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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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July 29, 2019
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OLIN CORPORATION,	)	
	)	
Complainant,	)	
	)	
v.	)	STB Docket No. NOR 42164
	)	
UNION PACIFIC RAILROAD COMPANY,	)	
	)	
Defendant.	)	
_____	)	

UNION PACIFIC'S MOTION TO DISMISS

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Defendant.	)	
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UNION PACIFIC’S MOTION TO DISMISS

The Board should dismiss Olin Corporation’s complaint in this matter without prejudice.¹ Olin’s complaint challenges the same Union Pacific empty repair move charges at issue in STB Docket No. NOR 42144 *et al.* (the “NAFCA Case”). Olin’s only plausible reason for not filing its complaint long ago was to avoid providing discovery in the NAFCA Case – discovery that would have been helpful to Union Pacific in mounting its defense and beneficial to the Board in developing a complete administrative record. In the NAFCA Case, the Board twice consolidated later-filed complaints with the original proceeding, recognizing the importance of developing a robust evidentiary record. *See N. Am. Freight Car Ass’n v. Union Pac. R.R.*, NOR 42144 *et al.* (STB served Mar. 31, 2017) & (STB served Oct. 3, 2017). The Board should not condone Olin’s

¹ Union Pacific is filing this Motion to Dismiss at this time out of an abundance of caution. Olin has not yet properly served its complaint because it has not yet sent a copy of its complaint “to the chief legal officer of each defendant either by confirmed facsimile and first-class mail or express overnight courier.” 49 C.F.R. § 1111.4. Instead, Olin sent a copy of its complaint to Union Pacific’s chief legal officer by first-class mail (but not by confirmed facsimile), as shown in the Certificate of Service accompanying Olin’s complaint.

Accordingly, Union Pacific is filing this motion without waiving arguments that Olin’s service of its complaint was defective and failed to toll the statute of limitations.

strategic behavior. Union Pacific is confident discovery obtained from Olin would only add to the overwhelming evidence that the challenged charges are lawful. However, allowing Olin to maintain this action now would only serve to encourage parties in future cases to adopt a similar strategy: shielding themselves from discovery by first using proxy litigants – their trade associations, which routinely disclaim having possession or control over relevant documents or records – then later seeking to reap the benefits of potentially favorable rulings by filing copycat claims after the close of argument and evidence. Such tactics would prejudice defendants, impoverish the record, and reduce the efficiency and effectiveness of Board proceedings. If parties can get away with this gamesmanship, the Board’s ability to rely on the party discovery process to unearth facts relevant to its proceedings will be seriously undermined.

I. BACKGROUND

Olin’s only plausible reason for not filing its complaint long ago was to avoid providing discovery Union Pacific could use to defend itself in the NAFCA Case. On March 31, 2015, in NOR 42144, five trade associations and three shippers filed a complaint against Union Pacific challenging the reasonableness of empty repair move charges in UP Tariff 6004, Item 55-C (“Item 55-C”). Olin is a member of two of the trade association complainants, the Chlorine Institute and the American Chemistry Council. See Olin’s Motion to Hold Proceeding in Abeyance, filed July 8, 2019 (“Abeyance Motion”) at 2.

Union Pacific moved to dismiss the complaint in NOR 42144 on the grounds that Board precedent supported our adoption of Item 55-C.² In the alternative, Union Pacific asked the

² See Mot. to Dismiss at 8-17, *N. Am. Freight Car Ass’n v. Union Pac. R.R.*, NOR 42144 (Apr. 20, 2015).

Board to require the complainants to make their complaint more definite to clarify their allegations and simplify discovery.³

In opposing Union Pacific's motion to dismiss, the complainants said the case requires "development of facts *through discovery* and the presentation of evidence."⁴ They said the precedent on which Union Pacific relied is "inapposite due to different facts and circumstances, including substantial changes that have occurred in the rail industry over the past 25 years."⁵ They said a proper consideration of the arguments "can only proceed after discovery and presentation of evidence of applicable industry conditions."⁶

In denying Union Pacific's motion, the Board said arguments about "whether UP is complying with [Board] precedent and whether that precedent is applicable" are "fact-specific and, as such can only be sufficiently addressed after the development of a full record."⁷ The Board also suggested it would consider arguments about "whether that precedent should stand given changes in the railroad industry, an issue that has not been fully briefed."⁸ Finally, the Board declined to order complainants to make their complaint more definite, agreeing with complainants that Union Pacific was seeking "*information more appropriately obtained in discovery.*"⁹

³ See *id.* at 21-24.

⁴ Reply to Mot. to Dismiss at 5, *N. Am. Freight Car Ass'n v. Union Pac. R.R.*, NOR 42144 (June 1, 2015) (emphasis added).

⁵ *Id.* at 7.

⁶ *Id.* at 15.

⁷ *N. Am. Freight Car Ass'n v. Union Pac. R.R.*, NOR 42144 (STB served Dec. 21, 2015) at 3.

⁸ *Id.*

⁹ *Id.* at 5 (emphasis added).

After the Board denied Union Pacific's motion to dismiss on the ground that the case could not be decided without discovery and presentation of evidence, Union Pacific vigorously pursued discovery. However, our ability to obtain discovery was severely constrained. The five trade association complainants possessed very little relevant information, they refused to produce information from their members who had relevant information, and only three shippers (out of hundreds that use tank cars on Union Pacific's network) had joined in the complaint and thus made themselves subject to party discovery.

Union Pacific would have preferred not to have to seek discovery from individual shippers. We tried asking the trade association complainants for information on industry-wide conditions relating to empty tank car repair movements. But attempts to obtain that important information were stymied. In response to discovery requests, the associations nearly universally and uniformly replied that they did not have the requested information. Rather, they said any information would be in their members' possession.

Administrative Law Judge Dring, who was assigned to handle discovery matters in NOR 42144, acknowledged Union Pacific's difficult position in discussing a motion we filed in an attempt to compel the trade associations to produce documents on behalf of their members:

Presiding Judge: Thank you. Mr. Rosenthal, I believe I said the last time we were here essentially what Mr. Donovan has just said, that I can't grant motions to compel against the Complainants when they don't have the information, they don't have what you're seeking, their members have that. I can't reach their members through a motion to compel. Okay? So let's -- go ahead.

...

Mr. Rosenthal: And we want to be prepared. When they file their evidence, we want to be able to respond. As you point out, we're in a bit of a bind, because most of the people on the other side are associations.

Presiding Judge: I can't help you with that.

Mr. Rosenthal: I understand.

Presiding Judge: I would love to help you. I don't mind getting down into the weeds with folks, but I can't do this.¹⁰

Because the trade associations steadfastly refused to collect and produce information from their members who had relevant information, Union Pacific stood to obtain discovery from only three of the hundreds of shippers represented by those trade associations – the three shipper complainants in NOR 42144.¹¹

In December 2016, twenty-one months after the filing of initial complaint in NOR 42144, two additional shippers, Valero and Tesoro, attempted to employ essentially the same gambit Olin is trying here. They filed their own complaints challenging Item 55-C, then, immediately after Union Pacific served discovery, they asked the Board to hold their cases in abeyance to await the outcome in NOR 42144. However, the Board agreed with Union Pacific that the new proceedings should be consolidated with NOR 42144, thus allowing Union Pacific to conduct discovery involving Valero and Tesoro and use the information we obtained to address the common issues in the consolidated proceedings. *See N. Am. Freight Car Ass'n v. Union Pac. R.R.*, NOR 42144 *et al.* (STB served Mar. 31, 2017).

In August 2017, nearly two and a half years after the filing of the initial complaint in NOR 42144, yet another shipper, Arkema, filed a complaint challenging Item 55-C. Arkema remained on the sidelines even as Valero and Tesoro filed their own belated complaints, had

¹⁰ Transcript of Status Conference at 35:18–37:11, *N. Am. Freight Car Ass'n v. Union Pac. R.R.*, NOR 42144 (Aug. 22, 2016).

¹¹ Union Pacific also obtained discovery from four companies that own tank cars and lease them to shippers, but they did not have the same types of information that shippers have, and Judge Dring strictly limited Union Pacific's discovery from non-parties. *See, e.g.*, Transcript of Oral Argument at 48:16-18, *N. Am. Freight Car Ass'n v. Union Pac. R.R.*, NOR 42144 (Sept. 20, 2016) (“But I have to balance my sympathy for your understandable desire to get this information against the burden imposed on the car owners.”).

their cases consolidated with NOR 42144, and were ordered to provide discovery. Arkema apparently let Valero and Tesoro test the waters, then after observing the results, it waited several more months before filing its complaint. However, the Board once again concluded consolidation was appropriate to allow Union Pacific the opportunity to conduct discovery involving Arkema and develop a more complete evidentiary record. *See N. Am. Freight Car Ass’n v. Union Pac. R.R.*, NOR 42144 *et al.* (STB served Oct. 5, 2017).

Olin took matters a step further than Arkema. Olin filed its complaint *after* the close of the evidentiary record in the NAFCA Case, doubtless calculating the risk of having its complaint consolidated by the Board with the now-closed-record proceedings – and thus subjecting itself to discovery – had finally been eliminated. Indeed, Olin was so adverse to providing discovery, and perhaps so concerned about what discovery would reveal, that it surrendered any chance of obtaining reparations for the time period between January 1, 2015, when Union Pacific began charging for empty repair moves under Item 55-C, and July 8, 2017 (*i.e.*, two years before the date of its complaint).¹²

II. ARGUMENT

The Board should discourage parties from engaging in gamesmanship that undermines the discovery process and the public interest in the Board’s having a complete record on which to base its decisions. Union Pacific submits the appropriate course of action under the circumstances is to dismiss Olin’s complaint without prejudice. Olin represents in its Motion to Hold Proceeding in Abeyance that it will not pursue its complaint if Union Pacific prevails in the

¹² In fact, as discussed in note 1, *supra*, Olin has not yet properly served its complaint or tolled the statute of limitations because it has not yet set a copy of its complaint “to the chief legal officer of each defendant either by confirmed facsimile and first-class mail or express overnight courier.” 49 C.F.R. § 1111.4.

NAFCA Case. See Abeyance Motion at 4-5.¹³ If Union Pacific does not prevail, Olin could re-file its complaint, and then the parties could litigate Olin’s claims with the benefit of the Board’s decision in the NAFCA Case.¹⁴ Olin might object that dismissal would prevent tolling of the limitations period under 49 U.S.C. § 11705(c) – the sole reason Olin chose to file its complaint now rather than await the Board’s decision in the NAFCA Case. See Abeyance Motion at 3. But even when they prevail, parties in unreasonable practice cases are not necessarily entitled to *any* damages, much less damages reaching back two years from the date of a strategically filed complaint. Instead, the Board “exercises discretion in determining whether the equities of restitution warrant reparations, based on the circumstances of each case.” *Mobile Tank Car Servs. v. Southern Ry.*, ICC Docket No. 40134 (ICC served July 1, 1988) at 5. Dismissal of Olin’s complaint would help discourage parties from engaging in the same type of strategic behavior that occurred here and would advance the Board’s interest in resolving disputes based on the best and most complete record possible.

¹³ In the cover letter accompanying Olin’s complaint, Olin’s counsel says something different. Olin’s counsel says: “If, however, the Board determines in Docket No. NOR 42144, *et al.* that the [Item 55-C] charges are not unlawful, Olin could then decide whether to dismiss the enclosed Complaint without prejudice.” See Letter from Michael F. McBride to Cynthia T. Brown, dated July 8, 2019. We understand the formal pleading to represent Olin’s actual and complete position.

¹⁴ Union Pacific does not concede Olin would have a viable claim even if Union Pacific does not prevail in the NAFCA Case. Union Pacific has defenses to liability that are specific to Olin. In addition, any adverse Board decision would likely identify factual issues relevant to liability that Union Pacific would expect to explore through discovery.

Respectfully submitted,

/s/ Michael L. Rosenthal

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July 29, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of July, 2019, I caused a copy of the foregoing document to be served by e-mail on counsel for all parties of record in NOR 42164.

/s/ Michael L. Rosenthal
Michael L. Rosenthal