

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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NORTH AMERICA FREIGHT CAR
ASSOCIATION; AMERICAN FUEL &
PETROCHEMICALS MANUFACTURERS;
THE CHLORINE INSTITUTE; THE
FERTILIZER INSTITUTE; AMERICAN
CHEMISTRY COUNCIL; ETHANOL
PRODUCTS, LLC D/B/A POET ETHANOL
PRODUCTS; POET NUTRITION, INC.; and
CARGILL INCORPORATED,

Complainants,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

STB Docket No. NOR 42144

Consolidated with:

Docket No. NOR 42150

Docket No. NOR 42152

Docket No. NOR 42153

UNION PACIFIC'S SUPPLEMENTAL REPLY BRIEF

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UNION PACIFIC'S SUPPLEMENTAL REPLY BRIEF

In their Joint Opening Supplemental Brief, Complainants¹ agreed with Union Pacific that 49 U.S.C. § 11122(a) does not permit the Board to prescribe the amount of an empty repair move charge by a rail carrier.² Complainants also made clear that they are not seeking a prescription of empty repair move charges.³ Thus, they did not provide any evidence regarding appropriate per-car charges for empty repair moves in this case. Accordingly, even if the Board disagrees with Complainants and Union Pacific, the Board could not award Complainants any relief under § 11122(a) because they have not carried their burden of proof.⁴

Complainants' renunciation of any interest in prescription of empty repair move charges eliminates the need for further discussion of that issue. However, Complainants' supplemental brief addressed a few additional points that require short responses.

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, NAFCO 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). NAFCO Complainants, Valero, Tesoro, and Arkema are referred to collectively as Complainants.

² See Complainants' Joint Opening Supplemental Brief at 15–17; Union Pacific's Supplemental Brief at 6–14.

³ See Complainants' Joint Opening Supplemental Brief at 1 (“At the outset, Complainants want to make clear their position that this is not a rate case.”); *id.* at 2 (“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 . . .”).

⁴ See *N. Am. Freight Car Ass'n v. Burlington N. & Santa Fe Ry.*, STB Docket No. 42060 (Sub-No. 1), slip op. at 5 (STB served Jan. 26, 2007) (complainants bear burden of proving violations of ICCTA), *pet. for review denied sub nom. N. Am. Freight Car Ass'n v. STB*, 529 F.3d 1166 (D.C. Cir. 2008); see also 5 U.S.C. § 556(d) (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”).

First, Complainants incorrectly say § 11122(a) “is relevant ... to the extent that UP has alleged ‘efficiency’ in defense of Item 55-C.”⁵ Section 11122(a) is *not* relevant here. Item 55-C promotes efficient use of rail cars and is thus consistent with § 11122(a)’s objectives. However, the ICC’s decision in *General American Transportation Corp. v. Indiana Harbor Belt Railroad (IHB-II)*⁶ recognized that charging separately for empty repair moves promotes efficient use of *all* rail transportation resources, not just rail cars.⁷ And, as Union Pacific’s Supplemental Brief discusses, the *IHB-II* decision did not rely on the car service provisions of § 11122(a); rather, it relied on ratemaking principles codified in Chapter 107 of Title 49.⁸

Second, Complainants incorrectly claim Union Pacific’s efficiency arguments were “concocted.”⁹ The record shows Union Pacific adopted Item 55-C in part to promote efficiency by giving shippers appropriate incentives to consider transportation costs when planning repairs and repair moves.¹⁰ Union Pacific’s efficiency concerns were validated by Complainants’ own documents and deposition testimony, which showed shippers had no regard for the costs their empty repair moves imposed on rail carriers before Union Pacific adopted Item 55-C, but that shippers changed their behaviors to make more efficient decisions about empty repair moves

⁵ Complainants’ Joint Opening Supplemental Brief at 3.

⁶ 3 I.C.C.2d 599 (1987).

⁷ See *id.* at 611 (explaining the free repair move rule was “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”); *cf. N. Am. Freight Car Ass’n* at 6 (“Under our statute, railroads are encouraged to independently price their services so as to eliminate cross-subsidies and improve track and equipment utilization.”).

⁸ See Union Pacific’s Supplemental Brief at 8–9.

⁹ Complainants’ Joint Opening Supplemental Brief at 6.

¹⁰ See Union Pacific’s Reply Evidence and Argument at 11–14, 73–77.

after Union Pacific adopted Item 55-C.¹¹ The record shows Union Pacific also had other legitimate justifications for adopting Item 55-C, including the desire to be compensated for providing empty repair moves and concern for eliminating cross-subsidies.¹²

Third, Complainants are incorrect when they claim § 11122(b) requires rail carriers to compensate shippers for supplying rail cars.¹³ Section 11122(b) describes *how* the Board should determine the rate of compensation *if* the agency decides to regulate compensation.¹⁴ In fact, a Board-prescribed rate of compensation for tank cars *already exists* as a result of the National Tank Car Allowance Agreement.¹⁵ However, for many decades, carriers and shippers have routinely chosen to use tariff and contract rates that apply to movements in shipper-supplied cars and provide that no car compensation will be paid (*i.e.*, zero-mileage rates).¹⁶

Fourth, Complainants never offer a valid justification for treating tank cars differently than all other private cars (which are subject to charges for empty repair moves). Nor have they explained why it makes any sense to treat charges for empty repair moves differently than the

¹¹ See *id.* at 56–66, 66–71.

¹² See *id.* at 11–14, 73–77; *cf. Mr. Sprout, Inc. v. United States*, 8 F.3d 118, 127 (2d Cir. 1993) (“[T]he Staggers Act, with its emphasis on allowing rail carriers the flexibility to price their services based on their costs and competitive considerations, discourages cross-subsidization among shippers.”); *ACF Indus., Inc. – Pet. for Exemption*, ICC Docket No. 40194, slip op. at 5 (ICC served May 10, 1989) (“Commission policy ... is clearly contrary to the free transportation of cars. ... The [Rail Transportation Policy] and Congressional mandates expressed in the [4R Act] and the Staggers Act encourage the application of separate rates for distinct rail services, demand-base rates and revenue adequacy and discourage cross-subsidization and misallocations of costs.”); *N. Am. Freight Car Ass’n* at 6–7 (“recover[ing] costs from those that generate them” is “exactly what the Board, the ICC before us, and Congress have encouraged railroads to do”).

¹³ See Complainants’ Joint Opening Supplemental Brief at 5, 7, 10, 11 & 12.

¹⁴ See Union Pacific’s Reply Evidence and Argument at 88–89.

¹⁵ The ICC prescribed the National Tank Car Allowance Agreement, commonly referred to as the “Ex Parte 328 Agreement,” in *Investigation of Tank Car Allowance System*, 3 I.C.C.2d 196 (1986).

¹⁶ See Union Pacific’s Reply Evidence and Argument at 82–92.

charges for actually repairing tank cars (which are paid by shippers, not railroads).

Complainants say their economic witness described how private ownership of tank cars allows Union Pacific to “exert a price squeeze.”¹⁷ But their witness said something different. He speculated that Union Pacific “likely” has “market power” over loaded moves and can extract “economic surplus” by “obliging” shippers to accept “higher prices” on empty repair moves to obtain service for loaded moves.¹⁸ At most, his argument calls for regulating charges for empty repair moves, not prohibiting them entirely – and only where the rail carrier actually has market power over loaded moves.¹⁹ In addition, his argument applies to empty repair moves of any type of private rail car – it does not justify special treatment of tank cars.²⁰ Finally, his argument erroneously assumes rail carriers can force shippers to use the same rail carrier for loaded moves and empty repair moves. As the record shows, Union Pacific adopted Item 55-C because it recognized that shippers could readily use *different rail carriers* for their loaded moves and their

¹⁷ Complainants’ Joint Opening Supplemental Brief at 7.

This proceeding has nothing to do with a “price squeeze.” “A price or margin ‘squeeze’ occurs when a vertically integrated firm sells an input to unintegrated rivals who also compete with the vertically integrated firm in a downstream market. The claim is that the large firm ‘squeezes’ the rival between a high wholesale price for the input and its own low price in the downstream market.” E. Hovenkamp & H. Hovenkamp, *The Viability of Antitrust Price Squeeze Claims*, 51 Ariz. L. Rev. 273, 273 (2009).

¹⁸ Complainants’ Joint Rebuttal Evidence and Argument, Verified Statement of Kevin W. Caves at 8.

¹⁹ Complainants’ economic witness argues that Union Pacific “likely” has market power because the rail industry is “concentrated.” *See id.* at 9–13. He did not come close to demonstrating that Union Pacific has market power over any loaded movements of any complaining shippers. *Cf. N. Am. Freight Car Ass’n* at 9 (“Moreover, Complainants have not demonstrated that BNSF has market power over the complaining shippers In any event, it is not an abuse of market power for [a rail carrier] to seek to recover from private car suppliers the costs associated with storing those suppliers’ empty private cars on its system; to the contrary, it is consistent with the individualized pricing principles advanced by Congress in the Staggers Act.”).

²⁰ Complainants might respond that shippers using other types of cars could require railroads to supply those cars. However, if railroads have a common carrier obligation to supply tank cars – as the Board said in its decision seeking supplemental briefing – then shippers could always choose to require railroads to supply tank cars.

empty repair moves.²¹ In sum, Complainants’ economic witness provided no support for prohibiting railroads from charging separately for empty repair moves, and no support for treating tank cars differently from other types of privately owned rail cars.

Fifth, Complainants ultimately concede (once again) that they are really arguing about *how* rail carriers should charge for empty repair moves, not *whether* they may charge.²² They say the Board could address the efficiency and cross-subsidy concerns underlying the *IHB-II* decision by encouraging rail carriers to adopt a complex, new mileage equalization-like system under which those rail carriers with relatively more empty tank car repair moves would obtain compensation for those moves from carriers with relatively more moves of loaded tank cars.²³ However, their proposal necessarily assumes “the cost of car repair movements already is or could be included in published freight rates” – that is why carriers with more loaded moves can supposedly afford to compensate carriers with more empty repair moves.²⁴ And their proposal ignores the reasons why the ICC concluded in *IHB-II* that carriers should be allowed to charge separately for empty repair moves, including that competition precludes carriers from setting

²¹ See Union Pacific’s Reply Evidence and Argument, Verified Statement of Kenny Rocker (Rocker VS) at 1–2.

²² See Union Pacific’s Reply Evidence and Argument at 7 (discussing Complainants’ concession of this point in their Joint Opening Evidence and Argument).

²³ See Complainants’ Joint Opening Supplemental Brief at 12–15.

²⁴ *Gen. Am. Transp. Corp. v. Indiana Harbor Belt R.R.* (“*IHB-I*”), 357 I.C.C. 102, 115 (1977). This further drives home the point that, even in *IHB-I*, the ICC recognized empty repair moves were never really supposed to be free to shippers. See *id.* at 115 (“Failure to provide a separate charge for repair movements does not result in free transportation service; rather, such movements are part of the total service obligations comprehended by charges for loaded movements.”); see also *Union Tank Car – Declaratory Order*, 358 I.C.C. 688, 691(1977) (“Line-haul revenue is supposed to cover all the costs involved [in maintaining the car fleet], including the cost of moving empty cars to cleaning and repair stations.”).

rates on loaded moves high enough to obtain compensation for empty moves,²⁵ and that the absence of separate charges for empty repair moves gives shippers “little or no incentive to consider transportation costs in selecting repair facilities.”²⁶ In sum, Complainants prefer pre-*IHB-II* rules that precluded rail carriers from charging separately for empty repair moves and required carriers to attempt to obtain compensation through rates on loaded moves, but they cannot dispute that carriers were always entitled to compensation for empty repair moves.

Respectfully submitted,

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²⁵ See *IHB-II*, 3 I.C.C. at 614 (“Line-haul rates frequently are set at levels determined by competitive factors without necessarily tracking all costs closely.”); see also *Rocker VS* at 3 (“We cannot set rates for loaded movements above market levels to recover compensation for unrelated movements. We would lose the business to competition.”).

²⁶ *IHB-II*, 3 I.C.C. at 611. Complainants say the mileage equalization system provides sufficient incentives for shippers to behave efficiently in directing empty tank cars to repair facilities. See Complainants’ Joint Opening Supplemental Brief at 14. However, the ICC rejected essentially the same claim in *IHB-II*, see 3 I.C.C.2d at 605–06, and the evidence in this proceeding confirms that the mileage equalization system does not provide strong incentives to consider transportation costs in selecting repair facilities, see Union Pacific’s Reply Evidence and Argument at 60–66.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May, 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
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