

244210
244211
244212

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
August 29, 2017
Part of
Public Record

**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, INC.; and
CARGILL INCORPORATED**

vs.

**UNION PACIFIC RAILROAD
COMPANY**

NOR 42144, et. al.
(consolidated)

REPLY TO UNION PACIFIC'S SECOND MOTION FOR CONSOLIDATION

Complainants¹ in Docket No. NOR 42144, and complainants in Docket Nos. NOR 42150 and 42152² (the three dockets hereafter referred to as "Consolidated Cases") hereby reply in opposition to "Union Pacific's Second Motion to Consolidate Proceedings," ("Second Consolidation Motion") and "Motion for Consolidation" ("Motion") filed by the Defendant,

¹ Complainants are The North America Freight Car Association ("NAFCA"); the American Fuel & Petrochemical Manufacturers; The Chlorine Institute, Inc.; The Fertilizer Institute; and the American Chemistry Council (collectively, the "Association Complainants"); and Ethanol Products, LLC d/b/a Poet Ethanol Products ("POET Ethanol"); Poet Nutrition, Inc. ("POET Nutrition"); and Cargill Incorporated ("Cargill") (collectively, the "Individual Complainants").

² Complainants in Docket NOR 42150 are Valero Marketing and Supply Co. and Valero Rail Partners, LLC ("Valero"), and Complainants in Docket NOR 42152 are Tesoro Refining & Marketing Co. LLC; Tesoro Great Plains Gathering & Marketing LLC; and Dakota Prairie Refining, LLC ("Tesoro"). This Reply refers to the Valero and Tesoro entities together as the Consolidated Complainants.

Union Pacific Railroad Company (“UP”), on August 9, 2017. The Second Consolidation Motion is a two paragraph document that references and attaches UP’s simultaneous, and more detailed, Motion filed in Docket NOR 42153, *Arkema, Inc. v. Union Pacific Railroad Co.* (“*Arkema*”), and the purpose of both motions is to convince the Board to consolidate these Consolidated Cases with the *Arkema* case, which was commenced on August 1, 2017 with the filing of a formal complaint. At their core, these motions are nothing more than the latest in a series of attempts by UP to avoid adjudication of the legality of its conduct.

The Second Consolidation Motion and Motion should both be denied and these Consolidated Cases allowed to complete the small amount of discovery that remains and progress to the submission of evidence pursuant to the schedule adopted by the Board in its March 31, 2017 Decision in the Consolidated Cases (“*March 31 Decision*”). For the reasons discussed in this Reply, consolidating the *Arkema* case into these cases at this eleventh hour would impose significant additional delay, which would be highly prejudicial to Complainants and Consolidated Complainants. On the other hand, denying UP’s request would result in no inefficiencies and will not prejudice UP in any way. The Board must, at some point, put an end to UP’s dilatory tactics.

I. BACKGROUND

A. Procedural Background Relevant to UP’s Motions

Complainants initiated Docket NOR 42144 by complaint filed on March 31, 2015, as amended on June 2, 2015. Almost immediately after the complaint was filed, UP and Complainants engaged in extensive discovery that has now unfortunately dragged on for over two years due to a variety of factors, but primarily because of UP’s insistence on seeking extensive discovery of information from non-parties and from the Individual Complainants.

Complainants, the Individual Complainants, and the non-parties all objected to this excessive discovery. On February 11, 2016, the Board referred all discovery matters to Administrative Law Judge John Dring of the Federal Energy Regulatory Commission.

Discussions between all parties (and non-parties) on how to assuage UP's demands for such extensive discovery were not successful, and so, in a series of discovery hearings held by Judge Dring on June 23, August 22, and September 20, all of the outstanding discovery disputes between UP and Complainants, and between UP and the third-party car owners, were presented to Judge Dring. He resolved them in a series of oral and written rulings, the last of which was a written ruling served on October 13, 2016. Accordingly, as of that date, all parties and non-parties in Docket NOR 42144 were proceeding to complete their respective discovery under the parameters established by Judge Dring.

While Complainants, UP, and the non-parties were in the process of completing discovery in Docket NOR 42144, Valero and Tesoro filed their complaints against UP on December 19, 2016 (Docket NOR 42150), and December 31, 2016 (Docket NOR 42152), respectively. These two complaints precipitated UP's first Motion for Consolidation, which was filed on January 26, 2017. The Board granted UP's motion over the strenuous objections of Complainants and Consolidated Complainants. A primary reason for the Board consolidating the three cases was its conclusion that "the record [in Docket NOR 42144] indicates that there are still a number of outstanding discovery items." *March 31 Decision* at 4. The Board also concluded that UP had identified "a significant potential efficiency," which is discussed below and which has proven to be illusory. *Id.*

B. Discovery is Very Advanced in the Consolidated Cases

1. Docket NOR 42144

Since the *March 31 Decision*, all deposition and document discovery from UP to Complainants, and all of the document production by Complainants to UP, in Docket No. NOR 42144 has been completed. UP's only example of an outstanding discovery matter in that docket is a single deposition scheduled to take place on September 20, 2017. Motion at 7. This therefore is no longer a situation where the Board should have difficulty gauging when discovery will end. *Cf. March 31 Decision* at 4. The Association Complainants completed their discovery responses to UP many months ago, in some cases over a year ago.³ All document and deposition discovery from UP to the Complainants was completed several months ago. All deposition and document discovery by UP of Individual Complainants POET Ethanol and POET Nutrition was completed on June 8, 2017.⁴ Cargill's document production to UP was completed on August 3, 2017.⁵ UP and the Complainants also executed a Stipulation Agreement on August 8, 2017, which contains a number of negotiated stipulations designed to reduce the overall discovery in Docket NOR 42144.

In addition, and especially significant in the context of UP's current Motion, at the time of UP's first motion for consolidation and the Board's issuance of the *March 31 Decision*, none of the discovery sought by UP from four of the nation's largest railroad tank car owners through third-party subpoenas had been produced to UP in accordance with Judge Dring's order of October 13, 2016 ruling on issues specific to this production. All of this material was

³ For example, Association Complainants the American Chemistry Council and The Fertilizer Institute completed their productions to UP on June 10, 2016.

⁴ *Complainants' Eighth Bi-Weekly Status Report*, filed in Docket. NOR 42144 on June 22, 2017.

⁵ *Complainants' Twelfth Bi-Weekly Status Report*, filed in Docket NOR 42144 on August 17, 2017.

subsequently produced to UP as of July 6, 2017.⁶ The material, which was also produced to the Complainants subject to the Protective Order in Docket NOR 42144, consists of approximately 15 *gigabytes* of lease documents, car movement records, and data and correspondence related to moves to repair shops for thousands of rail tank cars sold or leased to many rail shippers across multiple industries—all in addition to comparable information produced by the Individual Complainants. In addition to the huge amount of materials UP was allowed to obtain in discovery from the files of the non-parties, it obtained still more data associated with these non-parties through their consent for UP to obtain such data from RAILINC Corp. This data, which was also produced to Complainants pursuant to the Protective Order, consists of over 300 *gigabytes* of data spanning over 15 years on mileage equalization payments, loaded and empty car movements, certain cost data, tank car movement data, and other data. UP tries to hide the enormous quantity of information it has obtained in discovery from these non-parties by relegating this significant fact in a footnote to its Motion. *Id.* at 10, n.11.

Consequently, save for the deposition discovery, which is currently not scheduled to extend beyond September 20, 2017, discovery between UP and the Complainants, and between UP and non-parties, in Docket NOR 42144 has been completed, and has been for a considerable amount of time for some Complainants. The prolonged discovery phase of that case has resulted in UP obtaining a huge trove of documents and data.

2. Dockets NOR 42150 and 42152

As anticipated by the Complainants in Docket NOR 42144, the consolidation of Docket NOR 42150 and 42152 into Docket NOR 42144 has extended the overall discovery period of the

⁶ *Status Report of Non-Party Tank Car Owners for July 6, 2017*, filed in Docket NOR 42144. This report explains how UP began receiving information from the non-party car owners as early as April, 2017.

Consolidated Cases. In the *March 31 Decision*, the STB expressed its concerns about the additional delay and the corresponding prejudice to Complainants that protracted discovery involving Tesoro and Valero would entail. It therefore pointedly emphasized that “discovery involving Valero and Tesoro should proceed as quickly as possible to avoid or minimize any timing effects on the NAFTA case.” *March 31 Decision* at 4-5. The Board expressed its hope and belief that the guidance provided to the Individual Complainants by Judge Dring would help in this regard. *Id.* at 5.

Complainants do not question whether UP, Valero and Tesoro have proceeded as quickly as possible to complete discovery in those cases in response to the Board’s admonition and concern. Complainants assume this is indeed the case. It is Complainants’ understanding from the Consolidated Complainants that document discovery will be completed in those cases relatively soon, with depositions to follow thereafter. Discovery in those proceedings will likely conclude not long after the aforementioned deposition discovery in Docket NOR 42144 is completed.

However, it should be abundantly clear to the Board that discovery in the *Arkema* case cannot be completed in any reasonably comparable timeframe. As stated above, the complaints in Dockets NOR 42150 and 42152 were filed on December 19, 2016 and December 30, 2016, respectively. Even under the conditions identified by the Board in its *March 31 Decision* – that it believed discovery involving UP and the Consolidated Complainants would proceed as quickly as possible so as “to avoid or minimize any timing effects on the NAFTA case,” and the Board’s specific admonition that such speed was necessary to avoid or minimize prejudice to the Complainants — on their current schedule it will take nearly *eleven months* from the filing of the complaints in those two cases to complete discovery. If this same timeline is applied to the

Arkema case, UP and Arkema would not complete that phase of the case until July 2018. And even under UP's claim that discovery of the Consolidated Complainants did not begin "in earnest" until the *March 31 Decision*, see Motion at 7, Complainants are still faced with a virtual guarantee that further consolidation will extend discovery by another half-year.

II. ARGUMENT

A. UP's Speculation about Arkema's Motives is Irrelevant

In its Motion UP engages in accusatory speculation about not only Arkema's motivation and mindset, but also that of unnamed "parties in future cases." *Motion* at 2. UP's ultimate point seems to be that Arkema must have filed its complaint when it did to avoid discovery, and so the Board should call Arkema on this alleged "gamesmanship" and punish it by consolidating its case into the Consolidated Cases. *Id.* But this is nonsensical, since neither a complainant nor a defendant in a new case is excused from the Board's discovery rules under any circumstances. Nor has Arkema asked to be excused from such discovery. Furthermore, UP's strident assertion that the "only plausible reason" Arkema waited to file its case was to try and avoid discovery that UP could use in the Consolidated Cases, *id.* at 3, cannot be true. As demonstrated in Docket NOR 42144 by UP's own subpoenas to tank car manufacturers, UP could have sought discovery of Arkema at the outset of that case in 2015 when the original Complaint was filed in Docket NOR 42144. Accordingly, UP's professed urgent need for discovery of Arkema to defend the Consolidated Cases over two years after that proceeding started rings hollow.

Aside from being unsupported by any facts, UP's speculation about the timing of Arkema's complaint is utterly irrelevant to and distracts from the more substantive question of whether that case, having been filed when it was filed, should be consolidated with the other Consolidated Cases. As explained below, it should not, since to do so would be highly

prejudicial to both Complainants and Consolidated Complainants—but Complainants in particular—and would be extremely inefficient.

B. Consolidation Would Result in Significant Additional Delay that Would be Highly Prejudicial to both Complainants and Consolidated Complainants

In deciding whether to grant a consolidation request, “the Board considers whether the proceedings involve common facts, issues, and parties; whether consolidation would promote efficiency; and whether consolidation would unduly delay the proceedings or prejudice any party.” *March 31 Decision* at 3 (citing *Honey Creek R.R. – Petition for Declaratory Order*, FD 34869, slip op. at 3 (STB served June 4, 2008)). While there may be some common facts, issues, and parties present with the *Arkema* complaint, these factors are overwhelmed by the significant harm that would be caused by consolidation of that case with the Consolidated Cases. In fact, the proposed consolidation would be highly inefficient and impose significant additional delay upon a formal dispute first brought to this Board in March, 2015. For those reasons, consolidation would be highly prejudicial to the Complainants in NOR 42144 and to the Consolidated Complainants.

Although the Board ultimately decided to consolidate Dockets NOR 42150 and 42152 with Docket NOR 42144 in the *March 31 Decision*, it did so with clear reservations. It expressed real concern about the potential harm of that consolidation to the Complainants because of the unavoidable additional delay it would cause. The Board nevertheless justified consolidation of the Valero and Tesoro complaints at that time in large part because “the record indicates that there are a number outstanding discovery items.” *March 31 Decision* at 4. As summarized above, this is no longer the case, as discovery in NOR 42144 is complete except for a single deposition scheduled on September 20, 2017. All of the document and deposition discovery from all other Complainants is complete. A huge amount of documents and data from

the four non-party tank car owners also has been produced to UP since the *March 31 Decision*. Consequently, but for the taking of the final deposition, Complainants are prepared to file their opening evidence promptly upon the completion of discovery in Docket Nos. 42150 and 42152, which will trigger the end date of discovery in the Consolidated Cases and the institution of the evidentiary schedule 30 days later. That date will arrive months—and most certainly many months—before Arkema and UP complete the discovery phase of the *Arkema* case. While the Board countenanced some delay in the Consolidated Cases to complete discovery in Dockets 42150 and 42152, no further delay is warranted.

The circumstances surrounding UP's current Motion therefore are quite different from those previously presented to the Board. Consolidation of the *Arkema* case under current circumstances would introduce a considerable amount of additional delay that would be highly prejudicial to both Complainants and Consolidated Complainants. As stated above, even with the benefit of rulings from Judge Dring, the experience of POET Ethanol, POET Nutrition, and Cargill in Docket NOR 42144, and the Board's expressed desire that discovery in Dockets NOR 42150 and 42152 "should proceed as quickly as possible," discovery in those two dockets is still on track to be completed at least nine months after those complaints were filed. This is not likely to be long after the final deposition is taken in Docket No. 42144. A similar timeline for discovery in the *Arkema* case if it is consolidated, however, would result in Complainants and Consolidated Complainants sitting idle for many more months after the completion of all discovery in NOR 42144 (on top of the nearly two and a half *years* the discovery process in that docket has taken to date), and in Dockets NOR 42150 and 42152, just to file their *opening* evidence.

In addition to depriving Complainants and Consolidated Complainants of speedy relief, the additional delay may well degrade their ability to prove their case. Much of the evidence produced in discovery and deposition testimony addresses a specific time period in which UP acted. If another year passes, or even another six months, that evidence may begin to go stale—to lose its probative value as the parties decide they must update their evidence at great cost and effort. *Cf. Masimo Corp. v. Philips Elecs. N. Am. Corp.*, No. 11-742-LPS-MPT, 2012 WL 1267979, at *6 (D. Del. April 16, 2012) (“Resuming litigation after a protracted stay carries distinct problems associated with the passage of time, such as stale evidence, faded witnesses’ memories, and lost documents and information.”); *see also N. Plains Res. Council, Inc. v. STB*, 668 F.3d 1067, 1086-87 (9th Cir. 2011) (reversing a Board action predicated on stale data). The prejudicial delay will thus become self-reinforcing. Indeed, that situation has been borne out by delay in other cases before the Board. *See* Compl.’s Third Mot. to Compel, *Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.*, Docket No. NOR 42121, at 1 (Aug. 3, 2012) (seeking an order to compel the defendant “to update its responses to certain of [the complainant]’s original discovery requests that are now over two years out of date”). This is an unfair delay and introduces significant inefficiency that can and should be avoided by denying consolidation.

Finally, while these cases continue to be delayed, UP will continue to collect tens of millions of dollars in unlawful charges annually from tank car providers for movements to and from repair facilities. As those charges would continue to accumulate during the significant additional delay in processing these cases resulting from consolidating the *Arkema* case, even more tank car providers may deem it necessary to file new complaints against UP to stop the

financial damage by tolling the statute of limitations on reparations. The logic of UP's Motion would lead to even further delays since UP would surely seek to consolidate those cases too.

C. The Minimal Incremental Value of Information to UP from Arkema Does Not Come Close to Exceeding the Harms to Complainants and Consolidated Complainants

The standard articulated by the Board takes into account the prejudice to "any party" from consolidation, not any supposed prejudice from the failure to consolidate. Thus, UP's assertions that it will somehow be prejudiced by the Board's denial of UP's request to consolidate the *Arkema* case into the Consolidated Cases are unavailing and irrelevant to the Board's determination.

But in any event, UP will not be prejudiced in the least. At most, discovery from Arkema would only add incremental information from a single tank car shipper to the trove of documents and data UP already has collected in the Consolidated Cases from Complainants, the four non-party tank car owners, and Consolidated Complainants. Since the *March 31 Decision*, UP has received hundreds, if not thousands, of pages of documents and data from POET Ethanol, POET Nutrition, and Cargill. It has deposed personnel of POET Ethanol and POET Nutrition, and scheduled the aforementioned deposition of a Cargill witness. As referenced above, UP has received over 315 gigabytes of documents and data from the non-party tank car owners and from RAILINC. It has also already received substantial amounts of documents and data from Valero and Tesoro and indicated its intent to depose witnesses from those complainants. Other than noting that Arkema ships different commodities in tank cars than these other complainants, UP has not attempted to explain how additional discovery from Arkema justifies the additional delay inherent in consolidation.

UP's assertion that consolidation is justified because Arkema is "from the chemical industry, and thus provides potentially important diversity of experience with regard to tank car movements and the Impact of Item 55-C," is vague and unsupported by any facts. UP provides no support whatsoever as to what kind of "potentially important diversity of experience" there could be in sending a tank car that carries chemicals to repair shops as opposed to a tank car carrying ethanol, or crude oil, or any other commodity, and the Board should not supply its own speculation when UP has the burden to carry its own Motion. Indeed, Complainants submit that UP very likely has all the data it would need to show any "important diversity of experience" in the huge trove of data it has received from four of the largest car owners and lessors in the United States, which together account for the majority of all tank cars in operation for all commodities, including chemicals.

Nor are UP's "efficiency" arguments availing in the context of its current motion. In the *March 31 Decision*, the Board determined that UP had identified "a significant potential efficiency that consolidation would promote regarding interactions between these closely related cases." *March 31 Decision* at 4. Specifically, "[i]f the Board were to resolve the NAFCA docket first, and then discovery in the Valero or Tesoro dockets pointed toward a different resolution than that reached in NAFCA, it would be very inefficient for the Board to have to revisit or qualify the NAFCA decision at that point." *Id.* UP seeks to have the Board reach the same conclusion as to the *Arkema* case. Motion at 4. That plea has two fatal errors.

First, after the first three cases were consolidated, a significant amount of discovery has occurred in all of the dockets and there is no indication whatsoever that the issues and discovery in any of the consolidated cases is pointing toward differing resolutions. This is not surprising; nowhere did the Interstate Commerce Commission's cornerstone decision on repair moves

depend on differences among shipper commodities or car types. *See generally Gen. Am. Transp. Corp. v. Ind. Harbor Belt R.R. Co.*, 3 I.C.C. 2d 599 (1987). Nor is there any indication that the parties to that proceeding conducted any discovery, much less the voluminous discovery UP has sought and already obtained in the Consolidated Cases. Surely UP would have prominently highlighted any such benefit in its Motion.

Instead, UP has simply ignored the hole in its argument, and the inference should be clear: UP knows that the individual business practices of a single shipper have little impact, or even no impact, on the legal issues of these cases, which revolve entirely around *UP's practices*. Here, UP has not even attempted to explain what benefit it or the Board has gained from the consolidation that has already occurred. UP has not met its burden.

That also exposes a more fundamental problem with UP's Motion: It depends on the assumption that the Board can only pass judgment on UP if it has complete information from all agents in the entire rail industry. UP repeatedly asserts that it can only defend its own actions if it has data from "hundreds" of shippers or "industry-wide" information. Motion at 2, 4. Yet somehow the Board has managed to adjudicate many past unreasonable practice cases without relying on the practices of non-party shippers, or even those of non-party railroads. *See, e.g., Cargill, Inc. v. BNSF Ry. Co.*, Docket No. NOR 42120 (STB served Jan. 4, 2011). The absurdity in UP's position becomes apparent when one asks how much UP would need even if *Arkema* is consolidated: Does UP or the Board also need additional non-party discovery from every other shipper? From every other industry whose participants use tank cars? From every type and owner of repair facilities? From every fleet management company or vendor to shippers? From every railroad? At some point, the Board must simply tell UP "enough" and allow the case to move forward with the evidence available. And that requires a clear, specific statement of what

information is necessary to determine the legality of Item 55-C but still out of the Board's reach.

UP has not pointed to any such evidence, and its Motion must therefore fail.

III. CONCLUSION

For the reasons above, the Board should deny UP's Second Motion to Consolidate Proceedings and Motion to Consolidate.

Respectfully submitted,



Thomas W. Wilcox, Esq.
David K. Monroe, Esq.
GKG Law, P.C.
1055 Thomas Jefferson Street NW
Suite 500
Washington, DC 20007
(202) 342-5248

*Counsel for North America
Freight Car Association, Ethanol Products,
LLC, d/b/a POET Ethanol Products, POET
Nutrition, Inc., and Cargill, Incorporated*



Justin A. Savage, Esq.
Peter Whitfield, Esq.
Houston Shaner, Esq.
Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5558

*Counsel for American Fuel &
Petrochemical Manufacturers, Valero
Marketing and Supply Company, Valero
Rail Partners, LLC, Tesoro Refining &
Marketing Company LLC, Tesoro Great
Plains Gathering & Marketing LLC, and
Dakota Prairie Refining, LLC*



Paul M. Donovan, Esq.
LaRoe, Winn, Moerman & Donovan
1250 Connecticut Avenue, N.W., Suite 200
Washington, DC 20036
(202) 298-8100

Counsel for The Chlorine Institute



Jeffrey O. Moreno, Esq.
Thompson Hine LLP
1919 M Street, NW Suite 700
Washington, DC 20036
(202) 263-4107

*Counsel for The Fertilizer Institute and the
American Chemistry Council*

August 29, 2017

CERTIFICATE OF SERVICE

I do hereby certify that on this 29th day of August, 2017, I have served a copy of the foregoing Reply to Union Pacific's Second Motion for Consolidation via electronic mail and/ or regular mail to the following Parties of Record listed on the official service list for this docket:

Michael Rosenthal
Carolyn F. Corwin
Covington & Burling, LLP
One CityCenter
850 10th Street, NW
Washington, DC 20001

Patricia E. Charles
181 W. Madison Street, 26th FL
Chicago, IL 60602

Heaven Chee
Hogan and Lovells US LLP
700 Louisiana, Suite 4300
Houston, TX 77002

Paul Donovan
LaRoe, Winn, Moerman & Donovan
1250 Connecticut Avenue, N.W., Suite 200
Washington, DC 20036

The Honorable Judge John P. Dring
Federal Energy Regulatory Commission
Office of Administrative Law Judges
888 First Street, N.E.
Washington, DC 20426

Jennifer A. Kenedy
Locke Lord LLP
111 South Wacker Drive
Chicago, IL 60606

Jeffrey Moreno
Thompson Hine LLP
1919 M Street, Suite 700
Washington, DC 20036

Bruce Oakley
Hogan Lovells US LLP
700 Louisiana Street, Suite 4300
Houston, TX 77002

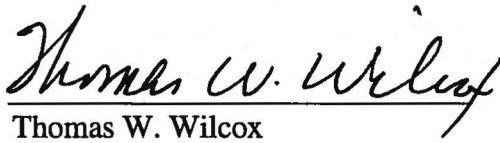
Peter A. Pfohl
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, DC 20036-3003

Justin Savage
Hogan Lovells US LLP
555 Thirteenth Street, N.W.
Washington, DC 20004

Houston Shaner
Hogan Lovells US LLP
555 Thirteenth Street, N.W.
Washington, DC 20004

Kevin M. Sheys
Nossaman LLP
1666 K Street, N.W., Suite 500
Washington, DC 20006

United States Office of Personnel Management
Human Resources Solutions, ALJ Program Office
1900 E Street N.W., Room 2458
Washington, DC 20414


Thomas W. Wilcox