

SERVICE DATE – MARCH 22, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42144¹

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

v.

UNION PACIFIC RAILROAD COMPANY

Digest:² This decision directs the parties to submit further briefing on two issues of statutory interpretation and application.

Decided: March 19, 2021

These cases involve disputes between private (non-railroad) providers of tank cars and Union Pacific Railroad Company (UP).³ The private tank car providers claim that UP has

¹ This decision embraces Valero Marketing & Supply Co. v. Union Pacific Railroad, Docket No. NOR 42150, Tesoro Refining & Marketing Co. v. Union Pacific Railroad, Docket No. NOR 42152, and Arkema Inc. v. Union Pacific Railroad, Docket No. NOR 42153. This decision also embraces Union Pacific Railroad—Petition to Exit Mileage Equalization System, Docket No. EP 328 (Sub-No. 2).

² The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

³ The complainants in Docket No. NOR 42144 are the North America Freight Car Association (NAFCA), American Fuel & Petrochemicals Manufacturers, The Chlorine Institute, Inc., The Fertilizer Institute, American Chemistry Council (ACC), Ethanol Products, LLC d/b/a POET Ethanol Products (POET Ethanol), POET Nutrition, Inc. (POET Nutrition), and Cargill Incorporated (Cargill) (collectively, NAFCA Complainants). The complainants in Docket No. NOR 42150 are Valero Marketing and Supply Company and Valero Rail Partners, LLC (collectively, Valero). The complainants in Docket No. NOR 42152 are Tesoro Refining & Marketing Company LLC, Tesoro Great Plains Gathering & Marketing, LLC, and Dakota Prairie Refining, LLC (collectively, Tesoro). The complainant in Docket No. NOR 42153 is Arkema Inc. (Arkema). NAFCA Complainants, Valero, Tesoro, and Arkema are referred to collectively in this decision as Complainants. Docket Nos. NOR 42144, NOR 42150, NOR 42152, and NOR 42153 are referred to collectively in this decision as the NAFCA Proceedings.

violated its car-service obligations under 49 U.S.C. §§ 11121 and 11122, engaged in an unreasonable practice under 49 U.S.C. § 10702, and violated its common carrier obligation under 49 U.S.C. § 11101 by (1) failing to pay them for UP's use of their cars when providing rail service and (2) imposing a charge for moving their cars when empty to repair facilities. Prior to ruling on the merits of this case, the Board directs further briefing based on two issues of statutory interpretation and application identified below.

I. BACKGROUND

Before 2015, under Tariff 6004, Item 55-C, UP charged separately for the movement of empty tank cars to repair facilities only in limited circumstances: when new cars left shops to enter into commercial service; when cars left shops after being re-stenciled to reflect a change in ownership; and when cars moved to shops for dismantling, sale, or scrap. (UP Reply 12, Apr. 26, 2019.) In 2014, the Pipeline and Hazardous Materials Safety Administration proposed a rule requiring tank cars used to transport crude oil and other highly flammable commodities to be phased out or retrofitted to meet new, stricter safety requirements. (*Id.*) According to UP, it determined that it would be disproportionately responsible for the empty retrofit moves because it serves a large number of repair facilities where retrofits would occur and yet participates in crude oil transportation markets to a lesser extent than some of its railroad competitors. (*Id.* at 12-13.) UP adopted a separate empty repair move charge in tariff Item 55-C, effective January 1, 2015. (*See id.*)⁴

On March 31, 2015, as amended June 2, 2015, NAFCA Complainants filed a complaint in Docket No. NOR 42144 against UP. In Count I, NAFCA Complainants allege that "UP's implementation of the January 1, 2015 modification to Tariff 6004, Item 55-C, namely the adoption of separate tariff charges for the movement of empty tank cars to 'Repair Facilities' as defined by UP, is (a) an unreasonable practice in violation of 49 U.S.C. § 10702, and (b) a violation of UP's statutory obligations to compensate private car owners for the use of their tank cars set forth in 49 U.S.C. § 11122(b)." (NAFCA Am. Compl. 8.) In Count II, NAFCA Complainants allege that "UP's refusal to compensate [NAFCA Complainants] for [the use of their tank cars], whether through mileage allowances or reduced line haul rates, constitutes an unreasonable practice under 49 U.S.C. § 10702, and a violation of 49 U.S.C. §§ 11101, 11121, and 11122." (*Id.* at 9.) For relief, NAFCA Complainants ask that the Board: (1) find that UP's implementation of Item 55-C is unlawful; (2) order UP to immediately rescind Item 55-C; (3) order UP to pay reparations for unlawful Item 55-C charges; (4) find that UP's failure to compensate the NAFCA Complainants (or their members) was unlawful; (5) order UP immediately to begin paying mileage allowances, in accordance with Investigation of Tank Car Allowance System (EP 328), 3 I.C.C.2d 196 (1986), modified, 7 I.C.C.2d 645 (1991), on all

⁴ Specifically, the charge applied to empty tank cars moving to and from repair facilities except that (i) empty movements that are immediately preceded by a loaded line-haul revenue movement on UP will move free of charge to repair facilities, (ii) empty tank cars taken out of service by UP inspection and waybilled by UP's Mechanical Department under Rule 1 of the Association of American Railroads Interchange Rules will move free of charge to and from repair facilities, and (iii) empty tank cars damaged by UP will move free of charge to and from repair facilities. (*See* UP Reply, Ex. 1, Apr. 26, 2019.)

shipments in private tank cars; (6) order UP to pay damages to the individual complainants for all mileage allowances not paid in accordance with EP 328; and (7) grant to Complainants such other and further relief as the Board may deem proper based on the record. (See id. at 10.)

On June 22, 2015, UP filed its answer in Docket No. NOR 42144 and moved to dismiss the amended complaint or make that complaint more definite. In opposing the motion to dismiss, NAFCA Complainants argued, among other things, that resolving the case “requires development of facts through discovery.” (See NAFCA Complainants Reply 5, 15, 21-22, June 1, 2015.) By decision served on December 21, 2015, the Board denied UP’s motion, stating that it agreed with NAFCA Complainants’ arguments that discovery was required and concluding that “UP seeks information more appropriately obtained in discovery.” N. Am. Freight Car Ass’n v. Union Pac. R.R., NOR 42144, slip op. at 3, 5 (STB served Dec. 21, 2015). On June 10, 2016, the Board granted UP’s motion to hold the procedural schedule in abeyance pending the resolution of discovery disputes and further order of the Board.

On December 19 and 30, 2016, respectively, Valero and Tesoro filed complaints against UP in Docket Nos. NOR 42150 and NOR 42152, raising allegations substantially similar to those of NAFCA Complainants and asking for substantially similar relief as to Item 55-C. On January 26, 2017, UP filed a motion to consolidate the NAFCA, Valero, and Tesoro complaint proceedings, which the Board granted in a decision served on March 31, 2017.

On August 1, 2017, Arkema filed a complaint against UP in Docket No. NOR 42153, raising substantially similar allegations to those of NAFCA Complainants, Valero, and Tesoro and asking for substantially similar relief as to Item 55-C. On August 9, 2017, UP filed a motion to consolidate Arkema’s complaint with the existing NAFCA, Valero, and Tesoro proceeding, which the Board granted by decision served on October 5, 2017. On July 8, 2019, Olin Corporation (Olin) filed a substantially similar complaint in Docket No. NOR 42164. By decision served on September 30, 2019, the Board denied UP’s motion to dismiss Olin’s complaint and granted Olin’s motion to hold the proceeding in abeyance pending the outcome of the NAFCA Proceedings.

Pursuant to a Memorandum of Understanding with the Federal Energy Regulatory Commission, the Board referred all discovery issues to Administrative Law Judge John P. Dring. Judge Dring held several discovery conferences in 2016 and 2017, and issued two discovery orders following oral arguments in 2016. The parties submitted status reports on discovery matters until January 28, 2019, when the parties jointly advised the Board in their final status report that discovery was complete.

Complainants jointly submitted opening evidence and argument on February 22, 2019. Also, on February 22, 2019, Arkema, POET Ethanol, POET Nutrition, Cargill, Valero, and Tesoro each submitted supplemental opening evidence and argument as to their individual circumstances (e.g., factual background, damages, and communications with UP). UP submitted reply evidence and argument on April 26, 2019. Complainants jointly submitted rebuttal evidence and argument on May 31, 2019.

On April 25, 2019, UP submitted a petition in Docket No. EP 328 (Sub-No. 2), to terminate its obligation to comply with the mileage equalization provisions of the National Tank

Car Allowance Agreement. In that proceeding, arguments have been raised that UP's petition is premature because the NAFA Proceedings address closely related matters. See NAFA Reply 2-3, May 15, 2019, EP 328 (Sub-No. 2). Because the litigation in the NAFA Proceedings may affect the issues to be addressed in UP's petition, the Board expects to act on the petition after the conclusion of the NAFA Proceedings.

II. DISCUSSION AND CONCLUSIONS

Section 11122(a) provides in part that: “[t]he regulations of the Board on car service shall encourage the purchase, acquisition, and efficient use of freight cars.”⁵ The current statutory text of § 11122(a) would suggest that the requirement to “encourage the purchase, acquisition, and efficient use of freight cars” applies only to the Board's *regulations*—and not, for example, to complaint proceedings like these. Compare 49 U.S.C. § 1321(a) (authorizing the Board to prescribe regulations) with 49 U.S.C. § 11701 (authorizing the Board to act on complaint); see also, e.g., Exec. Order No. 13,892, § 2(g), 84 Fed. Reg. 55,239 (Oct. 9, 2019) (“‘Regulation’ means a legislative rule promulgated pursuant to section 553 of title 5, United States Code, or similar statutory provisions”). Given that the parties' pleadings never directly address this requirement, it appears that they share this interpretation.

The statutory history of § 11122, however, suggests otherwise. In 1978, Congress recodified the Interstate Commerce Act, enacting it as Title 49 of the U.S. Code. Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337 (1978 Recodification). Section 3(a) of the

⁵ In a footnote in its reply, UP contends that railroads do not have a common carrier obligation to provide tank cars—an argument that would, if accepted, render all of Complainants' claims moot. (See UP Reply 35 n.43, Apr. 26, 2019.) The primary decision that UP cites—United States v. Pennsylvania Railroad, 242 U.S. 208 (1916)—did not hold that railroads lack a common carrier obligation to provide tank cars. Rather, it held that, assuming such an obligation existed, the authority to enforce that obligation did not reside with the Interstate Commerce Commission (ICC). Id. at 233-36. And that limited holding was overturned by statute when Congress delegated to the ICC the authority to regulate the supply of freight cars. Esch Car Service Act, Pub. L. No. 65-19, 40 Stat. 101 (1917), as amended, Transportation Act of 1920, Pub. L. No. 66-152, § 402, 41 Stat. 456, 476 (1920); Akron, Canton, & Youngstown R.R. v. ICC, 611 F.2d 1162, 1164 (6th Cir. 1979) (“The Pennsylvania Railroad case is now questionable authority.”); Winnebago Farmers Elevator Co. v. Chi. & N.W. Transp. Co., 354 I.C.C. 859, 865-67 (1978) (noting that the 1920 amendment to the Esch Car Service Act expanded the definition of car service to include car supply). UP also cites two lower court decisions—each of which cites to Pennsylvania Railroad—to support its contention. (See UP Reply 35 n.43, Apr. 26, 2019 (citing Chi. Rock Island & Pac. Ry. v. Lawton Refin. Co., 253 F.705 (8th Cir. 1918) and Rylander & Chi. Short Line Ry., 153 N.E.2d 225, 229-30 (Ill. App. Ct. 1958)).) But in so doing UP fails to explain how those two cases may be reconciled with the statutory changes noted above and the large body of more recent agency and judicial precedent recognizing carriers' obligation to provide tank cars. See, e.g., Gen. Am. Transp. Corp. v. ICC, 872 F.2d 1048, 1050 (D.C. Cir. 1989) (“Railroads . . . must provide railcars suitable for the transportation of a broad range of property, including . . . flammable liquids. . .”). Accordingly, UP's contention is inadequately developed and, more importantly, lacks merit.

1978 Recodification states:

Sections 1 and 2 of this Act restate, without substantive change, laws enacted before May 16, 1978, that were replaced by those sections. Those sections may not be construed as making a substantive change in the laws replaced. Laws enacted after May 15, 1978, that are inconsistent with this Act are considered as superseding it to the extent of the inconsistency.

92 Stat. at 1466. As the U.S. Supreme Court held in applying another section of the Interstate Commerce Act, this section of the 1978 Recodification requires that substantive differences between the pre-1978 and post-1978 statute must be resolved in favor of the pre-1978 language. See Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp., 561 U.S. 89, 107-09 (2010).⁶

Prior to the enactment of the 1978 Recodification, the predecessor to § 11122(a) stated, in relevant part:

It is the intent of the Congress to encourage the purchase, acquisition, and efficient utilization of freight cars. In order to carry out such intent, the Commission may, upon complaint of an interested party or upon its own initiative without complaint, and after notice and an opportunity for a hearing, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including (i) the compensation to be paid for the use of any locomotive, freight car, or other vehicle, (ii) the other terms of any contract, agreement, or arrangement for the use of any locomotive or other vehicle not owned by the carrier by which it is used (and whether or not owned by another carrier, shipper, or third party), and (iii) the penalties or other sanctions for nonobservance of such rules, regulations, or practices.

49 U.S.C. § 1(14)(a) (1976). In other words, it appears that the agency's discretion to prescribe car service terms, including compensation, must be guided by the policy "to encourage the purchase, acquisition, and efficient utilization of freight cars" when the case arises "upon complaint of an interested party"—a broader mandate than the language of current § 11122(a), which indicates that this policy applies only to the Board's regulations.

Here, most of the relief requested by Complainants—for example, ordering UP to rescind Item 55-C due to the alleged lack of compensation or directing UP to resume paying mileage allowances—appears to rely on the Board's authority to prescribe car service terms on complaint under § 11122. The interpretation discussed above suggests that, where that is the case, the Board must determine whether taking the requested actions would "encourage the purchase, acquisition, and efficient utilization of freight cars."

⁶ As explained in section 3(a), this requirement does not apply to laws enacted *after* the 1978 Recodification that differ from the pre-1978 language; such laws supersede the previous language to the extent of the inconsistency. 1978 Recodification, § 3(a), 92 Stat. at 1466. While the text of § 11122 has been modified since the 1978 Recodification, no subsequently enacted law has modified the "purchase, acquisition, and efficient use" language addressed here.

To be clear, the Board has neither determined that this standard applies nor reached a decision on the merits of the issues in this case. To assist the Board in making its decision, and to ensure that the parties have had a full and fair opportunity to address the potential application of this standard here, the Board will direct the parties to file supplemental briefs addressing whether this standard applies to these complaint cases, and if it does, how it applies.⁷

Furthermore, with respect to Count I specifically, the Board notes that the parties have already stated their positions as to whether the Board should allow or prohibit Item 55-C in its entirety—although the additional briefing directed above may alter these positions. In addition to directing that briefing, the Board directs the parties to address whether an alternative to the parties’ all-or-nothing approach to the charges under Item 55-C is available to the Board. Specifically, accounting for the statute and all other relevant principles, the parties are directed to provide supplemental briefing responding to each of the following questions, including by indicating, where appropriate, if they do not believe a response is warranted or applicable:

1. Does the Board’s authority to establish the “terms of any . . . arrangement” for car service, see 49 U.S.C. § 1(14)(a) (1976), permit it to prescribe the amount of an empty repair move charge by a rail carrier (i.e., prescribe a maximum charge)?

Assuming the Board does have such power:

2. How should the permissible per-car charge be determined, taking into account the “purchase, acquisition, and efficient utilization” standard to the extent appropriate?
3. What is the appropriate per-car charge for an empty repair move here?
4. Can the Board incorporate amounts charged in excess of the permissible charge into a potential damages award?

In the event the Board determines that a middle course between the parties’ current all-or-nothing positions is both legally permissible and appropriate under the circumstances, the additional argument and information sought here will also be used to determine the effect of this issue, if any, on potential damages. At this time, the parties should not submit data related to the calculation of any damages beyond what a party views as helpful or useful to answering the questions above. If the Board determines that damages are to be awarded, the parties will be asked to submit data for the calculation of such damages at that time.

Supplemental briefs addressing the issues identified above are due by April 21, 2021, and reply briefs are due by May 21, 2021. Parties may submit verified statements or other evidence with their briefs but are not required to do so. After this briefing is completed, if further input is

⁷ The Board recognizes that some of the evidence already submitted into the record appears relevant to the application of this standard. The Board also notes that the ICC’s analysis in General American Transportation Corp. v. Indiana Harbor Belt Railroad, 3 I.C.C.2d 599, 603-06, 611 (1987), which the parties have discussed extensively, relates to this issue. However, the parties have not addressed whether and how the “purchase, acquisition, and efficient utilization” standard could constitute a guiding principle for the Board’s decision.

needed, the Board may hold oral argument.

It is ordered:

1. Supplemental briefs addressing the issues identified above are due by April 21, 2021, and reply briefs are due by May 21, 2021.
2. This decision is effective on its date of service.

By the Board, Board Members Begeman, Fuchs, Oberman, Primus, and Schultz.