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Docket No. NOR- 42152

**UNION PACIFIC RAILROAD
COMPANY**

Complainants Tesoro Refining & Marketing Company LLC, Tesoro Great Plains Gathering & Marketing LLC, and Dakota Prairie Refining, LLC (“Complainants”) hereby oppose Defendant Union Pacific Railroad Company’s (“Union Pacific”) motion for consolidation with *North America Freight Car Association, et al. v. Union Pacific Railroad Company*, Docket No. NOR-42144 (“*NAFCA*”). In its filing dated January 26, 2017, Union Pacific both opposed Complainants’ request for an abeyance and, in the same document, asserted a novel motion to consolidate this case with *NAFCA*. That motion should be denied as it will impose serious prejudice on Complainants and non-parties to this case, will not provide Union Pacific the only means through which it can defend its own actions, and will not produce benefits beyond those produced by an abeyance.

BACKGROUND

Nearly two years ago, a group of shippers and trade associations initiated the *NAFCA* litigation against Union Pacific.¹ That suit sought declaratory, injunctive, and monetary relief for two claims: (1) Union Pacific's charges on the movement of empty tank cars to and from repair facilities under UP Tariff 6004, Item 55-C ("Item 55-C" charges"), and (2) Union Pacific's more general failure to compensate shippers through the mileage allowance system of Ex Parte 328.² The Item 55-C charges began in early 2015, while the *NAFCA* complaint did not specify when Union Pacific ceased to pay mileage allowances.³ Among other relief, the *NAFCA* complainants requested that the Board order Union Pacific to begin paying mileage allowances under Ex Parte 328 and to award damages for mileage allowances not paid—including those entirely unrelated to movements incurring Item 55-C charges.⁴ During the nearly two years of proceedings there, Union Pacific sought extensive discovery. It served at least seventeen sets of discovery requests on the *NAFCA* complainants, with the combined number of document requests and interrogatories totaling well into the hundreds and ranging as far back in time as 1987.⁵ On top

¹ See generally Compl., *N. Am. Freight Car Ass'n. v. Union Pac. R.R. Co.*, Docket No. NOR-42144 (Mar. 31, 2015).

² See *id.* at 7-10.

³ See *id.*

⁴ See *id.* at 10.

⁵ See Union Pac.'s Mot. to Compel Responses to Third Set of Disc. Requests to Cargill Inc. at Ex. 1, *N. Am. Freight Car Ass'n. v. Union Pac. R.R. Co.*, Docket No. NOR-42144 (Aug. 19, 2016); Union Pac.'s Mot. to Compel Disc. of Information from Individual Complainants at Exs. 1-3, 9-11, *N. Am. Freight Car Ass'n. v. Union Pac. R.R. Co.*, Docket No. NOR-42144 (May 25, 2016); Union Pac. R.R. Co.'s Mot. to Compel Discovery of Member Information from Ass'n Complainants at Exs. 1-5, 12-15, *N. Am. Freight Car Ass'n. v. Union Pac. R.R. Co.*, Docket No. NOR-42144 (May 17, 2016).

of that, Union Pacific petitioned for subpoenas to four non-party tank car manufacturers.⁶ The legal disputes over that discovery have essentially ended, and fact discovery is coming to a close as the parties there complete the final productions.⁷ Complainants in that case have now requested a schedule for evidentiary briefing.⁸

This case began roughly two months ago.⁹ Like *NAFCA*, Complainants seek relief against the Item 55-C charges.¹⁰ But unlike *NAFCA*, Complainants do not seek an order requiring Union Pacific to pay mileage allowances or to collect damages for movements unrelated to Item 55-C charges.¹¹ Complainants moved to hold these proceedings in abeyance on January 6, 2017.¹² Union Pacific answered the complaint on January 9, 2017,¹³ and replied to the motion for an abeyance on January 26, 2017, including in its reply a cross-motion for consolidation.¹⁴ Complainants respond here to that cross-motion.

⁶ See generally Union Pac. R.R. Co.’s Pet. for Subpoenas, *N. Am. Freight Car Ass’n. v. Union Pac. R.R. Co.*, Docket No. NOR-42144 (May 17, 2016).

⁷ See generally Complainants’ Second Status Report and Request for Re-Establishment of Procedural Schedule, *N. Am. Freight Car Ass’n. v. Union Pac. R.R. Co.*, Docket No. NOR-42144 (Feb. 7, 2017).

⁸ See *id.* at 3-4.

⁹ See generally Compl.

¹⁰ See *id.* at 6.

¹¹ See *id.*

¹² See Complainants’ Mot. to Hold Proceedings in Abeyance at 1.

¹³ See Answer at 1.

¹⁴ See Def.’s Opp. to Complainants’ Mot. to Hold Proceedings in Abeyance & Mot. for Consolidation at 1 [hereinafter “Def.’s Mot. for Consolidation”].

ARGUMENT

The Board has considerable discretion in deciding whether or not to grant a motion for consolidation. See, e.g., *Takin Bros. Freight Line, Inc.—Purchase (Portion)—Chi-Fli, Inc.*, 127 M.C.C. 408, 411, 1978 WL 10517 (I.C.C. 1978). In exercising its discretion the Board generally considers the efficiencies of consolidation, unless consolidation will “delay either proceeding or cause prejudice to any of the parties.” *MVC Transp., LLC—Acquisition Exemption —P&LE Props., Inc.*, Docket No. FD-34462, slip op. at 4 (STB served Oct. 20, 2004).

I. Consolidation is inappropriate because it will impose serious prejudice on Complainants and non-parties to these proceedings.

Whatever economies Union Pacific claims from consolidation, those cannot outweigh the prejudice that consolidation would work on Complainants or the parties in *NAFCA*. See, e.g., *Malcolm v. Nat’l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993) (denying a motion for consolidation because “[t]he benefits of efficiency can never be purchased at the cost of fairness”). That prejudice arises from two indisputable differences between this case and *NAFCA*: the stage of the proceedings and the scope of the dispute. Either difference warrants denial of Union Pacific’s motion. See *Ariz. Pub. Serv. Co. v. Burlington N. & Santa Fe Rwy. Co.*, Docket No. 41185, slip op. at 8 (STB served May 12, 2003) (denying a motion to consolidate where proceedings had different scope and would examine different time periods).

First and foremost is the drastic difference in progress between *NAFCA* and these proceedings. Where one case is far into or past the end of discovery and the other only beginning, the Board and other adjudicative bodies have repeatedly held that consolidation results in unacceptable prejudice. See, e.g., *Hiram Walker & Sons, Inc.—Pet. For Decl. Order*, Docket No. MC-C-30061, 1988 WL 226436, at *1 (I.C.C. June 3, 1988) (“Proceedings may be consolidated for administrative expediency. However, I do not believe that consolidation is

warranted here. Each proceeding is at a different procedural stage.”).¹⁵ The same black letter law dictates denial of Union Pacific’s motion as it will prejudice either Complainants’ discovery rights or the *NAFCA* parties’ interest in speedy resolution of their own claims.

This case is clearly in its infancy, and Union Pacific claims that “discovery is still ongoing” in *NAFCA*.¹⁶ But the most recent filings in that case demonstrate that its end is imminent. Union Pacific has received the lion’s share of discovery from the complainants in that case, with the remaining portion not disputed, and both Union Pacific and the *NAFCA* complainants have moved into deposition discovery.¹⁷ What outstanding discovery still remains may well be resolved even before the Board rules on the motion at issue here. Further, the

¹⁵ Other such cases are in ample supply. See *Denver & Rio Grande Rwy. Hist. Found.—Adverse Abandonment—In Mineral Cty., Colo.*, Docket No. AB-1014, slip op. at (STB served Mar. 4, 2008) (“[T]he City is too far along in its proceeding for Watson to join in at this stage without causing undue delay.”); *Albemarle Corp. v. La. & N.W. R.R. Co.*, Docket No. NOR-42097, slip op. at *2 (STB served Aug. 1, 2006) (“By denying the request to consolidate now, the Board avoids any prejudice to LNW from an unnecessary delay in STB Docket No. 42096[.]”); *Union Pac. R.R. Co.—Abandonment—In Morgan Cty., Colo. (Julesburg Subdivision)*, Docket No. AB-33 (Sub-No. 86), 1994 WL 198727, at *1 (“The Sub-No. 82X proceeding is in a different procedural posture, and the time frames involved in processing these two proceedings make consolidation impractical.”); see also *Lehman Bros. Holdings, Inc. v. Gateway Funding Div. Mortg. Servs., L.P.*, 785 F.3d 96, 102 (3d Cir. 2015) (“If actions before the court involve a common question of law or fact, the court *may* . . . consolidate the actions But in light of the vastly different stages of the cases. . . . the District Court acted well within its discretion in declining to consolidate.” (internal quotation marks omitted)); *Mills v. Beech Aircraft Corp.*, 886 F.2d 758, 762 (5th Cir. 1989) (“Consolidation may properly be denied in instances where the cases are at different stages of preparedness for trial.”); *KGK Jewelry LLC v. ESD Network*, Docket Nos. 11CV9236–LTS–RLE, 12CV9130–LTS–RLE, 2014 WL 7333291, at *2 (S.D.N.Y. Dec. 24, 2014); *Ulibarri v. Novartis Pharm. Corp.*, 303 F.R.D. 402, 404-05 (D. N.M. 2014) (refusing to consolidate cases at “completely different procedural stage[s]”); *Ruane v. Cty. of Suffolk*, 923 F. Supp. 2d 454, 461 (E.D.N.Y. 2013) (“[J]udicial economy would not be served through consolidation as these two actions are at different stages of the litigation.”).

¹⁶ Def.’s Mot. for Consolidation at 3.

¹⁷ See Complainants’ Second Status Report and Request for Re-Establishment of Procedural Schedule at 2-3, *N. Am. Freight Car Ass’n. v. Union Pac. R.R. Co.*, Docket No. NOR-42144 (Feb. 7, 2017).

NAFCA complainants have moved the Board to re-instate the procedural schedule.¹⁸ If the Board grants Union Pacific’s motion, NAFCA will inevitably be set back at least several months as discovery resets. The “efficiency” of consolidation is thus a mirage.

Union Pacific’s self-serving assertion that “discovery regarding Tesoro should proceed quickly the most contentious issues have been resolved by the administrative law judge in NAFCA” also rings hollow.¹⁹ For one thing, Union Pacific does not (and cannot) identify “the most contentious issues” regarding discovery of Complainants because discovery in this case is in very early stages. There is thus no way to ensure that any rulings by Judge Dring in fact resolve all potential disputes between Complainants and Union Pacific.²⁰ If anything, disputes over the reasonable burden of discovery would need to await significant information about the costs of production unique to Complainants. See 49 C.F.R. § 1114.21(c) (“[A]ny order which justice requires may be entered to protect a party from . . . undue burden or expense[.]”); see also *Tongue River R.R. Co.—Rail Constr. & Operation—In Custer, Powder River and Rosebud Cts., Mont.*, Docket No. FD-30186, slip op. at 4-8 (STB served Sept. 10, 2014) (weighing the relevance of each request against the burden imposed on the producing party). Nothing in the two-year history of NAFCA suggests that such disputes were resolved quickly or easily. As if those delays were not too much, Union Pacific further ignores Complainants’ right to appeal certain rulings to the Board. See 49 C.F.R. § 1113.15.

But more importantly, Union Pacific simply ignores the fact that Complainants should have the opportunity to conduct their own discovery for their damages claim. Even if “discovery

¹⁸ See *id.* at 4.

¹⁹ Def.’s Mot. for Consolidation at 3.

²⁰ Complainants are in no way conceding that it is fair to subject them to law of the case for which they had no opportunity to participate or argue.

regarding Tesoro” proceeds quickly,²¹ the remainder of discovery might not. Union Pacific does not so much as mention how it plans to fit the time needed for Complainants’ discovery into the *NAFCA* proceedings. Instead, Union Pacific apparently means that Complainants will have no chance to serve discovery of their own whatsoever: They will simply “be treated the same as the shipper parties that joined in the complaint in *NAFCA*.”²² Union Pacific will thus take discovery of Complainants while Complainants will have no opportunity to develop their own case for damages. Union Pacific might prefer that outcome, but it would be grossly unfair to Complainants.

Thus, either Complainants will be prejudiced in a much more real way through the very lack of discovery Union Pacific decries, or the *NAFCA* parties will be sorely delayed in the prosecution of their case as the discovery process begins anew after two long years. Union Pacific cannot have it both ways. *See, e.g., Ultimate Timing, LLC v. Sims*, 2:08–CV–01632–MJP, 2010 WL 1881868 at *2 (W.D. Wash. May 10, 2010) (denying a motion for consolidation of two cases at different stages because the party in the advanced case “would be prejudiced by having to postpone the resolution of this case” or the party in the nascent case “may be prejudiced if they were forced to litigate their dispute on a compressed schedule”); *Narvaes v. EMC Mortg. Corp.*, Civ. Docket No. 07–00621, 2009 WL 1269733, at *2 (D. Haw. May 1, 2009) (“If the cases were consolidated, applying the schedule in [the earlier case] would be unduly prejudicial to the parties in [the nascent case], and applying the schedule in [the nascent case] would unduly delay the resolution of [the earlier case].”). In sum, consolidation guarantees either the “*undue*

²¹ Def.’s Mot. for Consolidation at 3.

²² *Id.* at 14.

delay” that Union Pacific so easily ignores²³ or completely one-sided discovery to the detriment of Complainants.

Union Pacific also elides the harm to Complainants from consolidating two cases with vastly different scope. True, this case and *NAFCA* do share a set of core facts and legal questions related to the legality of Item 55-C. But the existence of some common questions is not sufficient to support consolidation. See, e.g., *Ariz. Pub. Serv. Co. v. Burlington N. & Santa Fe Rwy. Co.*, Docket No. NOR-41185, slip op. at 8 (STB served May 12, 2003). What truly matters, instead, is the degree to which the overlap in cases secures efficiencies while avoiding prejudice. See *Mo. Pac. R.R. Co.–Abandonment & Discontinuance–Between Centralia and Hoyleton in Clinton & Wash. Ctys., Ill.*, Docket No. AB-3 (Sub No. 84), 1989 WL 238812, at *2 (I.C.C. June 21, 1989) (“Although these transactions are related, Simmons has not demonstrated why consolidation is necessary or shown that it would lead to greater efficiency in handling.”). And the efficiencies, in turn, depend as much on the differences between cases as the similarities. As the Board held in *Arizona Public Service Company*, “consolidation is not appropriate” where one case has a decidedly more “limited scope” and both address “different time periods.” Docket No. NOR-41185, slip op. at 8. That rule is highly sensible: Dragging parties to a limited dispute into a much broader case will only subject them to unnecessarily burdensome discovery, delay, and the risk of confused decisions.

Consolidation here would produce those very harms. Union Pacific frames this case as completely identical to *NAFCA*.²⁴ Union Pacific also asserts that Complainants have

²³ *Id.*

²⁴ See *id.* at 13.

“concede[d]” such identity.²⁵ Close, but not quite: The cases both address Item 55-C, as Complainants have explained in their motion for an abeyance,²⁶ but *NAFCA* contains an entirely separate claim for relief that gives it a much larger factual and temporal scope.²⁷ The *NAFCA* complainants seek relief related to Union Pacific’s failure to pay mileage allowances dating back to an undefined point in time, possibly a decade or more.²⁸ Complainants here, in contrast, seek relief only for Item 55-C charges that took effect only in 2015. *NAFCA* thus addresses the facts around many more years of Union Pacific’s conduct, a wholly separate class of payments and movements beyond those directly tied to the empty tank car movements under Item 55-C, *and* a wholly distinct legal question of whether Union Pacific is obligated to pay mileage allowances at all.

Those differences are not trivial. Undoubtedly anticipating this motion, Union Pacific has already served Complainants with discovery seeking information more than a decade before the advent of the Item 55-C charges.²⁹ That discovery also seeks extensive information about mileage allowance payments that could not possibly implicate compensation for the charges for which Complainants seek damages.³⁰ After the potential time and cost of producing that information, Complainants would be forced, under Union Pacific’s motion, to bear further delay

²⁵ *See id.*

²⁶ *See* Complainants’ Mot. to Hold Proceedings in Abeyance at 5.

²⁷ *See* First Am. Compl. at 9-10, *N. Am. Freight Car Ass’n. v. Union Pac. R.R. Co.*, Docket No. NOR-42144 (Feb. 7, 2017).

²⁸ *See id.*

²⁹ *See, e.g.*, Exhibit A at 3.

³⁰ *See, e.g.*, Exhibit A at 12 (requesting information from 2001-2016 about movements on and mileage allowances from railroads other than Union Pacific under Interrogatory No. 32(a)).

from the additional delay of awaiting the Board's decision on a separate and much wider issue. The Board should therefore deny Union Pacific's motion.

II. Consolidation is not necessary for Union Pacific to mount an effective defense.

The Board should quickly dispose of one assertion that underpins Union Pacific's motion: that it must receive "industry-wide" discovery to receive a fair hearing.³¹ The fact that some non-party has additional relevant material does not mean that Union Pacific has been *prejudiced* to the point that it cannot defend its own actions. Were that claim true, Union Pacific would remain incapable of mounting its defense in *any* of the three proceedings for which it seeks consolidation. Prejudice must entail some inability to mount an effective or timely case.

By its own admission, Union Pacific will gain discovery of no fewer than three shippers and four tank car owners in *NAFCA*. Union Pacific articulates no reason—none—why this supposed "paucity of discovery" prevents it from defending its own actions without a fourth shipper, or a fifth, or a sixth in the same proceeding.³² This silence is telling. The critical information about Union Pacific's own charges is most likely held *by Union Pacific itself*, and, moreover, the information that it would collect from Complainants is likely cumulative to that of the complainants and non-parties in *NAFCA*. *See, e.g., Denver & Rio Grande W. R.R. Co. & Mo.-Kan.-Tex. R.R. Co. v. St. Louis Sw. Rwy. Co.*, Docket No. FD-30759, 1988 WL 224415, at *2 (I.C.C. Apr. 22, 1988) ("[W]e will not normally compel production of information which is merely cumulative[.]"). If Union Pacific cannot identify any *potential* information from Complainants that would be materially different from what it will already receive in *NAFCA*

³¹ Def.'s Mot. for Consolidation at 13; *see also id.* ("Union Pacific should be allowed, *as a matter of basic fairness*, to obtain discovery from Tesoro to defend its challenged practices in this proceeding *and in NAFCA*." (emphasis supplied)).

³² *Id.* Contrary to Union Pacific's assertion, nothing suggests that it will not receive discovery from Complainants in this proceeding. *See id.*

(and Union Pacific does not), it has not been denied any meaningful element of its defense in that case. Presumably, even Union Pacific accepted this point at one time; otherwise it would have sought subpoenas of shippers while it had the opportunity to do so.³³ It is no answer that Union Pacific cannot serve subpoenas on *every* shipper from which it might gather information. Union Pacific could have easily served subpoenas on *some* additional shippers, including Complainants. Indeed, if defending its own actions truly required “industry-wide” discovery, Union Pacific might have served subpoenas on other railroads as well.

Nor is there any fundamental unfairness to Union Pacific that a decision in *NAFCA* might impact this case and others.³⁴ The unavoidable truth is that Union Pacific, like every other corporation, might litigate cases against certain parties that set precedent or preclusion rules for future suits. That prospect will remain even if the Board grants this motion—there are far more shippers than Complainants and those in *NAFCA*.

A few easy hypotheticals illustrate the lack of prejudice. Suppose that only one shipper brought a claim against Union Pacific (a result perhaps not uncommon on the Board’s unreasonable practice docket). Union Pacific could obtain discovery from the shipper and fully defend itself there, and the decision resolving that case would strongly influence, if not outright decide, similar claims brought by other shippers. Suppose instead that one shipper and one trade association bring the suit; Union Pacific is no worse off and even gains some additional discovery. Or suppose that two shippers bring suit; still Union Pacific is not prejudiced by the lack of parties in the case. Party discovery is simply the norm, and the Board should reject

³³ See generally Union Pac. R.R. Co.’s Pet. for Subpoenas, *N. Am. Freight Car Ass’n. v. Union Pac. R.R. Co.*, Docket No. NOR-42144 (May 17, 2017).

³⁴ See Mot. for Consolidation at 13 (“It would be fundamentally unfair to allow shippers to shield themselves . . . by subsequently filing copycat claims to obtain reparations.”).

Union Pacific's implicit assumption that it *must* receive discovery from any entity conceivably affected by this suit or *NAFCA*. Ultimately, Union Pacific does not have a theory of prejudice that is as concrete or specific as the delay and burden articulated by Complainants. That disparity should be fatal to this motion.

III. An abeyance is superior to consolidation.

Even if the Board sees some minor benefit to Union Pacific's motion, an abeyance would capture those benefits while avoiding the worst harms from consolidation. To the extent that an abeyance allows resolution of common issues, it captures the resource efficiencies of consolidation and avoids any risk of inconsistent results between the cases. It avoids the cumulative, and essentially duplicative, discovery that would result from consolidation, and an abeyance avoids the prejudice to Complainants and to non-parties that flow from deciding a nascent and advanced case on the same procedural schedule. The federal courts have long recognized the advantages of a similar system, the bellwether trial. *See, e.g., In re Chevron U.S.A., Inc.*, 109 F.3d 1016 (5th Cir. 1997) ("If a representative group of claimants are tried to verdict, the results of such trials can be beneficial for litigants who desire to settle such claims by providing information on the value of the cases as reflected by the jury verdicts. Common issues or even general liability may also be resolved in a bellwether context in appropriate cases."). *NAFCA* approximates such a trial, and an abeyance is therefore more appropriate than consolidation.

CONCLUSION

For the foregoing reasons, Complainants respectfully request that the Board deny Union Pacific's motion for consolidation.

Respectfully submitted,

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*Counsel for Tesoro Refining & Marketing
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Gathering & Marketing LLC, and Dakota
Prairie Refining, LLC*

Dated: February 15, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February, 2017, I have caused a copy of the foregoing motion to be served by email and/or first class mail on the following counsel for the Defendant:

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/s/ Houston Shaner
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EXHIBIT A

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

TESORO REFINING & MARKETING	)	
COMPANY LLC; TESORO GREAT PLAINS	)	
GATHERING & MARKETING LLC; and	)	
DAKOTA PRAIRIE REFINING, LLC	)	
	)	
Complainants,	)	NOR 42152
	)	
v.	)	
	)	
UNION PACIFIC RAILROAD COMPANY,	)	
	)	
Defendant.	)	
	)	

**UNION PACIFIC’S FIRST SET OF DISCOVERY REQUESTS TO TESORO REFINING
& MARKETING COMPANY LLC, TESORO GREAT PLAINS GATHERING &
MARKETING LLC, AND DAKOTA PRAIRIE REFINING, LLC**

Pursuant to 40 C.F.R. §§ 1114.25 and 1114.30, Union Pacific Railroad Company requests that Tesoro Refining & Marketing Company LLC, Tesoro Great Plains Gathering & Marketing LLC, and Dakota Prairie Refining, LLC (collectively, “Tesoro”) produce documents and information responsive to the following requests to Michael L. Rosenthal at Covington & Burling LLP, One CityCenter, 850 Tenth Street NW, Washington, D.C. 20001, no later than January 21, 2017.

DEFINITIONS

- A. “Car Owner” means the Person to whom a tank car’s reporting mark is assigned.
- B. “Communication” means any transmission or receipt of information by one or more Persons and/or between two or more Persons by means including but not limited to telephone conversations, letters, telecopies, electronic mail, text messages, written memoranda, and in-person conversations.

- C. “Complaint” refers to the complaint filed in this matter on December 30, 2016.
- D. “Document” means all types of documents that are subject to discovery under the Board’s rules at 49 C.F.R. § 1114.30(a)(1). “Document” includes every copy of a document that is not identical to the original or any other copy.
- E. “Identify” when used with respect to a movement of a rail car means to state the waybill number, the date the movement began, the car number, the origin, the destination, the carriers in the route, any interchange points, and the total miles.
- F. “Identify” when used with respect to a communication means to state the method of communication (*e.g.*, in person, by telephone, by email), the persons participating in the communication and anyone receiving a copy of the communication, and the date of the communication and to state in general terms the content of the communication.
- G. “Identify” when used with respect to a lease agreement means to state the parties to the agreement, the date of the agreement and any amendments, the term of the agreement, the cars subject to the agreement, and the date the lessee took possession of the cars.
- H. “Item 55-C” means Item 55-C in UP Tariff 6004.
- I. “Person” means a corporation, company, partnership, trade association, or natural person.
- J. “Repair Facility” means any facility that cleans, lines, relines, maintains, modifies, repairs, or retrofits tank cars.
- K. “Union Pacific” means Union Pacific Railroad Company and its predecessor railroads.
- L. “You” and “Your” refer to Tesoro, as well as any of Tesoro’s employees, agents, officers, directors, advisors, independent contractors, expert consultants, and all other Persons acting or who have acted on Tesoro’s behalf.

INSTRUCTIONS

1. Unless a different time period is specified, these requests cover the period from January 1, 2001 to the time responsive information and documents are served on Union Pacific.
2. For each and every document request, You are required to produce any documents in Your possession, custody, or control.
3. If You for any reason withhold documents or information responsive to any of these requests, You should state the specific factual and legal basis for doing so and produce documents or information for any part of the request or interrogatory that is not alleged to be objectionable or to call for production of protected information. If You withhold documents on the basis of a claimed privilege or attorney work product, then for each such document, You should provide the following information: the document's date, type (e.g., letter, memo, notes), author(s), addressee(s), other recipient(s), general subject matter, and the basis for withholding the document or information.
4. Identify all persons who provided information for each response, and state which response(s) the person provided information for.
5. These requests are continuing in character so as to require You to supplement in accordance with 49 C.F.R. § 1114.29.

INTERROGATORIES

Interrogatory No. 1

Identify the number of tank cars that You currently (a) own or (b) use pursuant to a lease agreement.

Interrogatory No. 2

Are You seeking reparations or damages for transportation provided under contracts under Count I of the Complaint? If so, identify the contract(s).

Interrogatory No. 3

Do You lease tank cars to another Person pursuant to a lease agreement under which You will retain some or all of any mileage allowances paid on those cars? If so, identify the lease agreement(s).

Interrogatory No. 4

Do You lease tank cars to another Person pursuant to a lease agreement under which You must pass along to the lessee some or all of any mileage allowances paid on those cars? If so, identify the lease agreement(s).

Interrogatory No. 5

Do You lease tank cars from another Person pursuant to a lease agreement under which the Car Owner will retain some or all of any mileage allowances paid on those cars? If so, identify the Car Owner(s) and the lease agreement(s).

Interrogatory No. 6

Do You lease tank cars from another Person pursuant to a lease agreement under which the Car Owner must pass along to You some or all of any mileage allowances paid on those cars? If so, identify the Car Owner(s) and the lease agreement(s).

Interrogatory No. 7

Do You lease tank cars to another Person pursuant to a lease agreement under which the lessee must make a payment to You if the total empty miles moved by the lessee's cars that are

subject to lease exceed the total loaded miles moved by the lessee's cars that are subject to the lease by more than a specified amount or percentage? If so, identify the lease agreement(s).

Interrogatory No. 8

Do You lease tank cars to another Person pursuant to a lease agreement under which the lessee is not required to make a payment to You if the total empty miles moved by the lessee's cars that are subject to the lease exceed the total loaded miles moved by the lessee's cars that are subject to the lease by more than a specified amount or percentage? If so, identify the lease agreement(s).

Interrogatory No. 9

Do You lease tank cars from another Person pursuant to a lease agreement under which You must make a payment to the Car Owner if the total empty miles moved by Your cars that are subject to the lease exceed the total loaded miles moved by Your cars that are subject to the lease by more than a specified amount or percentage? If so, identify the lease agreement(s).

Interrogatory No. 10

Do You lease tank cars from another Person pursuant to a lease agreement under which You are not required to make a payment to the Car Owner if the total empty miles moved by Your cars that are subject to the lease exceed the total loaded miles moved by Your cars that are subject to the lease by more than a specified amount or percentage? If so, identify the lease agreement(s).

Interrogatory No. 11

Do You contend that when a private tank car is furnished to Union Pacific by a Person that is a lessee of the car, Union Pacific is required to pay a mileage allowance to (a) the lessee,

or (b) the lessor? If You contend that the answer depends on the circumstances, state the circumstances that You contend are relevant.

Interrogatory No. 12

Do You contend that when a Person that is not the Car Owner directs Union Pacific to move an empty private tank car to or from a Repair Facility, Union Pacific can recover the costs associated with the empty miles only from the Car Owner? If You contend that the answer depends on the circumstances, state the circumstances that You contend are relevant.

Interrogatory No. 13

Do You contend that Union Pacific may not provide common carrier transportation in private tank cars under zero-mileage rates? If You contend that the answer depends on the circumstances, state the circumstances that You contend are relevant.

Interrogatory No. 14

Identify each movement of an empty tank car owned or leased by You to or from a Repair Facility, and identify the Repair Facility to or from which the car moved and the work performed at the Repair Facility.

Interrogatory No. 15

Identify each movement for which You have been assessed a charge under Item 55-C and for which You are seeking reparations under Count I, and identify the amount of the charge, the Repair Facility to or from which the car moved, and the work performed at the Repair Facility.

Interrogatory No. 16

Identify each movement for which You have been assessed a charge by a railroad other than Union Pacific for the movement of a private tank car to a Repair Facility, and identify the railroad that assessed the charge, and amount of the charge, and whether You paid the charge.

Interrogatory No. 17

Separately by each car reporting mark assigned to You, and separately for each year from 2001 through 2016, with respect to Your tank cars, state:

- a. The number of loaded miles the cars moved on Union Pacific
- b. The total number of loaded miles the cars moved on all railroads
- c. The number of empty miles the cars moved on Union Pacific
- d. The total number of empty miles the cars moved on all railroads
- e. The number of empty miles on Union Pacific associated with the cars' movements to or from Repair Facilities
- f. The total number of empty miles on all railroads associated with the cars' movements to or from Repair Facilities

Interrogatory No. 18

Separately by each car reporting mark for tank cars You furnished to Union Pacific or other railroads but did not own, and separately for each year from 2001 through 2016, state:

- a. The number of loaded miles the cars moved on Union Pacific
- b. The total number of loaded miles the cars moved on all railroads
- c. The number of empty miles the cars moved on Union Pacific
- d. The total number of empty miles the cars moved on all railroads
- e. The number of empty miles on Union Pacific associated with the cars' movements to or from Repair Facilities
- f. The total number of empty miles on all railroads associated with the cars' movements to or from Repair Facilities

Interrogatory No. 19

Separately by each car reporting mark assigned to You, state the amount billed to You pursuant to the Freight Tariff RIC 6007-Series for empty mileage associated with movements of tank cars, separately for each year from 2001 through 2016.

Interrogatory No. 20

Separately by each car reporting mark assigned to You, state the amount You charged Persons leasing Your tank cars for cost associated with empty mileage movements by those cars, separately for each such lessee, separately for each year from 2001 through 2016.

Interrogatory No. 21

Separately by each car reporting mark for tank cars You furnished to Union Pacific or other railroads but that were not owned by You, state the amount the Car Owner billed You to cover costs associated with empty mileage movements by those cars, separately for each year from 2001 through 2016, and separately for each lease agreement, if cars were subject to different lease agreements during a calendar year.

Interrogatory No. 22

Identify all communications regarding Union Pacific's adoption of charges for empty movements of tank cars in Item 55-C with:

- a. Other Persons within Tesoro
- b. Persons to whom You lease tank cars
- c. Persons from whom You lease tank cars
- d. Repair Facilities
- e. Union Pacific
- f. Any Complainant in STB Docket Nos. NOR 42144 or NOR 42150

Interrogatory No. 23

Describe all changes in Your practices related to sending tank cars to Repair Facilities that have resulted from Union Pacific's adoption of Item 55-C.

Interrogatory No. 24

Identify all communications between You and Union Pacific in which You asked Union Pacific to establish rates for movements in tank cars that included payment of a mileage allowance.

Interrogatory No. 25

Identify all communications between You and a railroad other than Union Pacific in which You asked the railroad to establish rates for movements in tank cars that included payment of a mileage allowance.

Interrogatory No. 26

Identify all communications between You and Union Pacific in which You asked Union Pacific to establish reduced line-haul rates to reflect Your furnishing tank cars.

Interrogatory No. 27

Identify all communications between You and a railroad other than Union Pacific in which You asked the railroad to establish reduced line-haul rates to reflect Your furnishing tank cars.

Interrogatory No. 28

With regard to each tank car owned by You, state:

- a. Car number
- b. Year the car was built
- c. Year the car was acquired
- d. Car's cost as acquired
- e. Costs of any subsequent modifications or additions to the car
- f. Total loaded miles moved, separately for each year from 2005 through 2016

- g. Total empty miles moved, separately for each year from 2005 through 2016
- h. Costs for programmed maintenance of valves, separately for each year from 2005 through 2016
- i. Other maintenance costs, separately for each year from 2005 through 2016
- j. Costs for car cleaning, separately for each year from 2005 through 2016
- k. Repair costs, separately for each year from 2005 through 2016
- l. Storage costs, separately for each year from 2005 through 2016
- m. Taxes paid on the car, separately for each year from 2005 through 2016
- n. Total number of empty movements to or from Repair Facilities, separately for each year from 2005 through 2016
- o. Total number of miles associated with empty movements to or from Repair Facilities, separately for each year from 2005 through 2016
- p. Total payments received from lessees, if any, separately for each year from 2005 through 2016
- q. Payments received from lessees for maintenance and repair costs You incurred, separately for each year from 2005 through 2016
- r. Payments to/credits to lessees for maintenance and repair costs incurred by lessees, separately for each year from 2005 through 2016
- s. The lease agreement(s) that governed use of the car in each year from 2005 through 2016

Interrogatory No. 29

For each tank car You used pursuant to a lease, state:

- a. Car number
- b. Loaded miles moved, separately for each year from 2005 through 2016
- c. Empty miles moved, separately for each year from 2005 through 2016
- d. Costs for programmed maintenance of valves You incurred, separately for each year from 2005 through 2016

- e. Other maintenance costs You incurred, separately for each year from 2005 through 2016
- f. Costs for car cleaning You incurred, separately for each year from 2005 through 2016
- g. Repair costs You incurred, separately for each year from 2005 through 2016
- h. Storage costs You incurred, separately for each year from 2005 through 2016
- i. Number of empty movements to or from repair shops, separately for each year from 2005 through 2016
- j. Number of miles associated with empty movements to or from Repair Facilities, separately for each year from 2005 through 2016
- k. Total payments You made to the lessor, separately for each year from 2005 through 2016
- l. Payments/credits You received from the lessor for maintenance and repair costs as reimbursement for costs You incurred, separately for each year from 2005 through 2016
- m. Payments You made to the lessor for maintenance and repair costs incurred by the lessor, separately for each year from 2005 through 2016
- n. The lease agreement(s) that governed use of the car in each year from 2005 through 2016

Interrogatory No. 30

Separately for each year from 2005 through 2016, state for Tesoro:

- a. Number of tank cars owned
- b. Total number of rail cars owned
- c. Taxes on fixed property used for repair, cleaning, maintenance, or storage of (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)
- d. Depreciation on fixed property used for repair, cleaning, maintenance, or storage of (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)
- e. Insurance on fixed property used for repair, cleaning, maintenance, or storage of (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)
- f. Rentals on track and other property when used for repair, cleaning, maintenance, or storage of (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)

- g. Insurance paid on (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)
- h. Market value of machinery used for repair, cleaning, or maintenance of (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)
- i. Costs for repair of shop machinery used for repair, cleaning, or maintenance of (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)
- j. Market value of material inventory used for repair, cleaning, or maintenance of (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)
- k. Wages and benefits paid to employees engaged in repair, cleaning, or maintenance of (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)
- l. Payroll taxes paid in connection with employees engaged in repair, cleaning, or maintenance of (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)
- m. Payments for injuries or death during repairs when not covered by insurance for repairs of (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)
- n. Payments to third parties that are not directly allocated to specific cars for tank car (i) repair, (ii) cleaning, (iii) maintenance, or (iv) storage (or payments to third parties for repair, cleaning, etc. for all cars, if separate data for tank cars are not available)
- o. Any costs of owning and operating tank cars You owned that are not addressed in subsections a-n

Interrogatory No. 31

Separately for each year from 2001 through 2016, state for Tesoro:

- a. Number of tank cars used under a lease agreement, separately for each lease agreement
- b. Separately for each Car Owner and for each lease agreement, payments to Car Owners that are not directly allocated to specific cars, for tank car (i) repair, (ii) cleaning, (iii) maintenance, or (iv) storage

Interrogatory No. 32

Separately for each year from 2001 through 2016, state:

- a. separately by railroad (i) the number of tank cars movements for which You were paid a mileage allowance, (ii) the total number of miles on which You were paid allowances, and (iii) the total amount of allowances paid to You

- b. separately by railroad (i) the number of tank car movements for which You were not paid a mileage allowance, and (ii) the total number of miles on which You were not paid allowances

Interrogatory No. 33

With regard to the allegation in Paragraph 8 of the Complaint that “the cost of owning and maintaining tank cars . . . has increased” over the past 30 years, state on an annual basis:

- a. The cost of owning tank cars over the past 30 years
- b. The cost of maintaining tank cars over the past 30 years

Interrogatory No. 34

With regard to the allegation in Paragraph 19(b) of the Complaint that Union Pacific “does not offer or negotiate reduced line-haul rates on movements using Complainants’ rail tank cars in lieu of paying mileage allowances, in order to compensate for such use as required by law,” state the amount by which You contend Union Pacific’s line-haul rates should have been reduced to compensate for the use of rail tank cars You furnished and explain the basis for that amount.

Interrogatory No. 35

Identify the factors You use in deciding which Repair Facility to use for tank cars You own or lease that require empty movement to a Repair Facility.

Interrogatory No. 36

Identify the Persons who are responsible for:

- a. Deciding which Repair Facility will be used for tank cars You own or lease.
- b. Deciding when to direct tank cars You own or lease to a Repair Facility.
- c. Negotiating lease terms for tank cars You own or lease.
- d. Paying or billing for empty mileage payments required with regard to tank cars You own or lease.

- e. Requesting rates from railroads for transportation of products in tank cars.

Interrogatory No. 37

Identify all communications regarding charges by railroads other than Union Pacific for empty movements of tank cars to or from repair facilities with:

- a. Other Persons within Tesoro
- b. Persons to whom You lease tank cars
- c. Persons from whom You lease tank cars
- d. Repair Facilities
- e. Railroads other than Union Pacific
- f. Any Complainant in STB Docket Nos. NOR 42144 or NOR 42150

DOCUMENT REQUESTS

Document Request No. 1

Produce all documents identified in Your answers to the Interrogatories.

Document Request No. 2

Produce all documents, regardless of date, supporting Your allegation in Paragraph 8 of the Complaint that “the cost of owning and maintaining tank cars” has increased “over the past 30 years.”

Document Request No. 3

Produce all documents, regardless of date, supporting Your allegation in Paragraph 19(b) of the Complaint that Union Pacific “does not offer or negotiate reduced line-haul rates on movements using Complainants’ rail tank cars.”

Document Request No. 4

Produce all documents, regardless of date, that contain, reflect, or otherwise refer or relate to any study, analysis, or report of the cost of owning tank cars.

Document Request No. 5

Produce all documents, regardless of date, that contain, reflect, or otherwise refer or relate to any study, analysis, or report of the cost of maintaining tank cars.

Document Request No. 6

Produce all documents, regardless of date, that contain, reflect, or otherwise refer or relate to any study, analysis, or report of the level of any line-haul rate(s) under zero-mileage terms as compared with rate terms providing for payment of mileage allowances.

Document Request No. 7

Produce all documents, regardless of date, that contain, reflect, or otherwise refer or relate to any study, analysis, or report of the relationship between mileage allowance levels and tank car ownership costs.

Document Request No. 8

Produce all documents, regardless of date, that contain, reflect, or otherwise refer or relate to any study, analysis, or report of compensation paid by railroads for use of private cars.

Document Request No. 9

Produce all documents, regardless of date, that contain, reflect, or otherwise refer or relate to any study, analysis, or report of the costs of moving empty cars.

Document Request No. 10

Produce all documents regardless of date, that contain, reflect, or otherwise refer or relate to a request that Union Pacific establish rates for transportation in tank cars that include payment of mileage allowances.

Document Request No. 11

Produce all documents, regardless of date, that contain, reflect, or otherwise refer or relate to a request that a railroad other than Union Pacific establish rates for transportation in tank cars that include payment of mileage allowances.

Document Request No. 12

Produce all documents, regardless of date, that contain, reflect, or otherwise refer or relate to a request that Union Pacific establish lower rates for transportation in tank cars to reflect Your furnishing tank cars.

Document Request No. 13

Produce all documents, regardless of date, that contain, reflect, or otherwise refer or relate to a request that a railroad other than Union Pacific establish rates for transportation in tank cars to reflect Your furnishing tank cars.

Document Request No. 14

Produce a copy of each lease under which You are the lessee of tank cars furnished to Union Pacific in any year from 2001 through 2016.

Document Request No. 15

Produce a copy of each lease under which You are the lessor of tank cars furnished to Union Pacific in any year from 2001 through 2016.

Document Request No. 16

With respect to the leases produced in response to Document Request Nos. 14 and 15, produce documents sufficient to identify which tank cars were subject to each lease.

Document Request No. 17

Produce all documents that refer or relate to Item 55-C.

Document Request No. 18

Separately for each year from 2001 through 2016, produce documents sufficient to show Your costs of owning tank cars, as well as the extent to which those costs are reimbursed by lessees of Your tank cars.

Document Request No. 19

Separately for each year from 2001 through 2016, produce documents sufficient to show Your costs of maintaining tank cars that You own or lease to another Person, as well as the extent to which those costs are reimbursed by lessees of Your tank cars.

Document Request No. 20

Separately for each year from 2001 through 2016, produce document sufficient to show Your costs of maintaining tank cars that You lease from another Person, as well as the extent to which those costs are reimbursed by the lessor.

Document Request No. 21

Separately for each year from 2001 through 2016, for tank cars that You lease from another Person, produce documents sufficient to show Your payments to the lessor as reimbursement for the lessor's costs of owning the cars.

Document Request No. 22

Separately for each year from 2001 through 2016, for tank cars that You lease from another Person, produce documents sufficient to show Your payments to the lessor as reimbursement for the lessor's costs of maintaining the cars.

Document Request No. 23

Produce all documents relating to payments made pursuant to the Freight Tariff RIC 6007-Series for empty mileage associated with movements of tank cars from 2001 through 2016.

Document Request No. 24

Produce all Documents that contain, reflect, or otherwise refer or relate to plans or proposals for retrofitting tank cars.

Document Request No. 25

Produce all Documents that contain, reflect or otherwise refer or relate to Communications with Persons from whom or to whom You lease tank cars regarding the movement of tank cars to a Repair Facility.

Document Request No. 26

Produce all Documents that contain, reflect, or otherwise refer or relate to bids from and/or negotiations with a Repair Facility or a company that owns or operates a Repair Facility.

Document Request No. 27

Produce all contracts with Repair Facilities to which You have directed, since 2001, tank cars You own or lease.

Document Request No. 28

Produce all Documents that contain, reflect, or otherwise refer or relate to Communications to or from Persons from whom or to whom You lease tank cars regarding mileage allowances.

Document Request No. 29

Produce any contract and/or rate document under which a mileage allowance was paid by a railroad other than Union Pacific.

Document Request No. 30

Produce all documents that refer or relate to decisions by You to request zero-mileage rates rather than rates that include payment of a mileage allowance.

Document Request No. 31

Produce all documents that contain, reflect, or otherwise refer or relate to any analysis or projection of revenues You would receive as a result of rules regarding the rules adopted in the May 1, 2015, Final Rule issued by the Pipeline and Hazardous Materials Safety Administration and the Federal Railroad Administration regarding enhanced tank car standards, including but not limited to analyses or projections developed before the issuance of the Final Rule.

Document Request No. 32

Produce documents sufficient to show the average lease rate for tank cars, by car type, for tank cars You leased to other Persons in each month from 2001 through the present.

Document Request No. 33

Produce all documents discussing, analyzing, or relating to the reasons for selecting Repair Facilities, including without limitation, available capacity (or lack of capacity) at Repair Facilities, backlogs or delays in completing work at Repair Facilities, differences in pricing for

parts or services at Repair Facilities, preexisting agreements with Repair Facilities, or ownership or control (including by ownership or control by the tank car owner, lessor, or affiliates thereof) of Repair Facilities.

Document Request No. 34

Produce all documents discussing, analyzing, or relating to movements of tank cars from one Repair Facility to another Repair Facilities for any purpose, including without limitation, temporary storage, cleaning, inspections, testing, repairs, replacements or retrofits of any tank car.

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January 6, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January, 2017, I caused a copy of the foregoing document to be served by e-mail on all of the parties of record in NOR 42152.

/s/ Michael L. Rosenthal
Michael L. Rosenthal