

242370

January 6, 2017

ENTERED
Office of Proceedings
January 6, 2017
Part of
Public Record

By Electronic Filing

Rachel Campbell
Director
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

**Re: Valero Marketing and Supply Company and Valero Rail Partners, LLC v. Union
Pacific Railroad Company, NOR-42150**

Dear Ms. Campbell:

Complainants Valero Marketing and Supply Company and Valero Rail Partners, LLC are today filing the enclosed motion to hold these proceedings in abeyance. I write to inform you that a similar motion is also being filed today in STB Docket No. NOR-42152. The Board may wish to consider these motions together for purposes of administrative convenience.

Sincerely,



Justin A. Savage

Partner
justin.savage@hoganlovells.com
D +1 202 637 5558

Enclosure

CC: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

VALERO MARKETING AND SUPPLY COMPANY and VALERO RAIL PARTNERS, LLC	)	Docket No. NOR-42150
	)	
	)	
	)	
vs.	)	
	)	
UNION PACIFIC RAILROAD COMPANY	)	
	)	
	)	

COMPLAINANTS’ MOTION TO HOLD PROCEEDINGS IN ABEYANCE

Complainants Valero Marketing and Supply Company and Valero Rail Partners, LLC (“Complainants”) hereby request that the Surface Transportation Board hold these proceedings in abeyance pending its decision in separate Board proceedings, *North America Freight Car Association, et al. v. Union Pacific Railroad Company*, Docket No. NOR-42144 (“*NAFCA*”), that will resolve or greatly clarify central issues of liability in this case. Granting Complainants’ request will thus avoid the costs of duplicative litigation while fairly protecting the interests of all parties.

BACKGROUND

This motion addresses the congruence of certain key issues in this case and the *NAFCA* proceedings. Complainants filed a formal complaint with the Board on December 19, 2016.¹ That complaint seeks reparations for charges imposed under Union Pacific (“UP”) Tariff 6004, Item 55-C (“Item 55-C”), which first took effect on January 1, 2015.² Those charges apply to all

¹ See Compl. at 1.

² See *id.* ¶¶ 9, 15.

empty tank car moves on the UP network to or from repair facilities, unless the move is immediately preceded by a loaded line-haul revenue movement on the UP network, UP removes a defective car from service and waybills the car under AAR Interchange Rule 1, or UP damages the car.³ UP treats any facility that cleans, lines, relines, maintains, modifies, repairs, or retrofits tank cars as a “repair facility” for the purposes of the Item 55-C charges.⁴ Despite its statutory obligation to bear the costs of owning and maintaining private tank cars, UP in no way compensates Complainants for those charges, whether through mileage allowance payments or other means.⁵ Complainants therefore seek an order declaring the new charges unlawful as an unreasonable practice and providing for reparations for the charges paid.⁶

NAFCA began much earlier than these proceedings, with the filing of a formal complaint in March 2015.⁷ But, like this case, the *NAFCA* complainants seek a ruling that the Item 55-C charges are an unreasonable practice.⁸ And the *NAFCA* complainants do so for the very same reason alleged by Complainants here: UP in no way compensates those complainants for the additional costs imposed on shippers by those charges.⁹

³ *Id.* ¶ 15; *see also id.* Ex. A.

⁴ *Id.* Ex. A.

⁵ *Id.* ¶¶ 18-20.

⁶ *See id.* at 6.

⁷ *See* Compl. at 1, *N. Am. Freight Car Ass’n v. Union Pac. R.R. Co.*, Docket No. NOR-42144 (Mar. 31, 2015). The *NAFCA* complainants include five trade associations and three shippers.

⁸ *See* First Am. Compl. ¶¶ 23-29, *N. Am. Freight Car Ass’n v. Union Pac. R.R. Co.*, Docket No. NOR-42144 (June 6, 2015).

⁹ *See id.*

NAFCA will thus decide the fundamental legality of the Item 55-C charges. On June 22, 2015, UP moved to dismiss the NAFCA complaint for failure to state a claim.¹⁰ UP argued that its charges for the movement of empty tank cars to repair facilities have been immunized by two decisions from the Interstate Commerce Commission: *General American Transportation Corp. v. Indiana Harbor Belt Railroad Co.*, 3 I.C.C. 2d 599 (1987) (“IHB-II”), *aff’d sub nom. Gen. Am. Transp. Corp. v. ICC*, 872 F.2d 1048 (D.C. Cir. 1989), and *Charges for Movement of Empty Cars, Buffalo & Pittsburg Railroad, Inc.*, 7 I.C.C.2d 18 (1990) (“Buffalo & Pittsburgh”).¹¹ In reply, the NAFCA complainants disputed UP’s reading of those cases, rejecting any contention that the principles behind *IHB-II* apply to UP or that UP complies with that decision.¹²

The Board denied UP’s motion in December 2015,¹³ holding that “there is a significant dispute regarding the charges assessed for moves to and from repair facilities under Item 55-C and whether or not car owners or lessees should be compensated for such moves.”¹⁴ As the Board explained, the NAFCA “[c]omplainants question whether UP is complying with [ICC] precedent [in *IHB-II* and *Buffalo & Pittsburgh*] and whether that precedent is applicable [in

¹⁰ See Def.’s Mot. to Dismiss First Am. Compl. or to Make Compl. More Definite at 8-17, 24, *N. Am. Freight Car Ass’n v. Union Pac. R.R. Co.*, Docket No. NOR-42144 (Apr. 20, 2015). UP incorporated by reference the same arguments into a later motion to dismiss. See Def.’s Mot. to Dismiss First Am. Compl. or to Make Compl. More Definite at 3, *N. Am. Freight Car Ass’n v. Union Pac. R.R. Co.*, Docket No. NOR-42144 (June 22, 2015).

¹¹ See Def.’s Mot. to Dismiss First Am. Compl. or to Make Compl. More Definite at 1-2, 8-12, *N. Am. Freight Car Ass’n v. Union Pac. R.R. Co.*, Docket No. NOR-42144 (Apr. 20, 2015).

¹² See Complainants’ Reply to Def.’s Mot. to Dismiss First Am. Compl. or to Make Compl. More Definite at 8-10, *N. Am. Freight Car Ass’n v. Union Pac. R.R. Co.*, Docket No. NOR-42144 (July 10, 2015).

¹³ *N. Am. Freight Car Ass’n v. Union Pac. R.R. Co.*, Docket No. NOR-42144, slip op. at 6 (STB served Dec. 21, 2015).

¹⁴ *Id.* at 3.

NAFCA].” The Board further explained that it “should consider whether that precedent should stand given changes in the railroad industry, an issue that also has not been fully briefed.”¹⁵

The NAFCA proceedings are now at an advanced stage. That case has now progressed through four motions to compel,¹⁶ a petition for subpoenas to four non-party tank car manufacturers,¹⁷ four hearings before Administrative Law Judge Dring, and months of negotiations to resolve the motions and petition.¹⁸ Discovery may be near an end in the NAFCA proceedings, with briefing on the merits to follow soon thereafter.

ARGUMENT

A stay or abeyance of proceedings is a time-tested means of managing parallel or related proceedings. *See, e.g., Am. Life Ins. Co. v. Stewart*, 300 U.S. 203, 215 (1937). The Board enjoys broad discretion to use such means to control its docket, and its decision to do so depends on the facts and circumstances of each case. *Pet. of the Nat’l R.R. Passenger Corp. for Relief Pursuant to 49 U.S.C. § 24905*, Docket No. FD-36048, slip op. at 3 (STB served Oct. 3, 2016) (citing *E.I. DuPont de Nemours & Co. v. Norfolk S. Rwy. Co.*, Docket No. NOR-42125, *et al.*, slip op. at 4 (STB served Nov. 29, 2012)). The Board has traditionally considered, first, how an abeyance would promote the efficient allocation of resources and, second, whether an abeyance would be

¹⁵ *Id.*

¹⁶ *See generally* Def.’s Mot. to Compel Resps. to Third Set of Disc. Requests to Cargill Inc., *N. Am. Freight Car Ass’n v. Union Pac. R.R. Co.*, Docket No. NOR-42144 (Aug. 19, 2016); Complainants’ Mot. to Compel Disc., *N. Am. Freight Car Ass’n v. Union Pac. R.R. Co.*, Docket No. NOR-42144 (June 2, 2016); Def.’s Mot. to Compel Disc. of Information from Individual Complainants, *N. Am. Freight Car Ass’n v. Union Pac. R.R. Co.*, Docket No. NOR-42144 (May 25, 2016); Def.’s Mot. to Compel Disc. of Member Information from Ass’n Complainants, *N. Am. Freight Car Ass’n v. Union Pac. R.R. Co.*, Docket No. NOR-42144 (May 17, 2016).

¹⁷ *See* Def.’s Pet. for Subpoenas at 1-2, *N. Am. Freight Car Ass’n v. Union Pac. R.R. Co.*, Docket No. NOR-42144 (May 17, 2016).

¹⁸ *See N. Am. Freight Car Ass’n v. Union Pac. R.R. Co.*, Docket No. NOR-42144, slip op. at 3-8 (STB served Oct. 13, 2016) (order resolving petition).

fundamentally unfair to any party. *See id.* at 4. Both considerations support a pause in these proceedings until the Board resolves *NAFCA*.

I. An abeyance avoids duplicative litigation costs while *NAFCA* resolves or clarifies the core legal disputes in this case.

These proceedings should be stayed first and foremost because the Board’s decision in *NAFCA* will directly address the central issue in this case, namely, the legality of the Item 55-C charges under *IHB-II* and *Buffalo & Pittsburgh*. Complainants here plead the same basic facts as the first count in *NAFCA*: that UP does not provide its own tank cars, that UP has imposed a charge on certain movements of empty tank cars to repair facilities under Item 55-C effective January 1, 2015, and that UP has made no attempt to compensate shippers for those additional charges. The Board’s ruling on UP’s motion to dismiss in *NAFCA* has further crystallized the key legal questions raised by these facts. The Board has agreed that the propriety of Item 55-C turns at least in part “on whether UP is complying with that precedent [in *IHB-II* and *Buffalo & Pittsburgh*] and whether that precedent is applicable [in *NAFCA*].”¹⁹ And the Board further noted that it might reconsider the very principles underlying *IHB-II* as it considers the current state and structure of the rail industry.²⁰ In sum, the Board made clear *NAFCA* will resolve the “significant dispute regarding the charges assessed for moves to and from repair facilities under Item 55-C and whether or not car owners or lessees should be compensated for such moves.”²¹ That dispute lies at the center of this case, too.

¹⁹ *N. Am. Freight Car Ass’n v. Union Pac. R.R. Co.*, Docket No. NOR-42144, slip op. at 3 (STB served Dec. 21, 2015).

²⁰ *Id.*

²¹ *Id.*

And *NAFCA* will almost certainly resolve that dispute long before it is resolved in these proceedings. If *NAFCA* is any guide to the timeline can be expected in this case, the completion of discovery may not occur for many months, by which time merits briefing in *NAFCA* will very likely be before the Board. If these proceedings continue ahead, then, *NAFCA* will thus likely produce a clear statement on the legality of Item 55-C after the parties have invested a great deal of time and funds in discovery or dispositive motions.

That would be an unfortunate result for both the Board and the parties. Virtually all adjudicative bodies have strong policies disfavoring duplication of costs in parallel proceedings with common issues, *see, e.g., Basardh v. Gates*, 545 F.3d 1068, 1069 (D.C. Cir. 2008) (citing *Env'tl. Def. Fund v. Reilly*, 909 F.2d 1497, 1507 (D.C. Cir. 1990)), and the Board is no different, *see Pet. of the Nat'l R.R. Passenger Corp.*, Docket No. FD-36048, slip op. at 3. Here, the parties are likely to re-tread the extensive legal and factual ground as the *NAFCA* litigants—with all the attendant costs—only to see the central dispute decided before they conclude their own merits briefing. Abeyance is therefore fitting “in light of other pending proceedings[, namely *NAFCA*,] that may affect the outcome of [this] case[.]” *Basardh*, 545 F.3d at 1069; *see also Second Ave. Holdings, LLC v. Latimer (In re Latimer)*, 489 B.R. 844, 868 (Bankr. N.D. Ala. 2013) (“A stay may be imposed even if the parallel action will not settle every question of fact and law in the stayed suit if the litigation in the parallel suit will in all likelihood settle or simplify many of the issues.”). It is no surprise, then, that the Board has previously stayed actions for reparations that turn on general issues of liability to be answered in other proceedings. *See Ocean Logistics Mgmt., Inc.—Pet. For Declaratory Order—Certain Rates & Practices of NPR, Inc., & Holt Cargo Sys., Inc.*, Docket No. WCC-102, slip op. at 1 (STB served Nov. 6, 1998).

The misallocation of resources would only be magnified if the result in *NAFCA* sharply clarifies *IHB-II*'s application, revisits *IHB-II*, or implements any other intervening change in the law. The Board aptly explained this problem in *Petition of the National Railroad Passenger Corporation*, where it held the proceedings in abeyance pending a decision in parallel litigation that might render a governing statute unconstitutional. See Docket No. FD-36048, slip op. at 3. If the statute were found unconstitutional, “the Board and party resources required to litigate this proceeding would be wasted.” *Id.* “Accordingly, it would not be an efficient allocation of resources for the Board to go through the resource-intensive exercise of applying the statute and making a . . . determination in [that] proceeding until the issues” had been resolved elsewhere. *Id.* at 4. This case may see the same sort of “extensive discovery by the parties (and related discovery motions filed before the Board)” predicated on competing views of the law applicable to Item 55-C rendered erroneous or moot by an intervening decision in *NAFCA*. *Id.* at 3. The Board should therefore hold these proceedings in abeyance to preserve a sensible use of its own resources and those of the parties.

II. An abeyance fairly protects the interest of all parties.

Holding this proceeding in abeyance would not prejudice any party. Cf. *E.I. DuPont de Nemours & Co.*, Docket No. NOR-42125, *et al.*, slip op. at 5 (“The Board considers the fairness to both parties in determining whether to place these cases in abeyance.”). In fact, an abeyance is the fairest outcome for all parties. This case is at an early stage. No answer has been filed, and the parties have yet to confer on a schedule for the case. Union Pacific only today served a single set of discovery requests, and no objections, motions, or productions have yet occurred for those requests. Furthermore, no dispositive motions have been briefed and no evidence filed. There are thus no major costs incurred by either party that would be rendered meaningless by an abeyance. See *id.* at 7 (“DuPont adds that it would be prejudicial to hold the proceeding in

abeyance because it has already expended substantial time and money developing its case in accordance with the prevailing rules.”).

An abeyance would allow UP to avoid the burden of potentially duplicative discovery, *see Basardh*, 545 F.3d at 1070 (“Parallel litigation would needlessly increase the government’s production burden[.]”), but would still allow UP the ability to seek such discovery as becomes relevant and appropriate once *NAFCA* has clarified the dispute between the parties. Complainants, for their part, can preserve their full claims to damages before the statute of limitations begins to run. *See* 49 U.S.C. § 11705(c). If and when the Board establishes any liability for charges under Item 55-C, Complainants can pursue discovery and evidentiary briefing related to their particular damages.

Nor would this sort of abeyance result in any prejudicial delay. *Cf. E.I. DuPont de Nemours & Co.*, Docket No. NOR-42125, *et al.*, slip op. at 6. The indisputable fact is that *NAFCA* is much closer to evidentiary briefing and a ruling on the merits—and thus much more likely to reach the core issues related to Item 55-C long before this case does so. As a result, those issues will be decided in the first instance whether or not this motion is granted; the remaining question is the degree to which the parties here sink unnecessary costs before that point. Finally, any residual fairness concerns can be addressed by the parameters of the abeyance, including a conference between the parties after any final disposition of *NAFCA*.

CONCLUSION

For the foregoing reasons, Complainants respectfully request that the Board hold these proceedings in abeyance until the resolution of the comparable issues related to Item 55-C in *North America Freight Car Association, et al. v. Union Pacific Railroad Company*, Docket No. NOR-42144.

Respectfully submitted,

/s/ Justin A. Savage

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

*Counsel for Valero Marketing and
Supply Company and Valero Rail Partners,
LLC*

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January, 2017, I have caused a copy of the foregoing motion to be served by email and first class mail on the following counsel for the Defendant:

Michael L. Rosenthal
Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, D.C. 20001
mrosenthal@cov.com

/s/ Houston Shaner _____
Houston Shaner