

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
January 4, 2016
Part of
Public Record

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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'S PROPOSED PROCEDURAL SCHEDULE

GAYLA L. THAL
LOUISE A. RINN
JEREMY M. BERMAN
DANIELLE E. BODE
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
(402) 544-3309

MICHAEL L. ROSENTHAL
CAROLYN F. CORWIN
Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, D.C. 20001
(202) 662-6000

Attorneys for Union Pacific Railroad Company

January 4, 2016

files opening evidence.¹ This proceeding will be as complicated, and likely more complicated, than the typical case. Here, Complainants are challenging two separate practices relating to tank car movements: (i) adoption of charges for tank car movements to and from repair facilities, and (ii) use of zero-mileage rates in place of mileage allowances. Each challenge is essentially a separate case, and the Board has stated that Complainants' arguments are fact-specific and require development of a full record. *See* Decision at 3. Moreover, the typical case involves evidence filed by one complainant. Here, Complainants have indicated that the Association Complainants will submit joint evidence, but that the three individual complainants may file separate opening and rebuttal evidence because the individual parties may pursue different legal theories and present distinct evidence.

Because Union Pacific will have to respond to multiple sets of evidence on two different counts, Complainants' proposal to allow Union Pacific just 45 days to develop reply evidence would unfairly disadvantage Union Pacific. Complainants will have 75 days from the completion of initial written discovery to prepare opening evidence, and as a practical matter, they have an unlimited amount time to prepare opening evidence, since they controlled the timing of their Complaint. A 75-day period to prepare reply evidence is the minimum amount of time that would be fair under the circumstances.

2. *Final briefs.* Union Pacific believes it would be more efficient to establish a schedule that provides for final briefs at the outset, rather than require parties to submit motions after the

¹ *See, e.g., N. Am. Freight Car Ass'n v. Union Pac. R.R.*, NOR 42119 (STB served Sept. 26, 2011); *Cargill, Inc. v. BNSF Ry.*, NOR 42120 (STB served July 19, 2011); *Union Elec. Co. d/b/a Ameren Mo. & Mo. Cent. R.R. v. Union Pac R.R.*, NOR 42126 (STB served Jan. 14, 2011); *cf. BNSF Ry.—Terminal Trackage Rights—Kansas City S. Ry. & Union Pac. R.R.*, FD 32760 (Sub-No. 46) (STB served Nov. 25, 2014).

evidentiary submissions are complete, given the Board's practice of allowing parties to submit simultaneous final briefs.²

3. *Other discovery issues.* Union Pacific believes it is important to make clear that we reserve the right to pursue follow-up discovery after the initial discovery period. Such discovery may be related to documents and information produced before the end of the period, statements made in depositions, or material contained in evidentiary filings or workpapers. The potential need for follow-up discovery is of particular concern for us in this case because the Association Complainants have thus far resisted producing information in the possession of their members, who appear to be the best and perhaps the only source for information that is critical to this case, including information regarding changed conditions in the rail tank car industry, car ownership and maintenance costs, and the impacts on car owner and shipper behavior of charging for empty repair moves. *See* Decision at 3 & 5. We are concerned that the Association Complainants might submit arguments or evidence from their members or derived from their members' information despite their refusal to provide discovery within the period for initial discovery. Union Pacific is not asking the Board to rule in advance that particular follow-up discovery is appropriate, but our proposal of a period for pre-evidentiary discovery should not be understood as a waiver of our right to seek additional discovery.

Union Pacific also proposes two measures to help ensure timely resolution of discovery disputes. First, Union Pacific proposes that the parties should have 30 days from the date the Board adopts a procedural schedule to file any motions to compel relating to their currently

² *See, e.g., BNSF Ry.—Terminal Trackage Rights—Kansas City S. Ry. & Union Pac. R.R.*, FD 32760 (Sub-No. 46) (STB served Nov. 30, 2015); *N. Am. Freight Car Ass'n v. Union Pac. R.R.*, NOR 42119 (STB served May 11, 2012); *Cargill, Inc. v. BNSF Ry.*, NOR 42120 (STB served Mar. 1, 2012).

outstanding discovery requests. Second, Union Pacific proposes that, for future discovery requests, the parties should have 10 days after service of answers and/or objections to file motions to compel. In both cases, the deadlines could be extended by mutual agreement to allow the parties an opportunity to resolve their discovery disputes through private negotiations.

Finally, Union Pacific wants to make clear that by proposing a date for completion of pre-evidentiary deposition discovery we are not conceding that depositions would be appropriate.

Respectfully submitted,

/s/ Michael L. Rosenthal

MICHAEL L. ROSENTHAL

CAROLYN F. CORWIN

Covington & Burling LLP

One CityCenter

850 Tenth Street, NW

Washington, D.C. 20001

(202) 662-6000

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EXHIBIT A

UNION PACIFIC'S PROPOSED PROCEDURAL SCHEDULE

“D” is the date of the STB decision adopting the procedural schedule

D+120 days - Completion of pre-evidentiary written discovery

D+165 days - Completion of pre-evidentiary deposition discovery

D+195 days - Complainants' Opening Evidence and Argument

D+270 days - Defendant's Reply Evidence and Argument

D+300 days - Complainants' Rebuttal Evidence and Argument

D+330 days - Simultaneous Final Briefs

Motions to compel for outstanding discovery requests: D+30 (unless deferred by agreement)

Motions to compel for future discovery requests: 10 days after service of answers/objections (unless deferred by agreement)

The parties reserve their rights to seek follow-up on discovery served on or before D+120 or the evidentiary statements, and their rights to object to any such follow-up requests. The parties also reserve their right to object to depositions.

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January, 2016, I caused a copy of the foregoing document to be served by e-mail and first-class mail, postage prepaid, on all of the parties of record in NOR 42144:

/s/ Michael L. Rosenthal
Michael L. Rosenthal