

244160

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
August 23, 2017
Part of
Public Record

_____	)	
ARKEMA INC.,	)	
	)	
Complainant,	)	
	)	
v.	)	NOR 42153
	)	
UNION PACIFIC RAILROAD COMPANY,	)	
	)	
Defendant.	)	
_____	)	

ANSWER

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August 23, 2017

	)	
ARKEMA INC.,	)	
	)	
Complainant,	)	
	)	
v.	)	NOR 42153
	)	
UNION PACIFIC RAILROAD COMPANY,	)	
	)	
Defendant.	)	
	)	

Union Pacific Railroad Company hereby answers the Complaint of Arkema Inc., filed on August 1, 2017.¹ To the extent Union Pacific does not specifically admit an allegation in the Complaint, that allegation is denied.

Union Pacific responds to the allegations in each separately numbered paragraph of the Complaint as follows:

- ¹ Union Pacific actually received the service copy of the Complaint by express overnight courier on August 3, 2017. Arkema's counsel informed Union Pacific's counsel that Arkema's overnight courier missed its pick-up on August 1.

chemical products in rail tank cars for Arkema and that it does not hold itself out to furnish tank cars to customers.

3. Union Pacific admits that it is a common carrier by rail engaged in the transportation of freight in interstate commerce; that it is generally subject to the Interstate Commerce Commission Termination Act of 1995 and to the jurisdiction of the Surface Transportation Board; and that it regularly provides rail transportation in tank cars it does not own. Union Pacific denies that it requires shippers or receivers to enter into any particular ownership or lease arrangements with regard to the tank cars used to transport their products.

4. Paragraph 4 states legal conclusions to which no response is necessary.

5. Union Pacific admits that it does not hold itself out to furnish tank cars to customers, consistent with the Interstate Commerce Commission's recognition that "[a]s a rule carriers have never furnished these cars, and it has come to be mutually understood that they should not do so." *In the Matter of Private Cars*, 50 I.C.C. 652 (1918).

6. With regard to the allegations in Paragraph 6 relating to Ex Parte No. 328, Union Pacific admits that the Interstate Commerce Commission issued a decision in a proceeding that was docketed as Ex Parte No. 328, *Investigation of Tank Car Allowance System*, 3 I.C.C.2d 196 (1986), and asserts that the decision speaks for itself. With regard to the allegations in Paragraph 6 purporting to describe 49 U.S.C. §§ 11121 and 11122, those allegations state legal conclusions to which no response is necessary.

7. Union Pacific admits that the Interstate Commerce Commission issued a decision in a proceeding that was docketed as Ex Parte No. 328, *Investigation of Tank Car Allowance System*, 3 I.C.C.2d 196 (1986). Union Pacific asserts that the decision speaks for itself.

8. Union Pacific admits that the Interstate Commerce Commission issued a decision in *General American Transportation Corp. v. Indiana Harbor Belt Railroad Co.*, 3 I.C.C. 2d 599 (1987). Union Pacific asserts that the decision speaks for itself.

9. Union Pacific admits the allegations in Paragraph 9 with regard to 2015 and 2016 but further asserts that the amount it “collects” from customers and the amount Arkema “paid” are substantially more than the amount it retains because it must pass along a substantial portion of revenue it collects (and customers pay) to other railroads that participate in interline moves.

10. Union Pacific admits that most movements of tank cars pursuant to Union Pacific contracts and tariffs are made in private tank cars under zero-mileage rates and that it does not pay mileage allowances when it provides transportation under zero-mileage rates. Union Pacific also admits that it does not hold itself out to furnish tank cars to customers. Union Pacific denies the remaining allegations in Paragraph 10.

11. Union Pacific admits that Tariff UP 6004-C, Item 55-C was effective January 1, 2015 and provides for mileage-based charges on, among other types of movements, empty moves of tank cars to and from repair facilities, except when the empty move is immediately preceded by a loaded line-haul revenue movement on Union Pacific and under certain other specified circumstances. Union Pacific further asserts that Item 55-C is consistent with the Interstate Commerce Commission’s decisions in *General American Transportation Corp. v. Indiana Harbor Belt Railroad Co.*, 3 I.C.C.2d 599 (1987), and *Charges for Movement of Empty Cars, Buffalo & Pittsburgh Railroad, Inc.*, 7 I.C.C.2d 18 (1990), which recognize that charging shippers directly for repair moves encourages efficiency by giving car owners and users more incentive to consider transportation costs in selecting repair facilities, promotes individual market pricing of different aspects of rail service consistent with the Staggers Act, and eliminates

the harmful cross-subsidization inherent in the recovery of costs associated with repair moves through Freight Tariff RIC 6007-Series and the mileage equalization provisions of the National Tank Car Allowance Agreement. Union Pacific denies the remaining allegations in Paragraph 11, including any allegation that Union Pacific previously received no compensation for transporting empty private tank cars to repair facilities.

12. Union Pacific admits that when it adopted Item 55-C's new charges for empty moves of private tank cars to and from repair facilities it also established an exception to Freight Tariff RIC 6007-Series, so any empty miles for which Union Pacific imposes charges under Item 55-C would be excluded from mileage equalization accounting under Freight Tariff RIC 6007-Series. Union Pacific denies the remaining allegations in Paragraph 12. Union Pacific asserts that Item 55-C charges for transporting empty private tank cars to and from repair facilities can be \$0.

13. Union Pacific denies the allegations in Paragraph 13, including any allegation that providers of private tank cars, including Arkema, are entitled to any additional compensation in connection with Union Pacific's adoption of new charges for empty moves to and from repair facilities in Item 55-C.

14. Paragraph 14 states legal conclusions to which no response is necessary.

15. Paragraph 15 states legal conclusions to which no response is necessary.

16. Paragraph 16 states legal conclusions to which no response is necessary.

17. Paragraph 17 states legal conclusions to which no response is necessary.

18. Paragraph 18 states legal conclusions to which no response is necessary.

19. Union Pacific incorporates by reference its responses to the allegations in the preceding paragraphs.

20. Union Pacific admits UP Tariff 6004-C, Item 55-C was effective January 1, 2015.

Union Pacific asserts that Item 55-C speaks for itself.

21. Union Pacific asserts that UPRR 4703-Series speaks for itself.

22. Union Pacific asserts that UPRR 4703-Series speaks for itself.

23. Union Pacific asserts that UPRR 4703-Series speaks for itself.

24. Union Pacific denies that prior to January 1, 2015, it provided the transportation services covered by Item 55-C to Arkema without charge. Union Pacific admits that from January 1, 2015 to July 31, 2015, Union Pacific assessed charges against Arkema for certain movements of empty private tank cars to and from repair facilities pursuant to a contract with Arkema and that since August 1, 2015, Union Pacific has assessed charges against Arkema for certain movements empty private tank cars to and from repair facilities pursuant to Item 55-C. Union Pacific denies the remaining allegations in Paragraph 24.

25. Union Pacific admits it transports tens of thousands of loaded tank car shipments annually. Union Pacific denies it transported 6,028 loaded tank car shipments for Arkema in 2015 and 6,260 loaded tank car shipments for Arkema in 2016. Union Pacific admits the number of tank car shipments to Repair Facilities that it transported in 2015 and 2016 was less than the number of loaded tank car shipments.

26. Union Pacific admits that it does not pay mileage allowances to Arkema when Union Pacific transports products in tank cars under rates charged to Arkema. Union Pacific denies the remaining allegations in Paragraph 26, including any allegation that Arkema is not compensated for providing tank cars when it provides tank cars in which Union Pacific transports products under rates charged to Arkema.

27. Union Pacific denies the allegations in Paragraph 27, including any allegation that Arkema is not compensated for providing tank cars when it provides tank cars in which Union Pacific transports products under rates charged to Arkema or that Arkema is entitled to any additional compensation in connection with Union Pacific's adoption of new charges for empty moves to and from repair facilities in Item 55-C.

28. Union Pacific denies the allegations in Paragraph 28.

RESPONSE TO ARKEMA'S REQUEST FOR RELIEF

Union Pacific denies that Arkema is entitled to any of the relief it seeks.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim for Relief)

1. Arkema fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

(Jurisdiction)

2. The Board lacks jurisdiction over Arkema's claims to the extent the claims involve movements pursuant to contracts.

THIRD AFFIRMATIVE DEFENSE

(Estoppel, Waiver)

3. Arkema's claims are barred, in whole or in part, by the doctrines of estoppel and waiver.

FOURTH AFFIRMATIVE DEFENSE

(Filed Rate Doctrine)

4. Arkema's claims for reparations and damages are barred by the filed rate doctrine.

FIFTH AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

5. Arkema is barred from recovery by reason of its failure to mitigate, minimize, or avoid the damages alleged in the Complaint.

SIXTH AFFIRMATIVE DEFENSE

(Set-Off)

6. To the extent Arkema has suffered any damages, such damages should be set off by the amounts that would be owed to Defendant for empty miles Defendant excluded from mileage equalization accounting under Freight Tariff RIC 6007-Series because it adopted Item 55-C.

WHEREFORE, Union Pacific requests that the Complaint be dismissed with prejudice; that no relief of any kind be awarded to Arkema; that Union Pacific be awarded its costs; and that the Board grant Union Pacific such other and further relief as may be appropriate.

Respectfully submitted,

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August 23, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of August, 2017, I caused a copy of the foregoing document to be served by e-mail on all of the parties of record in NOR 42153.

/s/ Michael L. Rosenthal
Michael L. Rosenthal