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February 22, 2019

By E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: STB Docket No. NOR 42144, *North American Freight Car Association, et al. v. Union Pacific Railroad Company (consolidated)*

Dear Ms. Brown:

Accompanying this letter for filing in the above referenced proceeding is the Supplemental Opening Evidence and Argument filed on behalf of Ethanol Products, LLC d/b/a POET Ethanol Products. Please note that this filing contains material that has been designated HIGHLY CONFIDENTIAL pursuant to the terms of the protective order in this proceeding, and so HIGHLY CONFIDENTIAL and PUBLIC versions of the filing are being submitted.

Please do not hesitate to call me if you have any questions.

Sincerely,

A handwritten signature in blue ink that reads "Thomas W. Wilcox".

Thomas W. Wilcox
Attorney for Ethanol Products, LLC d/b/a POET
Ethanol Products

Cc All parties on the applicable official service lists

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42144

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 v. UNION PACIFIC RAILROAD COMPANY

Docket No. NOR 42150

VALERO MARKETING AND SUPPLY COMPANY
AND VALERO RAIL PARTNERS, LLC v. UNION PACIFIC RAILROAD COMPANY

Docket No. NOR 42152

TESORO REFINING & MARKETING COMPANY LLC;
TESORO GREAT PLAINS GATHERING & MARKETING, LLC;
AND DAKOTA PRAIRIE REFINING, LLC v. UNION PACIFIC RAILROAD COMPANY

Docket No. NOR 42153

ARKEMA INC. v. UNION PACIFIC RAILROAD COMPANY

**SUPPLEMENTAL OPENING EVIDENCE AND ARGUMENT
OF ETHANOL PRODUCTS, LLC D/B/A POET ETHANOL PRODUCTS**

Pursuant to the Procedural Schedule adopted by the Surface Transportation Board (“STB” or “Board”), Ethanol Products, LLC d/b/a POET Ethanol Products (“POET Ethanol”) hereby submits this Supplemental Opening Evidence and Argument. POET Ethanol is a complainant in this Docket No. NOR 42144. It is also a member of Complainant North America Freight Car

Association (“NAFCA”). POET Ethanol hereby adopts and incorporates by reference Complainants Joint Opening Evidence and Argument submitted by POET Ethanol and the other complainants in Docket Nos. NOR 42144, 42150, 42152 and 42153 (“Joint Opening”). POET Ethanol hereby supplements the Joint Opening with additional relevant facts that are particular to POET Ethanol’s dispute with defendant Union Pacific Railroad Company (“UP”), as well as the demonstration that POET Ethanol is entitled to relief from UP’s violations of 49 U.S.C. §§10702, 11121, and 11122, for the reasons set forth in the Joint Opening and set forth hereinbelow. This Supplemental Opening Evidence and Argument is supported by the attached Verified Statement of Mr. Phil Spieckermann, who is Vice President, Rail, of POET Ethanol (“Spieckermann V.S.”), and the Verified Statement of Mr. John Kieras, a former 42-year employee of Union Tank Car Company (“Kieras V.S.”).

I.
SUMMARY OF POET ETHANOL’S
SUPPLEMENTAL OPENING EVIDENCE AND ARGUMENT

POET Ethanol is a South Dakota limited liability company established in 2000 with its principal place of business in Wichita, Kansas. POET Ethanol is engaged in the business of marketing ethanol and other biorefined products, grains, and carbon dioxide. POET Ethanol is the marketing and logistics provider for 36 biorefineries in ten states. The raw materials used to make these products are shipped to the facilities by railroad, truck, and in one case, pipeline. POET Ethanol’s annual production of these commodities is over two billion gallons per year. Spieckermann V.S. at 2. Much of the ethanol¹ marketed by POET Ethanol is transported by UP

¹ POET Ethanol markets undenatured ethanol and fuel ethanol which are shipped by railroad via tank cars. Denatured fuel ethanol (DFE) is considered a biofuel, while undenatured ethanol may not carry that consideration. For purposes of this Supplemental Opening Evidence, the term “ethanol” refers to both. Spieckermann V.S. at 2.

in railroad tank cars to multiple destinations within the United States for use domestically, and also to facilities for export. Because UP does not own or lease any railroad tank cars, POET Ethanol must acquire and provide such rail cars to UP in order to receive rail service. As explained in more detail below, POET Ethanol expends approximately {{[REDACTED]}} per year to lease, manage and maintain a fleet of between {{[REDACTED]}} tank cars that it supplies to UP and other carriers to fulfill POET Ethanol's rail transportation needs. *Id.* at 4. Its ethanol products are transported in single cars in manifest service, and also in unit trains of 80-108 railroad tank cars. *Id.* at 3.

POET Ethanol asserts two separate but related claims against UP. In Count II of the First Amended Complaint filed in Docket No. NOR 42144, POET Ethanol asserts that UP has violated its statutory obligations under 49 U.S.C. §§11121 and 11122 by failing to properly compensate POET Ethanol for supplying railroad tank cars that UP uses in revenue service. In particular, UP has failed to directly reimburse POET Ethanol for the costs it incurs in providing tank cars to UP. Nor does UP fulfill its statutory obligations by paying mileage allowances on loaded revenue movements in tank cars as set forth in the industry-wide agreement approved by the Interstate Commerce Commission in Ex Parte No. 328, *Investigation of Tank Car Allowance System*, 3 I.C.C. 2d 196 (1986) (“*Ex Parte 328*”). The rules and procedures implementing the *Ex Parte 328* agreement are set forth in the Tariff RIC 6007-series published by Railinc, a subsidiary of the Association of American Railroads. UP's actions have resulted in POET Ethanol not receiving any compensation for its provision of tank cars to UP through the terms of its rail car leases.

In Count I of the Amended Complaint, POET Ethanol alleges that UP violated §§10702, 11121, and 11122 when it adopted, effective January 1, 2015, Tariff UP 6004, Item 55-C, Subpart

D (hereafter “Item 55-C”), which began assessing charges set forth in UP Tariff 4703² for certain movements of POET Ethanol’s empty tank cars to and from car repair shops. Such charges had never previously been assessed against POET Ethanol by UP, and they have historically been prohibited under applicable law and precedent. The imposition of these charges was purely for the purpose of enhancing UP’s profits, and UP misled POET Ethanol and its other tank car shippers as to this true purpose of Item 55-C. There was also no reasonable business or policy basis for the charges. UP has renewed and increased the charges assessed pursuant to Item 55-C in 2016, 2017, 2018 and 2019, and UP invoiced POET Ethanol nearly {{[REDACTED]}} in such charges between January 1, 2015 and December 31, 2018. Spieckermann V.S. at 10. {{[REDACTED]}}
{{[REDACTED]}}
{{[REDACTED]}} Id. at 10-11. However, UP continues to invoice POET Ethanol pursuant to Item 55-C for charges for empty tank car movements to and from repair shops to the present day.

UP’s imposition of charges for the movement of empty tank cars under Item 55-C is doubly inequitable because of UP’s failure to compensate the vast majority of parties who provide it with rail tank cars for transportation service. Thus, UP not only fails to compensate POET Ethanol in any way for UP’s use of POET Ethanol’s tank cars to generate revenue for UP, it also now imposes a new and unprecedented additional cost on POET Ethanol that under §11122 and applicable agency precedent should be borne by UP.

For all the reasons set forth in the Joint Opening and this Supplemental Opening Evidence and Argument, POET Ethanol is entitled to receive relief for the harm it has suffered as a result of

² The mileage-based charges established in Item 55-C were set forth in Item 1100 of Tariff UP 4703. The minimum and per-mile charges for repair movements are now set forth in Item 1200 of Tariff 4703.

UP's violations of its statutory obligations. Specifically, POET Ethanol is entitled to an order from the Board declaring (1) that UP's assessment of charges pursuant to Item 55-C and UP 4703 for the movement of POET Ethanol's empty tank cars to and from repair facilities for the period January 1, 2015 to the present is unlawful; (2) UP may not assess POET Ethanol such charges in the future; (3) POET Ethanol is entitled to be reimbursed by UP for POET Ethanol's costs of providing tank cars for UP's use in revenue service from March 31, 2013³ to the present; and (4) UP should be directed to henceforth appropriately compensate POET Ethanol or its car lessors in accordance with applicable law.

II. SUPPLEMENTAL RELEVANT FACTS⁴

A. Description of POET Ethanol's Need for Railroad Transportation in Tank Cars

1. POET Ethanol's reliance on transportation in railroad tank cars

Approximately 34 of POET Ethanol's 36 biorefineries have accessible switches to railroads, and POET Ethanol relies extensively on the nation's rail system to transport its ethanol products. *Id.* at 2. Approximately {{[REDACTED]}} of POET Ethanol's rail-originated traffic is transported by UP due to the location of certain POET Ethanol facilities on UP's system. *Id.* POET Ethanol currently tenders between {{[REDACTED]}} tank car loads of ethanol to UP each year for transportation on UP's system. *Id.* The remainder of POET Ethanol's railroad transportation needs are met by the other Class I railroads and their connecting short line railroads. In its arrangements with customers POET Ethanol typically pays UP the rates and other charges to transport its

³ The filing date of the Complaint in Docket No. NOR 42144 was March 31, 2015, and 49 U.S.C. §11705(c) limits the period of recovery for past compensation to two years prior to that date.

⁴ POET Ethanol hereby adopts and incorporates the Relevant Statement of Facts and Law set forth in the Joint Opening.

products, and then charges its customers a price for the respective product that includes POET's costs of transportation. *Id.* at 3. Since 2013, POET Ethanol has paid UP over {{[REDACTED]}} in rates and charges for rail transportation in tank cars provided to it by POET Ethanol, exclusive of the charges assessed by UP pursuant to Item 55-C that POET Ethanol is challenging in these consolidated proceedings. *Id.*

Over the relevant time period for purposes of POET Ethanol's claims in this proceeding UP has provided rail transportation service to POET Ethanol in tank cars primarily pursuant to UP's common carrier tariffs,⁵ namely UP Tariff 2028 Series and the various common carrier tariffs and documents referenced and incorporated by reference therein.

2. POET Ethanol is required to provide privately owned/leased tank cars to UP in order to receive rail transportation services in tank cars.

As stated previously, UP does not offer or provide rail transportation in tank cars owned or leased by UP. In order to ship its commodities by rail in tank cars, therefore, POET Ethanol is required to provide privately owned – *i.e.*, non-railroad owned – tank cars so UP can provide tank car service to POET Ethanol. Accordingly, POET Ethanol has acquired by lease, and manages and maintains, a large fleet of rail tank cars for use by UP and other Class I railroads. In the past three years, the fleet has grown from {{[REDACTED]}} to approximately {{[REDACTED]}} railroad tank cars due to poor railroad service and other commercial factors.⁶ *Id.* at 4. Over the relevant time period,

⁵ { [REDACTED]

}. [REDACTED]

⁶ The number of rail tank cars needed by POET Ethanol meet customer commitments had remained consistent until around 2015. Subsequently, railroad service to POET Ethanol by UP and other railroads deteriorated to unprecedented levels. The deterioration of railroad service

POET Ethanol's tank car fleet has been primarily made up of general purpose 30,000-gallon tank cars. POET Ethanol is able to manage and track its fleet by the car marks assigned to each car when it comes into service

a. **Lease rental and other costs paid by POET Ethanol to supply tank cars to UP**

As of the commencement of this case in March 2015, POET Ethanol leased approximately {{[REDACTED]}} rail tank cars from several different tank car owners/lessors. As stated previously, this total has subsequently grown due to poor rail service, increases ethanol production and sales, and other factors. As of June 30, 2018 POET's leased tank car fleet was {{[REDACTED]}} cars. POET Ethanol's tank car lease rental payments average approximately {{[REDACTED]}} per year. *Id.* at 4. The total amount of tank cars under each lease at any given time varies, as does each car's age and type. POET Ethanol typically leases rail tank cars for five-year periods, which has been the industry standard. POET Ethanol's tank car fleet lease portfolio {{[REDACTED]}}
[REDACTED]
[REDACTED] {{[REDACTED]}}. *Id.* Demand for rail tank cars has been high since 2015 {{[REDACTED]}}
[REDACTED] {{[REDACTED]}}. *Id.*

Consistent with industry practice, POET Ethanol's tank car leases are "full service" leases. In addition to the lease rental, POET Ethanol incurs certain additional maintenance and other costs associated with the tank cars it provides to UP. These costs typically average in aggregate around {{[REDACTED]}} per year. *Id.* In POET Ethanol's experience, lease agreements for tank cars are largely standardized, containing "boilerplate" provisions that are not subject to significant

notwithstanding increased rail sales of ethanol, production increases, and other factors forced POET Ethanol to increase its tank car fleet size to meet its customer commitments. *Id.* at 4.

negotiation. The provisions of POET Ethanol's railroad tank car leases are therefore very similar in terms of allocating the responsibilities and obligations of the lessor and lessee. One area common to its tank car leases is the allocation of maintenance responsibility. In general, the bulk of the maintenance and repairs of the leased tank cars is performed at the expense of the car owner/lessor at repair shops or other locations they select or approve. However, consistent with industry standards, POET Ethanol's rail car leases generally make POET Ethanol responsible for the cost of certain minor repairs and maintenance repair of certain components of the cars that could be affected by POET's use of them. *Id.* at 5. These are typically valves, fittings, plugs, chains, gaskets and any equipment handled and/or managed by POET Ethanol's employees or by POET Ethanol's customers when loading or unloading tank cars, respectively. Rail tank cars are also required to have a 10-year qualifying inspection, which must be performed at a repair facility.

Additionally, if a rail tank car has to be sent for repairs or a qualifying inspection, or if the tank car is coming off of a lease and being returned to the lessor, the rail tank car must be cleaned first. This cleaning takes place at the repair facility if it has that capability, or elsewhere, which could include {{[REDACTED]}}. Cleaning takes place at a location selected by POET Ethanol based on cost and efficiency of the location. *Id.*

b. Lease treatment of mileage allowance payment responsibilities

POET Ethanol's tank car lease agreements also typically address the disposition of mileage allowance payments received by the lessor for loaded movements in the tank cars leased by POET Ethanol. *Id.* at 5-6. Mileage allowances are payments railroads are supposed to make to tank car owners to cover the cost of providing privately-owned tank cars used by railroads in revenue

service.⁷ Under the procedures implementing *Ex Parte* No. 328 (1) mileage allowance payments are calculated based on the number of loaded miles traveled by each tank car, and (2) mileage allowance rates are calculated each year by Railinc – an organization affiliated with the American Association of Railroads. Mileage allowance rates vary depending on the age and cost of the particular tank car.

Most of POET Ethanol’s tank car leases contain provisions by which the lessor car owner either (1) remits payment to POET of any mileage allowance payments it receives from a transporting railroad paid pursuant to *Ex Parte* 328’s procedures, or (2) credits the rental account of POET Ethanol for all or part of any such mileage allowances earned and paid to the lessor by the railroad. *Id.* at 6. A collection of the relevant provisions from several of POET Ethanol’s leases in effect when this case was commenced and produced to UP in discovery is provided in Exhibit A to the Verified Statement of Mr. Spieckermann.⁸ However, as explained above and in the Joint Opening, UP long ago stopped paying any mileage allowances to the vast majority of car owners or any other party that provides UP with tank cars, including POET Ethanol. Because UP has ceased paying mileage allowances to tank car owners, POET Ethanol is being deprived of compensation for UP’s use of POET Ethanol’s tank cars by operation of the lease provisions that require such payments to be passed on or credited to POET Ethanol.

POET Ethanol’s tank car lease agreements generally require POET Ethanol to pay for the cost of transporting the leased tank cars to and from the point at which they are turned over to UP

⁷ See *Ex Parte* 328 and 49 U.S.C. § 11122 (requiring that railroads compensate providers of private rail cars used in revenue service).

⁸ Document production from POET Ethanol to UP was completed in early 2016, but discovery between UP and other complainants whose cases were consolidated with Docket No. NOR 42144 by the Board continued to the end of 2018. In the event the Board grants the relief requested by POET Ethanol for compensation under Count II of the Complaint, such relief will also be subject to the terms of the leases entered into after the discovery to UP was completed.

or another railroad for use in providing rail transportation for POET Ethanol. However, because the cost of moving empty tank cars to repair facilities has historically been understood to be the responsibility of the railroad using the tank car, and most of the leases predate Item 55-C, POET Ethanol's tank car leases generally do not specify whether the lessor or the lessee is responsible for UP's repair move charges under Item 55-C. Nonetheless, UP has chosen to bill POET Ethanol for charges pursuant to Item 55-C for movements of POET Ethanol's leased empty tank cars to and from repair facilities. *Id.* at 6.

c. POET Ethanol's tank car fleet management

As a general business goal, POET Ethanol strives to maximize the efficiency with which its rail tank cars are utilized for service to its customers. Toward this end, POET Ethanol closely tracks the whereabouts and status of the tank cars in its fleet both internally and using third party providers. In general, the loaded movement of POET Ethanol's rail tank cars vary between {{[REDACTED]}} miles to {{[REDACTED]}} miles per year, per car. Ideally, a POET Ethanol rail tank car would complete {{[REDACTED]}} loaded moves each month, but actual use is heavily dependent on railroad service and cycle times, which can vary widely. Accordingly, on average POET Ethanol tank cars complete {{[REDACTED]}} loaded moves a year. *Id.* at 6.

Ultimately, except for certain minor repairs which POET Ethanol performs at its own facilities when practicable, the lessor has the final decision on where a rail tank car will be repaired or requalified to meet regulatory requirements. Lessors must also approve who POET Ethanol may use to conduct mobile repairs. When POET Ethanol's leased cars require repairs, POET Ethanol and its lessors coordinate to manage repairs so as to maintain efficiency and meet customer commitments. *Id.* at 7. When a rail tank car is sent to a repair facility POET Ethanol strives for the fastest turnaround time for the car to be returned into service because the main focus for POET

Ethanol is to minimize the amount of car movements made in order to maximize efficiency. Therefore, when a rail tank car needs to be transported to a repair facility POET Ethanol will look at potential diversions when the tank car is returning empty from a loaded move and divert a rail tank car to a repair facility. *Id.*

When organizing moves with tank car owners, POET Ethanol has always strived to coordinate with the car owner to encourage them to send rail tank cars to repair facilities that are in close proximity to POET Ethanol's plants. This minimizes the number and length of empty maintenance and repair moves and moves the empty car into and out of repair shop and back in service as quickly as possible. *Id.* at 7.

POET Ethanol also manages its tank car fleet movements so the empty miles they travel do not exceed the loaded miles by 106%, which is the threshold for being assessed charges under the mileage equalization program established by *Ex Parte 328*. This program was designed and implemented in large part to incentivize owners and lessees of private tank to try and minimize the number of empty miles relative to loaded miles, calculated on an annual fleet-wide basis, so as to ensure the national tank car fleet was being used efficiently. Accordingly, in the normal course of business, POET Ethanol tracks its tank cars' loaded and empty miles to ensure that the empty miles remain below the 106% threshold so as to avoid any charges. *Id.* POET Ethanol has also tried to maximize the number of movements that entail a loaded movement and an empty movement that is included in the loaded line haul rate, as opposed to a separate movement of an unloaded car that incurs a separate charge. *Id.* As a result of these car fleet management practices, POET Ethanol has rarely exceeded the 106% threshold and accordingly rarely has had to pay the associated mileage equalization charges established by *Ex Parte 328*. *Id.* at 7-8.

POET Ethanol seeks to efficiently manage its tank car fleet not only to avoid paying equalization charges, but also to maximize utilization of its tank cars for loaded moves carrying POET Ethanol's products. Maximizing the efficient utilization of its tank cars allows POET Ethanol to ship products to its customers using the fewest number of tank cars. In particular, POET Ethanol seeks to minimize the number of empty miles its tank cars travel to repair facilities because the more miles a tank car must travel to move to a shop, the more time it will remain out of service.

B. UP's Assessment of Item 55-C Charges Against POET Ethanol

On December 10, 2014, UP informed POET Ethanol and its other customers that starting January 1, 2015, UP would begin, for the first time, assessing charges for certain movements of empty tank cars to repair shops based on how many miles the empty tank car was transported by UP. POET Ethanol vigorously opposed this new tariff term and the associated new charges, which were contrary to the law and long-time industry practice. POET Ethanol first objected to this announcement through NAFCA, which, along with the Fertilizer Institute, Railway Supply Institute, and the Chlorine Institute sent a letter on behalf of the organizations and their members to Mr. Eric Butler of UP on December 22, 2014 demanding that UP immediately withdraw the proposed publication of Item 55-C. Joint Opening at 17. POET Ethanol subsequently protested the announced change to Item 55-C directly to UP on March 23, 2015. *Spieckermann V.S.* at 10. POET Ethanol directly complained to UP that the tariff provision appeared to have been "timed to take advantage of the potential PHMSA ruling requiring retrofits of the existing ethanol fleet as well as the increased number of re qualifications associated with the aging ethanol tank car fleet,"⁹ a statement that has turned out to be 100% accurate over the course of this case. While increasing

⁹ Email from Ben Sweat to Jason Hess, dated March 23, 2015, attached as Exhibit A to this Supplemental Joint Opening Evidence and Argument.

UP's profits {{ [REDACTED] }}, UP responded to the protests of POET Ethanol and others by claiming that the tariff was being adopted for other reasons, including increasing efficiency.

POET Ethanol's plea to UP to withdraw the tariff and return to the prior industry practice of not charging for movements of empty tank cars to and from repair shops was rejected by UP, and over POET Ethanol's strong objection UP began issuing POET Ethanol invoices for empty car movements to repair shops as set forth in Item 55-C.¹⁰ Item 55-C established substantial mileage-based charges for the movement of empty tank cars to and from repair facilities, effective on January 1, 2015:

1-250 miles	\$1317 per car
251-500 miles	\$1477 per car
501 or greater miles	\$2.96 per mile

UP has imposed annual increases to its Item 55-C charges in 2016, 2017, 2018, and 2019.

The current 2019 Item 55-C charges are:

1-250 miles	\$1555 per car
251-500 miles	\$1744 per car
501 or greater miles	\$3.49 per mile

UP also assesses a fuel surcharge on each empty tank car movement in addition to Item 55-C charges. Item 55-C charges do not apply to the first empty move following a loaded line-haul revenue move on UP. However, Item 55-C defines "Repair Facility" broadly to include facilities at which tank cars are sent to be cleaned before being routed to a repair shop. To date, UP has invoiced POET nearly {{ [REDACTED] }} through December 31, 2018 under the terms of Item 55-C and Tariff 4703 Items 1100 and 1200. A spreadsheet summarizing the charges is attached as

¹⁰ In some instances, POET Ethanol's leasing company was billed for the freight charge under 55-C. After the freight charges were paid by the leasing company it demanded reimbursement from POET Ethanol pursuant to the terms of the car lease. POET Ethanol reimbursed the leasing company for the freight charges.

Exhibit B to Mr. Spieckermann's Verified Statement. {{ [REDACTED]

[REDACTED]

[REDACTED]

}} Id. at 11.

The Joint Opening explains in detail how Item 55-C is contrary to the mileage equalization program, and how UP's adoption of Item 55-C was accompanied by the unreasonable practice of removing the miles associated with empty movements covered by the tariff from the mileage equalization calculation. Joint Opening at 44-49. The charges established by Item 55-C are far in excess of the charges applicable under the equalization program for empty moves exceeding 106% of the loaded miles. In January 2015, the equalization charge was \$.96 per mile, but applied only to empty miles in excess of 106%. As stated previously, POET Ethanol has diligently managed its tank car fleet to not exceed the 106% threshold and incur equalization charges. However, UP's Item 55-C per-mile charges completely ignore such efficiencies by not only imposing charges on empty movements of tank cars to *and from* repair shops – thereby capturing empty movements back to loading facilities which are already covered by the line haul rates POET Ethanol is being charged - but by also imposing huge new charges on repair shop movements for which charges had never before been assessed. By issuing Item 55-C, UP unilaterally removed itself from the *Ex Parte 328* equalization program for empty tank car movements to and from repair shops and substituted charges for those previously uncharged movements that are multiples of the equalization rate.

Under the terms of Item 55-C, the first movement of an empty tank car following a loaded line haul revenue movement on UP - *i.e.*, after the tank car is transported to a destination and it is unloaded - is not subject to the additional charges. However, charges are then applied for all

subsequent movements to and from “Repair Facilities” between the unloading point and the origin or other loading point and the movement of the repaired cars back to an origin. Pursuant to the tariff, the charges assessed are freight charges for moving the empty tank car - where the car itself is the commodity being transported.¹¹ Accordingly, if a loaded tank car is transported 900 miles from origin to a destination at a rate of \$5,000, where it is unloaded and then returned to directly origin for loading without visiting a “Repair Facility,” Item 55-C by its terms does not apply and POET Ethanol pays only the line haul rate, all other factors being equal. This is because under standard industry practice the line haul rate covers the return empty movement as well as the loaded movement. Now however, when a POET Ethanol unloaded tank car is required to be transported to a repair shop after being unloaded, under Item 55-C this first movement is not to be charged, but *all other* subsequent movements are charged, including movements of empty cars back to the origin.

This scenario becomes more complex, and the cost to POET Ethanol to have its tank cars transported to a destination and then back to a loading point increases further, in the event that an empty tank car must first be moved to a cleaning facility before it can be routed to a repair shop. Specifically, Item 55-C treats the required move to the cleaning facility, the subsequent move to the repair shop, and the third move back to a POET Ethanol facility as three separate empty tank car movements – with the latter two subject to the charges of Tariff 4703. Thus, for example, the cost to POET Ethanol for the transportation of a tank car by UP under the aforementioned \$5,000 line haul rate to a destination, and then after unloading 500 miles to a cleaning facility, then 50

¹¹ See STC Code 3742217 (Revenue movement, cars, railway freight, not railway owned, not new, not newly acquired, not re-stenciled, or not for sale, moved on own wheels (private marked)).

miles to the nearest repair shop, and then the remaining miles back to POET Ethanol's facility for loading is now not only the full \$5,000 round trip rate, but also \$1,555 and \$1,744, respectively, for the latter two moves (assuming the final movement to origin is less than 450 miles). Added to the \$5,000 linehaul rate, the total roundtrip cost to POET Ethanol of transporting the tank car has increased significantly, to \$8,299.

C. UP does not compensate POET Ethanol for the use of POET Ethanol's Tank Cars

UP not does not reimburse POET Ethanol for any of the costs it incurs to provide tank cars to UP. First, UP refuses to compensate the vast majority of its customers and other parties that supply it tank cars through the payment of mileage allowances required to be calculated and paid pursuant to *Ex Parte* 328 and Tariff 6007 Series. This is evidenced in the common carrier rate documents governing POET Ethanol's transportation, specifically Tariff UP 2028, which states as to the rates applicable to POET Ethanol's commodities, "Mileage allowance payment on private equipment shall not apply." POET Ethanol's belief is that UP considers these tariff terms to be non-negotiable. To POET Ethanol's knowledge UP has never paid any of POET Ethanol's tank car lessors a mileage allowance as compensation for UP's use of the tank cars they lease to POET Ethanol. *Spieckermann V.S.* at 8. Had UP ever paid mileage allowances to POET Ethanol's lessors the provisions of POET Ethanol's leases would have operated to either pass the allowance amount on to POET Ethanol, or the lease rental would have been credited for the amount of the allowance payment. Neither of these has occurred since POET Ethanol began tendering traffic to UP in 2002.

Second, UP does not compensate POET Ethanol for the use of its tank cars in any other manner. UP has asserted in this proceeding that it fulfills its statutory obligations under §11122

to compensate parties who provide it tank cars by charging “zero allowance” line haul rates that contain a discount in lieu of complying with its responsibilities under *Ex Parte 328* by paying mileage allowances. Leaving aside the question of whether UP may fulfill its obligations under §11122 in this manner for tank cars,¹² this cannot be the case from a practical standpoint. UP cannot offer POET Ethanol or any other rail shipper a true choice of actual rates – a zero allowance rate in an UP-provided tank car or a “full mileage” rate (i.e. a rate accompanied by mileage allowance payments pursuant to *Ex Parte 328*) in a private tank car – because UP does not offer tank car transportation in tank cars owned or leased by UP. Moreover, even if UP could lawfully comply with §11122 by discounting rates, UP does not even offer POET Ethanol a choice of rates for the tank cars POET Ethanol provides– that is, a choice of a rate accompanied by including payment of mileage allowances to POET Ethanol or its car lessor, or a discounted zero allowance rate. UP has always established only one rate for tank car movements in POET Ethanol provided tank cars - a rate not accompanied by mileage allowance payments. *Id.* at 9.

Moreover, UP has never represented to POET Ethanol that its tariff freight rates are discounted off a higher rail rate for the purpose of compensating POET Ethanol for the use of its tank cars, let alone ever quantified the amount by which its rates are supposedly discounted or how such purported discounts are calculated – even after this case was initiated in 2015. *Id.* Indeed,

¹² There exists a threshold question, discussed in the Joint Opening at 29-32, whether it is even lawful for UP to engage in the practice of discounting its rates for the purposes of complying with 49 U.S.C. §§11121 and 11122 as applied to railroad tank cars. Specifically, since the railroads have not owned and supplied tank cars to their customers for over 150 years, there is no “dual rate” system in place as is found in other industries where transportation can be and is provided in either railroad-owned cars or shipper-provided cars. Thus, there is no zero allowance rate in a UP tank car to discount, or from which to ascertain whether a purported discount exists or is sufficient to comply with sections 11121 and 11122, and therefore this practice cannot be applied to tank cars.

POET Ethanol is aware of no evidence that UP even considers any of the costs incurred by POET Ethanol to provide tank cars to UP when UP establishes rates for POET Ethanol's shipments. To the contrary, based on POET Ethanol's experience in its dealings with UP, UP sets all of its freight rates for tank car shipments based solely on what it believes the market will bear in order to maximize UP's revenues and profit. *Id.* Indeed, UP and other railroads have publicly acknowledged that they "price to the market" – in other words, that UP's rates are established at the maximum level UP believes shippers like POET Ethanol will pay without decreasing or shifting production, altering its selling or distribution patterns, or reducing its use of rail transportation. Thus, the transportation rates POET Ethanol pays are the maximum market rates and UP has never maintained or represented otherwise to POET Ethanol.

UP's conduct since it began imposing 55-C charges on POET Ethanol also demonstrates that UP is not offering discounted rates in lieu of paying mileage allowances or otherwise satisfying its obligation to compensate POET Ethanol for providing tank cars used in UP's revenue service. The costs of transporting tank cars to and from repair shops has always been the responsibility of the railroad to whom the cars have been provided. By adopting Item 55-C, UP has attempted to foist that responsibility onto its customers. If UP was actually discounting its freight rates for tank car shipments to compensate POET Ethanol for the costs incurred in providing tank cars to UP, UP would have reduced its rates to POET Ethanol in January 2015 to reflect the new additional cost to POET Ethanol of paying to move empty tank cars to and from repair facilities. However, UP did not reduce its freight rates for loaded tank car shipments when it began charging for moving empty tank cars to and from repair facilities in 2015. Nor did UP reduce its tank car freight rates when it increased the charges under Item 55-C and Tariff 4703 in

2016, 2017, 2018 and 2019. In fact, since 2015, UP has *increased* POET Ethanol’s transportation rates an average of 3-5% per year in 2016, 2017, and 2018. *Id.* at 11.

III. ARGUMENT

A. UP’s Imposition and Implementation of Item 55-C, Part D Violates 49 U.S.C. §§10702, 11121, and 11122, *Ex Parte* 328, and the Interstate Commerce Commission’s Decision in *IHBII*.¹³

1. UP has violated §§11121 and 11122 and harmed POET Ethanol by not compensating any party for the leased tank cars that POET Ethanol provides to UP

As set forth more fully in the Joint Opening, UP has a statutory obligation as a common carrier railroad to provide adequate car service, or in the alternative, to adequately compensate providers of private rail cars that UP uses to provide revenue-producing rail transportation services. 49 U.S.C. §§11121 and 11122. UP’s car service obligations require that it provide an adequate number of railroad-owned tank cars to handle POET Ethanol’s tank car shipments, or in the alternative, be responsible for the costs incurred by POET Ethanol to provide tank cars used in UP’s revenue service. The costs associated with using POET Ethanol’s tank cars include not only POET Ethanol’s costs in acquiring and maintaining its fleet of tank cars, but also the costs of moving empty tank cars to repair facilities for required inspections, maintenance, repair or retrofit.¹⁴ Indeed, if UP provided tank car service in UP-owned tank cars, UP would obviously be responsible for the cost of moving its own tank cars for necessary repairs.

¹³ *General American Transp. Corp v. Indiana Harbor Belt Railroad Co*, 3 I.C.C 2d 599 (1987)(“*IHBII*”), which as the Joint Opening explains UP heavily relies upon for authority to implement Item 55-C.

¹⁴ *See IHB II* at 608 (the costs of moving empty tank cars to repair facilities must ultimately be borne by railroads that use those tank cars in revenue service).

Section III of the Joint Opening reviews in great detail the legal basis for UP's statutory obligation to compensate parties who provide it railroad tank cars so it can provide tank car railroad service, how UP has violated that statutory obligation by implementing Item 55-C, and why UP cannot rely on *IHBII* and its progeny as authority for adopting Item 55-C. POET Ethanol supplements that discussion below.

Under current law, railroads are required to compensate parties who provide them railroad tank cars in the form of mileage allowance payments calculated pursuant to *Ex Parte* 328 and Tariff 6007. UP does not pay mileage allowances in exchange for its use of POET Ethanol's tank cars. Indeed, UP has stated that it has no legal obligation to compensate rail tank car providers through the payment of mileage allowances.¹⁵ Instead, UP maintains it is fulfilling its statutory obligations under §§11121 and 11122 solely through the establishment of discounted, zero allowance rates for tank car transportation. However, as summarized above at no time during its transportation of POET Ethanol's leased tank cars has UP ever stated that its transportation rates are discounted off of a rate UP would charge if it supplied railroad tank cars or paid mileage allowances. Indeed, UP has never established such higher rates in any of the tariffs and other common carrier documents that have applied to POET Ethanol's transportation, so there is no reason for POET Ethanol to request rates for shipments in UP railroad tank cars. Nor has UP ever offered or established rail rates for transportation in POET Ethanol's tank cars that are accompanied by a promise to pay mileage allowance payments under *Ex Parte* 328 and Tariff 6007. On the contrary, the *only* common carrier rates UP has *ever* established for service to POET Ethanol have been rates accompanied by a *refusal* to pay mileage allowances.

¹⁵ Motion to Dismiss Complaint or to Make Complaint More Definite, at 13.

UP's failure to pay mileage allowances or to charge POET Ethanol discounted rates (assuming UP may legally do so) has resulted in POET Ethanol paying approximately (1){[REDACTED]} to UP annually for railroad service in tank cars; (2) an average of {[REDACTED]} annually to car providers to lease a fleet of {[REDACTED]} tank cars to provide to UP; and (3) {[REDACTED]} to manage and maintain the fleet. In exchange for this {[REDACTED]} annual expenditure POET Ethanol receives no compensation from UP for the railroad tank cars POET Ethanol has supplied. It has also resulted in none of the car owners POET Ethanol leases its cars from being compensated by UP for their costs of owning and maintaining railroad tank cars. As such, UP is being provided the railroad tank cars leased by POET Ethanol free of charge. POET Ethanol and other shipper lessees pay the vast majority of the costs of owning, operating and maintaining the nation's tank car fleet through lease rental rates and the other costs they incur to manage and maintain the tank car fleets they provide for the railroads' use.

Directing UP to comply with *Ex Parte* 328 and Tariff 6007 would result in UP complying with its statutory obligation to compensate parties who provide it with tank cars. Pursuant to *Ex Parte* 328, compliance with §11122 is currently fulfilled by the payment of mileage allowances to tank car owners, who in turn, pursuant to the lease terms described above, pass through the mileage allowance payments or credit them to POET Ethanol's account. Directing UP to comply with its statutory obligations and applicable rules would restore the balance intended by the statutory and regulatory scheme.

2. UP's adoption of Item 55-C violated 49 U.S.C. §10702 and *Ex Parte* 328

POET Ethanol also adopts and incorporates by reference the discussion and argument in the Joint Opening demonstrating that UP's adoption and implementation of Item 55-C was an

unreasonable practice in violation of §10702 because (1) UP's sole internal reason for Item 55-C was to increase profits { [REDACTED] }; and (2) UP misled POET Ethanol and other rail shippers of this true purpose. As additional grounds for finding that UP violated §10702, POET Ethanol asserts that that applying Item 55-C and the associated charges to POET Ethanol's tank car fleet was unreasonable because there was absolutely no business or other justification for it. Prior to 2015 POET Ethanol was managing the tank car fleet it provided to UP at maximum efficiency under the standard established by *Ex Parte 328*, i.e., consistently keeping its empty miles below 106% of the loaded miles. POET Ethanol has no instances where UP expressed any concern or issues with POET Ethanol's tank car fleet management. *Spieckermann V.S.* at 10. There was therefore absolutely no business basis for UP to impose additional charges on POET Ethanol in order to incentivize it to increase fleet management efficiency or reduce empty miles. Moreover, POET Ethanol has always strived to have repairs performed at shops that are closest to its facilities. *Id.* at 7. Item 55-C, by imposing charges for movements of empty tank cars to repair shops following the first movement after a loaded revenue movement, provides an incentive for shippers to want empty tank cars moved to a repair shop close to the tank car's next anticipated loading point in order to minimize subsequent mileage charges under the new charges. Since POET already engaged in this practice, the substantial new charges imposed by UP in Item 55-C and Tariff 4703 are largely just a significant additional cost in addition to line haul rates that POET Ethanol now has to pay UP if it is to receive rail service from UP.¹⁶

¹⁶ Additionally, UP's practice of double charging for movements to and from a repair facility is inconsistent with UP's own tariff and therefore an unreasonable practice. As stated previously, when a POET Ethanol tank car moves from its unloading point to a cleaning facility, and then on to a repair shop, UP charges for both the empty move from the cleaning facility to the repair ship, and then *also* assesses a charge for the empty move from the repair ship back to a POET Ethanol

Moreover, as discussed in the Joint Opening, UP's issuance of Item 55-C, Part D to impose charges for empty tank car movements to repair facilities also violated its obligations under *Ex Parte 328*. At the same time UP announced the imposition of 55-C charges, it also announced that it was unilaterally removing the miles for empty tank car movements to and from Repair Facilities from the mileage equalization calculation. The equalization program is part of an industry-wide agreement that was approved by the ICC in *Ex Parte 328* and is therefore an agreement that UP is not free to ignore or abrogate at will. UP did not seek Board approval to unilaterally modify its participation in the equalization program. Nor did UP offer any legal authority for its actions at the time it announced the imposition of Item 55-C charges. As explained in the Joint Opening, UP's *post hoc* attempt to rely on *IHBI* for authority to take such a drastic step in response to the complaints filed in these dockets is unsupported. Indeed, UP appears to have given no consideration to the effect its unilateral withdrawal of Item 55-C movement miles from the equalization program would have on the equitable allocation of the costs of providing private tank cars for UP's use in revenue service.

B. POET Ethanol is Entitled to Relief from UP's Implementation of Item 55-C and its Failure to Compensate POET Ethanol for the Use of POET Ethanol's Tank Cars

1. The charges assessed by UP pursuant to Item 55-C should be declared unlawful as of its effective date

facility where it will be loaded. However, pursuant to the UP tariffs the empty move from the cleaning facility to the repair shop is itself a "loaded line-haul revenue move" – since UP is imposing a freight charge for moving the tank car where the car itself is the commodity. Consequently, the empty move from the repair facility to POET Ethanol's facility for loading should be *not* be subject to 55-C charges, since it is the first empty move following a loaded line-haul revenue move. Moreover, POET Ethanol has already been charged the full line-haul rate from UP, which includes the empty return movement. Consequently, the assessment of a substantial charge to transport an empty tank car from a repair shop back to origin is therefore an additional double charge and corresponding unjustified windfall to UP.

As of December 31, 2018 UP has invoiced POET Ethanol nearly {{[REDACTED]}} for charges pursuant to authority of Item 55-C. A spreadsheet summarizing these invoices and charges has been included with this Supplemental Evidence and Argument as Exhibit B to the Verified Statement of Mr. Spieckermann. For all the reasons set forth in the Joint Opening, as supplemented by this Supplemental Opening Evidence and Argument, POET Ethanol urges the Board to issue an order (1) finding that Item 55-C was unlawful as of its effective date, (2) directing UP to delete Item 55-C from Tariff 6004, and (3) confirming that UP may not collect any of the charges it has invoiced POET Ethanol pursuant to the terms of Item 55-C {{[REDACTED]}}.

2. POET Ethanol is entitled to recover unpaid mileage allowances for loaded moves in tank cars leased by POET Ethanol for the period from March 31, 2013 to the present

In addition to the foregoing, the Board should also determine that UP has failed to compensate any party for the use of the tank cars POET Ethanol has provided to UP for its transportation of POET Ethanol's commodities. Under current law, the amount of proper compensation in compliance with §11122 are mileage allowances calculated pursuant to the formula established by *Ex Parte 328*. POET Ethanol is entitled to damages in the form of the amount of allowances that should have been paid by UP to POET Ethanol's car owner lessors over the relevant time period, which is from March 31, 2013 to present, adjusted by the terms of POET Ethanol's tank car leases in effect over this time period. Pursuant to the terms of most of POET Ethanol's leases, its lessors, upon receiving mileage allowance payments from UP, would pass those amounts on to POET Ethanol, typically in the form of credits against lease rental payments. POET Ethanol is therefore entitled to recover its rightful portion of the mileage allowances owed by UP to POET Ethanol's lessors as a third-party beneficiary of UP's obligation to the car lessors. POET Ethanol does not

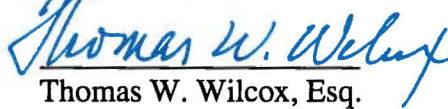
possess the data necessary to calculate the mileage allowances owed on its tank cars over the relevant period. However, this calculation may be made using data collected by Railinc, a subsidiary of the Association of American Railroads, and mileage allowance calculations conducted by Railinc and supplied to UP in the normal course of business. The accompanying Verified Statement of John Kieras (“Kieras V.S.”), a former employee of Union Tank Car Company for 42 years who administered the mileage allowance program for that company, provides a summary explanation of how Railinc administers the mileage rate allowance program through data collection and analysis pursuant to the *Ex Parte* 328 procedures. Mr. Kieras also explains how Railinc provides UP and other railroads with a monthly file, denominated the Car Hire Accounting Rate Master (“CHARM”) which is the official source for time and mileage rates on all freight cars in service, including tank cars. Kieras V.S. at 3. POET Ethanol does not have access to the CHARM database. Mr. Kieras further explains how the amount of unpaid allowances to POET Ethanol’s lessors may be calculated by UP by multiplying the mileage allowance rates calculated by Railinc for each of POET Ethanol’s leased tank cars times the loaded miles each car has been transported by UP since March, 2013. *Id.* at 5-6. In addition to being directed to pay past allowance amounts owed on POET Ethanol’s cars, UP should also be directed to continue such payments on a going forward basis from the date of the STB’s decision, unless and until the Board determines an alternative means by which parties who provide UP tank cars are adequately compensated pursuant to 49 U.S.C. §11122.

IV. CONCLUSION

Currently, POET Ethanol has no choice but to provide its own leased tank cars for use by UP to enable its ethanol to be transported by rail to and/or from locations served by UP. UP’s adoption of Item 55-C was a violation of §11121 and UP’s statutory obligation to compensate

parties who provide it with railroad cars set forth in §11122, since UP does not intend to pass any of the amounts it collects pursuant to Item 55-C to any party who provides it tank cars. The adoption of Item 55-C was also an unreasonable practice in violation of 49 U.S.C. §10702. UP has also violated §11122 because it does not otherwise compensate POET Ethanol for the use of tank cars leased by it and provided to UP to transport POET Nutrition's commodities. The Board should find UP has violated §§10702, 11121 and 11122 and grant the relief requested by POET Ethanol set forth hereinabove.

Respectfully submitted,



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*Attorneys for Ethanol Products, LLC d/b/a POET
Ethanol Products*

February 22, 2019

Exhibit A

From: Ben Sweat
Sent: Monday, March 23, 2015 5:39 PM
To: 'Jason M. Hess'
Subject: Formal Objection

Jason,

As per our conversations both in person and over the phone, I would like to submit our formal objection to the recently published empty car movement tariff (UPRR 6004-C, Item 55-C modification) as it relates to ethanol tank cars moving to shop for requalifications, repairs and retrofits.

We believe this tariff is excessive and timed to take advantage of the potential PHMSA ruling requiring retrofits of the existing ethanol fleet as well as the increased number of requalifications associated with the aging ethanol tank car fleet.

Current practice allows us to ship empty tank cars up to 106% of our loaded mile movements. In the history of our company, we have only seen nominal charges in 2009 for empty mile shipments which demonstrates our intent to ship our cars in the most efficient manner. This tariff will introduce a significant cost increase for our company at a time when the industry will be forced to maximize shop capacity in order to create a safer shipping environment. As opposed to burdening the industry as we move to a safer car as per the inevitable PHMSA ruling, we believe the UP should be more supportive of these efforts and continue the historical treatment of movements to repair facilities.

We appreciate your consideration in rolling back this tariff to the 2014 industry practice.

Sincerely,

Ben Sweat
Chief Operating Officer



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PUBLIC VERSION

BEFORE THE SURFACE TRANSPORTATION BOARD

Docket No. NOR 42144

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 v. UNION PACIFIC RAILROAD COMPANY

Docket No. NOR 42150

VALERO MARKETING AND SUPPLY COMPANY
AND VALERO RAIL PARTNERS, LLC v. UNION PACIFIC RAILROAD COMPANY

Docket No. NOR 42152

TESORO REFINING & MARKETING COMPANY LLC;
TESORO GREAT PLAINS GATHERING & MARKETING, LLC;
AND DAKOTA PRAIRIE REFINING, LLC v. UNION PACIFIC RAILROAD COMPANY

Docket No. NOR 42153

ARKEMA INC. v. UNION PACIFIC RAILROAD COMPANY

VERIFIED STATEMENT OF PHIL SPIECKERMANN

My name is Phil Spieckermann. I am Vice President, Rail, of Ethanol Products, LLC d/b/a POET Ethanol Products (“POET Ethanol”). I have been Vice President, Rail since 2015. In that position I have responsibility for all of our rail transportation logistics for liquid fuels. These duties include managing POET Ethanol’s commercial relationships with the railroads and railcar companies, negotiating freight transportation with the railroads, and responsibility for acquiring

and managing our rail car fleet and the leases associated with that. Prior to assuming my duties as Vice President, Rail, I was employed by POET Ethanol in other capacities beginning in 2008. In this Verified Statement I provide certain factual information about POET Ethanol, its rail operations, our railroad tank car fleet, and our current dispute with Union Pacific Railroad Company.

A. Background

POET Ethanol is a South Dakota limited liability company established in 2000 with its principal place of business in Wichita, Kansas. POET Ethanol is engaged in the business of marketing ethanol, natural gasoline, grains, and carbon dioxide. POET Ethanol's products include undenatured ethanol and fuel ethanol which are shipped by railroad via tank cars. Denatured fuel ethanol ("DFE") is considered a biofuel, while undenatured ethanol may not carry that consideration. For purposes of this Verified Statement and POET Ethanol's Supplemental Opening Evidence and Argument, the term "ethanol" refers to both.

POET Ethanol is the marketing and logistics provider for 36 biorefineries in ten states. The raw materials used to make these products are shipped to the facilities by railroad, truck, and in one case, pipeline. POET Ethanol's annual production of these commodities is over 2 billion gallons per year. A significant volume of the ethanol marketed by POET Ethanol is transported by Union Pacific Railroad Company ("UP") and other Class I railroads in railroad tank cars to multiple destinations within the United States for use domestically, and also for export.

B. POET Ethanol's Railroad Transportation Needs

Approximately 34 of POET Ethanol's 36 production facilities have accessible switches to railroads, and POET Ethanol relies extensively on the nation's rail system to transport its ethanol products. Approximately {{[REDACTED]}} of our rail-originated traffic is transported by UP due to the

location of certain POET Ethanol facilities on UP's system. Our ethanol products are transported in single cars in manifest service, and also in unit trains of 80-108 railroad tank cars. We currently tender between {{[REDACTED]}} tank car loads of ethanol to UP each year for transportation on UP's system. The remainder of POET Ethanol's railroad transportation needs are met by the other Class I railroads and their connecting short line railroads. POET Ethanol typically pays UP the rates and other charges UP establishes to transport our products, and then charges our customers a price for the respective product that includes POET's costs of transportation. Accordingly, high rail transportation costs and charges diminish our ability to enjoy a margin on our sales, and in some cases dictate product sales volumes, and where and how we transport our products. For example, high rail transportation costs force us to raise our prices to customers, who have competitive options to POET Ethanol. They also can prevent us from transporting ethanol by rail over certain distances, and instead use trucks, which is less preferable.

Since 2013, POET Ethanol has paid UP over {{[REDACTED]}} in rates and charges for rail transportation in tank cars we provide to UP, exclusive of the charges assessed by UP pursuant to Item 55-C that POET Ethanol is challenging in these consolidated proceedings. Over the relevant time period for purposes of POET Ethanol's claims in this proceeding UP has provided rail transportation service to POET Ethanol in tank cars primarily¹ pursuant to UP's common carrier tariffs, namely UP Tariff 2028 Series and the various common carrier tariffs and documents referenced and incorporated by reference therein.

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C. POET Ethanol's Tank Car Fleet

UP does not supply any tank cars to its customers, so we must acquire and provide such rail cars to UP in order to receive rail service. As of the commencement of this case in March 2015, POET Ethanol leased approximately {{[REDACTED]}} rail tank cars from several different tank car owners/lessors. In the past three or four years, the fleet has grown from {{[REDACTED]}} railroad tank cars due to poor railroad service², as well as other factors. As of June 30, 2018, POET Ethanol leased {{[REDACTED]}} rail tank cars from twelve different tank car owners/lessors. Our cost of leasing, managing and maintaining a tank car fleet of this size averages {{[REDACTED]}} per year. Over the past 18 years, POET Ethanol's tank car fleet has been primarily made up of general purpose 30,000-gallon tank cars.

The total number of tank cars under each lease at any given time varies, as does each car's age and type. POET Ethanol typically leases rail tank cars for five-year periods, which has been the industry standard. POET Ethanol's tank car fleet lease portfolio {{[REDACTED]}}. Demand for rail tank cars has been high in recent years {{[REDACTED]}} unless poor railroad service, regulatory changes, or other factors require us to lease additional cars, which has been the case since 2016.

In addition to the lease rental, POET Ethanol incurs certain additional maintenance and other costs associated with the tank cars it provides to UP. These costs typically average in

² Until three to four years ago when railroad service deteriorated to unprecedented levels, the number of rail tank cars needed by POET Ethanol had remained consistent. However due to railroad service deterioration, POET Ethanol was required to increase its fleet size to meet its customer commitments.

aggregate around {{[REDACTED]}} per year. POET Ethanol's leases are "full service" leases in accordance with industry practice. In POET Ethanol's experience, lease agreements for tank cars are largely standardized, containing "boilerplate" provisions that are not subject to significant negotiation. The provisions of POET Ethanol's railroad tank car leases are therefore very similar in terms of allocating the responsibilities and obligations of the lessor and lessee. One area common to its tank car leases is the allocation of maintenance responsibility. In general, the bulk of the maintenance and repairs of the leased tank cars is performed at the expense of the car owner/lessor at repair shops or other locations they select or approve. However, consistent with industry standards, POET Ethanol's rail car leases generally make POET Ethanol responsible for the repair of certain components of the cars that could be affected by POET's use of them, primarily during the loading process. These are typically valves, fittings, plugs, chains, gaskets and any equipment handled and/or managed by POET Ethanol's employees or its customers when loading or unloading tank cars, respectively. Rail tank cars are also required to have a 10-year qualifying inspection, which must be performed at a repair facility. Additionally, if a rail tank car has to be sent for repairs or a qualifying inspection, or if the tank car is coming off of a lease and being returned to the lessor, the rail tank car must be cleaned first. This cleaning takes place at the repair facility if it has that capability, or elsewhere, which could include {{[REDACTED] [REDACTED]}}. Cleaning takes place at a location selected by POET Ethanol based on cost and efficiency of the location.

Most of POET Ethanol's tank car leases also contain provisions by which the lessor either (1) remits payment to POET Ethanol any mileage allowance payments it receives from a

transporting railroad paid pursuant to *Ex Parte 328*'s³ procedures, or (2) credits the rental account of POET Ethanol for all or part of any such mileage allowances earned and paid to the lessor by the railroad.

POET Ethanol's tank car lease agreements generally require POET Ethanol to pay for the cost of transporting the leased tank cars to and from the point at which they are turned over to UP or another railroad for use in providing rail transportation for POET Ethanol. However, because the cost of moving empty tank cars to repair facilities has historically been understood to be the responsibility of the railroad using the tank car, and most of the leases predate Item 55-C, POET Ethanol's tank car leases generally do not specify whether the lessor or the lessee is responsible for UP's repair move charges under Item 55-C. However, in practice, lessors have taken the position that any railroad charges for such moves are the responsibility of POET Ethanol. Regardless, UP has chosen to bill POET Ethanol for charges pursuant to Item 55-C for movements of POET Ethanol's leased empty tank cars to and from repair facilities.

As a general business goal, POET Ethanol strives to maximize the efficiency with which our rail tank car fleet is utilized. We closely track the whereabouts and status of the tank cars in POET Ethanol's tank car fleet both internally and using third party providers. In general, the loaded movement of POET Ethanol's rail tank cars vary between {{[REDACTED]}} miles to {{[REDACTED]}} miles per year, per car. Ideally, one of our rail tank cars would complete {{[REDACTED]}} loaded moves each month, but actual use is heavily dependent on railroad service and cycle times between origin and destination, which can vary widely. Accordingly, due to railroad service inconsistencies, on average POET Ethanol tank cars complete {{[REDACTED]}} loaded moves a year.

³ *Ex Parte 328, Investigation of Tank Car Allowance System*, which procedures are included in Freight Tariff RIC 6007 Series administered by Railinc.

Except for certain minor repairs which POET Ethanol has performed by mobile repair service companies at our facilities when practicable, our tank car lessors have the final decision on where a rail tank car is being repaired or requalified to meet regulatory requirements. When our leased cars require repairs, POET Ethanol and its lessors coordinate to manage repairs so as to maintain efficiency and meet customer commitments. When a rail tank car is sent to a repair facility we encourage the fastest turnaround time for the car to be returned into service because our main focus is to minimize the amount of tank car movements made in order to maximize fleet efficiency. Therefore, when a rail tank car needs to be transported to a repair facility POET Ethanol will look at potential diversions when the tank car is returning empty from a loaded move and divert a rail tank car to a repair facility.

When organizing moves with tank car owners, POET Ethanol has always strived to coordinate with the car owner to encourage them to send rail tank cars to repair facilities that are in close proximity to POET Ethanol's plants. This minimizes the number and length of empty maintenance and repair moves, and moving an empty car into and out of repair shops and back in service as quickly as possible.

POET Ethanol also manages its tank car fleet movements so the empty miles the cars travel do not exceed the loaded miles by 106%, which is the threshold for being assessed charges under the mileage equalization program established by *Ex Parte 328*. This program was designed and implemented in large part to incentivize owners and lessees of private tank to try and minimize the number of empty miles relative to loaded miles, calculated on an annual fleet-wide basis, so as to ensure the national tank car fleet was being used efficiently. Accordingly, in the normal course of business, POET Ethanol has always tracked its loaded and empty miles to ensure that it remains within the 106% so as to avoid any charges. We have also tried to maximize the number of

movements that entail a loaded movement and a corresponding empty movement that is included in the loaded line haul rate, as opposed to a separate movement of an unloaded car that incurs a separate charge. As a result of these car fleet management practices, POET Ethanol has rarely exceeded the 106% threshold and accordingly rarely has had to pay the associated mileage equalization charges established by *Ex Parte 328*.

POET Ethanol seeks to efficiently manage its tank car fleet not only to avoid paying equalization charges, but also to maximize utilization of its tank cars for loaded moves carrying POET Ethanol's products. Maximizing the efficient utilization of our tank cars allows POET Ethanol to ship products to our customers using the fewest number of tank cars required to efficiently deliver our product under the railroad service conditions we are presented with. In particular, POET Ethanol has always sought to minimize the number of empty miles its tank cars travel to repair facilities because the more miles a tank car must travel to move to a shop, the more time it will remain out of service.

UP does not reimburse POET Ethanol for any of the costs we incur to acquire leased tank cars and provide them to UP. First, UP does not compensate us through the mileage allowance program developed in *Ex Parte 328* and set forth in Tariff RIC 6007. Under the *Ex Parte 328* process, combined with our rail car leases, mileage allowance payments would be made to our car lessors, and then passed through to POET Ethanol pursuant to our lease terms in the form of payments or credits. To my knowledge UP has never paid any of POET Ethanol's tank car lessors a mileage allowance as compensation for UP's use of the tank cars they lease to POET Ethanol. In fact, the common carrier rate documents published by UP governing POET Ethanol's transportation, specifically Tariff UP 2028, state as to the rates applicable to POET Ethanol's

commodities, “Mileage allowance payment on private equipment shall not apply.” In our experience and belief, these tariff terms are non-negotiable.

Second, UP does not compensate POET Ethanol for the use of our tank cars in any other manner. UP has never offered us or established a choice of rates for the tank cars POET Ethanol provides – that is, a choice of a rate including payment of mileage allowances to POET Ethanol or its car lessor, or a discounted “zero allowance rate” where we are compensated for supplying UP tank cars through a rate discount. UP has always established only one rate for tank car movements in POET Ethanol provided tank cars; a rate not accompanied by mileage allowance payments. UP has never represented to POET Ethanol that its tariff freight rates are discounted off a higher rail rate for the purpose of compensating POET Ethanol for the use of its tank cars. Nor has UP ever quantified the amount by which its rates are supposedly discounted or how such purported discounts are calculated. To the contrary, based on POET Ethanol’s experience in its dealings with UP, UP sets all of its freight rates for tank car shipments based solely on what UP believes the market will bear in order to maximize UP’s revenues and profit. UP has never maintained or represented otherwise to POET Ethanol.

D. UP’s Imposition of Item 55-C and Related Charges

On December 10, 2014, UP informed POET Ethanol through a general email announcement that starting January 1, 2015, UP would begin, for the first time, assessing mileage-based charges for certain movements of empty tank cars to repair shops. Such charges had never previously been assessed against POET Ethanol by UP. No previous notice of this significant change had been communicated to us. Upon receiving the notice, it was readily apparent to us that UP was adopting Item 55-C and imposing the associated charges for movement of empty tank cars to and from repair shops because UP wanted to capitalize on proposed new regulations from

the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) concerning railroad tank cars, then a topic of great discussion and concern in the ethanol industry. There was no other reasonable business or policy basis for the charges, and POET later came to understand there were legal impediments to Item 55-C as well.

We vigorously opposed Item 55-C. We first objected to this announcement through our membership in the North America Freight Car Association (“NAFCA”), which, along with the Fertilizer Institute, Railway Supply Institute, and the Chlorine Institute sent a letter on behalf of the organizations and their members to Mr. Eric Butler of UP on December 22, 2014 demanding that UP immediately withdraw the proposed publication of Item 55-C. We later protested the adoption of Item 55-C directly to UP in an email sent on March 23, 2015, voicing our view that the tariff provision appeared to have been timed to take advantage of the potential PHMSA ruling requiring retrofits of the existing ethanol fleet as well as the increased number of re qualifications associated with the aging ethanol tank car fleet. UP responded to our objection by claiming that Item 55-C was being adopted for other reasons, including increasing efficiency. However, at no time prior to implementing Item 55-C did UP express to us any concerns or issues with POET Ethanol’s tank car fleet management. Effective January 1, 2015,⁴ UP adopted Tariff UP 6004, Item 55-C which began assessing charges set forth in UP Tariff 4703 for certain movements of POET Ethanol’s empty tank cars to and from car repair shops.

UP has renewed and increased the charges assessed pursuant to Item 55-C in 2016, 2017, 2018, and 2019 and UP has submitted invoices to POET Ethanol for nearly {{[REDACTED]}} in such charges between January 1, 2015 and December 31, 2018. A spreadsheet summarizing the

⁴ The mileage-based charges established in Item 55-C were set forth in Item 1100 of Tariff UP 4703. The minimum and per-mile charges for repair movements are now set forth in Item 1200 of Tariff 4703.

invoices received from UP as of December 31, 2018 is attached as Exhibit B to this Verified Statement. {{ [REDACTED]

[REDACTED] }}

However, UP continues to invoice POET Ethanol pursuant to Item 55-C for charges for empty tank car movements to and from repair shops to the present day.

Finally, UP did not reduce the common carrier rates it charges POET Ethanol for tank car shipments when it began assessing us charges under Item 55-C in 2015. Nor did UP reduce its tank car freight rates when it increased the charges in 2016, 2017 and 2018. On the contrary, since 2015 UP has *increased* POET Ethanol's transportation rates an average of 3-5%% per year in 2016, 2017, and 2018.

VERIFICATION

I, Phil Spieckermann, hereby certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on this 19th day of February, 2019.



Phil Spieckermann
Vice President, Rail

Exhibit A
REDACTED

Exhibit B
REDACTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42144

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 v. UNION PACIFIC RAILROAD COMPANY

Docket No. NOR 42150

VALERO MARKETING AND SUPPLY COMPANY
AND VALERO RAIL PARTNERS, LLC v. UNION PACIFIC RAILROAD COMPANY

Docket No. NOR 42152

TESORO REFINING & MARKETING COMPANY LLC;
TESORO GREAT PLAINS GATHERING & MARKETING, LLC;
AND DAKOTA PRAIRIE REFINING, LLC v. UNION PACIFIC RAILROAD COMPANY

Docket No. NOR 42153

ARKEMA INC. v. UNION PACIFIC RAILROAD COMPANY

VERIFIED STATEMENT OF JOHN M. KIERAS

My name is John M. Kieras. I am a former employee of Union Tank Car Company (“Union Tank”). Union Tank manufactures and owns over 90,000 railroad tank cars, which is the largest fleet of railroad tank cars in North America owned by a single company. Many of Union Tank’s railroad tank cars are sold or leased to railroad shippers who provide them to the Union Pacific Railroad Company (“UP”) for it to transport their products. I was employed by Union Tank for 42 years in various capacities, most recently as Director of Railroad and Industry Relations. I

retired from Union Tank in April 2018 and am presently working for the company in a consulting capacity.

During my tenure at Union Tank I had significant experience with the tank car mileage allowance system negotiated by railroad industry stakeholders and adopted by the Interstate Commerce Commission (“ICC”) in Ex Parte No. 328, *Investigation of Tank Car Allowance System*, 3 I.C.C. 2d 196 (1986)(“*Ex Parte 328*”). The agreed upon *Ex Parte 328* procedures were deemed by the ICC to meet the requirement of 49 U.S.C. §11122 that railroads compensate parties who provide them railroad tank cars. The procedures are codified in Freight Tariff RIC 6007-series (“Tariff 6007”), which is published and maintained by Railinc, a wholly owned subsidiary of the Association of American Railroads (“AAR”). Railinc administers the mileage rate allowance program through data collection and analysis pursuant to the *Ex Parte 328* procedures. Union Tank was actively involved in the negotiations leading up to the industry agreement in *EP 328*, and that process in general. I managed Union Tank’s mileage accounting system from 1982 to 2007, a position that included administering Union Tank’s participation in the mileage rate allowance program. In this and my subsequent positions at Union Tank I was required to have contact with Railinc as well as the Class I and other railroads who used Union Tank’s tank cars provided to them by their railroad shipper customers.

I have been asked by counsel for Ethanol Products LLC d/b/a POET Ethanol Products, POET Nutrition, Inc, and Cargill, Incorporated to provide the Surface Transportation Board (“STB”) with an overview of my understanding and experience with how the tank car mileage compensation system works between the railroads, Railinc and the tank car owners, and how Railinc administers the tank car mileage rate allowance program. I have also been asked to provide my opinion on the means by which a railroad, found to be liable for non-payment of mileage

allowances to a tank car owner, could calculate and pay such past allowances based on information in the railroad's possession.

The tank car mileage compensation system is relatively straightforward conceptually. Tariff 6007 requires that railroads to report tank car mileage compensation allowances to the car owner on a monthly basis. Each railroad reports car mark and number, as well as cycle information which includes dates, loaded or empty status, and actual miles moved for each cycle movement. The railroad multiplies the loaded miles for that cycle movement by a mileage allowance rate to arrive at an amount due the car owner for that movement. The total of these calculations for all movements of the tank car owner's cars is the amount due the tank car owner for that month. The mileage rates published in Tariff 6007 for all tank cars are individually assigned to each tank car in service by Railinc, using the tank car's cost and year-built information reported to Railinc for input into the Umler file by the tank car owner. Railinc provides the railroads a monthly file, denominated the Car Hire Accounting Rate Master ("CHARM"), which is the official source for time and mileage rates on all freight cars. Each railroad reports the mileage compensation information to Railinc who in turn passes it through to the tank car owners. While *Ex Parte 328* determines the procedures for calculating mileage allowance rates, in my experience the mileage rate actually used by the railroads can vary. Finally, in the case of leased tank cars most leases contain provisions whereby the car owner passes on the mileage allowance information and payments to the lessee/shipper in the form of rental credits or, in some cases, direct payment.

1. The Umler file and the Tariff 6007 Mileage Rate Allowance Tables

The terms and conditions of the mileage allowance program are set out in Tariff 6007. In addition to administering the tariff, Railinc is also the custodian for data submitted by tank car owners when a tank car is placed into service. The data to be submitted is set forth in the Umler

Data Specification Manual, which is also published and administered by Railinc,¹ Part of the data submitted by car owners when registering a new tank car is the original invoice price or true value of the tank car, which is submitted to Railinc on a confidential basis. This information is a key component of the mileage rate allowance calculation. Because it is submitted confidentially, unless a rail shipper purchases a tank car it will not have knowledge of this component of the mileage rate allowance calculation. Moreover, since UP and other railroads do not own rail tank cars, they also do not have knowledge of this component. From this and other data submitted by the tank car owner, such as the year built, Railinc calculates and assigns the mileage rate allowance amount for each registered tank car in service using the *Ex Parte 328* procedures. The range of assigned allowance amounts, which are expressed in a cents per loaded mile, is published by Railinc in tables found in in Section 1 of Item 195 of Tariff 6007. The mileage rate allowance tables are updated by Railinc twice a year, updating the cost of ownership information and interest rate used in the formula to calculation the rates.

2. Submittal of Mileage Rate Allowance Information to the Railroads

The calculation of mileage rate allowances for tank cars is one of many tasks Railinc undertakes in the area of tank car compensation. Railinc also calculates mileage rate allowances for other types of privately marked cars, such as grain hopper cars, and it publishes time and mileage rates that the railroads charge each other for their use of each other's railroad marked cars on their systems. All of this information is compiled by Railinc into the CHARM database, which Railinc describes as "the official source of time and mileage rates on freight cars."² This file is confidential, so it may not be not available to rail shippers. As Railinc's website explains, the

¹ <https://www.railinc.com/rportal/documents/18/260655/UmlerDataSpecs.pdf>

² <https://www.railinc.com/rportal/charm>

CHARM database “contains rates effective for the current month and is updated each subsequent month with the appropriate deprescribed or prescribed rates effective for the month.” In my experience, the mileage allowances for all rail tank cars registered with the AAR are contained in the CHARM database, and that this database is updated by Railinc and supplied to the UP and the other railroads monthly.

3. Loaded and Empty Mileage Data

The other primary component of the mileage compensation system is the number of miles the tank car is transported, whether on one railroad’s system or multiple railroads’ systems. Part of the data reported monthly to the car owner by the railroads, pursuant to *Ex Parte 328* and Tariff 6007, through Railinc is the actual miles travelled for each car. Railinc maintains a history of this data for at least ten years.

4. Railroad Use of Mileage and Allowance Data

In my experience, the railroads who transport Union Tank’s cars submitted an accounting of the usage of those cars to Union Tank on a monthly basis. This accounting was provided for several reasons, including the amount of money owed to Union Tank under the mileage allowance program, but also to inform Union Tank of the miles its cars traveled in each state for ad valorem tax law compliance.

Although the railroads received the mileage allowance rate information for each tank car they transport from Railinc - and this number could be used to calculate mileage allowance payments using the loaded mileage data compiled and reported to Railinc - the railroads would often replace that rate with a mileage rate allowance value of zero. This resulted in a calculated owed amount of zero when multiplied by the applicable loaded miles. This is a practice that began

around 1990 when railroads started to enter into contracts with rail shippers after passage of the Staggers Rail Act of 1980.

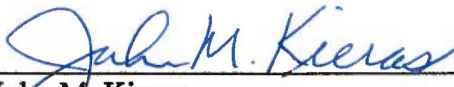
In my opinion, if the Surface Transportation Board found that UP or any other railroad had violated applicable law by refusing to pay mileage compensation for its use of railroad tank cars provided to it, a calculation of the past mileage compensation amounts owed by the railroad could be accomplished for those cars in question by multiplying the mileage rate allowances calculated by Railinc over the applicable time period and supplied to the railroad via the CHARM file by the number of loaded miles each tank car moved, subject to any adjustments set out in Tariff 6007. While the railroad and Railinc both have this information and could easily make this calculation, a rail shipper typically cannot make this same calculation because it is not privy to the mileage allowance rate for each of its leased cars that has been calculated by Railinc.

Finally, under Tariff RIC 6007, such mileage compensation payments would be made to the owner of the car (owner of the car marks). Under most of Union Tank's leases with its customers, mileage allowance payments received by Union Tank are passed through to the lessee or credited against amounts owed under the lease.

VERIFICATION

I, John M. Kieras, hereby certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on this 15th day of February, 2019.



John M. Kieras

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February, 2019, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or a more expeditious manner of delivery, on all of the parties of record in STB Docket Nos. NOR 42144, 42150, 42152 and 42153 (consolidated).


Thomas W. Wilcox