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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,
INCORPORATION 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' PETITION FOR RECONSIDERATION

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PREFACE AND SUMMARY OF ARGUMENT

Pursuant to 49 C.F.R. § 1115.3, Complainants in these consolidated proceedings (collectively, “Complainants”)¹ jointly submit this Petition for Reconsideration of the Board’s decision in this docket served on January 15, 2025 (“Decision”). By decision served January 21, 2025, the Board extended the deadline for submitting this petition until March 6, 2025. Complainants allege material error under 49 C.F.R. § 1115.3(b)(2) on three grounds.

First, the Board committed material error by holding that Complainants could obtain compensation through mileage allowances and zero-mileage rates for Union Pacific Railroad Company’s (“UP”) empty tank car repair move charge, published in Item 55-C, Subpart D, of UP 6004-C (“Item 55-C”). The Board misread *IHB-II*² as confirming that the then recently modified mileage allowance system compensated for repair move charges, when the Interstate Commerce Commission (“ICC”) clarified in *IHB-III* that it merely *presumed*, without affirmatively holding, that the mileage allowance system would account for these charges in the future.³ And the D.C.

¹ The Complainants seeking reconsideration in Docket NOR 42144 are the North America Freight Car Association (“NAFCA”); The Fertilizer Institute (“TFI”); the American Chemistry Council (“ACC”); Ethanol Products, LLC d/b/a POET Biofuels (“POET Ethanol”); POET Nutrition, LLC. d/b/a POET Bioproducts (“POET Nutrition”); and Cargill, Incorporated (“Cargill”) (collectively, “NOR 42144 Complainants”). The Complainants seeking reconsideration in Docket NOR 42150 are Valero Marketing and Supply Company and Valero Rail Partners, LLC (collectively “Valero”). The Complainants seeking reconsideration 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 seeking reconsideration in Docket NOR 42153 is Arkema, Inc. (“Arkema”). NAFCA, TFI, and ACC are hereafter collectively referred to as “Association Complainants” and the other Complainants as “Individual Complainants.” The following complainants in docket NOR 42144 do not join in this petition, but do not oppose reconsideration: the American Fuel & Petrochemical Manufacturers and The Chlorine Institute.

² *General American Transp. Corp. et al. v. Indiana Harbor Belt RR. Co.*, 3 I.C.C. 2d 599 (1987) (“*IHB-II*”); *on reconsideration*, 1988 ICC LEXIS 55 (served Feb. 29, 1988).

³ *General American Transp. Corp. v. Indiana Harbor Belt R.R.*, 1988 ICC LEXIS 55 at *10 (served Feb. 29, 1988) (“*IHB-III*”).

Circuit affirmed this untested assumption on procedural grounds, cautioning that, should any obstacles arise to obtaining compensation for repair move costs through the allowance system, that would merit the agency's "immediate" attention.⁴ Although the Complainants presented evidence and argument on two such obstacles to recovering repair move costs through the mileage allowance system, the Board failed to consider nearly all of that evidence.

The Board also ignored the industry reality that UP and other Class I railroads do not supply tank cars to their customers and have not done so for nearly a century. Therefore, contrary to the Board's conclusion, requesting rates in railroad-supplied tank cars also would not provide any ability to verify that zero-mileage rates compensate for Item 55-C charges because UP cannot actually provide railroad-supplied tank cars.

Second, the Decision fails to consider whether Complainants' evidence and arguments of the obstacles to recovering repair move costs through allowances satisfied Complainants' burden of proving that UP did not provide compensation for Item 55-C. The Decision only assesses Complainants' evidence and argument as to compensation for tank car ownership costs *generally* (Count II of the First Amended Complaint), which the Decision rejects, but not as to Item 55-C *specifically* (Count I of the First Amended Complaint). This was material error.

Third, the Decision, at 21 and 26, erroneously concludes that UP had a reliance interest upon the approach adopted in *IHB-II* and *IHB-III* that warranted only prospective application of the Board's decision to shift the burden of proof to UP to demonstrate compensation for Item 55-C. Item 55-C, however, was a brand-new charge that Complainants promptly challenged. Complainants' only protection against this potentially unlawful charge was to initiate this complaint proceeding and rely upon their ability to recoup this cost through reparations. UP had

⁴ *Gen. Amer. Transp. Co. v. ICC*, 872 F.2d 1048, 1057-58 (D.C. Cir. 1989) ("*IHB-II Appeal*").

no symmetrical risk because it continued to collect Item 55-C throughout the 10-year duration of this proceeding and would retain that money if it prevailed. Thus, although UP would not be prejudiced by retroactive application of the Board's holding, the Individual Complainants each are prejudiced by millions of dollars.

These errors, once corrected, warrant a determination that UP's empty repair move charges under Item 55-C were unlawful and that empty repair move charges for tank cars should be prohibited, just as they were before *IHB-II*, because neither mileage allowances nor any other mechanism can ensure that tank car providers receive compensation for these charges. The Board also should award reparations to the Individual Complainants.

Such a finding would not undermine the mileage allowance system, because that system still can compensate tank car providers for all other ownership costs since those costs are paid to third parties. In contrast, repair move costs are distinct because they are paid to the very railroads that have a statutory duty to compensate tank car providers for that same cost, which is a distinction that enables those railroads to avoid their statutory duty to compensate tank car providers for that cost.

Further, a prohibition upon repair move charges need not replicate the misallocation and cross-subsidy concerns that prompted the Board to permit repair move charges in *IHB-II*. Complainants have proposed a practical and feasible inter-carrier allocation solution that would allocate repair move costs among railroads based upon the benefit they receive from their use of tank cars in loaded service. A different inter-carrier allocation could be developed in a proceeding before the Board. But so long as the Board permits railroads to assess their customers charges for empty tank car repair moves, the rail industry will have no incentive to adopt an inter-carrier

allocation solution, and the Board will continue to face disputes over the existence of any compensation.

ARGUMENT

I. THE BOARD SHOULD RECONSIDER THE DECISION ON THREE GROUNDS

A. The Board's Failure to Address the Obstacles to Recovering Repair Move Costs Through Mileage Allowances or Zero-Mileage Rates Was Material Error.

The Board materially erred in holding that the Individual Complainants were not entitled to reparations for past empty repair move charges assessed by UP because they failed to seek compensation through payment of mileage allowances or discounted zero-mileage rates. This holding misapplies *IHB-II* and neglects the specific obstacles to the recovery of repair move charges that Complainants identified.

According to the Board, *IHB-II* recognized that tank car providers could recover empty repair move charges through the then recently modified mileage allowance system. But in *IHB-II and III*, the ICC *assumed*, without analysis, that mileage allowances account for repair move costs, the same as all other tank car ownership costs.⁵ Although the D.C. Circuit affirmed this untested assumption,⁶ it did so for *procedural* reasons,⁷ finding that the ICC did not at that time need to

⁵ See *IHB-II* at 16 (“While we do not require it, we commend it to the parties for consideration.”); *IHB-III* at *5, *10 (“the primary issue in this proceeding is the lawfulness of tariff charges for repair moves, rather than the suitability of alternatives open to car owners for recouping those costs”; “[Repair movement] costs presumably will be fully incorporated [in the mileage allowance calculation] at the time of the next annual update”).

⁶ *IHB-II Appeal* at 1057-58 (affirming *IHB-II and III* even though the ICC “rested its decision in part on the assumption that car providers could use mileage allowance systems and other measures to recover empty-repair-move costs ...[without] engag[ing] in full-scale scrutiny of those recovery systems.”).

⁷ *Id.* at 1058 (“We have no legitimate grounds, under these circumstances, to quarrel with the Commission’s procedural determination concerning the limited scope of the *Indiana Harbor II* proceeding.”)

fully analyze whether mileage allowances enabled recovery of empty repair move costs since the industry was still implementing the recently modified mileage allowance system.⁸ Moreover, the D.C. Circuit reserved judgment on the efficacy of mileage allowances to recover repair move charges until some future challenge, expressly noting the potential need for “immediate” agency attention should specific obstacles to recovery be identified.⁹

In this proceeding, the Complainants have identified two specific obstacles to the recovery of repair move costs through the mileage allowance system that undermine the assumptions in *IHB-II*. First, the mileage allowance formula adopted in *EP 328*¹⁰ does not capture repair move charges.¹¹ UP conceded this point.¹² Second, the unique status of repair move charges as a cost paid directly to the railroad enables the railroad to increase its net freight revenue through the additional repair move charge, even though the repair move charge is supposed to be returned to tank car providers through mileage allowances.¹³ In economic parlance, paying empty repair move charges directly to railroads allows a railroad to exploit its market power to extract more economic surplus than by increasing its rates on loaded traffic, even if the railroad pays mileage allowances.

⁸ *Id.* at 1058 (“We are persuaded that the Commission need not have undertaken the elaborate inquiry into mileage allowances requested by petitioners,” and “we see no reason why the Commission should be prevented from giving the market some opportunity to assimilate repair-move costs before entertaining a challenge to the adequacy of mileage allowances.”)

⁹ *Id.* 1058 (“Petitioners do not complain of any *regulatory* obstacle to recovery of empty-repair-costs from carriers, a concern that might warrant **immediate** Commission attention.”) (italics in original; bold added).

¹⁰ *Investigation of Tank Car Allowance Sys.*, 3 I.C.C. 2d 196 (1986) (“*EP 328*”).

¹¹ See “Complainants Joint Rebuttal Evidence and Argument,” at 18 (filed May 31, 2019) (“Jt. Reb.”).

¹² “Union Pacific’s Reply Evidence and Argument,” at 43 note 52 (filed April 26, 2019) (“UP Reply”).

¹³ “Complainants’ Joint Opening Evidence and Argument”, at 28-29 (filed Feb. 29, 2019) (“Jt. Op.”); Jt. Reb. 14-15, 26.

Exacerbating this problem, consolidation within the rail industry since *IHB-II* has increased the rail industry's market power over time. Complainants presented evidence and arguments, including expert economic testimony, to demonstrate how UP can extract this economic surplus through Item 55-C.¹⁴ Complainants' evidence also showed that UP intended this result because its primary objective was to capture a new revenue source through Item 55-C.¹⁵

The Decision only cursorily discusses the first obstacle and completely neglects the second, despite the D.C. Circuit's admonition that such obstacles warrant immediate attention. This constitutes material error.

The Decision summarily dismisses the first obstacle as "an argument for revision of the mileage allowance system, not for ignoring it."¹⁶ This was material error because such action could not provide "immediate attention" to the harm incurred by Complainants from paying the Item 55-C charges. Reopening *EP 328* would involve lengthy and uncertain negotiations between multiple stakeholders with disparate interests and no assurance of reaching agreement. Stakeholders then would need to petition the Board either to approve an agreement or resolve any disagreements, which would entail additional resources and time (which could include judicial review of the Board's final action).¹⁷ Indeed, the Decision exacerbates the prejudicial impact of this obstacle on the Individual Complainants by declining to give retroactive effect to the Board's

¹⁴ Jt. Op. 28-29; Jt. Reb. 22-26, Verified Statement of Kevin W. Caves ¶¶ 10-34.

¹⁵ Jt. Op. 9-20.

¹⁶ Decision 18.

¹⁷ The original *EP 328* proceeding lasted three years, beginning with a Notice of Proposed Rulemaking, served on July 14, 1976, and culminating in a final decision approving a negotiated agreement, served on June 15, 1979. A subsequent renegotiation lasted more than four years, beginning with a Petition filed on July 20, 1982, and culminating in a final decision approving the current agreement on September 23, 1986. Ex Parte No. 328, *Investigation of Tank Car Allowance System*, 3 I.C.C. 2d 196, 196-97 (Sept. 23, 1986).

decision to shift the burden of proving compensation.¹⁸ By precluding the Individual Complainants from obtaining refunds of the Item 55-C charges they have paid to UP for more than ten years while this proceeding has been pending, the Board has created a powerful incentive for UP and other railroads to prolong renegotiation of *EP 328* and to continue collecting repair move charges for as long as possible. There is no scenario where this aspect of the Decision constitutes “immediate attention” consistent with the D.C. Circuit’s admonition in *IHB-II Appeal*.¹⁹

Concerning the second obstacle, the Decision materially erred because it does not address Complainants’ evidence and arguments.²⁰ The Board assumes that mileage allowances and zero-mileage rates compensate tank car providers for *all* ownership costs, *including* empty repair move costs.²¹ This assumption ignores Complainants’ evidence and arguments that even if other ownership costs *generally* are recovered through the mileage allowance system, empty repair move costs are not *specifically* recoverable through either mileage allowances or zero-mileage rates because these costs are paid directly to the railroad, making them unique.

¹⁸ Decision 21.

¹⁹ The circumstances surrounding UP’s adoption of Item 55-C are particularly prejudicial. UP first began charging for empty repair moves in Item 55-C in anticipation of an expected surge of such moves to comply with new regulatory retrofit mandates. Jt. Op. 9-15. In practice, UP also charges for empty moves that are necessary to comply with federally mandated qualification activities, *see* 49 C.F.R. § 180.503, as well as moves mandated by the AAR interchange rules and AAR equipment advisories, allowing for additional windfall. The consequent financial harm of requiring tank car providers to first renegotiate the EP 328 agreement is evident in the actual damages sought by Individual Complainants and the total additional revenue that UP collected from Item 55-C in just the first few years of charging for repair moves. Jt. Op. 18-20.

²⁰ Jt. Op. 28-29; Jt. Reb. 14-15, 26.

²¹ Decision 13-16. The Board further states that “presuming adequate compensation under these circumstances” furthers congressional intent that marketplace decisions govern the relationship between railroad and shippers. Decision 16. However, the marketplace that existed in 1980 when Congress made this statement is vastly different than the highly consolidated rail industry that exists today, where a handful of railroads dominate, leaving many shippers, and especially those who use tank cars, with no competitive options.

The Complainants presented evidence and arguments, including expert economic testimony, that the payment of repair move charges directly to UP enabled it to exploit its market power to extract more economic surplus than is possible by increasing its rates on loaded traffic.²² Complainants even presented an arithmetic illustration of precisely how UP is able to do this through Item 55-C.²³ Other probative evidence included (1) the assertion of UP’s own economic witness that Complainants wrongly expected UP to embed compensation for Item 55-C in its zero-mileage rates,²⁴ (2) confirmation by the two senior UP executives in charge of the team developing and implementing Item 55-C that they never contemplated such compensation or presented any information about compensation to UP’s Operating Committee which made the final decision to adopt Item 55-C, and (3) internal UP documents establishing that UP’s primary objective was to capture a new revenue source.²⁵

UP could not have extracted a similar economic surplus from other tank car ownership costs because UP does not receive that revenue; instead tank car providers pay those costs to third parties, namely repair facilities. Therefore, even if, as the Decision holds with respect to Count II of the Complaint, the mileage allowance system compensates tank car providers for all *other* ownership costs, Complainants have presented probative evidence demonstrating why that holding should not extend to repair move costs. This is precisely the type of obstacle to recovery of such costs that the D.C. Circuit declared might warrant “immediate attention” from the agency. Yet, the Decision does not even address this argument, which constitutes material error.

²² Jt. Op. 28-29; Jt. Reb. 22-26, Verified Statement of Kevin W. Caves ¶¶ 10-34.

²³ Jt. Reb. 25-26.

²⁴ UP Reply, Verified Statement of Kevin M. Murphy, 13, note 25.

²⁵ Jt. Op. 9-20.

These obstacles to recovery of repair move costs through the allowance system effectively rendered futile any request by Complainants for either payment of allowances or properly discounted zero-mileage rates. In fact, the record contains examples of UP creating arithmetic spreads between full-mileage and zero-mileage rates to discourage requests for the former.²⁶ Now, in response to the Board’s directive in the Decision that UP not charge Item 55-C unless it can demonstrate that car providers are appropriately compensated for that cost, UP has published full-mileage rates that rely upon an arithmetic spread over zero-mileage rates to “demonstrate” compensation.²⁷ As the Complainants’ evidence demonstrates, that spread is economically meaningless. Finally, the record also demonstrates how UP can extract more economic surplus from repair moves even when paying an allowance that includes repair move costs.²⁸

The Decision, at 14, also faults Complainants for not requesting full-service rates in UP-supplied cars to establish a benchmark against which to measure the adequacy of compensation provided by zero-mileage rates pursuant to *LO Shippers Action Comm. v. Aberdeen & Rockfish Ry.*, 4 I.C.C. 2d 1 (1987) (“LOSAC”). If any shipper were to request a full-service rate in UP-supplied tank cars – a fictional exercise because UP cannot provide this service – there is no reason to believe UP’s incentive to discourage such requests through arithmetic rate spreads would be any less than it is for full-mileage rates, especially since UP has a strong incentive to discourage requests for a service that would require it to acquire a fleet of tank cars that it does not have. The use of privately owned tank cars also is not merely a shipper “preference,”²⁹ it is an industry reality

²⁶ Jt. Reb. 9, note 21; *see also*, UP Reply 95, note 107.

²⁷ *E.g.*, UP Tariff 2028-A, Item 1360-BX (Feb. 13, 2025); UP Tariff 4920 (Feb. 13, 2025); UP Tariff 4922 (Feb. 13, 2025).

²⁸ Jt. Reb. 21, 25-26.

²⁹ Decision 2.

given that UP and other railroads generally do not own tank cars. Furthermore, the Board's reasoning fails because: (1) it disregards the complexities of requesting a rate for service in UP-supplied tank cars when UP does not maintain a fleet of tank cars in which to provide such services; (2) it assumes such a request would be "reasonable," pursuant to 49 U.S.C. § 11101, when the shipper has no intent to use a service that the shipper knows does not exist; (3) if the shipper must use the full-service transportation to obtain the rate, such a requirement unreasonably conditions the shipper's ability to determine the adequacy of its compensation required by 49 U.S.C. § 11122 upon using a service that it neither wants nor needs and strands the shipper's investment in its private fleet; and (4) even if the railroad must quote a full-service rate in tank cars it does not own and the shipper will not use, such rate would not be a true market rate to generate a meaningful *LOSAC* comparison.³⁰

Despite the foregoing evidence and argument, the Decision, at 18, holds that the Individual Complainants are not entitled to refunds of Item 55-C charges paid to UP because they neither requested mileage allowances or full-service rates. This holding is material error because the Board has failed even to consider Complainants' evidence and argument that demonstrates these obstacles to recovery of repair move costs, separate from other types of tank car ownership costs, through either the allowance system or full-service rates. Those obstacles would have rendered any such requests futile.

B. The Board's Failure to Consider Whether Complainants' Evidence Satisfied Their Burden of Proof With Respect to Recovery of Item 55-C Was Material Error.

The First Amended Complaint in Docket NOR 42144 alleged UP's failure to compensate for Item 55-C *specifically* (Count I) and tank car ownership costs *generally* (Count II). In holding

³⁰ Jt. Reb. 20-21.

that Complainants failed to satisfy their burden of proof, the Decision, at 14-15, only addresses Count II. As demonstrated in the preceding Part I.A., Complainants presented evidence and argument that would satisfy their burden of proof as to Count I even if it does not as to Count II. The Board did not, however, evaluate whether this evidence satisfied Complainants' burden of proof under Count I, which was material error.

Complainants, through the arguments summarized above, presented a *prima facie* case that Item 55-C charges cannot be recovered through mileage allowances, are not recovered through zero-mileage rates, and that UP never intended for such recovery; in fact, the evidence shows precisely the opposite.³¹ Complainants showed that (1) UP never contemplated a need to compensate tank car providers for Item 55-C charges, (2) UP produced no records in this proceeding to demonstrate compensation for Item 55-C charges, and (3) significant obstacles prevent recoupment of Item 55-C through the allowance system. This was more than adequate to establish a *prima facie* case that UP failed to compensate for Item 55-C and, thus, shift the burden of production – not the burden of proof – to UP to rebut Complainants' evidence and argument by demonstrating that tank car providers were compensated for Item 55-C.³² UP's failure to do so

³¹ The leader of the UP team that proposed Item 55-C (Douglas Craven) and his boss (Kenny Rocker), who were in the best position to know, testified that UP never intended to compensate tank car providers for Item 55-C (Jt. Op. 14-15); UP's internal documents advocated for Item 55-C as an opportunity to substantially increase revenue and do not contain a single reference to rate offsets that would occur if UP had provided compensation (Jt. Op. 11-13, 40-41; Jt. Reb. 36); the entirety of the presentation to the UP operating committee that made the final decision to adopt Item 55-C focused on revenue without any reference to compensation (Jt. Op. 15); and UP did not produce any documents in discovery to indicate compensation for Item 55-C despite Complainants' requests (Jt. Op. 34-35). Indeed, the documents produced show how UP went to great lengths to conceal its profit motives underlying Item 55-C from customers (Jt. Op. 16-18, 41-42; Jt. Reb 31-33).

³² Jt. Op. 39, note 104 (describing the difference between the burden of proof, which remains with the Complainants throughout the case, and the burden of production, which shifts between the parties based on the evidence presented). Complainants did not ask the Board to shift the

means that Complainants have satisfied their burden of proof with respect to their § 11122 claim in Count I.

While the Decision, at 15, addresses some of this evidence, and deems it insufficient to establish a *prima facie* case as to compensation *generally* (Count II), it does not assess that evidence with respect to Item 55-C *specifically* (Count I) or the totality of the evidence and argument summarized in the preceding Part I.A. This failure was material error.

C. The Board’s Conclusion That UP Had A Reliance Interest In *IHB-II* Was Arbitrary and Contrary to Precedent.

Despite denying Complainants’ challenge to Item 55-C as a violation of § 11122, the Decision, at 18-19 (emphasis in original), holds that “[w]ith respect to *future* empty repair move charges...a different result is appropriate” due to “significant changes since the ICC adopted the current mileage allowance system” that “creates an environment of diminished transparency with respect to car ownership costs.” Considering these changes, the Decision, at 19, declares that “going forward, it will be the responsibility of railroads to ensure that they provide adequate compensation for empty tank car repair move costs,” thereby shifting the burden of proof prospectively. Although the same “significant changes” (*i.e.*, increased market power through industry consolidation) and transparency concerns support the Individual Complainants’ request for reparations of Item 55-C,³³ the Decision, at 21 and 26, declines to give retroactive effect to this

burden of proof, but merely to apply the requisite shifting of the burden of production to determine satisfaction of Complainants’ burden of proof. Although Complainants do not object to the Decision’s prospective shifting of the burden of proof, they agree with Chairman Fuch’s position that it is not necessary to shift the burden of proof for Complainants to prevail on the evidence presented. Decision 29-31.

³³ In partial dissent, Chairman Fuchs highlights this anomalous result when pointing out that “the burden-shifting requirement here undercuts much of the Decision’s presumptions regarding zero-mileage rates (among other aspects of its reasoning) in arriving at its merits finding.” Decision 33.

holding, contending that it would be unfair to UP. The facts and directly relevant precedent demonstrate that this result is material error.

First, UP did not have a reasonable or legitimate reliance interest in *IHB-II* and *IHB-III*. Although these decisions were nearly 30 years old when Item 55-C became effective on January 1, 2015, UP had not attempted to assess repair move charges on tank cars prior to that time and, thus, had no expectation or established practice of doing so. In fact, this was the first opportunity to challenge this type of charge by UP. Moreover, Complainants promptly filed their original complaint on March 31, 2015, just three months after Item 55-C became effective. This put UP on notice almost immediately that Item 55-C could be unlawful, and continuing to assess its customers for the charges could result in UP being required to refund them through reparations. The Individual Complainants had no other recourse to protect themselves from owing substantial sums to UP, especially given the imminent prospect of large numbers of repair moves to comply with new tank car retrofit regulations.³⁴ In contrast, UP had no symmetrical risk because it could collect the charges (and increase them) during the litigation and retain that revenue if it prevailed. Therefore, the Board's refusal to apply the Decision's holding retroactively is far more unfair to the Complainants than retroactive application would be to UP.

Second, the Board's *IHB-II* and *III* precedent supports retroactive application of the Decision. The *IHB-II* and *III* decisions, which allowed repair move charges, were themselves a reversal of the *IHB-I* decision, which prohibited such charges.³⁵ Thus, the railroad defendants in

³⁴ See note 19, *supra*.

³⁵ *Gen. Am. Transp. Corp. v. Ind. Harbor Belt R.R.* ("*IHB-I*"), 357 I.C.C. 102 (1977), *aff'd*, 577 F.2d 394 (7th Cir. 1978).

IHB-II and *III* were assessing and collecting such charges in violation of *IHB-I*.³⁶ The ICC nevertheless applied *IHB-II* retroactively, and allowed the railroads to retain the charges collected from their customers, despite the reliance of tank car providers on the *IHB-I* precedent.³⁷ The ICC reasoned that permitting the railroads to keep the charges assessed over the course of the litigation did not result in manifest injustice.³⁸ Yet, when the situation is reversed in this case, the Board inexplicably has refused to apply its decision retroactively and enable the Individual Complainants to recoup the charges they have paid or owe to UP. This “heads the railroad wins, tails the car owner loses” determination with respect to the very same issue – the retroactive effect of a decision on the lawfulness of repair move charges – is arbitrary and constitutes material error.

II. THE BOARD CAN PROHIBIT REPAIR MOVE CHARGES FOR TANK CARS WITHOUT IMPLICATING THE CROSS-SUBSIDY AND MISALLOCATION CONCERNS THAT LED TO ALLOWING SUCH CHARGES IN *IHB-II*.

As the Decision, at 5, acknowledges, the ICC prohibited railroads from charging for the empty movement of tank cars to repair facilities for over 40 years prior to *IHB-II*. The Decision, at 5, also acknowledges that the ICC reversed itself in *IHB-II* after concluding that the prohibition led to misallocation and cross-subsidization of empty repair move costs among railroads. Most importantly, the Decision, at 17, correctly observes that “when the ICC authorized railroads to charge separately for empty repair movements, it *assumed* that compliance with this statutory requirement would be accomplished by reimbursement of car providers through mileage allowances.” (emphasis added) The D.C. Circuit, 872 F.2d at 1058, ultimately affirmed that decision but noted that any regulatory obstacle to recovery of empty repair move costs from

³⁶ *IHB-II*, 3 I.C.C. 2d at 602 (defendants published repair move charges that plaintiffs challenged in complaints).

³⁷ *Id.* 620 (order clause denying reparations).

³⁸ *Id.* 618.

carriers would be a concern that might warrant “immediate attention.” As summarized in Part I.A. above, the Complainants have identified the factual reality (i.e., the “obstacles”) that negates the assumption in *IHB-II* that tank car providers can recover empty repair move costs through the mileage allowance system. The failure of that assumption means that the statutory compensation requirement for repair move costs cannot be accomplished by maintaining the *status quo*.

This does not mean, however, that by once again prohibiting repair move charges, the Board must accept the cross-subsidy and misallocation concerns that gave rise to *IHB-II*. The Board can avoid these concerns by encouraging an inter-carrier solution that would allocate repair move costs among railroads based on the benefit they receive from their individual use of tank cars in loaded service. Since the cross-subsidy and misallocation concerns are first and foremost a problem of inter-carrier allocation of responsibility for repair move costs, an inter-carrier solution is optimal.

The Complainants presented two potential solutions in “Complainants’ Joint Opening Supplemental Brief,” at 12-15 (filed April 21, 2021), including an inter-carrier solution. The Decision, at 19 note 24, rejects Complainants’ first solution but never mentions, much less considers, the more optimal inter-carrier solution.

Complainants’ proposed inter-carrier solution is both practical and feasible. As detailed in Complainants’ Supplemental Brief at 12-13, Complainants modeled their proposal closely upon mileage equalization by allocating repair move costs among railroads based on their use of loaded tank cars in revenue service. But the proposal is much simpler and easier to administer than mileage equalization because railroads would be the only participants in contrast to the hundreds of shippers who also participate in mileage equalization. Also, because this approach does not depend on mileage allowances to pass back repair move costs to tank car providers, it avoids the

obstacles identified in Part I.A. to compensating tank car providers for such costs. It also ensures a fair allocation of repair move costs among railroads regardless of whether a railroad pays mileage allowances or offers zero-mileage rates.

This alternative requires the rail industry's cooperation to implement, but the industry has no incentive to do so. The *status quo* under *IHB-II* discourages adoption of an inter-carrier solution because, as Complainants have demonstrated, it allows railroads to exploit their market power to extract more economic surplus through repair move charges than they otherwise could by increasing rates on loaded moves. In fact, several other railroads have been emboldened to develop their own tariffs for charging shippers for empty repair moves while this case has been pending. So long as tank car providers are the conduit for reallocating repair move responsibility among all railroads, this problem will persist.

To create the necessary incentive for the rail industry to consider an inter-carrier solution, the Board first should prohibit repair move charges, as the ICC did before *IHB-II*. This would remove the disincentive for railroads to alter the *status quo*. It would address the D.C. Circuit's concern that regulatory obstacles to recovery of repair move costs from carriers would warrant immediate attention. And it would prevent railroads from avoiding their statutory duty to compensate for use of private tank cars. Contemporaneously, the Board could initiate a proceeding to solicit comments on Complainants' proposal and any other inter-carrier solution that might be offered. Notably, the ICC sought comments on a different form of inter-carrier pooling arrangement in *IHB-II* but did not receive sufficient input to assess its viability.³⁹ The timing is ripe to revive that inquiry based on this proceeding.

³⁹ *IHB-II*, 3 I.C.C. 2d at 613. See also, *IHB-II Appeal* at 1059 ("the record was deemed inconclusive on the question of the viability of intercarrier pooling of line-haul freight revenues").

REQUEST FOR RELIEF

Complainants request that the Board grant this Petition by declaring Item 55-C, and repair move charges generally, to be unlawful; prohibiting such charges; awarding reparations to the Individual Complainants for Item 55-C; and initiating a proceeding to develop an inter-carrier solution to the misallocation and cross-subsidy problems identified in *IHB-II*.

Respectfully submitted,

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March 6, 2025

CERTIFICATE OF SERVICE

I do hereby certify that on this 6th day of March 2025, I have served a copy of
“Complainants’ Petition for Reconsideration” by electronic delivery upon:

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