

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

242570

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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.

NOR 42144

**SECOND STATUS REPORT AND REQUEST FOR
RE-ESTABLISHMENT OF PROCEDURAL SCHEDULE**

This Second Status Report and Request for Re-Establishment of Procedural Schedule (“Status Report and Request”) is submitted by the Complainants in this case pursuant to the Board’s decision served in this matter on June 10, 2016 and the Status Report submitted by the parties on July 1, 2016 pursuant to that decision. In the June 10, 2016 decision, the Board held in abeyance the procedural schedule it had previously established for this case because of the existence of several discovery disputes which had been set for hearing before the Honorable John P. Dring on June 23-24, 2016. The Board further directed the parties to file a status report, including a proposed revised procedural schedule if appropriate, by July 1, 2016. In their July 1, 2016 Status Report, the parties informed the Board that the June 23 discovery conference had

been adjourned by Judge Dring pending further discussions by the parties over their disputes and discovery in general. The Status Report further stated that the parties would submit another status report to the Board, including a proposed procedural schedule, if appropriate, within 10 days of either (1) reaching agreement on their outstanding discovery disputes, or (2) the conclusion of the discovery conference if it was reconvened by Judge Dring for him to resolve any outstanding disputes.

The Complainants¹ hereby inform the Board that, with the assistance of Judge Dring in hearings held before him on August 22, 2016, September 20, 2016, and September 29, 2016, and as a result of discussions between the Complainants and Defendant Union Pacific Railroad Company ("UP"), the parties have resolved all of their outstanding discovery disputes. Complainants further submit that they believe document production and deposition discovery has progressed to the point that it is appropriate to re-institute the procedural schedule for this case. More specifically, the following discovery-related events have occurred since the initial Status Report:

1. All of the Association Complainants have completed their document production to UP, subject to production of privilege logs by North America Freight Car Association and American Fuel & Petrochemicals Manufacturers.
2. On December 14, 2016, Complainants took the depositions of two UP employees in Omaha, Nebraska.

¹ Complainants unsuccessfully attempted to obtain UP's concurrence with this Second Status Report and the schedules proposed below and also in a contemporaneous filing being made with Judge Dring requesting that he establish dates for concluding discovery in this case.

3. Complainants Ethanol Products, LLC d/b/a POET Ethanol Products, and POET Nutrition, Inc., completed their document production to UP in January, 2017, subject to a few follow up requests for documents by UP that neither POET entities oppose.
4. On January 19, 2017, UP noticed the depositions of employees of POET Ethanol Products, POET Nutrition, Inc., and Cargill. The employees to be deposed have not yet been designated and the dates for these depositions have not yet been set.
5. Cargill has produced substantial cost and other data to UP pursuant to agreements reached at the discovery conferences before Judge Dring, and is in the process of completing its production of other documents. Cargill expects to complete that production before the end of this month.
6. On October 27, 2016, UP counsel informed Complainants' counsel via email that "my understanding is that, subject to checking on one or two open issues, we should complete our production of documents next week. I'm not yet certain about the privilege log." On January 19, 2017, however, in response to a request for UP to confirm it had completed its production, UP counsel informed Complainants via email that "Union Pacific still has some documents left to produce. We also expect to produce an update of our traffic data, covering movements through 2016, by late February."
7. It is Complainants' collective understanding that UP and the four tank car owner/lessor companies it served subpoenas upon are working on completing discovery in accordance with the directives outlined in the decision served in this case on October 13, 2016, and the hearings held on the discovery sought from these parties by UP. Complainants are not privy to any agreed-upon end dates for such discovery from these non-parties to UP, but Complainants position has been that this production is not germane to Complainants'

opening evidence, but rather UP's responses to such evidence. As such, that production from non-parties should have no bearing on the end dates for party discovery or date for Complainant's submittal of Opening Evidence and Argument.

During the course of the hearings before Judge Dring, he informed the parties that he had been given authority by the Board to establish the end dates for document and deposition discovery in the case. As such, contemporaneous with this Status Report and Request, Complainants have also filed with the Board a Status Report and request to Judge Dring asking him to establish the end dates for document production, deposition discovery, and privilege log production and follow up. In conjunction with those requests, the Complainants ask the Board to establish the following schedule for the presentation of evidence in this case, keyed off of the date established by Judge Dring for completion of deposition discovery, which the parties have previously agreed would be the date for discovery to be concluded. The intervals coincide with the intervals originally agreed upon by the parties and reflected in the Board's February 11, 2016 Order establishing the original procedural schedule:

Day 0	Completion of Deposition Discovery
D + 30	Complainants' Opening Evidence and Argument
D + 90	Defendant's Reply Evidence and Argument
D + 120	Complainants' Rebuttal Evidence and Argument

For all the reasons set forth above, Complainants hereby request that the Board expeditiously issue an order re-establishing the foregoing schedule for submitting evidence and argument in this case.

Respectfully submitted,

/s/ Thomas W. Wilcox

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February, 2017, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or a more expeditious manner of delivery, on all of the parties of record in NOR 42144 listed in the official service list prepared for this case.

I also caused a copy of the foregoing document to be served by email and by hand delivery upon Administrative Law Judge John P. Dring, Federal Energy Regulatory Commission Office of Administrative Law Judges, 888 First Street, N.E., Washington DC 20426.

/s/ Thomas W. Wilcox
Thomas W. Wilcox