

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
April 21, 2021
Part of
Public Record

Docket No. NOR 42144

NORTH AMERICA FREIGHT CAR ASSOCIATION; AMERICAN FUEL &
PETROCHEMICAL MANUFACTURERS; THE CHLORINE INSTITUTE; THE
FERTILIZER INSTITUTE; AMERICAN CHEMISTRY COUNCIL; ETHANOL PRODUCTS,
LLC D/B/A POET ETHANOL PRODUCTS; POET NUTRITION, LLC.; AND CARGILL
INCORPORATED v. UNION PACIFIC RAILROAD COMPANY

Docket No. NOR 42150

VALERO MARKETING AND SUPPLY COMPANY
AND VALERO RAIL PARTNERS, LLC v. UNION PACIFIC RAILROAD COMPANY

Docket No. NOR 42152

TESORO REFINING & MARKETING COMPANY LLC;
TESORO GREAT PLAINS GATHERING & MARKETING, LLC;
AND DAKOTA PRAIRIE REFINING, LLC v. UNION PACIFIC RAILROAD COMPANY

Docket No. NOR 42153

ARKEMA INC. v. UNION PACIFIC RAILROAD COMPANY

COMPLAINANTS' JOINT OPENING SUPPLEMENTAL BRIEF

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Complainants in these consolidated proceedings (collectively, “Complainants”)¹ hereby submit their “Joint Opening Supplemental Brief” in response to the Surface Transportation Board (“STB” or “Board”) decision served on March 22, 2021 (“Decision”).² The Decision, at page 6, requests supplemental briefing on the following two issues, with the second issue having three subparts:

1. Whether the “purchase, acquisition, and efficient utilization” standards in 49 U.S.C. § 11122(a) apply to this proceeding and, if so, how?
2. Whether the Board’s authority to establish the “terms of any...arrangement” for car service, *see* 49 U.S.C. § 11122(a)(2), permit it to prescribe a carrier’s maximum charge for an empty repair move and, if so:
 - a. how should that charge be determined,
 - b. what is the appropriate per-car charge in this case for UP, and
 - c. can the Board award damages based on the amounts UP may have charged in excess of a maximum prescribed rate?

At the outset, Complainants want to make clear their position that this is not a rate case. Rather, Complainants in these consolidated proceedings challenge UP’s practice of assessing an

¹ The Complainants in Docket NOR 42144 are the North America Freight Car Association (“NAFCA”); the American Fuel & Petrochemical Manufacturers (“AFPM”); The Chlorine Institute, Inc. (“TCI”); The Fertilizer Institute (“TFI”); the 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, “NOR 42144 Complainants”). The Complainants in Docket NOR 42150 are Valero Marketing and Supply Company and Valero Rail Partners, LLC (collectively “Valero”). The Complainants in Docket 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 NOR 42153 is Arkema, Inc. (“Arkema”). NAFCA, AFPM, TCI, TFI and ACC are hereafter collectively referred to as “Association Complainants” and the other Complainants as “Individual Complainants.”

² Throughout this pleading, information that has been designated “Highly Confidential” pursuant to the amended Protective Order entered in Docket NOR 42144 by decision served on October 20, 2017, is contained within double braces, *e.g.*, {{...}}, and such information has been redacted from the public version of this pleading.

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empty tank car repair move charge, Item 55-C, irrespective of the amount charged. Absent compensation of tank car providers for those charges in accordance with 49 U.S.C. § 11122(b), Item 55-C charges should never have been levied by UP upon tank car providers in the first place. In contrast to all other rail car types, the entire North American rail tank car fleet is privately owned. Therefore, attempting to seek a middle ground that takes the form of a maximum reasonable rate for tank car repair moves pursues an outcome that is improper in a case involving private tank car owners entitled to statutory compensation and is contrary to STB precedent.

Throughout this supplemental brief, the Complainants cite to the following prior submissions in these consolidated dockets as follows:

- “Complainants’ Joint Opening Evidence and Argument,” filed February 22, 2019 (“Joint Op.”)
- “Union Pacific’s Reply Evidence and Argument,” filed by Defendant Union Pacific Railroad Company (“UP”) on April 26, 2019 (“Reply”).
- “Complainants’ Joint Rebuttal Evidence and Argument,” filed May 31, 2019 (“Joint Reb.”)

I. **Issue #1: Whether the “purchase, acquisition, and efficient utilization” standard in 49 U.S.C. § 11122(a) applies to this proceeding and, if so, how?**

A. **The “purchase, acquisition, and efficient utilization” standard is relevant to complaint proceedings.**

In requesting this supplemental briefing, the Board appears to be considering the relevance of efficiency in 49 U.S.C. § 11122(a) for purposes of evaluating the legitimacy of Item 55-C. As a threshold matter, although Complainants have made global references to 49 U.S.C. § 11122 throughout this proceeding, their Complaint is predicated specifically upon subsection (b) and not subsection (a). Complainants allege that it is an unreasonable practice under 49 U.S.C. § 10702 and a violation of Section 11122(b) for UP to assess Item 55-C charges when tank car providers are not being compensated for those charges as required by Section 11122(b). Count I alleges that

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“UP’s implementation of...Item 55-C... 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).”³ To the extent that the efficiency standard in Section 11122(a) is relevant, it cannot eclipse the statutory obligation to compensate private tank car providers under Section 11122(b).

The Board observes that Section 11122(a) provides that “[t]he *regulations* of the Board on car service shall encourage the purchase, acquisition, and efficient use of freight cars,” but does not reference complaint proceedings.⁴ It then draws the inference that, because neither Complainants nor Defendant address this requirement, they appear to share an interpretation that this standard does not apply to complaint proceedings.⁵ After noting that the pre-1978 version of the Interstate Commerce Act did refer to both regulations and complaints, and that the 1978 recodification purports not to have intended any substantive change, the Board asks the parties to brief this question of whether the “purchase, acquisition, and efficient utilization” standards in 49 U.S.C. § 11122(a) apply to this proceeding and, if so, how.⁶

Section 11122(a) is relevant to the Complaints to the extent that UP has alleged “efficiency” in defense of Item 55-C. Subsection (a)(1) states that “[t]he regulations may include ... (1) the *compensation* to be paid for the use of a ... freight car ...” (emphasis added). According to subpart (a), regulations determining such compensation “shall encourage the purchase, acquisition, and efficient use of freight cars.” Thus, to the extent that the term “regulations”

³ Dkt. NOR 42144, First Amended Complaint, ¶ 29.

⁴ Decision, p. 4 (emphasis added).

⁵ *Id.*

⁶ Decision, pp.4-6.

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encompasses “complaints” for the reasons the Board sets forth in the Decision, at 4-5, Complainants agree that the “purchase, acquisition, and efficient utilization” standard in subpart (a) is a relevant consideration in this complaint proceeding. However, an interest in efficiency under subsection (a) does not trump the statutory obligation to compensate private car owners in subsection (b). Complainants’ principal argument is that tank car providers are not receiving compensation that encompasses the Item 55-C charges; indeed, they cannot be receiving such compensation because UP designed Item 55-C to be a profit center.

This brings us to the second part of the Board’s question: how the standard in Section 11122(a) applies to this proceeding.

- B. The proper application of the “purchase, acquisition, and efficient utilization” standard in Section 11122(a) is to acknowledge that compensation must be a predicate to assessment of tank car repair move charges, as the ICC held in *IHB-II* and the D.C. Circuit affirmed.**

Count I of the First Amended Complaint in Docket NOR 42144 invokes 49 U.S.C. §§ 10702 (unreasonable practice), 11121 (car service criteria), and 11122(b) (car service compensation and practices). Complainants’ evidence applies those statutory requirements in the context of Board precedent that defines the circumstances when rail carriers may assess tank car repair move charges, like those in Item 55-C. UP has defended Item 55-C on grounds that it fosters efficiency.⁷ If applicable, Section 11122(a) requires the consideration of two questions: (1) whether Item 55-C encourages the purchase, acquisition, and efficient use of tank cars? and (2) what is the proper balance between a tank car owner’s right to compensation and UP’s claim that a charge for empty movements is necessary to ensure efficiency? Complainants’ Opening and Rebuttal Evidence provides all the information that the Board needs to answer those questions.

⁷ See Dkt. NOR 42144, Answer to First Amended Complaint, ¶ 18.

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In Part III.A. of “Complainants’ Joint Opening Evidence and Argument,” Complainants succinctly captioned their argument and made clear that “Item 55-C is unlawful because UP does not compensate tank car providers for this cost through mileage allowances, or any alternative, in violation of 49 U.S.C. § 11121, 11122 and Board precedent.” The principal Board precedent cited by both Complainants and UP is *IHB-II*, in which the Interstate Commerce Commission (“ICC”) held that it was permissible for rail carriers to charge separately for transporting tank cars to repair facilities when those “charges are...considered a cost of repair to be included in the computation of mileage allowances that the railroads pay the shippers.”⁸ *IHB-II* reversed a prior ICC decision that imposed a nearly total prohibition against repair move charges because an unintended consequence of that prohibition had saddled terminal and switching railroads with large numbers of free repair moves due to the presence of one or more repair facilities on their lines with little or no opportunity for those carriers to earn revenue on loaded tank car moves.⁹ When repair move charges are included in the compensation that railroads pay tank car providers, *IHB-II* holds that, although tank car providers initially would pay for repair moves, the compensation requirement in § 11122(b) would not be violated because ultimate responsibility for the repair move charges would remain with the railroads that earn revenue on loaded tank car moves through their payment of mileage allowances.¹⁰ Complainants’ argument thus is that UP cannot assess Item 55-C charges when tank car providers do not receive compensation for them as required by *IHB-II*.

⁸ *General American Transportation Corp. v. Indiana Harbor Belt R.R. Co.*, 3 I.C.C. 2d 599, 599 (1987); *on reconsideration*, 1988 ICC LEXIS 55 (Feb. 22, 1988), *aff’d sub nom. Gen. Am. Transp. Corp. v. ICC*, 872 F.2d 1048 (D.C. Cir. 1989).

⁹ Joint Op., p. 24-26, *citing IHB-II* at 603-06, 613-16.

¹⁰ Joint Op., pp. 22-23, 26, *citing IHB-II*, at 608, 610, 613-16.

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In response to this argument, UP's Reply ignored the compensation predicate to assess repair move charges required by *IHB-II* and argued instead that the statute obligates tank car providers to compensate UP for repair facility movements.¹¹ Complainants rebutted UP's arguments and demonstrated that tank car owners are not being compensated for Item 55-C charges.¹² But UP concocted another argument derived from the ICC's conclusion in *IHB-II*, at 611, that permitting repair move charges would foster greater efficiency.¹³ Although UP has not cited to Section 11122(a) in its efficiency argument, UP's evidence is nevertheless pertinent to the application of the Section 11122(a) requirement that railroad "car service" rules and practices encourage efficiency.

But efficiency is just one of two factors in Section 11122(a); the other is to encourage the purchase and acquisition of freight cars. It goes without saying that compensating tank car providers for their costs of owning and maintaining tank cars, as required by Section 11122(b), is critical to encourage their purchase and acquisition. By asserting that Item 55-C merely harmonizes the treatment of tank car repair moves with all other car types, UP rests its position on the proposition that what is acceptable to encourage the purchase and acquisition of other car types must be acceptable for tank cars.¹⁴ But as Complainants have explained, in contrast to all other rail car types, the entire North American rail tank car fleet is privately owned. Consequently, absent regulatory compensation requirements, railroads could shirk their statutory responsibilities to provide adequate tank car service.¹⁵ This risk is greatest for repair move charges. In contrast

¹¹ UP Reply, pp. 11-37.

¹² Joint Reb., pp. 8-26. *See also*, Joint Op., pp. 22-24, 29-39.

¹³ UP Reply, pp. 21-22, 26-27, 44-45, 54-71.

¹⁴ UP Reply, p. 47; *see also*, Joint Op., pp. 16, 40-42.

¹⁵ Joint Op., pp. 16, 31-32, 48; Joint Reb., pp. 17-22

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to all other tank car ownership and maintenance costs, which tank car providers pay to third-parties, Item 55-C allows UP to profit directly from repair moves.¹⁶ As Complainants’ economic witness, Dr. Kevin Caves, has explained, because all tank cars are privately owned – *i.e.*, railroads do not provide the option to ship in railroad-supplied cars – railroads can exert a price squeeze to extract greater revenue from customers through repair move charges on private tank cars.¹⁷ In this case, the evidence shows that is precisely what UP intended to do through Item 55-C.¹⁸ This is antithetical to the statutory compensation requirement and thus to the very notion that Item 55-C encourages the purchase and acquisition of tank cars.¹⁹

In view of the foregoing evidence and argument, UP’s evidence, although never citing Section 11122(a), focused heavily on efficiency claims to justify Item 55-C.²⁰ UP’s position boils down to an economic argument that “free” repair moves lead to inefficient repair moves. And thus, UP will likely argue in response to the Decision that repair move charges allow for an efficient use of tank cars under Section 11122(a). But UP cannot reconcile that argument with the statutory compensation rights of tank car providers. In contrast, Complainants have provided the

¹⁶ Joint Op., pp. 28; Joint Reb., pp. 14-15, 26.

¹⁷ Joint Reb., pp. 22-26; Caves Reb. V.S., ¶¶ 4-6, 11, 26-34.

¹⁸ Joint Op. pp. 9-20, 40-44; Joint Reb. pp. 31-35.

¹⁹ Because the economic harm to shippers from not shipping at all is greater than the economic harm from Item 55-C, tank car providers will continue to purchase and acquire tank cars, but overall economic efficiency will suffer. Joint Reb., Caves Reb. V.S., ¶¶ 28-30. This inefficiency, for example, could manifest in tank car providers producing less product due to higher car ownership costs, resulting in less demand for tank cars than would exist at the optimal level of economic efficiency.

²⁰ UP Reply, pp. 21-22, 26-27, 44-45, 54-71. UP latched onto language in *IHB-II*, at 610-11, that the prior prohibition against repair move charges “promotes inefficiency by giving private car owners little or no incentive to consider transportation costs in selecting repair facilities.” Although neither the ICC in *IHB-II*, nor UP in its evidence, cited Section 11122(a), the evidence already presented in this case thoroughly addresses the efficiency standard in that statute.

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Board with four substantial arguments, supported by the evidence and expert testimony, to strike the proper balance between UP's efficiency claims and a tank car owner's compensation right.

First, Complainants demonstrated that UP invented its efficiency argument as a *post hoc* justification of Item 55-C. UP never discussed or considered efficiency considerations leading up to adoption of Item 55-C. Rather, efficiency considerations first surfaced when UP began to craft its message to inform customers of this new charge.²¹ {{

}}²² In an attempt to mislead its customers, UP made these new *post hoc* efficiency justifications the centerpiece of its sales pitch.²³ On Reply, UP claims that its motives are irrelevant.²⁴ But motives clearly are relevant when considering whether a practice is unreasonable.²⁵

Second, Complainants demonstrated that, consistent with its true motives, UP designed Item 55-C to maximize revenue, not efficiency.²⁶ Indeed, UP's internal documents show that its empty tank car revenue moves were {{ }} even before UP began to apply Item 55-C to tank car repair moves.²⁷ Empty tank car revenue {{ }} in the first year after UP adopted Item 55-C, and Item 55-C accounted for at least {{ }}.²⁸

²¹ Joint Op., pp. 9-18, 40-44; Joint Reb., pp. 31-35.

²² Joint Op., pp. 11-12, 14-15.

²³ Joint Op., pp. 16-18; Joint Reb., pp. 31-33.

²⁴ UP Reply, pp. 77-78.

²⁵ Joint Reb., pp. 33-35.

²⁶ Joint Reb., pp. 35-38.

²⁷ Joint Op., p. 24; Joint Reb., pp. 36-37.

²⁸ Joint Op., Crowley Op. V.S., pp. 9, 12.

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The basic economic law of supply and demand holds that, as the price for a service increases, demand for that service will decrease. But this fundamental concept does not further translate to higher prices always resulting in greater efficiency. As Complainants' expert economic witness explains, an economically efficient repair move charge would reflect UP's marginal cost of repair moves as distance increases, whereas Item 55-C reflects the exercise of market power to maximize UP's revenue.²⁹ Thus, the actual design and application of Item 55-C has been consistent with UP's profit-maximizing motive rather than its *post hoc* efficiency justification.

Third, Complainants demonstrated that UP does not have a compelling need to promote more efficient repair move decisions. Complainants have demonstrated that tank car providers have ample incentives to make efficient repair move decisions without Item 55-C – a fact that even UP's economic witness concedes.³⁰ Furthermore, the mileage equalization program encourages efficient repair moves by requiring tank car providers to pay railroads for excessive empty tank car miles.³¹ Therefore, rather than argue that tank car providers lack incentives to make efficient repair move decisions, UP can only assert that Item 55-C gives them an incremental additional incentive to do so.³² But, as noted above, UP designed Item 55-C to maximize revenue, not efficiency. Thus, even if the Board accepts that Item 55-C provides some additional incentive for more efficient repair move decisions, it must consider the proportionality

²⁹ Joint Reb., pp. 35-38; Caves Reb. V.S., ¶¶ 35-45.

³⁰ Joint Reb., pp. 27-28, 37-38.

³¹ Joint Op. pp. 43-47. Although UP desires more compensation than mileage equalization provides, UP's allegations of deficiencies in the mileage equalization program do not entitle it to unilaterally declare this stakeholder-negotiated and Board-approved program inadequate. Joint Op., pp. 44-50; Joint Reb., pp. 48-50.

³² UP Reply, p. 56.

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of that marginal efficiency gain relative to the overwhelming evidence of UP's desire for and realization of revenue maximization as a result of Item 55-C.

Fourth, Complainants demonstrated that UP does not bear a disproportionate responsibility for repair moves relative to its participation in loaded revenue moves, which was the problem that prompted the ICC to permit empty repair move charges in *IHB-II*.³³ Not once during its decision-making process to adopt Item 55-C did UP consider its "disproportionate responsibility for repair moves." In its Reply, however, UP attempted for the first time to craft evidence that it has suffered a disproportionate repair move burden.³⁴ Regardless, Complainants have shown UP's analysis to be flawed in multiple respects and that, when those flaws are corrected, UP clearly does not bear the burden it claims.³⁵ In the absence of substantial evidence that UP bears a disproportionate responsibility for repair moves relative to its participation in loaded moves, combined with unrefuted evidence of UP's true revenue-maximization motive, the Board must closely scrutinize UP's attempt to invoke an efficiency justification for Item 55-C. Otherwise, the Board risks allowing UP { { } } to turn tank car repair moves into a profit center,³⁶ which would be contrary to the compensation requirement in Section 11122(b) and the holding of *IHB-II*.

Taken together, the preceding four demonstrations made by Complainants provide the proper test to balance UP's efficiency argument against Complainants' compensation argument. In this case, the evidence shows:

- Revenue-maximization goals motivated UP to adopt Item 55-C and, consistent with that motive, UP designed Item 55-C to maximize revenue, not efficiency. This motive was

³³ Joint Op., pp. 24-29; Joint Reb., pp. 26-27, 38-43.

³⁴ UP Reply, pp. 52-53.

³⁵ Joint Reb. pp. 38-43; Crowley Reb. V.S., pp. 4-25.

³⁶ Joint Op., pp. 9-13.

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inconsistent with the Section 11122(b) requirement that railroads compensate tank car providers for the expense of owning and maintaining tank cars, including the cost of transportation to repair facilities.

- UP only crafted an efficiency justification to communicate Item 55-C to its customers, which undermines UP's claim that efficiency was an objective of Item 55-C, much less its main objective.
- There is no need to improve the efficiency of repair move decisions because tank car providers have ample incentives to make efficient decisions in the absence of Item 55-C, including charges for excess empty miles through the mileage equalization program. Item 55-C does much more to further UP's revenue maximization objective than to foster greater efficiency. Any efficiency benefits from Item 55-C are both incidental and marginal at best.
- UP does not suffer from the circumstances that prompted the ICC to permit repair move charges in *IHB-II*, which further belies UP's efficiency claims and warrants close critical scrutiny by the Board to prevent the subordination of tank car providers' statutory right to be compensated for repair moves to UP's desire to maximize revenue from such moves.

In view of the foregoing evidence, any incidental and marginal efficiency gains from Item 55-C must not eclipse the compensation right of tank car providers in Section 11122(b), which is necessary to encourage the purchase and acquisition of tank cars in accordance with Section 11122(a). Thus, the proper balance between the statutory efficiency and compensation goals is to apply the holding in *IHB-II*, as affirmed by the D.C. Circuit, that compensation must be a predicate to assessment of repair move charges.³⁷ Because UP's revenue-maximizing purpose and design of Item 55-C plainly are antithetical to the compensation requirement in Section 11122(b), the Board should declare Item 55-C to be an unreasonable practice under Section 10702 and a violation of Section 11122(b).

³⁷ Joint Reb., pp. 15-16.

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C. **The principal “efficiency” focus should be upon the “cross-subsidy and misallocation” concerns expressed in *IHB-II*.**

In applying Section 11122(a), the Board’s consideration of “efficiency” should focus on the “cross-subsidy and misallocation” concerns underlying the *IHB-II* decision. In *IHB-II*, the Board sought to resolve those concerns by allowing repair move charges provided that those charges ultimately are paid by railroads, not tank car providers, through the mileage allowance system.³⁸ But that system no longer serves that function effectively today due to significant changes in the rail industry.³⁹

Cross-subsidy and misallocation concerns, however, can be addressed in ways other than the mileage allowance system. For example, the Board could narrow the application of *IHB-II* to permit only terminal and switching railroads to assess repair move charges because that is where the “cross-subsidy and misallocation” problem was greatest in 1987 when the ICC decided *IHB-II* and remains so today.⁴⁰

Nevertheless, even if the Board concludes that Class I railroads also suffer from this inequity today, despite their universal participation in large volumes of loaded tank car revenue movements, there is no need to assess tank car providers with repair move charges to address this concern. There is another option that allows all railroads to separately charge for repair moves without raising conflicts with the compensation requirement of Section 11122(b). This alternate approach works just like the mileage equalization system adopted in Ex Parte No. 328,⁴¹ with a slight adaptation to remove tank car providers from this equation. Under this alternative, all

³⁸ Joint Op., pp. 24-26; Joint Reb., pp. 15-16.

³⁹ Joint Op., pp. 22-23, 26-29; Joint Reb., pp. 17-26.

⁴⁰ Joint Op., pp. 25, 29; Joint Reb., pp. 26-29.

⁴¹ Ex Parte No. 328, *Investigation of Tank Car Allowance System*, 3 I.C.C. 2d 196 (1986).

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railroads may charge for repair moves, but instead of invoicing tank car providers, they would submit their invoices to Railinc.⁴² Railinc would be the clearinghouse for: (1) receiving the invoices; (2) aggregating the total charges from all rail carriers over a defined time period (*e.g.*, annually, quarterly); (3) allocating payment responsibility to each railroad in proportion to its loaded tank car revenue miles over that same time period; (4) subtracting each railroad's total allocated responsibility for repair move charges (*i.e.*, debits) from its total invoiced amounts for repair move charges (*i.e.*, credits) to determine the net amount that each railroad either owes or is owed; and (5) collecting money from those railroads who owe more than they have invoiced and redistributing it to those railroads who have invoiced more than they owe.

This alternative would not require Railinc to do much more than it already does to implement the mileage equalization system today. For example, Railinc currently collects annual data on loaded and empty tank car miles needed to calculate the 106% threshold at which the equalization charge applies; invoices tank car providers who owe equalization charges; collects the revenue from those providers; and distributes that revenue among rail carriers in proportion to their loaded revenue miles.⁴³ Railinc can use this same data to determine the proper allocation of repair move charges to those rail carriers which benefit most from the use of tank cars in loaded revenue service, collect the appropriate revenue from those carriers, and redistribute it to those carriers with the greatest repair move responsibility.

Because this alternative does not depend on the payment of mileage allowances to pass-back repair move charges to tank car providers, it completely avoids the question posed by this case of whether tank car providers are being compensated for repair move charges and it ensures

⁴² Railinc is a subsidiary of the AAR which has responsibility for administering the Ex Parte 328 Agreement, among other matters. Railinc is the publisher of Tariff RIC-6007.

⁴³ *E.g.*, *IHB-II* at 601 n. 5 (describing how the equalization rule works).

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proper allocation of repair move costs among railroads regardless of whether a railroad pays mileage allowances or offers zero-mileage rates in lieu of paying allowances. In addition, because all rail carriers would be responsible to each other for repair move charges, they would have a strong incentive to establish a universal commercially reasonable mileage rate that they would charge each other for repair moves, just as they do for *per diem* charges when railroad-owned cars are on foreign roads.

Because this approach would complement, not replace, mileage equalization, tank car providers would continue to have a disincentive to rack up excessive empty miles and railroads would continue to be compensated for excess empty miles (including repair move miles) beyond the 6% threshold deemed reasonable for empty movements in Ex Parte 328. Indeed, a railroad's mileage equalization revenue now would be *in addition to* repair move charges.

The Board need not mandate this alternative approach, just as the ICC did not mandate the mileage allowance pass-back approach in *IHB-II*. The Board, however, first must reject the assessment of repair move charges on tank car providers due to the lack of compensation required by Section 11122(b) and *IHB-II*. That rejection will provide the rail industry a necessary incentive to consider the foregoing alternative, or some variant, that does not require tank car providers to be the conduit for reallocating repair move responsibility more equitably among all railroads. Otherwise, the rail industry will have no incentive to adopt any alternative that places responsibility directly upon themselves because, at present, they are in the enviable position of being able to profit from repair moves without compensating tank car providers.

Thus, the Board can declare Item 55-C unlawful without concern that the pre-*IHB-II* “cross-subsidization and misallocation” inequities would reemerge. As a transitional measure, until the rail industry implements an alternative that does not impose repair move charges upon

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tank car providers, the Board could restrict the *IHB-II* holding to just permitting terminal and switching carriers to charge tank car providers for repair moves. That would preserve the status quo that has existed for most of the 30-plus years since *IHB-II*.⁴⁴

II. **Issue #2: Whether the Board’s authority to establish the “terms of any ... arrangement” for car service, see 49 U.S.C. § 11122(a)(2), permit it to prescribe a carrier’s maximum charge for an empty repair move.**

As a threshold matter, the second question posed by the Board is *irrelevant* to this proceeding. Complainants’ unambiguous position is that it is an unreasonable practice under Section 10702 and a violation of Section 11122(b) for UP to assess Item 55-C charges when tank car providers are not compensated for those charges, because such compensation is a condition precedent for the imposition of such charges under *IHB-II*. This is true for *any* level of Item 55-C charge, *even a prescribed maximum reasonable charge*, because that charge is a cost of tank car ownership and maintenance to which *tank car providers* are entitled to receive compensation by Section 11122(b). Complainants have not challenged the level of UP’s Item 55-C charges; they have challenged UP’s right to impose *any* empty repair move charge when that charge is not included in the compensation that must be paid to tank car providers.⁴⁵

Nevertheless, the Decision 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,” and specifically directs the parties to provide supplemental briefing on a series of questions, starting

⁴⁴ Joint Op., p. 29.

⁴⁵ The Board’s suggestion that Complainants’ challenge to Item 55-C might be resolved as an unreasonable rate case also is bad policy. The rail industry has demonstrated its ability and desire to shift much of its responsibility for car service to shippers over time. At the same time, the rate case process has grown more complicated, costly, and lengthy. Nor can the conventional rate case process be easily applied to charges, like Item 55-C, that are universal across all shippers and movements (*e.g.*, mileage-based). The ineluctable result of the Board’s effort will be to further empower railroads to create more such charges with no practical regulatory protections.

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with “whether the Board’s authority to establish the ‘terms of any . . . arrangement’ for car service . . . permit it to prescribe a carrier’s maximum charge for an empty repair move.”⁴⁶ Complainants conclude that it does not. Section 11122(a)(2) does not permit the Board to prescribe a carrier’s maximum rate for an empty repair move because it addresses only the Board’s authority over compensation to be *paid by* a rail carrier using a rail car not owned by the rail carrier, not compensation to be *received by* such a rail carrier.

The predecessor to the current version of Section 11122(a)(2) stated:

[T]he Commission may . . . 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 (iii) the penalties or other sanctions for nonobservance of such rules, regulations or practices.⁴⁷

The current version of the statute shortened the forgoing to state, “The regulations may include – (1) the compensation to be paid . . . ; (2) *the other terms of any arrangement* for the use by a rail carrier of a locomotive, freight car, or other vehicle not owned by the rail carrier using the locomotive, freight car, or other vehicle, whether or not owned by another carrier, shipper, or third person; and (3) sanctions for nonobservance.” (emphasis added)⁴⁸ Both versions address only the compensation to be paid by rail carriers that use rail cars they do not own. Section 11122(a) is

⁴⁶ Decision, p. 6.

⁴⁷ 49 U.S.C. § 1(14)(a) (1976) (emphasis added).

⁴⁸ Complainants are not arguing that the prior version of the statute’s use of “contract, agreement or arrangement” constituted a “broader mandate than just the term “arrangement” in §11122(a). Decision at p. 5. Rather, the current iteration appears merely to have condensed the language to just “arrangement,” which is sufficiently broad to encompass contracts and agreements.

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silent as to rates or charges assessed by railroads, which are addressed in other statutory provisions.⁴⁹

Because Complainants contend, first, that it is irrelevant to this case whether the Board possesses authority under Section 11122(a)(2) to prescribe a maximum charge for empty repair moves and, second, that the Board does not possess such authority in the circumstances of this case, the ensuing three questions are moot. Thus, Complainants are not presenting evidence on how the permissible per-car charge should be determined; the level of the appropriate per-car charge in this case; or the Board's authority to award damages for amounts charged in excess of the maximum permissible charge.⁵⁰

III. Conclusion

In response to Issue #1, Complainants' claim against UP is that it violated Sections 10702 and 11122(b), but they concur with the Board's conclusion that the reference to "regulations" in Section 11122(a) also encompasses "complaints" and, thus, that the "purchase, acquisition, and efficient utilization" standard in that subsection is a relevant consideration for evaluating UP's efficiency defense in this case. Under this interpretation of the statute, the fundamental questions are how Item 55-C encourages the purchase, acquisition, and efficient utilization of tank cars and how to balance any efficiency benefits against a tank car provider's compensation rights under Section 11122(b). It hardly requires saying that the provision of compensation for the costs of owning and maintaining tank cars in accordance with Section 11122(b), including the cost of repair moves, encourages the purchase and acquisition of tank cars. UP, although it has not invoked

⁴⁹ See 49 U.S.C §§11101, 10701, 10702, 10704, all of which address the rates that shippers pay railroads.

⁵⁰ Decision, p. 6 (instructing parties to indicate, where appropriate, if they do not believe a response is warranted or applicable).

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Section 11122(a), mounted an “efficiency” defense of Item 55-C in its Reply Evidence and Argument to which the Complainants submitted extensive Rebuttal Evidence and Argument. Thus, consideration of Section 11122(a) in this case is likely to focus upon the efficiency factor for which there already is extensive evidence in the record.

Complainants have established four sets of facts to show that: (1) UP’s efficiency defense is a *post hoc* justification of Item 55-C to obfuscate its true objective to maximize revenue; (2) UP designed Item 55-C to maximize revenue, not efficiency, and that is precisely what Item 55-C has accomplished; (3) tank car providers had, and continue to have, ample efficiency incentives in the absence of Item 55-C; and (4) UP does not bear a disproportionate responsibility for repair moves relative to its participation in loaded revenue moves, which was the problem that prompted the ICC to permit empty repair move charges in *IHB-II*. Consequently, whatever efficiency benefits are derived from Item 55-C, they are incidental and incremental at best and cannot eclipse a tank car provider’s statutory right to compensation for repair move charges. The proper balance between the statutory efficiency and compensation goals, thus, is to apply the holding in *IHB-II*, as affirmed by the D.C. Circuit, that compensation must be a predicate to assessment of repair move charges.

In response to Issue #2, Complainants do not believe that Section 11122(a)(2) permits the Board to prescribe a maximum reasonable charge for Item 55-C because that section addresses only the Board’s authority over compensation to be *paid by* a rail carrier using a rail car not owned by the rail carrier, not compensation to be *received by* such a rail carrier. Such authority derives from other statutory provisions that are not at issue in this case. More important, the level of the Item 55-C charge is not relevant to this case because, no matter what the rate level, Item 55-C

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would be unlawful because tank car providers are not compensated for that cost of tank car ownership as required by Section 11122(b) and *IHB-II*.

For the foregoing reasons, Complainants aver that the Board has all the evidence it needs to conclude that Item 55-C is an unreasonable practice under Section 10702 and violates Section 11122(b).

Respectfully submitted,



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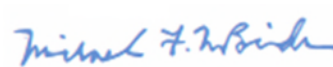
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April 21, 2021

CERTIFICATE OF SERVICE

I do hereby certify that on this 21st day of April, 2021, I have served a copy of
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