

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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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 SUPPLEMENTAL REPLY BRIEF

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Complainants in these consolidated proceedings (collectively, “Complainants”)¹ hereby submit their Joint Reply Supplemental Brief (“Joint Reply Brief”) in response to the Surface Transportation Board’s (“STB” or “Board”) decision served on March 22, 2021 (“Decision”). As stated in Complainants’ Joint Opening Supplemental Brief (“Joint Opening Brief”), the Decision, at page 6, requested 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?

In their Joint Opening Brief, Complainants attempted to answer the Board’s specific questions concerning the construction and potential application of 49 U.S.C. §11122(a) to these consolidated proceedings. In summary, Complainants reaffirmed that their cause of action against UP stems solely from UP’s violations of 49 U.S.C. §§10702 and 11122(b), and not §11122(a). To

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.”

the extent the Board applies language from Section 11122(a), (stating that “[t]he regulations of the Board on car service shall encourage the purchase, acquisition, and efficient use of freight cars”), Complainants asserted that the application of this standard “cannot eclipse the statutory obligation to compensate private tank car providers under Section 11122(b).”² More importantly, Complainants have met their burden to demonstrate that UP has violated this obligation. Complainants also demonstrated that, if the Board was to apply Section 11122(a) to evaluate UP’s defense that it adopted Item 55-C to encourage efficiency, the Complainants’ evidence and argument shows UP’s defense fails. Finally, Complainants informed the Board that, because Section 11122 as a whole does not apply to the assessment of rates or charges by railroads, but rather to the compensation railroads pay to entities who provide them with railcars for their use, the standard in Section 11122(a) cannot provide a basis for the Board to determine the reasonableness of a charge that a railroad imposes to move an empty railroad tank car to a repair shop.

In its Supplemental Brief, UP takes the position that neither Section 11122(a) nor its predecessor have any application or relevance to these complaint proceedings or any other formal adjudications, and that in enacting this statutory provision, Congress always intended it to be limited solely to rulemakings concerning car service.³ UP also concurs with Complainants’ conclusion that Section 11122(a) does not provide authority to the Board to establish the maximum reasonable level of a charge to move an empty tank car to and from a repair shop. However, UP’s rationale for reaching this latter conclusion differs from Complainants and is flawed, as discussed in more detail in Part I of this Reply. Finally, in its Supplemental Brief, UP has misstated and

² Joint Opening at 3.

³ UP Supplemental Brief at 1.

mischaracterized Complainants' positions and the law applicable to their Complaint, which Complainants correct in Part II of this Joint Reply Brief.

I. UP's Conclusions Regarding the Inapplicability of Section 11122(a) to This Case.

UP and Complainants reach the same ultimate conclusion that Section 11122(a) does not provide authority for the Board to determine the maximum reasonable level of the charge UP may assess for moving empty tank cars to and from repair shops. More specifically, Complainants and UP agree that Section 11122 by its terms does not apply to the payment of rates and charges *to railroads*. Rather, the statute's intent and purpose is to establish the statutory obligation of railroads to compensate parties who provide them with railcars, and to provide the Board with authority to regulate the terms and conditions of such arrangements, particularly "the compensation to be paid" and "other terms and conditions of any arrangement for the use *by a rail carrier* of a locomotive, freight car, or other vehicle not owned by the rail carrier . . ."⁴ Because that fact dispositively resolves the Board's questions, Complainants express no opinion on UP's discussion of the legislative history of Section 11122(a), the Congressional intent in enacting it and its predecessors, or UP's specific views about how this statute should be interpreted.

While Complainants agree with UP's ultimate conclusion that Section 11122(a) does not provide authority to determine the maximum reasonable level of UP's charges, they disagree with the following additional blanket assertion that Section 11122(a) does not apply because its charges for empty tank car moves are the equivalent of line haul rates:

[T]he 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

⁴ 49 U.S.C. § 11122(a) (emphasis added).

that the rate must be “reasonable” if the “rail carrier has market dominance over the transportation to which [the] particular rate applies”⁵

Complainants have stressed throughout this proceeding that, under *IHB-II*, a separate charge imposed by a railroad for an empty repair shop movement is a *cost of ownership* that railroads would otherwise incur if they supplied tank cars to their customers. Under the law, this cost of ownership must ultimately be borne by the railroads that use the car for their benefit in revenue service. Such charge is therefore not a distinct transportation service that can be evaluated in isolation from the line-haul service in which those cars are used by railroads to earn revenue.⁶

For these reasons, Complainants disagree with UP’s claim that “[r]ates 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.”⁷ They also disagree with UP’s assertion that “[t]he 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.”⁸ In addition to the ownership cost distinction discussed above, the record in these consolidated cases demonstrates that not one aspect of UP’s statement is true as to: (1) UP’s reasons for adopting Item 55-C and its associated charges, (2) the specific terms and conditions of Item 55-C, and (3) UP’s implementation of Item 55-C and assessment of associated charges.⁹

⁵ UP Supplemental Brief at 9, citing *IHB-II* and 49 U.S.C. §10701(d)(1).

⁶ Joint Reb. at 13-14.

⁷ UP Supplemental Brief at 15.

⁸ *Id.* at 16.

⁹ Joint Opening Brief at 4-11.

Nevertheless, Complainants reiterate that the standards that should be applied to determine the maximum reasonable level of the charges UP implemented in conjunction with its adoption of Item 55-C are not at issue in this case.¹⁰ As such, UP's claims that the charges for movements of empty tank cars to repair shops are the functional equivalent of line-haul rates for loaded tank cars, while seriously flawed and erroneous, ultimately are not relevant to the allegations in the complaints, which are that UP violated the law by implementing Item 55-C and its associated charges in the first instance, regardless of their amount.

II. UP Misrepresents Complainants' Evidence and Argument and Misstates the Applicable Law

In addition to its responses to the Board's specific questions, UP's Supplemental Opening Brief included a gratuitous and lengthy "Background" section that misrepresents many key elements of Complainants' evidence and argument. While Complainants' evidence speaks for itself notwithstanding UP's efforts to recast it, Complainants nevertheless provide brief responses to the key misstatements in UP's Supplemental Brief.

A. Complainants do *not* concede "that with respect to Count I . . . Union Pacific is entitled to compensation for empty repair moves."¹¹

UP does not cite anywhere in the record where Complainants allegedly made this concession, and this is not Complainants' position. Nor is there any truth to the additional unattributed statement that "Complainants did not challenge Union Pacific's *right* to compensation for empty repair moves."¹² The fundamental issue in these consolidated cases is whether tank car providers are compensated as required in light of the charges assessed under Item 55-C, and not

¹⁰ Accordingly, UP's speculation about the possible application of 49 U.S.C. §10745 to compensation paid by railroads for the use of railcars, which Complainants vigorously dispute on numerous grounds, is irrelevant. UP Supplemental Brief at 11.

¹¹ UP Supplemental Brief at 3 (emphasis in original).

¹² *Id.* at 4 (emphasis in original).

whether UP is entitled to compensation. Complainants have demonstrated that *IHB-II* permits UP to assess a charge for repair moves against tank car providers only if that cost ultimately is born by the railroads that use the car in loaded revenue service, not by the tank car provider. UP has offered no proof that tank car providers are receiving such compensation as required by Section 11122(b) and *IHB-II*.

B. Complainants do not “say railroads may obtain compensation for empty repair moves *only* through charges on loaded tank car moves, *unless* railroads separately pay shippers “mileage allowances.”¹³

Again, UP fails to cite where in the evidence Complainants make this statement, and the statement is nonsensical as written. Also, the issue is not whether *UP* is entitled to compensation, it is whether private tank car providers are compensated as required by the statute. Complainants have shown that *IHB-II* held that the mileage allowance system developed in Ex Parte No. 328, and prevalent at that time of the *IHB-II* decision, was a permissible, albeit not necessarily the only, means by which the statutory duty to compensate could be made. Complainants, therefore, are not claiming that the only form of compensation is mileage allowances, but that mileage allowances are the only form of compensation for *tank cars* that has been expressly considered and sanctioned by this Board. Consequently, UP’s assertion that Complainants are challenging “only Union Pacific’s *practice* of separately charging for empty repair moves without paying mileage allowances”¹⁴ also misrepresents Complainants’ position.

Complainants also have demonstrated, however, that the virtual elimination of mileage allowance payments over the three decades since *IHB-II* means that tank car providers no longer receive the requisite compensation for repair moves and that zero-mileage rates cannot provide

¹³ *Id.* at 3.

¹⁴ *Id.* at 4 (emphasis in original).

that compensation for tank cars.¹⁵ Moreover, Complainants previously demonstrated that UP's claim in its Supplemental Brief that "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"¹⁶ is overly simplistic and flawed because it is based on a definition of a dual scale rate that entails UP providing two rates for the same service in a private tank car, not two rates for two different services, one in a private tank car and the other in a railroad-supplied tank car, as required by *LOSAC*.¹⁷ Complainants also previously demonstrated the errors with UP's claim in its Supplemental Brief that, "[w]ith respect to Count II, Complainants relinquished their claim that Union Pacific "refus[es]" to pay mileage allowances when they stipulated that "[t]here 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."¹⁸

C. UP wrongly claims that "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."¹⁹

Finally, the "Background section" of UP's Supplemental Brief repeats misstatements about the meaning and scope of *IHB-II* found in UP's evidence and argument, including its statement that the ICC in *IHB-II* did not put any conditions on the ability of railroads to charge separately

¹⁵ Joint Op., pp. 20-39; Joint Reb., pp. 15-26.

¹⁶ UP Supplemental Brief at 4.

¹⁷ *LO Shippers v. Aberdeen & Rockfish Ry Co., et al.* 4 I.C.C. 2d 1 (1987); Joint Reb. at 19-20 and 24-26.

¹⁸ See Joint Reb. at 18-19, pointing out that UP's evidence demonstrated why requesting such rates would be pointless in today's industry because mileage allowances would not adequately compensate tank car providers for repair movement charges.

¹⁹ UP Supplemental Brief at 4.

for repair moves. This is not true, as Complainants have proven in their Joint Rebuttal evidence, stating that, “in *IHB-II*, the ICC permitted railroads to separately charge for repair moves based upon the critical assumption that the tank-car providers who pay those charges *initially* to a railroad *ultimately* will recoup those charges through the compensation that railroads must pay them under 49 U.S.C. § 11122. The ICC concluded that the mileage-allowance pass-back approach would enable railroads to charge for repair moves, thereby addressing both the cross-subsidy and efficiency concerns, and would still ensure that tank-car providers would be compensated for those charges through allowance payments.”²⁰

III. Conclusion

In conclusion, Complainants reiterate that their cause of action against UP is that it violated Sections 10702 and 11122(b), and that the statutory obligation to compensate tank car providers in Section 11122(b) is controlling. But Complainants concur that the “purchase, acquisition, and efficient utilization” standard in Section 11122(a) is a relevant consideration for evaluating UP’s efficiency defense in this case. Complainants have established four sets of facts in their Joint Opening Brief showing 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 principal efficiency concern 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

²⁰ Joint Reb. at 15-16 (emphasis in original); *see also, id* at 17, note 45.

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, UP and Complainants are in agreement that Section 11122(a)(2) does not permit the Board to prescribe a maximum reasonable charge for Item 55-C, but Complainants disagree with UP that its charges for movements of empty tank cars to and from repair shops are the equivalent of line haul rates for loaded movements. However, the legal status of the charges is irrelevant to Complainant's allegations, which are that, no matter what the level of the charges UP assesses, Item 55-C is 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 reaffirm 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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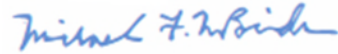
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CERTIFICATE OF SERVICE

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