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NORTH AMERICA FREIGHT CAR	)	
ASSOCIATION; AMERICAN FUEL &	)	ENTERED
PETROCHEMICALS MANUFACTURERS;	)	Office of Proceedings
THE CHLORINE INSTITUTE; THE	)	April 21, 2021
FERTILIZER INSTITUTE; AMERICAN	)	Part of
CHEMISTRY COUNCIL; ETHANOL	)	Public Record
PRODUCTS, LLC D/B/A POET ETHANOL	)	
PRODUCTS; POET NUTRITION, INC.; and	)	STB Docket No. NOR 42144
CARGILL INCORPORATED,	)	
	)	Consolidated with:
Complainants,	)	Docket No. NOR 42150
	)	Docket No. NOR 42152
v.	)	Docket No. NOR 42153
	)	
UNION PACIFIC RAILROAD COMPANY,	)	
	)	
Defendant.	)	
	)	

April 21, 2021

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I. Introduction

The Board's Order requiring supplemental briefing suggests Congress may have erred when it recodified 49 U.S.C. § 1(14)(a) (1976) by omitting language authorizing the agency to adjudicate complaints about, and prescribe maximum rates for, empty repair moves. However, § 1(14)(a) never authorized the agency to regulate rates for empty repair moves. Regulation of rail carrier rates for transportation services is governed by the provisions in Chapter 107 of Title 49 (formerly codified primarily in 49 U.S.C. § 1(5) and § 15 (1976)). Also, § 1(14)(a) conferred only rulemaking authority – it never authorized the agency to adjudicate claims involving rail carrier practices relating to car service. In short, Congress did not make a mistake when it recodified § 1(14)(a) as current 49 U.S.C. § 11122(a) – recodification stated clearly what was always the law.

Even if Complainants¹ could have sought the relief suggested by the Order, they chose to pursue different claims. Union Pacific framed its discovery to address those claims. The Board should resolve those claims, not inject new factual issues and legal theories at this very late stage of the process. If the Board concludes Complainants are not entitled to relief, it should dismiss their claims. If Complainants then elect to pursue new claims based on new legal theories, they can of course file new complaints that provide Union Pacific appropriate notice and a full, fair

¹ The complainants in Docket No. NOR 42144 are North America Freight Car Association, American Fuel & Petrochemicals Manufacturers, The Chlorine Institute, Inc., The Fertilizer Institute, American Chemistry Council, Ethanol Products, LLC d/b/a POET Ethanol Products, POET Nutrition, Inc., and Cargill Incorporated (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 as Complainants.

opportunity to respond. Any other approach would raise significant and fundamental due process concerns.

II. Background: Complainants' claims lack merit.

Before 2015, tank cars traversing Union Pacific's network received extraordinary treatment when moving empty to and from repair facilities: those movements bore no separate transportation charge. Thus, a tank car with all its loaded movements on another railroad could move empty over Union Pacific to one repair facility for cleaning, a different repair facility for maintenance, and then back to the other railroad for loading, all with no charge from Union Pacific. For all other private cars, Union Pacific charged separately for empty repair moves, unless the empty move directly followed a loaded move on Union Pacific.²

On January 1, 2015, Union Pacific eliminated this extraordinary treatment of empty tank cars by adopting the challenged charges in UP Tariff 6004, Item 55-C, Subpart D (Item 55-C).³ Under Item 55-C, Union Pacific charges separately for empty repair moves of tank cars in the same circumstances as it charges for empty repair moves of all other private cars. Union Pacific's rates are based on the distance the empty tank cars move on Union Pacific.

On March 31, 2015, NAFCA Complainants filed a complaint against Union Pacific, which was amended on June 2, 2015. In Count I, NAFCA Complainants allege Union Pacific's adoption of the charges in Item 55-C was "(a) an unreasonable practice in violation of 49 U.S.C. § 10702, and (b) a violation of [Union Pacific's] statutory obligations to compensate private car

² See Union Pacific's Reply Evidence and Argument, Ex. 2 (UP Tariff 6004-C, Item 50-F).

Union Pacific also does not charge for moving empty cars to and from repair facilities if cars are damaged by Union Pacific or waybilled to a shop by Union Pacific personnel after being taken out of service following a Union Pacific inspection. As used in this pleading, the term "empty repair moves" does not include movements of cars to and from repair facilities resulting from Union Pacific-caused damage or Union Pacific-conducted inspections.

³ See Union Pacific's Reply Evidence and Argument, Ex. 1 (UP Tariff 6004-C, Item 55-C).

owners for the use of their tank cars set forth in 49 U.S.C. § 11122(b).”⁴ In Count II, which does not directly involve Item 55-C, NAFCA Complainants allege Union Pacific’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.”⁵

On December 19 and 30, 2016, respectively, Valero and Tesoro filed complaints against Union Pacific, raising a substantially similar challenge to Item 55-C as NAFCA Complainants. Their complaints *do not* include a Count II. On August 1, 2017, Arkema filed a complaint substantially similar to the complaints filed by Valero and Tesoro.

With respect to Count I, Complainants concede Union Pacific is entitled to compensation for empty repair moves. They also acknowledge the Interstate Commerce Commission (ICC) ruled in *General American Transportation Corp. v. Indiana Harbor Belt Railroad (IHB-II)*, 3 I.C.C.2d 599 (1987), that railroads may separately charge for empty repair moves. However, they say railroads may obtain compensation for empty repair moves *only* through charges on *loaded* tank car moves, *unless* railroads separately pay shippers “mileage allowances.”⁶ Joint Evidence at 28 (“Indeed, this is how UP recovered its repair move costs for private tank cars prior to Item 55-C.”).⁷ In other words, Complainants say Union Pacific can charge for empty

⁴ NAFCA Am. Compl. at 8.

⁵ *Id.* at 9.

⁶ “Mileage allowances” are mileage-based fees that rail carriers sometimes pay shippers for using their cars. The current formula used to calculate standard mileage allowances for tank cars was established in the National Tank Car Allowance Agreement (Ex Parte 328 Agreement), an industry-wide agreement adopted by the Interstate Commerce Commission (ICC). *See Investigation of Tank Car Allowance System*, 3 I.C.C.2d 196 (1986).

⁷ “Joint Evidence” refers to Complainants’ joint submission of opening evidence and arguments, filed on February 22, 2019.

repair moves *indirectly*, through rates on loaded moves, without paying mileage allowances, but if it wants to charge for empty repair moves *directly*, it must pay shippers mileage allowances.

Complainants intentionally framed their complaints narrowly. They did not challenge Union Pacific's *right* to compensation for empty repair moves. They did not challenge Union Pacific's *rates* for empty repair moves. They challenged only Union Pacific's *practice* of separately charging for empty repair moves without paying mileage allowances.

Complainants' challenge lacks merit. If Complainants' interpretation of *IHB-II* were correct, Union Pacific could simply pay shippers mileage allowances, raise shippers' rates on loaded moves to offset the new mileage allowance payments, and continue charging for empty repair moves. The process would create more work for accountants but leave the parties in the same economic position as today.⁸ Union Pacific's reply evidence included testimony from a company employee with many years of rate-setting experience who confirmed this offsetting process actually occurs in those unusual cases in which shippers insist on receiving mileage allowance payments.⁹

Complainants' interpretation of *IHB-II* is not correct. The ICC's decision in *IHB-II* allowed all rail carriers to charge separately for empty repair moves, regardless of whether they paid mileage allowances. Shippers understood that *IHB-II* did not turn on whether rail carriers paid mileage allowance. In fact, shippers using "zero-mileage rates" – *i.e.*, rates established for shippers that agree to forgo mileage allowance payments – sought reconsideration, arguing the ICC failed to consider *IHB-II*'s effects on them. The ICC denied their petition, reiterating that

⁸ If Union Pacific were required to pay a shipper an additional \$x per car-mile, it would know it could raise its rate to the shipper by the same \$x per car-mile on corresponding moves without any reduction in demand.

⁹ See Union Pacific's Reply Evidence and Argument, Verified Statement of Robert C. Hirst.

the “free repair move rule” it rejected in *IHB-II* was “outmoded,” “impractical,” and “irrational,” and *encouraging* rail carriers to adopt separate empty repair move charges:

[The free repair move rule was] an outmoded, impractical, and irrational prohibition against tariff charges for repair movements charges based upon the theory that private cars were instrumentalities of transportation. Instead, we recognized that, *in moving cars for repairs, the railroad is performing a distinct service for which a tariff charge should be made*

Gen. Am. Transp. Corp. v. Indiana Harbor Belt R.R. (“*IHB-III*”), ICC Docket No. 35404, slip op. at 2 (ICC served Feb. 29, 1988) (emphasis added). More recently, the Board reiterated that the decision to allow separate charges for empty repair moves “did not turn on whether a portion of the empty repair move charges might be recovered through allowances.” *N. Am. Freight Car Ass’n – Protest & Petition for Investigation – Tariff Publications of the Burlington N. & Santa Fe Ry.*, STB Docket No. 42060 (Sub-No. 1), slip op. at 6 (STB served Aug. 13, 2004).

With respect to Count II, Complainants relinquished their claim that Union Pacific “refus[es]” to pay mileage allowances when they stipulated: “There is no evidence that [Union Pacific] has refused a request to establish rates for movements in cars that provide for payment of a mileage allowance.”¹⁰ Moreover, Board precedent permits railroads to use zero-mileage rates. *See LO Shippers Action Comm. v. Aberdeen & Rockfish Ry.*, 4 I.C.C.2d 1, 17 (1987) (“Where a carrier publishes a rate specifically applicable only to movements in private cars, the carrier is not obligated to provide a car and has no obligation to publish an allowance.”), *aff’d sub nom. LO Shippers Action Comm. v. ICC*, 857 F.2d 802 (D.C. Cir. 1988). Union Pacific also showed the Individual Complainants¹¹ were all voluntarily shipping their traffic under contracts

¹⁰ See Union Pacific’s Reply Evidence and Argument, Ex. 59 (Stipulation #4).

¹¹ The Individual Complainants are POET Ethanol, POET Nutrition, Cargill, Valero, Tesoro, and Arkema.

and tariffs providing for zero-mileage rates, and none had ever asked Union Pacific for rates that provide for mileage allowances – even after four years of litigating this case.¹² Finally, Union Pacific showed that shippers with zero-mileage rates would pay higher rates if they insisted on receiving mileage allowance payments.¹³

III. Argument: The Board’s Order is misguided.

The Board’s Order asks whether Complainants could have pursued an entirely different approach to challenge Item 55-C – whether, instead of arguing that Union Pacific cannot charge separately for empty return moves, they could have asked the Board to prescribe the maximum rate that Union Pacific could charge for empty repair moves pursuant to authority granted to the Board under § 11122(a). The Board suggests Complainants may have overlooked the possibility of pursuing that approach because the current text of § 11122(a) indicates the Board’s authority under that statute is confined to rulemaking. Order at 4. The Board observes that the version of § 11122(a) in existence immediately prior to the 1978 recodification stated the ICC could act “upon complaint.” *Id.* at 5. The Board observes that recodification was not intended to make substantive changes to the statute, and it asks whether Complainants could have filed a complaint requesting that the Board “prescribe a maximum charge” for Union Pacific’s empty repair moves pursuant to § 11122(a). *Id.* at 6. It then asks the parties to assume it has authority to prescribe a maximum charge and address how it would determine the charge, what the appropriate charge would be in this case, and whether it could incorporate amounts charged in excess of the permissible charge into a damages award. *Id.*

¹² See Union Pacific’s Reply Evidence and Argument, Verified Statement of Douglas Craven.

¹³ See *id.*, Verified Statement of Robert C. Hirst.

In Part III.A, Union Pacific addresses the Board’s first question and shows Complainants could not have sought prescription of maximum rates for empty repair moves under § 11122(a). In Part III.B., Union Pacific addresses the Board’s remaining questions. In Part III.C, Union Pacific explains why giving Complainants a Board-inspired “do-over” by requiring “supplemental briefing” regarding a claim that does not appear in their complaints raises fundamental due process concerns.

A. The Board’s Order misinterprets § 1(14)(a).

Section 11122(a) does not authorize the Board to prescribe a maximum charge for empty repair moves. As discussed below, § 1(14)(a) addressed the use of freight cars, not rates rail carriers charge for their transportation services. The Board’s authority to regulate rail carrier rates is found in Chapter 107 of Title 49 (previously codified primarily in 49 U.S.C. § 1(5) and § 15 (1976)). Moreover, § 1(14)(a) authorized only rulemaking proceedings, not adjudications of complaints against rail carriers. Congress did not overlook a separate function of § 1(14)(a) when it recodified that provision. It merely simplified the statute’s language.

1. Section 11122(a) does not authorize the Board to regulate rates for transportation service under the pretext of regulating car service.

Section 11122(a) does not authorize the Board, and § 1(14)(a) did not authorize the ICC, to establish the maximum rate a rail carrier may charge for empty repair moves. An empty repair move is transportation provided by a rail carrier. The Board’s authority to regulate the maximum rate a rail carrier may charge for transportation is governed exclusively by the provisions of Chapter 107 of Title 49. If Complainants want to challenge the level of rates Union Pacific charges for empty repair moves, they must invoke the Board’s authority under § 10704, not its authority under § 11122(a).

In fact, § 11122(a) does not give the Board *any* authority over *rates* rail carriers charge for *transportation services*. Section 11122(a), authorizes the Board, and § 1(14)(a) authorized the ICC, to establish regulations to encourage efficient sizing and use of the nation’s freight car fleet. For example, the ICC invoked § 1(14)(a) to establish rules governing compensation a rail carrier must pay to use freight cars not owned by the rail carrier – *e.g.*, mileage allowances or per diem rates, *see* § 1(14)(a)(i) – and rules governing terms of a rail carrier’s use of cars not owned by the rail carrier – *e.g.*, rules regarding reloading and routing of empty cars, *see* § 1(14)(a)(ii).¹⁴ Section 1(14)(a)(iii) also authorized the ICC to establish penalties for violating rules established under § 1(14)(a). However, § 1(14)(a) never authorized the ICC to regulate the rates rail carriers charge for transportation services, including empty repair moves, whether through rulemaking or adjudication.

IHB-II and *IHB-III* confirm that § 11122(a) does not authorize the Board, and § 1(14)(a) did not authorize the ICC, to establish a rule prohibiting rail carriers from charging separately for empty repair moves. In affirming the ICC’s decision in *General American Transportation Corp. v. Indiana Harbor Belt Railroad* (“*IHB-P*”), 357 I.C.C. 102 (1977), the Seventh Circuit said § 1(14)(a) authorized the ICC to require rail carriers “to provide empty repair movements for privately-owned cars without extra compensation.” *Indiana Harbor Belt R.R. v. Gen. Am. Transp. Corp.*, 577 F.2d 394, 402–03 (7th Cir. 1978). But the court mistakenly relied on decisions involving ICC regulation of allowances *rail carriers pay shippers* for the *use of*

¹⁴ As discussed below in Part III.A.2.(b), although § 11122(a)(2) refers to rules governing the use of “a locomotive, freight car, or other vehicle,” the parallel provision in § 1(14)(a)(ii) does not include the words “freight car.” Thus, if § 1(14)(a)(ii) is not just elaborating on various possible subjects of “rules, regulations, and practices” but has some independent significance, the Board would not be authorized to address the terms of rail carriers’ use of *freight cars* owned by others. *See Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89 (2010) (cited in Order at 5).

shipper-owned cars, not ICC regulation of rates *shippers pay rail carriers* for providing transportation service. The ICC corrected that mistake in *IHB-II*. The agency reversed *IHB-I*, thus allowing rail carriers to charge separately for empty repair moves, after recognizing that *IHB-I*'s rationale was “in direct conflict with Congressional direction in the statutory provisions of the 4R Act and the Staggers Act” governing rail carrier ratemaking that were codified in Chapter 107 of Title 49. *IHB-II*, 3 I.C.C.2d at 611. In *IHB-III*, the ICC reaffirmed its conclusion in *IHB-II* that empty repair moves were “a distinct rail service for which a tariff charge should be made under the provisions of 49 U.S.C. 10728.” *IHB-III* at 2. (Section 10728 explicitly encouraged separate pricing for distinct services. In passing the ICC Termination Act of 1995, Congress repealed § 10728 and several other rate-related provisions as “unnecessary” in light of the general provisions governing rail rates.)¹⁵

In sum, the ICC concluded in *IHB-II*, and reaffirmed in *IHB-III*, that rates for empty repair moves are governed by the provisions of Chapter 107, in which Congress authorized rail carriers to “establish any rate for transportation or other service provided by the rail carrier,” 49 U.S.C. § 10701(c), subject only to the requirement that the rate must be “reasonable” if the “rail carrier has market dominance over the transportation to which [the] particular rate applies,” *id.* § 10701(d)(1). Section 11122(a)'s provisions governing car *service* do not displace § 10701's provisions governing *rate* regulation.

¹⁵ See S. Rep. No. 104-176 at 22 (“Section 10728—which expressly permits separate pricing for distinct rail services—is similarly unnecessary.”).

2. Section 11122(a) authorizes the Board to engage in industry-wide rulemaking proceedings, not to adjudicate claims regarding an individual rail carrier's rates.

a) Recodification merely streamlined § 1(14)(a)'s language.

Even if § 11122(a) authorized the Board to establish generally applicable rules regarding separate charges for empty repair moves, it would not authorize the Board to adjudicate claims regarding maximum rates an individual carrier could charge. Section 1(14)(a) authorized the ICC to establish general rules applicable to all rail carriers – “rules, regulations, and practices with respect to car service by common carriers by railroad.” Congress enacted § 1(14)(a) to provide the ICC authority to regulate the “freight cars of the Nation,” which had become “in essence a single common pool, used by all roads.” *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 743 (1972); *see also ICC v. Oregon Pacific Indus., Inc.*, 420 U.S. 184, 187 (1974) (“[C]ar service rules dealt with the management of a ‘single common pool’ of cars ‘used by all roads’” (quoting *Allegheny-Ludlum*, 406 U.S. at 743)).

Section 1(14)(a) did not authorize the ICC to adjudicate whether an individual rail carrier's conduct was lawful. Before the 1978 recodification, courts consistently recognized that § 1(14)(a) “grant[ed] authority to the Commission to make rules and regulations of a prospective nature.” *United States v. Florida East Coast Ry.*, 410 U.S. 224, 239 (1973); *see also Allegheny-Ludlum*, 406 U.S. at 757 (ICC proceedings under § 1(14)(a) “were an exercise of legislative rulemaking power”); *Boston & Maine R.R. v. United States*, 358 U.S. 68, 70 (1958) (referring to the ICC's “recognized rule-making power over car-hire rates conferred by § 1(14)(a)”; *Ann Arbor R.R. v. United States*, 358 F. Supp. 933, 934 (E.D. Pa. 1973) (referring to the ICC's “rule making authority embodied in Section 1(14)(a)”; *id.* at 937 (in a proceeding governed by § 1(14)(a), the ICC was “obligated to afford fair notice of exactly what [it] intends to do . . . so that all interested parties have a fair opportunity to participate in the rule making process”).

Congress’s limitation of § 1(14)(a) to industry-wide rulemaking is clearly shown in Congress’s approach to addressing the compensation rail carriers pay for the use of freight cars. Even though § 1(14)(a) clearly authorized the ICC to establish industry-wide rules regarding the compensation rail carriers pay for the use of freight cars, it did *not* authorize the ICC to prescribe the maximum compensation an individual rail carrier could pay. The prescription of maximum compensation for the use of freight cars was governed by a separate statute – 49 U.S.C. § 15(15) (1976). That is, § 1(14)(a) authorized (but did not require) the ICC to establish industry-wide rules for compensation. Where the ICC did not establish industry-wide rules but a rail carrier paid compensation, or where the ICC established industry-wide rules but a rail carrier paid a higher rate, challenges to the carrier’s payments were governed by § 15(15). Specifically, where a shipper furnished freight cars used to transport its property, § 15(15) granted the ICC authority to “determine what is a reasonable charge as the maximum to be paid by the carrier or carriers . . . for the use of the instrumentality so furnished, and fix the same by appropriate order.” Post-recodification, this authority is found in § 10745, which grants the Board authority to “prescribe the maximum reasonable charge or allowance a rail carrier subject to its jurisdiction may pay for . . . [an] instrumentality [used in the transportation service].” 49 U.S.C. § 10745. If Congress intended § 1(14)(a) to authorize the adjudication of complaints and establishment of maximum charges in proceedings involving individual rail carriers, it would not have needed to grant the ICC authority under different statutes to address complaints seeking to prescribe maximum charges.

Recodification of § 1(14)(a) involved using fewer words to state what had always been true: the statute authorized the agency to make and enforce industry-wide rules regarding car service. There was no need to say the ICC could institute a rulemaking “upon complaint of an

interested party or upon its own initiative without complaint.” Nor was there any need to recite the well-understood requirement of “notice and an opportunity for a hearing.”

The Board’s Order appears to place some particular significance on § 1(14)(a)’s use of the phrase “upon complaint of an interested party.” Order at 5. Read in context, however, the phrase merely refers to an occurrence that could prompt the agency to “*establish reasonable rules, regulations, and practices* with respect to car service by common carriers by railroad.” Section 1(14)(a) never authorized adjudication of complaint proceedings against individual rail carriers.

b) The Board’s Order does not accurately reflect § 1(14)(a)’s actual language.

The Board’s Order has the potential to create confusion about the meaning of § 1(14)(a). When the Order paraphrases § 1(14)(a), it omits certain important statutory language and ignores the absence of other important statutory language. The Order omits important language when it quotes a portion of § 1(14)(a) to suggest the Board has “authority to establish the ‘terms of any . . . arrangement’ for car service.” Order at 6 (quoting § 1(14)(a)). Section 1(14)(a) did not authorize the ICC to establish the “*terms*” of any individual rail carrier’s arrangement for the use of freight cars. It authorized the ICC to establish “*rules, regulations, and practices*” regarding compensation and other terms applicable to all rail carriers. Specifically, § 1(14)(a) authorized the ICC to “establish reasonable *rules, regulations, and practices* with respect to car service by *common carriers by railroad . . . 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.” Confirmation that §§ 1(14)(a)(i) and (ii) addressed *rules* about “compensation” and “other terms” is provided by § 1(14)(a)(iii),

which referred to “penalties or other sanctions for nonobservance of such *rules, regulations, or practices.*”

The Order’s focus on § 1(14)(a)(ii)’s use of the word “terms” is particularly misplaced because § 1(14)(a)(ii) did not address “terms” for the use of “freight cars.” Section 1(14)(a)(i) addressed “*compensation . . . for the use of any locomotive, freight car, or other vehicle.*” But § 1(14)(a)(ii) addressed “*terms . . . for the use of any locomotive or other vehicle not owned by the carrier.*” In other words, even if § 1(14)(a)(ii) did not just identify topics the agency could address through “rules, regulations, and practices,” § 1(14)(a)(ii) would not authorize the agency to establish “terms” for an individual rail carrier’s use of “freight cars.” Section 11122(a) does include the words “freight car” in § 11122(a)(2) – the analog of § 1(14)(a)(ii). However, the difference must be resolved in favor of the pre-1978 language, as the Board recognizes. *See* Order at 5 (citing *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89 (2010)).

The Board is also misreading § 1(14)(a) if it believes the “terms” it may establish include “compensation.” Order at 5 (discussing “the agency’s discretion to prescribe car service terms, including compensation”). Section 1(14)(a) expressly distinguished between “compensation” and “other terms.” Where § 1(14)(a) referred to “compensation,” it referred to a very specific type of compensation: “the compensation to be paid for the use of any locomotive, freight car, or other vehicle.” 49 U.S.C. § 1(14)(a)(ii) (1976). Union Pacific’s challenged charges in Item 55-C are not compensation Union Pacific *pays* for the use of freight cars, they are rates Union Pacific *charges* to move freight cars to repair facilities. Thus, even if § 1(14)(a) authorized the agency to prescribe the maximum compensation a rail carrier could pay for using freight cars, it would not have authorized the agency to prescribe the maximum rates a rail carrier could charge for empty repair moves.

Finally, even if § 1(14)(a) authorized the agency to establish “rules, regulations, and practices” applicable to an individual rail carrier, the agency could not prescribe a maximum rate for empty repair moves under the pretext of regulating a rule, regulation, or practice relating to car service. Congress enacted specific rules and standards for regulating rates charged by rail carriers. The Board may not circumvent those rules and standards by purporting to address a “practice” when it is really regulating rates. *See Union Pacific R.R. v. ICC*, 867 F.2d 646 (D.C. Cir. 1989). When a challenged “practice” is “manifested exclusively in the level of rates . . . , [it] may only be challenged as an unreasonable rate after a finding of market dominance.” *Cargill, Inc. v. BNSF Ry.*, STB Docket No. NOR 42120, slip op. at 6 (STB served Jan. 4, 2011) (emphasis omitted).

In sum, the 1978 recodification of § 1(14)(a) did not change the meaning of § 1(14)(a). The current language in § 11122(a) correctly reflects that § 1(14)(a) granted the agency authority to establish industry-wide rules regarding cars service, not authority to adjudicate complaints against individual rail carriers or prescribe rates for transportation services. If Complainants want to challenge Union Pacific’s rates for empty repair moves, they must file a rate case.

B. The Board must regulate rates for empty repair moves using the same standards applicable to rail carrier rates for other transportation services.

Union Pacific’s response to the first question in the Board’s Order should eliminate any need to respond to the remaining questions, which are predicated on the erroneous assumption that the Board could prescribe maximum rates for empty repair moves under § 11122(a). *See* Order at 6. In the sections below, Union Pacific briefly addresses the issues raised by the remaining three questions.

1. The Board should regulate maximum rates for empty repair moves using its standards for regulating rates, not a standard designed to “encourage the purchase, acquisition, and efficient use of freight cars.”

The Order’s second question asks how the Board should determine permissible charges for empty repair moves in light of the statutory requirement that its car service rules encourage the “purchase, acquisition, and efficient utilization” of freight cars. Order at 6. The question itself reinforces the point that Congress never intended the Board to address maximum rates for empty repair moves in § 11122(a). Rates rail carriers charge for empty repair moves serve the same purposes as the rates carriers charge for other transportation services, and thus they should be regulated under the same standards. They should not be subject to special standards designed to encourage the “purchase, acquisition, and efficient utilization” of freight cars.

The ICC’s recognition that rates for empty repair moves serve the same purposes as rates for other rail transportation services was critical to its decision in *IHB-II*. The ICC did not reject the free repair move rule because of its effects on the acquisition and efficient use of freight cars. The ICC rejected the rule because it was inconsistent with Congress’s approach to rate regulation under the 4R Act and the Staggers Act: it was “directly contrary to current statutory provisions that require the Commission to encourage efficient pricing and provide all rail carriers with a realistic opportunity to earn adequate revenues.” *IHB-II*, 3 I.C.C.2d at 611. The ICC also said the free repair move rule was “also inconsistent with current statutory requirements because it requires carriers to establish rates or free movements which do not contribute to going concern value . . . , prohibits individual pricing for distinct services . . . , encourages cross-subsidization . . . , and promotes inefficiency by giving private car owners little or no incentive to consider transportation costs in selecting repair facilities.” *Id.*

The statutory objectives the ICC recognized in *IHB-II* – promoting efficient pricing, discouraging cross-subsidization, providing the opportunity to earn adequate revenues, and encouraging efficient use of transportation resources – are the same objectives that govern regulation of rail rates today. *See* 49 U.S.C. §§ 10101, 10701, 10704.¹⁶

The record in this proceeding confirms Union Pacific’s separate charges for empty repair moves serve the same objectives as rates charged for other transportation services; namely, they ensure Union Pacific is compensated for the transportation it provides, they eliminate cross-subsidies among railroads and shippers, and they promote efficiency by giving shippers incentives to consider transportation costs when planning repairs and repair moves. The record also confirms Union Pacific’s separate charges are serving their intended purposes. Briefly, the record shows:

Union Pacific adopted Item 55-C to ensure it would be compensated for providing empty repair moves, to eliminate cross-subsidies, and to promote efficiency by giving shippers appropriate incentives to consider transportation costs when planning repairs and repair moves. *See* Union Pacific’s Reply Evidence and Argument at 11–14, 73–77 & Verified Statement of Kenny Rocker at 1–8.

- Union Pacific could not accomplish its objectives through charges on loaded movements because empty repair moves are a separate service with separate demand characteristics – that is, a shipper’s empty repair moves have no necessary connection to its loaded moves. For example, cars moving in loaded service on one railroad often move empty to repair facilities on other railroads; empty moves are infrequent for any single car and not in any fixed proportion to loaded moves; and different shippers have different levels of demand for empty repair moves depending on the products they ship and their investments in repair facilities. *See* Union Pacific’s Reply Evidence and Argument at 14–17 & Verified Statement of Michael R. Baranowski at 5, 7–10 & Verified Statement of Kevin Murphy at 12–13.
- Union Pacific’s concerns about cross-subsidies are valid and recognized by Complainants themselves. “Free” empty repair moves create cross-subsidies among carriers, *see* Union

¹⁶ The economic justification for allowing rail carriers to charge separately for empty repair moves is discussed in a verified statement provided by Professor Kevin M. Murphy. *See* Union Pacific’s Reply Evidence and Argument, Verified Statement of Kevin M. Murphy at 3–4, 8–20.

Pacific's Reply Evidence and Argument at 51–53, and among shippers with different demands for empty repair moves, *see id.* at 54–55. “Free” empty repair moves also distort markets for repair facilities *see id.* at 55, and markets for new tank cars, *see id.*

- Union Pacific's concerns about efficiency and incentives are valid, as demonstrated through Complainants' documents and deposition testimony. Before Union Pacific adopted Item 55-C, shippers had no regard for costs empty repair moves imposed on rail carriers when selecting repair facilities – they would send cars to distant repair facilities or move cars empty from one repair facility to another just to save on repair charges or obtain faster repairs – because they did not need to consider Union Pacific's costs to provide the transportation service. *See id.* at 56–66.
- Union Pacific's adoption of Item 55-C has actually given shippers incentives to make more efficient decisions about empty repair moves. Shippers are placing more focus on car management (to reduce the number of empty repair moves) and shop selection (to minimize transit distance), and they are factoring in the costs of empty repair moves when deciding whether to perform repairs on-site. *See id.* at 66–71.

* * *

The record in this proceeding demonstrates that Union Pacific adopted separate charges for empty repair moves to serve the same purposes as rates for other transportation services, and that the separate charges are in fact serving those purposes. If a shipper believes Union Pacific's separate charges exceed a reasonable maximum level, the shipper should challenge them under the standards used to regulate rates, not the standards that apply to car service rules.

Even if the Board concludes it has authority to develop a special rate reasonableness standard for charges for empty repair moves, it should not proceed without providing industry-wide notice and an opportunity to be heard. Union Pacific is far from the only rail carrier with separate charges for empty repair moves. Union Pacific believes most major rail carriers have adopted separate charges for empty repair moves of both tank cars and other types of private equipment.¹⁷ The issue is much broader than this one pending case.

¹⁷ *See* Union Pacific's Reply Evidence and Argument at 48.

2. Union Pacific cannot calculate maximum reasonable charges for the empty repair moves at issue in this proceeding.

The Order's third question asks what the "appropriate per-car charge" should be for the empty repair moves at issue in this proceeding. Order at 6. As discussed above, Union Pacific believes the Board should determine maximum reasonable rates for empty repair moves using the same standards that apply to other rates. Thus, the "appropriate" charge should be the rate established in the applicable Union Pacific tariff, unless a shipper shows (1) Union Pacific has market dominance over the transportation to which the rate applies, and (2) the rate exceeds a reasonable maximum as determined using one of the Board's established methods for determining the reasonableness of challenged rates. *See* 49 U.S.C. §§ 10701, 10707.

Union Pacific believes application of the Board's rate reasonableness standards would show the empty repair move charges at issue here are reasonable. In many cases, if a shipper believed Union Pacific's rates were unreasonable, it could avoid paying. As the record in this proceeding shows, shippers control, or at the very least, they influence, when and where their empty tank cars move for repairs. Shippers can almost always direct cars to repair facilities immediately following a loaded move (and thus pay nothing), and use repair facilities served by other rail carriers (and thus eliminate or at least minimize Union Pacific's role in moving cars from repair facilities to loading points). Shippers can also perform many repairs on site rather than move cars to repair facilities. In short, when shippers actually pay Union Pacific's charges, they have likely concluded the charges are reasonable. However, in the 30 days provided by the Order, Union Pacific could not possibly analyze Individual Complainants' empty repair moves to evaluate market dominance and rate reasonableness issues on a movement-specific basis.

If the Board concludes it is authorized to develop a special rate reasonableness standard for charges for empty repair moves, and if it decides to develop and apply those standards in this

proceeding, it should provide Union Pacific an opportunity to conduct discovery under the new standard. Union Pacific agrees with the Board that “some of the evidence already submitted into the record” might be relevant to a rate standard based on encouraging the “purchase, acquisition, and efficient utilization” of freight cars. Order at 6 n.7. However, Union Pacific’s discovery in this proceeding focused on obtaining evidence to address legal theories Complainants actually pled and pursued in their complaints. If Complainants are allowed to pursue new claims under a new standard, due process requires the Board to provide Union Pacific an opportunity to conduct discovery regarding the new claims and new standard, as discussed below in Part III.C.

3. The Board could not establish damages here based on a new rate reasonableness standard.

The Order’s fourth question asks whether the Board could “incorporate amounts charged in excess of the permissible charge into a potential damages award.” Order at 6. The answer is “No.” Complainants chose not to pursue a rate reasonableness case. The evidence in the record is therefore insufficient for the Board to make rate reasonableness determinations under its well-established standards for determining whether rates exceed a reasonable maximum.

The Board also could not award damages in this proceeding based on its evaluation of the reasonableness of charges for empty repair moves using some new, special standard designed to regulate car service – even setting aside all the reasons the Board lacks authority to establish and apply such a standard under § 11122(a) and setting aside all the due process problems with the supplemental briefing approach followed in the Board’s Order. An agency is “barred from applying a new rule in the adjudication in which it is announced if doing so would work a ‘manifest injustice.’” *Garvey v. Nat’l Transp. Safety Bd.*, 190 F.3d 571, 584 (D.C. Cir. 1999) (quoting *Cassel v. FCC*, 154 F.3d 478, 487 (D.C. Cir. 1998)). “[T]he issue boils down to the question of whether the regulated party reasonably and detrimentally relied on a previously

established rule.” *Id.* at 584–85. Here, Union Pacific developed and charged rates for empty repair moves in reliance on *IHB-II*, which allowed rail carriers to charge for empty repair moves just as they charge for other transportation services.¹⁸ Union Pacific’s reliance was reasonable because the Board and the ICC had repeatedly reaffirmed the holding and logic of *IHB-III*. *See IHB-III; Charges for Movement of Empty Cars, Buffalo & Pittsburgh R.R.*, 7 I.C.C.2d 18 (1990); *N. Am. Freight Car Ass’n – Protest & Petition for Investigation – Tariff Publications of the Burlington N. & Santa Fe Ry.*, STB Docket No. 42060 (Sub-No. 1) (STB served Aug. 13, 2004). Union Pacific’s reliance also was reasonable because Union Pacific and other rail carriers have charged separately for empty repair moves of other types of cars for many decades without ever being challenged.¹⁹ Union Pacific certainly had no inkling that its rates for empty repair moves could be found unreasonable under a standard so novel that the Board is only now asking the parties “[h]ow should the permissible per-car charge be determined?” Order at 6.

C. The Board’s Order raises due process concerns.

Even if Complainants could have pursued the rate reasonableness claims suggested by the Order, the injection of new claims into these proceedings at this stage would raise significant due process concerns. The Order requires Union Pacific to respond to a legal theory Complainants never invoked, regarding a claim for relief Complainants never made. The Order also requires Union Pacific to submit new evidence – calculations of maximum rates for thousands of empty repair moves developed using a novel rate-setting standard – in just 30 days and without allowing Union Pacific any opportunity to conduct discovery.

¹⁸ *See* Union Pacific’s Reply Evidence and Argument, Verified Statement of Kenny Rocker at 4.

¹⁹ *See* Union Pacific’s Reply Evidence and Argument at 47 & n.58.

The Order is inconsistent with the agency’s rules governing complaint cases. Under the Board’s rules for complaint cases, a complainant must file a complaint that sets forth “the facts upon which it is based,” provides “specific reference to pertinent statutory provisions,” and “advise[s] the Board and the defendant fully in what respects these provisions or regulations have been violated.” 49 C.F.R. § 1111.2(a). The complaint must “contain a detailed statement of the relief requested.” *Id.*²⁰ The defendant must file an answer. *Id.* § 1111.5. Defendants may conduct discovery. *See* 49 C.F.R. Part 1114. After discovery, cases typically follow schedules under which the complainant files opening argument and evidence, the defendant files a reply, and the complainant files a rebuttal. *See* 49 C.F.R. Part 1112. This case had proceeded under these rules, until the Order.

The Board cannot give Complainants a “do-over” by ordering “supplemental briefing” on a claim Complainants never made. If the Board agrees with Union Pacific that Complainants are not entitled to the relief they sought in their complaints under the factual and legal theories they pled in their complaints, then it should dismiss their complaints. In dismissing the complaints, the Board could identify legal theories Complainants might elect to pursue in new complaints. The Board essentially followed such an approach in *Entergy Arkansas, Inc. v. Union Pacific Railroad*, STB Docket No. 42104 (STB served June 26, 2009), when it decided that Entergy should have challenged an interchange commitment under § 10705, not § 10702:

[W]e will afford Entergy an opportunity to amend its complaint accordingly within 30 days. If Entergy chooses to do so, the parties should then meet and confer and, within 14 days of that filing of such an amended complaint, propose a new procedural schedule that would allow for discovery and further evidentiary submissions under section 10705.

²⁰ The Administrative Procedure Act imposes the same requirements. *See* 5 U.S.C. § 554(b).

Id., slip op. at 2; *cf. Union Pacific R.R. – Petition for Declaratory Order*, Docket No. FD 35504, slip op. at 2 (STB served Oct. 10, 2014) (denying request for “show cause order” but stating that “upon notice from the Interested Parties, [the Board] would treat the motion for a show cause order as an unreasonable practice complaint and would institute a procedural schedule for the presentation of evidence and argument”). However, basic principles of due process preclude the Board from ordering defendants to address factual and legal theories that were never presented in a complaint without giving them a reasonable opportunity to conduct discovery and a reasonable amount of time to gather and present evidence.²¹ This process is needed to create an appropriate record.²² And the Board acknowledges the current record does not fully address the standard it contemplates applying in this case. *See Order at 6 n.7.*

IV. Conclusion

This case has nothing to do with the Board’s authority to establish car service rules under § 11122(a). Union Pacific adopted Item 55-C so it could charge separately for the transportation

²¹ *See, e.g., So. Cal. Regional Rail Auth. – Joint Use of Terminal Facilities – The Atchison, Topeka & Santa Fe Ry.*, ICC Fin. Dkt. No. 31951, 1991 WL 250934, at *2 (ICC Nov. 21, 1991) (recognizing “adequate discovery” is one “requirements of procedural due process”); *SP/SSW Switching Charges on Carloads of Grain at Kansas City*, ICC Dkt. No. 40178, 1989 WL 238691, at *1 (ICC June 5, 1989) (recognizing a case should not move forward “in a manner which violates procedural due process or results in an insufficient evidentiary base”); *Tongue River R.R. – Construction and Operation – In Rosebud & Big Horn Counties, MT*, STB Fin. Dkt. No. 30186 (Sub-No. 3), slip op. at 3 (STB served June 23, 1998) (procedural schedule “will accord all parties due process because it provide ample time for the submission of comments and replies”); *see also McClelland v. Andrus*, 606 F.2d 1278, 1286 (D.C. Cir. 1979) (“[T]he agency is bound to ensure that its procedures meet due process requirements. Therefore, discovery must be granted if in the particular situation a refusal to do so would so prejudice a party as to deny him due process.” (internal citations omitted)).

²² *See, e.g., Freeman Prods., Inc. v. Rebel Motor Freight, Inc.*, ICC No. MC-C-30015, 1987 WL 99781, at *3 (ICC Oct. 29, 1987) (Lambole, Vice Chairman, concurring in part, dissenting in part) (“[Discovery] is derived from traditional constitutional notions of due process and fundamental fairness. . . . It is an essential element in an administrative agency’s development of, and decision on, the record in contested cases such as here.”); *SP/SSW Switching*, 1989 WL 238691, at *1 n.6 (“Protestants . . . are responsible for providing sufficient information to enable respondents to fully test the validity of the allegations leveled against them.”).

service it provides in moving empty private tank cars to and from repair facilities. The ICC authorized and encouraged railroads to adopt such charges in *IHB-II*.

The ICC Termination Act, Federal rail transportation policy, Board precedent, economic principles, and the record in this case highlight the many reasons railroads should be allowed to establish separate charges for separate services, and for empty repair moves in particular.

The Board should adjudicate the claims Complainants actually made and dismiss their complaints.

Respectfully submitted,

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April 21, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of April, 2021, I caused a copy of the foregoing document to be served by first class mail, postage prepaid, or a more expeditious method of service on all parties of record in Docket Nos. NOR 42144, NOR 42150, NOR 42152, and NOR 42153.

/s/ Michael L. Rosenthal
Michael L. Rosenthal