

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

NORTH AMERICA FREIGHT CAR)	239944
ASSOCIATION; AMERICAN FUEL &)	ENTERED
PETROCHEMICAL MANUFACTURERS;)	Office of Proceedings
THE CHLORINE INSTITUTE; THE)	January 27, 2016
FERTILIZER INSTITUTE; AMERICAN)	Part of
CHEMISTRY COUNCIL; ETHANOL)	Public Record
PRODUCTS, LLC D/B/A POET ETHANOL)	Docket No. NOR 42144
PRODUCTS; POET NUTRITION, INC.; and)	
CARGILL INCORPORATED)	
)	
vs.)	
)	
UNION PACIFIC RAILROAD)	
COMPANY)	

**COMPLAINANTS' REPLY TO UNION PACIFIC'S
PROPOSED PROCEDURAL SCHEDULE**

The Complainants in this case hereby reply in opposition to “Union Pacific’s Proposed Procedural Schedule” filed by Defendant, Union Pacific Railroad Company (“UP”), on January 4, 2016 (“UP Motion”).¹ Complainants instead urge the Surface Transportation Board (“Board”) to adopt Complainants’ proposed procedural schedule also filed on January 4th.

The different procedural schedules submitted by the parties vary in two primary respects. First, UP proposes 75 days² for its reply evidence whereas the Complainants propose 45 days. Second, UP includes a provision for final briefs, whereas the Complainants do not. Although UP

¹ The original due date for this Reply was January 25, 2016. However, due to the weather-related closure of Federal government offices in Washington, DC, including the Board, on January 25 and 26, Complainants are filing this Reply on the first succeeding business day, consistent with 49 C.F.R. § 1104.7(a).

² UP never requested 75 days during its “meet and confer” discussions with Complainants; UP instead proposed 60 days. UP apparently has increased its request in the belief that the Board will “split the baby” and grant UP its true objective.

also contemplates a need for follow-up discovery after the initial discovery period, UP does not incorporate that into its proposed procedural schedule and disavows any request that the Board rule in advance that such discovery is appropriate. UP Motion at 4. UP also proposes two measures for resolving discovery disputes. Complainants respond below to each of UP's proposals, which would prolong this proceeding prematurely and unnecessarily.

1. *Defendant's Reply Evidence.* UP overstates the complexity of this case to justify its request for 30 more days to submit reply evidence than Complainants have proposed. *Id.* at 2-3. The issues in this case do not require complicated analyses. They are predominantly legal and policy issues requiring some economic testimony and factual evidence of changed circumstances in the rail industry. Count I requires the parties to address whether this agency's holding in *General Amer. Transp. Corp. v. Indiana Harbor Belt R. Co.*, 3 I.C.C.2d 599 (1987), does or should apply to the different facts and policies presented by UP Tariff 6004, Item 55, and current conditions in the rail industry. Count II turns on whether zero-allowance rates for tank car shipments should be an unlawful practice *per se*, or alternatively, whether UP can demonstrate whether its zero-allowance rates are lower than the non-existent, hypothetical rates that UP contends it otherwise would have charged for the same transportation under rates that provided for the payment of mileage allowances. *See* UP Answer, ¶¶ 33-35.

UP also contends that more time is warranted because it will have to respond to multiple sets of evidence from the Association complainants and the individual complainants because the individual complainants "may pursue different legal theories and present distinct evidence." Motion at 3. This reflects a misunderstanding of Complainants' representations to UP on this subject during their negotiations over a procedural schedule. The individual complainants would not file separately to pursue different legal theories or facts, but only if necessary to address their

specific situation. Most notably, because the individual complainants have requested damages, whereas the Association complainants have not, they would need to submit separate evidence on that issue.³ The legal theories, however, would be the same.

2. *Final Briefs.* UP insists that the procedural schedule include the simultaneous submission of final briefs even before the need or desire for such briefs is evident. *Id.* at 3-4. Contrary to UP's suggestion, there is no routine "practice" of submitting final briefs in any proceeding other than stand-alone cost rate cases. All three of the decisions cited by UP (*id.* at 4, note 2) granted requests for final briefs *after* development of the evidentiary record demonstrated the desirability of briefs in those cases. The Board should not pre-judge the desirability of final briefs, and prolong the case by including them in the procedural schedule, prior to development of the record in this proceeding.

3. *Other Discovery Issues.* Although UP does not ask the Board to do anything at this time, it nonetheless makes gratuitous arguments regarding a potential need for follow-up discovery on "information that is *critical* to this case" after the initial discovery period. *Id.* at 4 (emphasis added). UP, however, identifies "critical" information based upon misrepresentations of Complainants' claims.

- First, UP inaccurately refers to "changed conditions in the rail tank car industry" as information in the possession of Complainants' members that is critical to this case. *Id.* But Complainants have alleged changed conditions in the "railroad" industry, not the tank car industry.
- Second, UP refers to "car ownership and maintenance costs" as critical information possessed by Complainants' members. *Id.* Count I, however, concerns a single such

³ Complainants offered to bifurcate the damages issues, which only would need to be addressed if and when the Board ruled favorably on Counts I and II, but UP declined that offer.

cost, the UP tariff charge for empty tank car movements, which does not require discovery of Complainants' members to ascertain. Count II concerns the lawfulness of zero-allowance rates for tank car shipments and whether UP's zero-allowance rates are in fact lower than the non-existent, hypothetical rates that UP contends it otherwise would charge for the same transportation under rates that provide for the payment of mileage allowances. The former turns upon legal and economic arguments and the latter concerns facts solely within the knowledge and possession of UP.

- Third, UP refers to “the impacts on car owner and shipper behavior of charging for empty repair moves.” *Id.* It is not clear to Complainants how this is relevant to their claims, nor is this factor evident in the pages of the Board's December 21, 2015 decision in this proceeding cited by UP.

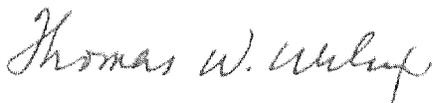
Nonetheless, despite the foregoing claims by UP, there is nothing for the Board to decide at this time because UP's Motion does not ask the Board to incorporate follow-up discovery into its proposed procedural schedule.

UP, however, does ask the Board to require the parties to file any motions to compel related (1) to their currently outstanding discovery requests within 30 days from adoption of a procedural schedule, and (2) to future discovery requests within 10 days after service of answers and/or objections. *Id.* at 4-5. There is no need for the Board to take either action because its discovery rules adequately address both situations. Because 49 C.F.R. § 1114.31(a) requires motions to compel within 10 days, UP's second request already is the controlling time period. As to UP's first request, the parties previously agreed to toll the 10-day period in § 1114.31(a), to the extent that time period applies in this case, pending their discovery discussions. Either party currently can trigger that 10-day clock as to its discovery responses by terminating negotiations

and declaring its position to be final, which could occur even before the Board issues a procedural schedule.

For the foregoing reasons, Complainants urge the Board to deny UP's proposed procedural schedule and to adopt Complainants' schedule.

Respectfully submitted



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CERTIFICATE OF SERVICE

I do hereby certify that on this 27th day of January, 2016, I have served a copy of the foregoing COMPLAINANTS' REPLY TO UNION PACIFIC'S PROPOSED PROCEDURAL SCHEDULE via electronic mail and regular mail to counsel for Defendant at the following address:

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