵, 5, 6, and 7. First and foremost, regardless of the relevancy of any of this information to the issues in this case, forcing the four companies and their affiliates, etc., to undertake the burden and cost of searching for and producing this information – to the extent this is even possible - is not necessary because much of what UP seeks is available from UP's own files, or from a single other source. As explained in Part II.B.6 of the Reply to Motion to Compel, most of the tank car movement data UP claims it needs resides with Railinc.. UP sits on the Board of Directors of the AAR, and on the Board of Directors of Railinc. As explained

⁵ The only two reasons given by UP for the Board to accept proposed RFP 3 are (1) UP's flatly erroneous claim that NAFCA did not object to this category of information on relevance grounds; and (2) Complainants' discovery requests seek similar information from UP. Petition at 10. UP made the same assertions for RFP 2, 4. These are clearly insufficient reasons to invoke the extraordinary measure of issuing a subpoena to a non-party.

in the Reply to Motion to Compel, Railinc is a centralized, consolidated data source for empty and loaded railcar movements, tank car ownership, lessees, acquisition costs and other information. Railinc even makes much of this information available for purchase. It therefore makes no sense to subpoena four separate non-party entities when all UP had to do was either request this information from Railinc and afford it the appropriate designation under the Protective Order in this case, or ask the Board to issue a single subpoena to Railinc for this data. *See, also* Reply to Motion to Compel at Part II.D.2.

To the extent that UP's requests cover information that might not be in the files of Railinc, such as the selection of railcar repair facilities, the work done at the facility, and the reasons the repairs were made, this information is either not relevant to the issues in this case, or already in UP's files. For example, part of UP's justification for seeking such data from the four non-parties is to advance its "efficiency" argument, which Association Applicants have discredited above and in the Reply to Motion to Compel. Second, as explained above and in the Reply to Motion to Compel at Part II.C.2., empty tank car repair movements are only relevant in this proceeding when they occur on UP and are subject to Item 55-C. The nature and the reasons for the repair work performed is not relevant at all. Although data on UP's car movements to repair shops is relevant to the question of whether UP bears a disproportionate responsibility for such moves relative to the revenue it receives from loaded tank car movements, such that UP may charge for repair movements pursuant to *IHB-II*, that information is already in the possession of UP. There is no need to seek discovery of this information from nonparties.

b. Requests Pertaining to Tank Car Ownership and Operating Cost Data (RFP 2, 10-11)

In addition to the massive amount of car movement and repair data summarized above, UP's proposed subpoenas broadly (and vaguely) seek discovery of "all documents that discuss or analyze" tank car ownership and/or maintenance costs incurred by "tank car Owners and Lessees," or "how those costs are allocated between tank car Owners and Lessees." RFP 10-11. *See, e.g.*, proposed Subpoena to Union Tank at 5. UP also seeks discovery of documents that relate or refer to the development of the "Lessor Cost" calculated in Section 3 of the tank car allowance Agreement discussed above and in Part I.A of the Reply to Motion to Compel. (RFP 11).

Leaving aside the fact that proposed Request 10 is impermissibly broad and vague, and spans a 15 year time frame, to the extent UP seeks discovery of tank car ownership and maintenance costs beyond the costs submitted by car owners that are used to calculate "Lessor Costs" in Ex Parte No. 328, its requests seek information that is not relevant to any of the issues in this case. This Reply incorporates by reference the discussion of this issue contained in Part II.C.6 of the Reply to Motion to Compel.

Moreover, the Petition's arguments for the relevancy and discoverability of tank car ownership and maintenance costs completely ignore the extensive correspondence and other interaction between UP and the parties over Complainants' position on the irrelevance of tank car cost data. Since the second "meet and confer" session between counsel on July 10, 2015, Complainants have consistently stated (1) to the extent that car ownership and maintenance costs are implicated in Count I, it is only the cost imposed by UP's Tariff Item 55-C; and (2) the only car ownership and maintenance costs that are relevant to Count II are the costs used in the Ex Parte 328 Agreement, including those

calculated and submitted by the three car owners pursuant to the formula set out in Section 3(b) of that Agreement. Petition, Exhibit 21, at 2; and Exhibit 23, at 2 (where, in September, 2015, Complainants offered “If the amended Complaint or complainants’ discovery requests have caused UP to misconstrue Complainants’ allegations, Complainants are prepared to further amend their Complaint to make this more clear and to discuss ways to narrow their discovery requests to better reflect the foregoing allegations.” UP never accepted Complainants’ offer, (*see* Exhibit 24 at 2, and Exhibit 27 at 2), which Complainants reasonably inferred to mean that no issues were present. Instead, seven months later, UP acted as if the offer had never been made. Exhibit 29 at 2 (where, in April, 2016, UP sought to use language in Complaint and discovery requests to undermine Association Complainants’ positions on the relevancy of car ownership and maintenance costs). The Board should reject UP’s effort in the Petition to ignore the parties’ extensive discussions on this point and to obscure UP’s clear understanding of Complainants’ position on the irrelevancy of the expansive ownership and maintenance cost data UP seeks.

Moreover, there is no need for the Board to issue the proposed subpoenas for rail car ownership cost and maintenance information because during the course of the parties’ discovery discussions, NAFCA and the three car owners required to provide their maintenance cost data pursuant to Section 3 of the EP 328 Agreement (all of whom who are NAFCA members) agreed to voluntarily provide such data to UP. Specifically, the three companies submit the required data to Railinc, which compiles it into a consolidated report that is used to make the mileage allowance calculation. Association Complainants offered to provide 15 years of the consolidated costing data to UP, even

though UP also could have easily obtained this information from Railinc. *See* Exhibit 26 at 1-2. However, UP rejected this proposal, and instead demanded (1) that NAFCA produce an extremely broad range of additional cost information and documents from the three companies, and (2) that the Association Complainants further agree to unacceptable litigation stipulations concerning car ownership and maintenance cost information. Exhibit 27 at 2-3. Complainants rejected UP's demands, but still continued to try and fashion a solution that involved voluntary production. *See* Exhibit 28.

Notably, none of UP's expansive demands in the March 17, 2016 letter from UP counsel attached as Exhibit 27, included asking for any information from Trinity Industries, Inc. Moreover, since Trinity is not one of the major tank car companies whose costs are used to calculate "Lessor Costs," Trinity would have little, if any information responsive to RFP 11. This illustrates how UP's proposed "cookie-cutter" subpoenas violate the general rule that requests contained in subpoenas to nonparties should be narrowly tailored.

c. UP's Requests Seeking the Production of Rail Car Leases and Lease Rates (RFP 12-13)

In addition to seeking massive amounts of car movement and repair data, and a broad and undefined range of tank car ownership and maintenance cost data, UP's proposed subpoenas also would require the four non-parties to search for and produce lease agreements covering all of their tank cars, "including all riders and any other documents referenced in or attached to each lease agreement," for the past 15 years. Such an undertaking would undoubtedly call for the identification and production of hundreds of car leases and related documents, at a huge cost in dollars and manpower. This cost and burden would far outweigh any relevance tank car leases might have to

either count in the Complaint, which allege (1) that UP's Tariff 55-C charges are unlawful and (2) that UP is not compensating tank car providers for the use of their cars. Moreover, UP has rejected a reasonable proposal from Association Complainants to voluntarily provide UP with sufficient information on rail car leases for purposes of this case.

As explained in the Reply to Motion to Compel at Part II.C.1, which is hereby incorporated by reference into this Reply, it has been established for nearly 100 years that the lease arrangements between car lessors and car lessees are of no concern to the railroad using the car in revenue service. *See, In the Matter of Private Cars*, 50 I.C.C. 652, 674 (1918) (“So far as the carrier is concerned it can make no difference whether the shipper is owner or lessee [of a rail tank car]”). UP's obligation under 49 U.S.C. §11122 is to pay compensation to someone for the use of the rail car that it does not own: how that someone may or may not share, allocate or pass on those railroad payments is of no concern to the railroad. Consequently, the leases setting out the relationship between car owners and their lessees governing tank cars that are supplied to UP for rail service are irrelevant to Complainants' claims.

Nevertheless, UP states it needs the production of leases and related documents for three reasons: (1) leases might contain information about empty repair moves, including whether lessor or lessee is responsible for directing cars to repair shops and how the repair charges are to be allocated between the parties; (2) leases might contain information regarding the ability of lessees to enter into transportation arrangements under zero-allowance rates; and (3) leases “certainly” contain rental rates and information about “changes in market rates over time.” Petition at 16. Taking each of these in turn,

as stated above, the division of responsibility between lessor and lessee as to the direction of cars to repair facilities and paying UP's tariff charges has nothing at all to do with the fundamental question in the case: whether UP is compensating *someone* for the use of their car in revenue service. Moreover, while UP claims that understanding the division of responsibility is relevant to understanding the impact of UP's charges on incentives to manage the tank car fleet efficiently, "and thus arguably the reasonableness of, Item 55-C," *id.*, whatever incentives Tariff 55-C may have created has no relevance to the question of whether UP is compensating any entity for the use of a private tank car.

Second, whether a party may have the ability to negotiate a zero-allowance rate with UP is irrelevant to the question of whether UP's zero-allowance rates are lawful generally. To the extent such information were relevant, it would be relevant only to the claims of an individual shipper for reparations. The individual shipper complainants in this proceeding⁶ have agreed to produce to UP their tank car leases and associated documents for this reason. Additional production from the four non-parties pursuant to the proposed subpoenas is not necessary.

Finally, UP's interest in lease rates was belatedly raised nearly a year into the parties' discussions about production of rail car leases in response to UP's discovery requests, (Petition, Ex. 27 at 5) and it greatly complicated the ongoing attempts to reach agreement on the terms by which Association Complainants would voluntarily produce rail car lease information from their members. Specifically, the prior discussions were aimed at UP's interest in standard terms used by the industry related to mileage allowances and equalization. This led the parties to discuss providing samples of lease

⁶ Ethanol Products, LLC d/b/a POET Ethanol Products; POET Nutrition, Inc. ("POET entities"), and Cargill Incorporated ("Cargill").

templates (not signed leases) to UP (Petition, Ex. 25 at 1). UP's later expansion of its demands to include lease rates over time greatly expanded the universe of potential leases, and was instrumental in ending the discussion about voluntarily providing UP with a sample of rail car leases.

Be that as it may, UP has stated no consistent, let alone cogent, reason for wanting lease rate information. UP first said it wanted this information because it was allegedly "relevant to understanding current conditions in the tank car market and how conditions have changed since 1987." Petition, Ex. 27 at 5. It now states in its Petition that rate information is needed to explain why so few shippers ask for rates from UP that include payments of mileage allowances. Petition at 16. The initial reason is based on allegedly understanding changes in the tank car market. UP's new reason is purportedly (and belatedly) to strain to associate tank car leasing rates with railroad rates offered to shippers by UP. However, neither has anything to do with whether the charges assessed under Item 55-C are lawful, or whether UP is compensating car providers for their tank cars. Indeed, UP has offered no explanation or rationale as to the relevance of rail car lease rates to its rate setting practices, nor could it because UP is not a party to those confidential agreements. Indeed, as pointed out in this section Part II.C.1 of the Reply to Motion to Compel, UP's transportation rates make no distinction between whether a customer owns or leases the car it provides to UP for rail service.

In any event, as stated above, despite their relevance objection, Complainants offered to accommodate UP's desire to discover car leases and related documents by (1) the production of all of the leases entered into by the POET entities and Cargill during the relevant time period; and (2) a stipulation by Association Complainants, after NAFCA's

confirmation with the lessors of each of the produced leases, that the POET and Cargill leases are representative of the industry standards for the division of responsibility for directing empty movements to repair facilities, charges and payments for empty movements, rights to negotiate zero-allowance rates, and rights to advance payments. UP rejected this proposal. However, this remains a reasonable and appropriate accommodation of UP's originally-stated reasons for seeking production of rail car leases; which was to obtain discovery of the industry standard lease provisions governing mileage allowances and mileage equalization.

d. UP's Requests for Documents Pertaining to Calculation and Payment of Mileage Allowances and to Zero-Allowance Rates (RFP 8 and 9)

In addition to all of the foregoing, UP's proposed subpoenas seek from each of the four non-parties an extremely expansive amount of documents and information over a 15 year period - for UP and all other railroads - pertaining to mileage allowances and zero-allowance rates, including "all" (1) communications with other persons; (2) studies or analyses on these two topics and their relationship to line-haul rates and costs of ownership; (3) movements of their railcars on all railroads, loaded miles, and mileage allowances paid; and (4) movements of their tank cars on all railroads where an mileage allowance was not paid.

This Reply, as well as the Reply to Motion to Compel, has demonstrated that any information from railroads other than UP are irrelevant to the issues in this proceeding. Further, as stated in Part II.C.5 of the Reply to Motion to Compel, which is hereby incorporated by reference, evidence of whether a car owner or shipper received a mileage allowance from UP for its use of a rail tank car is only relevant in an action by a specific customer to determine whether UP has any liability to the customer based on the dealings

between UP and that customer. Moreover, whether movements on UP's system were pursuant to rates that called for payment of a mileage allowance or were zero-allowance rates, as well as the amount of any allowances paid, is all information clearly within the possession, custody and control of UP. There is no need to seek discovery of it through subpoenas to non-parties.

e. Documents that Refer or Relate to Item 55-C (RFP-1)

Finally, UP's proposed subpoenas would require each of the four non-parties to produce "all documents that refer or relate to Item 55-C." The only reason given for this proposed request (since NAFCA did raise a general relevancy objection) is that Complainants sought similar information from UP in their discovery requests. Petition at 10. As with other proposed requests (*See* note 4, *infra*) this is insufficient justification for taking the extraordinary measure of subpoenaing a non-party for the information. Moreover, UP's impermissibly vague and broad request goes beyond Complainants' discovery to UP in any event. Rather than ask for "all documents" in UP's files pertaining to Item 55-C, Complainants asked targeted questions directed to UP's decision to adopt this tariff nearly 30 years after the *IHBII* decision, and the extent to which UP has analyzed the revenues it expected to reap from the charges it adopted. As UP has not asserted any cogent reason in its Petition for the Board to issue subpoenas to the four non-parties to collect and produce this category of information, and because the request is impermissibly broad and vague, the proposed request should be rejected.

B. Even if the Board is Inclined to Issue Subpoenas, They Must be Modified to become Reasonably Tailored

Even if the Board finds that the four companies targeted by the Petition have a sufficient amount of interest in the issues presented by the Complaint in this proceeding,

and that some of the materials sought through the proposed subpoenas are relevant and discoverable, the Board should refrain from issuing the proposed subpoenas as written. Instead, as it did in *Coal Dust*, the Board, through the Administrative Law Judge appointed to hear and resolve discovery disputes in this case, should proactively seek to reasonably tailor any subpoenas it issues to minimize the burden of complying with them.

V.
CONCLUSION

For all the reasons set forth in this Reply, the Board should deny the Petition for Subpoenas in total and not allow the requested discovery on the four non-parties UP has targeted. If, however, the Board is inclined to grant the Petition in whole or in part as to any of the four non-parties, the scope of the proposed subpoenas should be substantially narrowed and focused so as to minimize the burden imposed on those non-parties to this case.

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CERTIFICATE OF SERVICE

I do hereby certify that on this 6th day of June, 2016, I have served a copy of the accompanying Reply to Petition for Subpoenas via electronic mail and regular mail to the counsel listed below at the following addresses:

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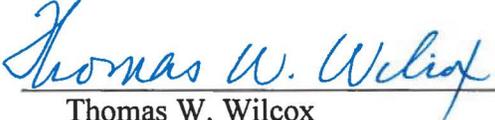
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