

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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January 26, 2017
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NORTH AMERICA FREIGHT CAR
ASSOCIATION; AMERICAN FUEL &
PETROCHEMICALS MANUFACTURERS;
THE CHLORINE INSTITUTE; THE
FERTILIZER INSTITUTE; AMERICAN
CHEMISTRY COUNCIL; ETHANOL
PRODUCTS, LLC D/B/A POET ETHANOL
PRODUCTS; POET NUTRITION, INC.; and
CARGILL INCORPORATED,

Complainants,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

NOR 42144

UNION PACIFIC'S MOTION TO CONSOLIDATE PROCEEDINGS

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January 26, 2017

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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UNION PACIFIC’S MOTION TO CONSOLIDATE PROCEEDINGS

Pursuant to 49 C.F.R. §§ 1100.3 and 1117.1, Union Pacific Railroad Company hereby requests that the Board consolidate the proceedings in STB Docket No. NOR 42144 with the proceedings in STB Docket No. NOR 42150, *Valero Marketing and Supply Company and Valero Rail Partners, LLC v. Union Pacific Railroad Company*, and STB 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*.

Union Pacific is simultaneously filing motions for consolidation in NOR 42150 and NOR 42152. As we explain in detail in those filings, which we are including as Attachments 1 and 2 to this motion, the three proceedings involve common facts, issues, and parties; consolidation is the

most fair and efficient way for the Board to resolve the issues raised by the three proceedings;
and consolidation would neither unduly delay the proceedings nor prejudice any party.

Accordingly, Union Pacific requests that the Board consolidate the three proceedings.

Respectfully submitted,

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January 26, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January, 2017, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or a more expeditious manner of delivery, on all of the parties of record in NOR 42144.

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

/s/Michael L. Rosenthal
Michael L. Rosenthal

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

_____	)	
VALERO MARKETING AND SUPPLY	)	
COMPANY and VALERO RAIL PARTNERS,	)	
LLC,	)	
	)	
Complainants,	)	NOR 42150
	)	
v.	)	
	)	
UNION PACIFIC RAILROAD COMPANY,	)	
	)	
Defendant.	)	
_____	)	

**UNION PACIFIC’S OPPOSITION TO COMPLAINANTS’
MOTION TO HOLD PROCEEDINGS IN ABEYANCE
AND UNION PACIFIC’S MOTION FOR CONSOLIDATION**

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VALERO MARKETING AND SUPPLY	)	
COMPANY and VALERO RAIL PARTNERS,	)	
LLC,	)	
	)	
Complainants,	)	NOR 42150
	)	
v.	)	
	)	
UNION PACIFIC RAILROAD COMPANY,	)	
	)	
Defendant.	)	
	)	

The Board should deny the motion to hold this proceeding in abeyance filed by Valero Marketing and Supply Company and Valero Rail Partners, LLC (collectively, “Valero”). In the interest of promoting fair, accurate, and expeditious regulatory decisions, the Board should consolidate this matter with *North America Freight Car Association, et al. v. Union Pacific Railroad Company*, NOR 42144 (“NAFCA”), in which the procedural schedule has been stayed to permit the parties to complete discovery. The Board should reject Valero’s transparent attempt to deprive Union Pacific and the Board of evidence bearing on the common issues in the two cases. If the Board allows Valero’s tactics to succeed, then parties in future cases will have a roadmap for avoiding discovery—they will pursue complaints through trade associations, rather than as individuals—and the Board’s ability to rely on the party discovery process to unearth facts relevant to its proceedings will be severely compromised.

I. INTRODUCTION

Valero chose to wait until two years after Union Pacific adopted the tariff charge it is challenging to file its complaint, while a trade association to which it belongs pursued an identical claim on its behalf in *NAFCA*. Yet, immediately after Union Pacific served discovery, Valero asked the Board to hold the matter in abeyance. The effect of an abeyance would be prejudicial to Union Pacific: Valero would avoid providing Union Pacific with discovery regarding the common issues raised in *NAFCA* and its own case, while ensuring that its claim for damages is not barred by the statute of limitations. *See* Mot. at 8 (“Complainants, for their part, can preserve their full claims to damages before the statute of limitations begins to run.”).

Valero does not try to disguise its effort to avoid providing discovery of the type that is occurring in *NAFCA*. Its main argument is that discovery would be “duplicative” (Mot. at 5-7), and thus an abeyance “would not prejudice any party” and “is the fairest outcome,” *id.* at 7.

However, discovery of Valero would not be duplicative, and allowing Valero to stand on the sidelines, ready to spring into action to collect damages, but unwilling to provide discovery regarding the common legal and policy issues in *NAFCA*, would be unfair and prejudicial.

Union Pacific has vigorously pursued discovery in *NAFCA* ever since the Board denied our motion to dismiss on the ground that the case could not be decided without discovery and presentation of evidence regarding industry conditions. But our ability to obtain discovery has been severely constrained. The *NAFCA* complainants that are trade associations possess very little relevant information, they refused to collect and produce information from their members who had relevant information, and only *three* shippers (out of hundreds of trade association members) joined in the *NAFCA* complaint and were thus subject to party discovery.

Valero’s decision to file a complaint raising the same issues as the *NAFCA* complaint provides a significant opportunity for Union Pacific to obtain the type of discovery the Board

considered relevant to its decision in *NAFCA*. Depriving Union Pacific of the right to conduct discovery regarding issues the Board considered relevant to its decision in *NAFCA* would be unfair and prejudicial. The Board would also be depriving itself of relevant information. By contrast, Valero will suffer no harm if this case moves forward. A party filing a complaint should expect to provide discovery related to its claim.

Under the circumstances here, the best way to address any concerns about efficiency and fairness is to consolidate this case with the *NAFCA* case. Consolidation will allow the Board to address the issues raised in this case and the *NAFCA* case in a single proceeding based on the most complete record possible. Valero will not be harmed by consolidation—its claims will be resolved faster than if they were held in abeyance. The complainants in *NAFCA* will not be harmed—discovery is still ongoing, and discovery regarding Valero should proceed quickly because the most contentious issues have been resolved by the administrative law judge in *NAFCA*. Finally, Union Pacific will not be harmed. To the contrary, consolidation will help mitigate the prejudice it faces, given the constraints on its ability to obtain discovery, in addressing the issues that led the Board to deny its motion to dismiss in *NAFCA*.

II. BACKGROUND

In *NAFCA*, five trade associations and three shippers allege that Union Pacific committed an unreasonable practice by adopting charges for certain movements of empty tank cars to and from repair facilities in Tariff 6004-C, Item 55-C, without compensating shippers for the costs imposed by those charges through payment of mileage allowances or reduced-line haul rates in lieu of mileage allowances.¹ Valero's complaint makes the same allegations. *See* Mot. at 2. The

¹ *See* First Am. Compl. ¶¶ 23-29, 32-33, *N. Am. Freight Car Ass'n v. Union Pac. R.R.*, NOR 42144 (June 2, 2015).

identical nature of the allegations is no coincidence—Valero is a member of the American Fuel & Petrochemical Manufacturers (“AFPM”), one of the trade association complainants in *NAFCA*,² and Valero’s legal counsel also represents AFPM.

Union Pacific moved to dismiss the *NAFCA* complaint on the grounds that its adoption of Item 55-C and use of zero-mileage rates, rather than rates that include mileage allowances, were lawful under Board precedent.³ In the alternative, Union Pacific asked the Board to require the complainants to make the complaint more definite to clarify their allegations and simplify discovery.⁴

In opposing Union Pacific’s motion to dismiss, the *NAFCA* complainants argued that the case requires “development of facts *through discovery* and the presentation of evidence.”⁵ They argued that the precedent upon which Union Pacific had relied is “inapposite due to different facts and circumstances, including substantial changes that have occurred in the rail industry over the past 25 years,”⁶ and that a proper consideration of their arguments “can only proceed *after discovery* and presentation of evidence of applicable industry conditions.”⁷

In denying Union Pacific’s motion, the Board said that arguments about “whether UP is complying with [Board] precedent and whether that precedent is applicable” are “fact-specific

² See Membership Directory, American Fuel & Petrochemical Manufacturers, *available at* <https://www.afpm.org/membership-directory/> (last visited Jan. 17, 2017).

³ Mot. to Dismiss at 8-17, *N. Am. Freight Car Ass’n v. Union Pac. R.R.*, NOR 42144 (Apr. 20, 2015).

⁴ *Id.* at 21-24.

⁵ Reply to Mot. to Dismiss at 5, *N. Am. Freight Car Ass’n v. Union Pac. R.R.*, NOR 42144 (June 1, 2015) (emphasis added).

⁶ *Id.* at 7.

⁷ *Id.* at 15 (emphasis added).

and, as such can only be sufficiently addressed after the development of a full record.”⁸ The Board also suggested that it would consider arguments about “whether that precedent should stand given changes in the railroad industry, an issue that has not been fully briefed.”⁹ Finally, the Board declined to order the *NAFCA* complainants to make their complaint more definite, agreeing with complainants that Union Pacific was seeking “*information more appropriately obtained in discovery.*”¹⁰

The *NAFCA* case remains in the discovery phase. The parties engaged in extensive negotiation and litigation regarding the scope of discovery. The parties appear to have resolved all of their disputes regarding the scope of discovery through negotiations and extensive motions practice before Administrative Law Judge John P. Dring. They are currently in the process of producing information and conducting depositions.¹¹ In addition, Union Pacific is awaiting the production of information from four tank car owners upon which it served subpoenas, which were also the subject of extensive litigation before Judge Dring.¹² The Board has stayed the procedural schedule to allow the parties to resolve their discovery issues.¹³

Valero’s complaint duplicates the complaint in *NAFCA*. Like the shipper parties in *NAFCA*, Valero claims that Union Pacific committed an unreasonable practice by adopting the

⁸ *N. Am. Freight Car Ass’n v. Union Pac. R.R.*, NOR 42144, slip op. at 3 (STB served Dec. 21, 2015).

⁹ *Id.*

¹⁰ *Id.* at 5 (emphasis added).

¹¹ For example, on January 19, 2017, Union Pacific served notices of deposition on Ethanol Products, LLC d/b/a Poet Ethanol Products, Poet Nutrition, Inc., and Cargill Incorporated.

¹² See Union Pacific Railroad Company’s Petition for Subpoenas, *N. Am. Freight Car Ass’n v. Union Pac. R.R.*, NOR 42144 (May 17, 2016); Transcript of Oral Argument, *N. Am. Freight Car Ass’n v. Union Pac. R.R.*, NOR 42144 (Sept. 20, 2016).

¹³ See *N. Am. Freight Car Ass’n v. Union Pac. R.R.*, NOR 42144 (STB served June 10, 2016).

charges in Item 55-C without compensating shippers for the costs imposed by Item 55-C through payment of mileage allowances or reduced-line haul rates, and it seeks damages for the charges imposed under Item 55-C.¹⁴ The only difference between the two complaints is that Valero does not seek damages for the alleged failure to compensate tank car owners for the use of their cars. However, Valero’s complaint includes the *NAFCA* complaint’s key allegations regarding the compensation issue, because Valero links its claim that Item 55-C charges are an unreasonable practice with the alleged failure to compensate tank car owners for use of their cars.¹⁵

On January 6, 2017, Union Pacific served discovery requests on Valero. Later that same day, Valero filed its motion to hold this proceeding in abeyance. On January 11, Valero sent Union Pacific a letter stating that it would not respond to Union Pacific’s discovery requests until the Board rules on its motion.¹⁶ On January 18, Union Pacific responded that Valero’s refusal to respond to discovery was unjustified and that Union Pacific was willing to agree that Valero could simply search for and produce the same materials that the shipper parties agreed to search for and produce in *NAFCA*.¹⁷

III. ARGUMENT

A. The Board Should Not Hold This Proceeding In Abeyance.

The Board enjoys broad discretion in deciding whether to hold a case in abeyance, and its decisions depend “on the facts and circumstances of the case.” *Intermountain Power Agency v. Union Pac. R.R.*, NOR 42136, slip op. at 2 (STB served Dec. 14, 2012). In addressing abeyance

¹⁴ See Compl. ¶¶ 14-21.

¹⁵ See Mot. at 2 (explaining that Valero seeks a ruling that Item 55-C charges are an unreasonable practice because “UP in no way compensates [shippers] for the additional costs imposed on shippers by those charges.”); see also Compl. ¶¶ 7, 8, 9, 10, 11, 19, and 21.

¹⁶ Letter from Justin A. Savage to Michael L. Rosenthal (Jan. 11, 2017) (Exhibit A hereto).

¹⁷ Letter from Michael L. Rosenthal to Justin A. Savage (Jan. 18, 2017) (Exhibit B hereto).

requests, the Board considers issues of fairness, policy, and efficiency. *See id.* at 2-4; *E.I. DuPont de Nemours & Co. v. Norfolk S. Ry.*, NOR 42125, slip op. at 5-7 (STB served Nov. 29, 2012). Granting Valero's motion would be fundamentally unfair to Union Pacific, would deprive the Board of potentially important evidence, and would not produce legitimate efficiencies.

1. Holding this proceeding in abeyance would unfairly deprive Union Pacific of the opportunity to obtain discovery from Valero.

Holding this case in abeyance would unfairly deny Union Pacific the opportunity to obtain discovery of precisely the types of evidence the Board believed necessary to address the issues raised in *NAFCA* and repeated in Valero's complaint. In *NAFCA*, the Board agreed with the complainants that the legal and policy issues raised by the case could not be decided without discovery and without the presentation of evidence regarding industry conditions and changes in industry conditions over time.¹⁸ Valero's allegations parallel the allegations in *NAFCA*. Union Pacific has thus asked Valero to search for and produce the same categories of information that the shipper parties are searching for and are producing to Union Pacific in *NAFCA*.¹⁹

Valero's position appears to be that it should not have to provide discovery regarding the common legal and policy issues raised by its complaint and the *NAFCA* complaint because Union Pacific will obtain adequate discovery in *NAFCA*. However, Union Pacific has obtained only limited discovery in *NAFCA*—in large part because Valero and most other shippers are participating in *NAFCA* only indirectly, through their trade associations.

Union Pacific has attempted to obtain discovery from the trade associations in *NAFCA* regarding industry-wide conditions relating to movements of empty tank cars to repair facilities

¹⁸ *See N. Am. Freight Car Ass'n v. Union Pac. R.R.*, NOR 42144, slip op. at 3 (STB served Dec. 21, 2015).

¹⁹ *See* Exhibit B hereto.

and compensation for tank car ownership costs. But it has largely come up empty. In response to discovery requests, the association complainants nearly universally and uniformly responded that they do not possess the information requested.²⁰ Rather, they said any information would be in the possession of their members. AFPM, of which Valero is a member, produced just *one* document, consisting of AFPM's comments and analyses relating to a Department of Transportation rulemaking regarding tank car retrofitting. AFPM confirmed it has no other responsive, non-privileged information in its possession, custody or control responsive to any of the 39 interrogatories and 35 document requests submitted by Union Pacific.²¹

Administrative Law Judge Dring acknowledged Union Pacific's difficult position in discussing a motion that Union Pacific filed in an attempt to compel the trade associations to produce documents on behalf of their members:

Presiding Judge: Thank you. Mr. Rosenthal, I believe I said the last time we were here essentially what Mr. Donovan has just said, that ***I can't grant motions to compel against the Complainants when they don't have the information, they don't have what you're seeking, their members have that.*** I can't reach their members through a motion to compel. Okay? So let's -- go ahead.

...

Mr. Rosenthal: And we want to be prepared. When they file their evidence, we want to be able to respond. As you point out, we're in a bit of a bind, because most of the people on the other side are associations.

Presiding Judge: I can't help you with that.

²⁰ See, e.g., Responses and Objections of The American Fuel & Petrochemicals Manufacturers to Union Pacific's First Set of Discovery Requests, *N. Am. Freight Car Ass'n v. Union Pac. R.R.*, NOR 42144 (June 23, 2015) (Responses to Interrogatory Nos. 3, 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 30, 31, 32, 33, 34, 35 and 36, and Responses to Document Request Nos. 14, 15, 16, 18, 19, 20, 21, 22, and 23) (Exhibit C hereto).

²¹ See Letter from Justin A. Savage to Michael L. Rosenthal (Aug. 18, 2016) (Exhibit D hereto).

Mr. Rosenthal: I understand.

Presiding Judge: I would love to help you. I don't mind getting down into the weeds with folks, but I can't do this.²²

Because the *NAFCA* trade associations refused to collect and produce information from their members who had relevant information, Union Pacific will obtain discovery from only three of the hundreds of shippers represented by those trade associations—the shipper complainants in *NAFCA*.²³

Valero's decision to file a complaint gives Union Pacific an opportunity to obtain at least some of the discovery it has been precluded from obtaining in *NAFCA*. That discovery could be significant, especially given the paucity of information Union Pacific obtained from individual shippers thus far. Notably, Valero participates in different rail transportation markets than the shipper complainants in *NAFCA*. An abeyance would unfairly deprive Union Pacific of the opportunity to defend against Valero's claims by obtaining relevant discovery from Valero.

By contrast, allowing this case to proceed involves no unfairness to Valero. Valero is not being asked to expend resources to litigate parallel claims—it is not a party in *NAFCA*. Valero would not be required to do any more than any individual complainant in any case before the Board. Indeed, Valero would benefit from work done by the parties in *NAFCA* to narrow the

²² Transcript of Status Conference at 35:18–37:11, *N. Am. Freight Car Ass'n v. Union Pac. R.R.*, NOR 42144 (Aug. 22, 2016) (emphasis added).

²³ As discussed in the next section, Board precedent contemplates the possibility of serving subpoenas on a trade association's members, but that is not a realistic possibility in *NAFCA*, where the five trade associations together have several hundred members.

Union Pacific is using subpoenas to obtain discovery from four companies that own tank cars and lease them to shippers, but they do not have the same types of information that shippers would have, and Judge Dring strictly limited Union Pacific's discovery from non-parties. *See, e.g.*, Transcript of Oral Argument at 48:16-18, *N. Am. Freight Car Ass'n v. Union Pac. R.R.*, NOR 42144 (Sept. 20, 2016) (“But I have to balance my sympathy for your understandable desire to get this information against the burden imposed on the car owners.”).

scope of discovery—it would just be getting a little less of a free ride than the one it seeks from any abeyance.

2. Holding this proceeding in abeyance would deprive the Board of relevant information and would establish precedent that allows parties to avoid discovery related to the merits of their claims.

Holding this case in abeyance would also affect the Board. It would preclude the Board from deciding the legal and policy issues raised by *NAFCA* and Valero's complaint based on the most complete record reasonably available. This should be a particular concern here, where the Board has emphasized the need for discovery and development of a factual record, and where Union Pacific's efforts to help build that record have been hindered by the lack of cooperation from the *NAFCA* trade associations.²⁴

Holding this case in abeyance would also be bad policy. It would provide a road map for other shippers to pursue claims without providing the discovery required for the Board to decide cases on a full record. In past cases, when trade associations have pursued claims on behalf of their members, they have voluntarily provided discovery on behalf of their members,²⁵ or they have been small enough that it was practical to subpoena all their members.²⁶ But if shippers know they can prompt a large trade association to pursue a claim on their behalf, while they avoid discovery that might well undermine their claims, that is what they will do. And if that

²⁴ Union Pacific previously reached a compromise with North America Freight Car Association to coordinate discovery on behalf of the association's members in STB Docket NOR 42119.

²⁵ See n.24, *supra*.

²⁶ See *Reasonableness of BNSF Ry. Co. Coal Dust Mitigation Tariff Provisions*, FD 35557, slip op. at 3-7 (STB served June 25, 2012).

happens, the Board will be unable to rely on the party discovery process to create the record it needs to resolve cases.²⁷

3. Holding this proceeding in abeyance would not produce legitimate efficiencies.

Valero's primary argument for holding this case in abeyance involves the efficiencies in avoiding duplicative litigation. As discussed in the next section, the best way to avoid duplicative litigation while simultaneously addressing the many factors that counsel against holding this case in abeyance would be to consolidate this case with *NAFCA*. Consolidation was not an option in any of the cases Valero cites to support its efficiency arguments because the cases were pending before different courts and agencies.²⁸

Moreover, Valero is not actually seeking to avoid duplicative litigation. Valero is seeking to avoid producing discovery that might help the Board address the issues raised by both *NAFCA* and Valero's complaint. Valero's motion wrongly implies that the Board already has a complete record in *NAFCA*, when Valero is really seeking a tactical advantage by avoiding discovery that would reduce its chance of obtaining its desired outcome in *NAFCA* and its own proceeding. In

²⁷ Cf. *Nat'l R.R. Passenger Corp.—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian Nat'l Ry.*, NOR 42134, slip op. at 3 (STB served Jan. 3, 2013) (declining to issue Board subpoenas to initiate an investigation because the Board's "standard practice in complaint-type proceedings is to have the record built through party-directed discovery" and the Board "expects both parties to be forthcoming and to make full disclosure in responding to reasonable requests for discovery").

²⁸ See *Basardh v. Gates*, 545 F.3d 1068 (D.C. Cir. 2008) (describing habeas petitioner's separate request for direct review of his detention by the Court of Appeals while his habeas case was still pending in a district court); *Petition of the Nat'l R.R. Passenger Corp. for Relief Pursuant to 49 U.S.C. § 24905 ("Amtrak")*, FD 36048, slip op. at 3-4 (STB served Oct. 3, 2016) (deciding to conserve the Board's and parties' resources while a litigation proceeded in a district court); *Ocean Logistics Mgmt., Inc.—Petition for Declaratory Order—Certain Rates & Practices of NPR, Inc.*, WCC-102, slip op. at 1 (STB served Nov. 6, 1998) (holding Board proceeding in abeyance to allow jurisdictional arguments to be resolved by district court); *In re Latimer*, 489 B.R. 844, 868 (Bankr. N.D. Ala. 2013) ("Considerations of the economic burden which the debtor will have to bear in order to litigate *in two forums at the same time* are, therefore, particularly acute.") (emphasis added).

other words, Valero is not seeking to avoid duplicative litigation—it is seeking to avoid providing discovery that might undermine its case.

Finally, none of the cases Valero cites in support of its efficiency argument are relevant to this case. The cases Valero cites involve situations where the party seeking abeyance would otherwise be required to participate in two cases at once, and proceeding sequentially would potentially reduce the party's costs.²⁹ Here, Valero is not participating in *NAFCA*. It is not incurring duplicative costs. Valero is seeking to free-ride on the efforts of others, conduct litigation by proxy, and avoid subjecting its claims to the test of discovery.

B. The Board Should Consolidate This Proceeding With *NAFCA*.

The most fair and efficient way for the Board to address the issues raised by Valero's complaint would be to consolidate this proceeding with *NAFCA*. In deciding whether to grant a request for consolidation, the Board considers whether the proceedings involve common facts, issues, and parties; whether consolidation would promote efficiency; and whether consolidation would "unduly delay" the proceedings or "prejudice any party." *Honey Creek R.R.—Petition for Declaratory Order*, FD 34869, slip op. at 3 (STB served June 4, 2008); *see also Bobs Candies*,

²⁹ *See Amtrak*, slip op. at 4 (holding Board proceeding in abeyance because district court proceeding could result in the operative statute being rendered unconstitutional); *Ocean Logistics*, slip op. at 1 (holding Board proceeding in abeyance because pending district court litigation would resolve the issues if allowed to move forward); *Basardh*, 545 F.3d at 1069 (holding detainee's request for direct review of his detention in abeyance because pending habeas petition could moot direct review petition); *Latimer*, 489 B.R. at 868 (staying bankruptcy proceeding because ongoing arbitration could moot proceeding in bankruptcy court).

Valero particularly mischaracterizes *Ocean Logistics*. Contrary to Valero's assertion (Mot. at 6), the Board did not stay that case because it merely involved reparations and a liability determination would be made in another proceeding. Rather, the petitioner initially filed its claims in a district court, and it subsequently filed a complaint and a motion to hold the proceeding in abeyance at the Board to preserve its rights after the defendant moved to dismiss the district court claim on jurisdictional grounds. Moreover, the defendant consented to the request. *See Ocean Logistics*, slip op. at 1; *see also Ocean Logistics Mgmt., Inc. v. NPR, Inc.*, 38 F.Supp.2d 77, 91 (D.P.R. 1999) (dismissing several claims because they fell under the Board's jurisdiction).

Inc. v. Nat'l Motor Freight Traffic Ass'n, No. 40777, 1992 WL 139638, *1 (ICC served June 24, 1992).

Valero concedes the issues raised in its complaint are the same as the issues in *NAFCA*; indeed, identity of issues is the basis for Valero's argument that this case should be held in abeyance. The facts in both cases should be the same, since both cases raise the same industry-wide legal and policy issues. Union Pacific is the sole defendant in each case.

Consolidation of these proceedings is the most fair and efficient way to move forward.³⁰ Union Pacific should be allowed, as a matter of basic fairness, to obtain discovery from Valero to defend its challenged practices in this proceeding and in *NAFCA*. As discussed above, the Board denied Union Pacific's motion to dismiss in *NAFCA* on the grounds that discovery and development of a full record were required to address the industry-wide legal and policy issues raised by these cases. The discovery Union Pacific obtains from Valero could be important to the Board's decision on the merits in both cases, especially given the paucity of discovery Union Pacific has been able to obtain in *NAFCA* from shippers affected by the challenged practices. It would be fundamentally unfair to allow shippers to shield themselves from providing discovery regarding issues raised by their claims by litigating cases through trade associations, but to reap the benefits of that litigation by subsequently filing copycat claims to obtain reparations. Furthermore, to the extent discovery produced by Valero reveals meaningful differences between Valero and the three shippers that were subject to discovery in *NAFCA*, it would be extremely

³⁰ Union Pacific is simultaneously filing a motion to consolidate a parallel proceeding in STB 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*, with *NAFCA*.

inefficient for the Board to issue a decision in *NAFCA*, only to have to backtrack or qualify that decision once additional evidence becomes available from Valero.

Consolidation would not unduly delay proceedings in *NAFCA*. Discovery in *NAFCA* has not been completed. Union Pacific has not yet received all the discovery material promised by the three shipper parties, and it has not scheduled depositions of shipper witnesses.³¹ Union Pacific also has not yet received any discovery material from any of the four tank car owners upon which it served subpoenas that were subject to extensive litigation before Judge Dring.

If Valero's case is consolidated with *NAFCA*, Valero can move expeditiously to provide discovery because of the framework established by Union Pacific, the complainants in *NAFCA*, and Judge Dring. There have been extensive negotiations among the parties over the scope of discovery, as well as four motions to compel, a petition for subpoenas, and four hearings before Judge Dring. Union Pacific has no intention of relitigating these issues. Indeed, Union Pacific has told Valero that it is willing to agree that Valero could search for and produce the same materials that the shipper parties agreed to search for and produce in *NAFCA*.³²

Moreover, even if there were any delay in *NAFCA* from the process of obtaining discovery from Valero, it would not constitute *undue* delay. Discovery from Valero may provide information that is highly relevant to the Board's resolution of the issues in *NAFCA*. Given the extremely limited number of shippers that have produced discovery in *NAFCA* and the Board's interest in providing an accurate, informed ruling on the merits, the delay would be well justified.

Finally, consolidation would not prejudice any party. Valero would be treated the same as the shipper parties that joined in the complaint in *NAFCA* and would obtain a decision faster than

³¹ As noted above, Union Pacific has served notices of deposition on the shipper parties in *NAFCA*. See n.11, *supra*.

³² See Exhibit B hereto.

if its case were held in abeyance. The *NAFCA* complainants would not be prejudiced. Valero's complaint raises no new issues, and Valero's interests are fully aligned with those of the *NAFCA* complainants—indeed, Valero's counsel represents one of the *NAFCA* associations. Any claims of prejudice from delay would be entirely speculative, because the *NAFCA* procedural schedule has been stayed. In any event, as discussed above, any delay in *NAFCA* would be minor and would be well justified by the public interest in fair and fully informed regulatory decision-making.

IV. CONCLUSION

The Board should deny Valero's motion to hold this case in abeyance. Union Pacific should be allowed to obtain discovery from Valero to address the common legal and policy issues presented by this case and *NAFCA*. Under the circumstances, the best way to address concerns about fairness and efficiency is to consolidate this case with *NAFCA*.

Respectfully submitted,

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/s/ Michael L. Rosenthal
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Attorneys for Union Pacific Railroad Company

January 26, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January, 2017, I caused a copy of the foregoing document to be served by e-mail or first class mail, postage pre-paid, on all of the parties of record in NOR 42150 and NOR 42144.

/s/ Michael L. Rosenthal
Michael L. Rosenthal



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January 11, 2017

By Electronic Mail

Michael L. Rosenthal, Esq.
 Covington & Burling LLP
 One CityCenter
 850 Tenth Street, N.W.
 Washington, D.C. 20001

Re: STB Docket No. NOR 42150 - First Set of Union Pacific Discovery Requests

Dear Mike:

I write to reiterate our objections to Union Pacific's First Set of Discovery Requests to Valero Marketing and Supply Company and Valero Rail Partners, LLC (collectively, "Valero") communicated to you by phone on January 6, 2017. As you know, we filed a motion to hold the proceedings in abeyance pending the outcome of a liability determination in STB Docket No. NOR 42144, *North America Freight Car Association v. Union Pacific Railroad Company*. No ruling has yet been issued on that motion. Nor have the parties conferred on a protective order, schedule, or other procedural matters necessary for the case to proceed. Discovery would be premature, unduly burdensome, and a waste of the parties' resources until these issues have been resolved. This is particularly the case because Union Pacific's voluminous discovery to Valero appears to be the same as that served on the parties in the *NAFCA* case, even though there is an additional claim in that litigation that is not at issue here. Until the Board rules on the pending motion to hold the proceedings in abeyance, and, should that motion be denied, the parties confer on procedural issues, Valero stands on its objections.

Regards,

A handwritten signature in red ink, appearing to read "Justin A. Savage", with a long horizontal flourish extending to the right.

Justin A. Savage

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By Electronic Mail

January 18, 2017

Justin A. Savage, Esq.
Hogan Lovells US LLP
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555 Thirteenth Street, NW
Washington, DC 20004

Re: STB Docket Nos. NOR 42150 & NOR 42152

Dear Justin:

This responds to your January 11, 2017 letters on behalf of Valero Marketing and Supply Company and Valero Rail Partners, LLC ("Valero") and Tesoro Refining & Marketing Company LLC, Tesoro Great Plains Gathering & Marketing LLC, and Dakota Prairie Refining, LLC ("Tesoro") regarding Union Pacific's first set of discovery requests to Valero and Tesoro.

Under the Surface Transportation Board's rules, Valero's and Tesoro's motions to hold proceedings in abeyance do not suspend Valero's and Tesoro's obligations to respond to Union Pacific's discovery requests.

Discovery in these cases need not be complicated. The legal issues appear to be nearly identical to the issues being litigated in STB Docket No. NOR 42144. As counsel for one of the parties in that matter, you know that the scope of discovery was extensively discussed by the parties, and the most contentious issues were ultimately resolved by an administrative law judge. If Valero and Tesoro agree to search for and produce the same materials that the individual complainants agreed to search for and produce in NOR 42144, we can rapidly complete discovery and focus on the substance of the claims in all of these proceedings.

Sincerely,



Michael L. Rosenthal

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

NORTH AMERICA FREIGHT CAR	)	
ASSOCIATION; AMERICAN FUEL &	)	
PETROCHEMICALS MANUFACTURERS;	)	
THE CHLORINE INSTITUTE; THE	)	
FERTILIZER INSTITUTE; AMERICAN	)	
CHEMISTRY COUNCIL; ETHANOL	)	
PRODUCTS, LLC D/B/A POET ETHANOL	)	Docket No. NOR 42144
PRODUCTS; POET NUTRITION, INC.; and	)	
CARGILL INCORPORATED	)	
	)	
vs.	)	
	)	
UNION PACIFIC RAILROAD	)	
COMPANY	)	

**RESPONSES AND OBJECTIONS OF
THE AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS TO
UNION PACIFIC'S FIRST SET OF DISCOVERY REQUESTS**

Complainant, the American Fuel & Petrochemical Manufacturers ("AFPM"), hereby submits its Responses and Objections to Defendant Union Pacific Railroad Company's ("UP's") First Set of Discovery Requests ("Requests"). AFPM's responses to the Discovery Requests are based on information presently known. Because AFPM continues to investigate the facts and information relating to the issues in this case, AFPM reserves the right to modify and/or supplement any of its responses as the existence of additional responsive information becomes known.

The following General Objections, Objections to Definitions, and Objections to Instructions are incorporated into the specific responses and/or objections to each Interrogatory and Document Request.

Dated: June 23, 2015.

Respectfully submitted,

By: /s/ Justin A. Savage
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**Counsel for Complainant American Fuel
& Petrochemical Manufacturers**

GENERAL OBJECTIONS

The following general objections and statements apply to each of the particular document requests and interrogatories propounded by Defendant and are hereby incorporated within each specific response set forth below:

1. Complainant objects to Defendant's Requests to the extent they seek to impose upon Complainant any obligation or responsibility other than those mandated by 49 C.F.R. § 1114.21 *et seq.*

2. Complainant objects to Defendant's Requests for Information from members of AFPM who are not named Complainants in this proceeding through discovery requests directed at AFPM.

3. Complainant objects to Defendant's Requests to the extent they purport to impose on Complainant the burden to collect, produce, or disclose information that cannot be found in the course of a reasonable search.

4. Complainant objects to Defendant's Requests to the extent they call for information outside Complainant's possession, custody or control.

5. Complainant objects to Defendant's Requests to the extent they are not limited by date and seek information from outside the relevant time period for this proceeding.

6. Complainant objects to Defendant's Requests to the extent they seek information that is already within Defendant's possession, custody, or control, equally available to Defendant, or that is more appropriately sought from third parties to whom discovery requests may be directed.

7. Complainant objects to Defendant's Requests to the extent they may be construed to require Complainant to search for and disclose or produce information that is a matter of public record or otherwise as accessible to Defendant as to Complainant.

8. Complainant objects to Defendant's Requests to the extent they seek discovery more appropriately obtained by means other than requests for the production of documents or interrogatories.

9. Complainant objects to Defendant's Requests insofar as they seek production or disclosure of information subject to the attorney-client privilege, work product doctrine, or any other applicable privilege, rule, doctrine or immunity, whether created by statute or common law. All Requests have been read to exclude discovery of such privileged information. By responding to any Request, Defendant does not waive the attorney-client privilege, the work product doctrine, or any other applicable privilege, doctrine, immunity or law as to that Request or as to any other Request or any future Request. Inadvertent production of any such information shall not constitute a waiver of any privilege or any other ground for objecting to discovery with respect to such information, nor shall inadvertent production waive the right of Complainant to object to the use of any such information in any proceeding.

10. Complainant objects to Defendant's Requests to the extent they call for the production or disclosure of trade secrets, proprietary, personal, commercially sensitive, or other confidential information. Complainant will produce confidential information that is responsive, non-privileged, relevant, and not otherwise protected from discovery, if any, only pursuant to the terms of a Protective Order issued by the Board in this proceeding and reserves the right to seek further entrance of protective orders by the Board should the need arise.

11. By responding to any Request, Complainant does not adopt Defendant's definitions of words and phrases contained in these Requests. Complainant objects to words and phrases to the extent they are undefined and/or inconsistent with (a) the ordinary and customary meaning of such words and phrases and/or (b) the rules governing the permissible scope of discovery.

12. Complainant objects to Defendant's Requests to the extent that they use language incorporating or calling for a legal conclusion or making an erroneous statement of law. Complainant's responses herein shall be as to matters of fact only and shall not be construed as stating or implying any conclusions of law concerning the matters referenced in any discovery request or concerning any matter relevant to this proceeding.

13. Nothing in Complainant's responses shall be construed as constituting or implying an admission of any allegation or agreement with any assertion or characterization in Defendant's Requests.

14. Complainant's discovery and investigation into the matters specified is ongoing. These answers and objections are made as of the date stated and include information located or obtained up to that time after reasonable inquiry. Complainant does not purport to have reviewed and extracted information from every potentially relevant document. Further information responsive to Defendant's Requests may be ascertained or identified at a later time, and Complainant reserves the right to amend its answers and objections to rely on such information and to assert additional objections as necessary.

15. The information and documents supplied in response to Defendant's Requests are for this proceeding only and for no other purpose.

The applicable foregoing General Objections are incorporated into each of the specific objections and answers that follow. The assertion of the same, similar, or additional objections and specific objections to an individual Request, or the failure to assert any additional objection to an individual Request, shall not be construed as a waiver of any objection by Complainant.

OBJECTIONS TO DEFINITIONS

The following objections to Defendant's Definitions, and the following statements, apply to each of the particular Requests propounded by Defendant and are hereby incorporated within each specific response set forth below:

1. Complainant objects to the definition of "Communication" to the extent that it exceeds the scope of discoverable material under, or seeks to impose any obligation or responsibility in excess of those required under, 49 C.F.R. § 1114.21 *et seq.*

2. Complainant objects to the definition of "Document" to the extent that it exceeds the scope of discoverable material under, or seek to impose any obligation or responsibility in excess of those required under, 49 C.F.R. § 1114.21 *et seq.*

3. Complainant objects to the definitions of "Identify," as set forth in Definitions E through G, to the extent that they seek to impose any obligation or responsibility in excess of those required under 49 C.F.R. § 1114.21 *et seq.*

4. Complainant objects to the definition of "AFPM Member" as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence in that it seeks discovery on Complainant's members and "any subsidiary or affiliate" thereof, who are not party or relevant to this proceeding.

5. Complainant objects to the definition of "Repair Facility" to the extent that it exceeds the scope of facilities described by Item 55-C in Union Pacific's Tariff 6004.

6. Complainant objects to the definitions of “You” and “Your” as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence in that they include Complainant’s members, outside attorneys, advisers, consultants, and other persons or entities not within Complainant’s control, as well as Complainant’s members’ parent companies, subsidiaries, and other persons or entities not party or relevant to this proceeding.

OBJECTIONS TO INSTRUCTIONS

The following objections to Defendant’s Instructions, and the following statements, apply to each of the particular Requests propounded by Defendant and are hereby incorporated within each specific response set forth below:

1. Complainant objects to Instruction No. 1 to the extent that it is overly broad, unduly burdensome, and not reasonably limited in time, as it seeks discovery “from January 1, 1987.” Complainant will produce responsive information or documents that can be obtained without undue burden or expense and that are located after a reasonable search, as required by 49 C.F.R. § 1114.21 *et seq.*

2. Complainant objects to Instruction No. 2 to the extent that it requires Complainant to produce documents in the custody, possession or control of an AFPM member.

3. Complainant objects to Instruction No. 2 to the extent that it requires identification and description of “the source of the documents” and thus seeks to impose any obligation or responsibility in excess of those required under 49 C.F.R. § 1114.21 *et seq.*

4. Complainant objects to Instruction No. 3 to the extent that it requires identification and description of documents withheld “for any reason” and documents withheld

“on the basis of a claimed privilege or attorney work product,” and thus seeks to impose any obligation or responsibility in excess of those required under 49 C.F.R. § 1114.21 *et seq.*

5. Complainant objects to Instruction No. 4 to the extent that it requires identification and indexing of “all persons who provided information for each response” and the “response(s) the person provided information for” and thus seeks to impose any obligation or responsibility in excess of those required under 49 C.F.R. § 1114.21 *et seq.*

INTERROGATORIES

Interrogatory No. 1

Identify each current AFPM Member and the number of tank cars each member currently (a) owns or (b) uses pursuant to a lease agreement.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. AFPM further objects to this Interrogatory as irrelevant and unduly burdensome to the extent it requests the number of tank cars that each of AFPM’s members owns or leases because the number of such cars is irrelevant to the issue of whether UP is providing compensation for its use of those cars as required by statute. Subject to and without waiving its objections, AFPM will provide a list of its members, as is publicly available on AFPM’s website.

Interrogatory No. 2

Is AFPM or any AFPM Member seeking reparations or damages for transportation provided under contracts under Count I of the Complaint? If so, identify the member(s) and contract(s).

Response

In accordance with the First Amended Complaint, filed on June 2, 2015, AFPM is no longer requesting reparations or damages on behalf of its members.

Interrogatory No. 3

Does any AFPM Member that leases tank cars to another Person have a lease agreement under which the Car Owner will retain some or all of any mileage allowances paid on those cars? If so, identify the member(s) and the lease agreement(s).

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 4.

Does any AFPM Member that leases tank cars to another Person have a lease agreement under which the Car Owner must pass along to the lessee some or all of any mileage allowances paid on those cars? If so, identify the member(s) and the lease agreement(s).

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 5

Does any AFPM Member that leases tank cars from another Person have a lease agreement under which the Car Owner will retain some or all of any mileage allowances paid on those cars? If so, identify the member(s) and the lease agreement(s).

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 6.

Does any AFPM Member that leases tank cars from another Person have a lease agreement under which the Car Owner must pass along to the lessee some or all of any mileage allowances paid on those cars? If so, identify the member(s) and the lease agreement(s).

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 7

Does any AFPM Member that leases tank cars to another Person have a lease agreement under which the lessee must make a payment to the Car Owner if the total empty miles moved by the lessee's cars that are subject to lease exceed the total loaded miles moved by the lessee's cars

that are subject to the lease by more than a specified amount or percentage? If so, identify the member(s) and the lease agreement(s).

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 8

Does any AFPM Member that leases tank cars to another Person have a lease agreement under which the lessee is not required to make a payment to the Car Owner if the total empty miles moved by the lessee's cars that are subject to the lease exceed the total loaded miles moved by the lessee's cars that are subject to the lease by more than a specified amount or percentage? If so, identify the member(s) and the lease agreement(s).

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 9

Does any AFPM Member that leases tank cars from another Person have a lease agreement under which the lessee must make a payment to the Car Owner if the total empty miles moved by the lessee's cars that are subject to the lease exceed the total loaded miles moved

by the lessee's cars that are subject to the lease by more than a specified amount or percentage?
If so, identify the member(s) and the lease agreement(s).

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 10

Does any AFPM Member that leases tank cars from another Person have a lease agreement under which the lessee is not required to make a payment to the Car Owner if the total empty miles moved by the lessee's cars that are subject to the lease exceed the total loaded miles moved by the lessee's cars that are subject to the lease by more than a specified amount or percentage? If so, identify the member(s) and the lease agreement(s).

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 11

Does AFPM contend that when a private tank car is furnished to Union Pacific by a Person that is a lessee of the car, Union Pacific is required to pay a mileage allowance to (a) the lessee, or (b) the lessor? If AFPM contends that the answer depends on the circumstances, state the circumstances that AFPM contends are relevant.

Response

AFPM objects to this Interrogatory as premature because it requests that AFPM formulate its position prior to completing discovery of UP. Subject to and without waiving its objections, AFPM states that the answer depends upon which entity owns the reporting marks on the subject tank car, because Freight Tariff RIC 6007-Series specifies that mileage allowances are paid only to the owner of the reporting marks.

Interrogatory No. 12

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

Response

AFPM objects to this Interrogatory as premature because it requests that AFPM formulate its position prior to completing discovery of UP. AFPM also objects to the phrase “costs associated with the empty miles” as vague and ambiguous because it is unclear whether this refers to UP’s actual cost of service for the empty movement, its tariff rate for the empty movement, or other such costs. AFPM further objects to this Interrogatory as irrelevant to the extent that “costs” refers to UP’s actual cost of service for the empty movement. Subject to and without waiving its objections, AFPM contends that the costs associated with empty miles are UP’s responsibility as a matter of law.

Interrogatory No. 13

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

Response

AFPM objects to this Interrogatory as premature because it requests that AFPM formulate its position prior to completing discovery of UP.

Interrogatory No. 14

Separately for each AFPM Member, identify each movement of an empty tank car owned or leased by the member to or from a Repair Facility, and identify the Repair Facility to or from which the car moved and the work performed at the Repair Facility.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Moreover, the work performed at the Repair Facility is also irrelevant.

Interrogatory No. 15

Separately for each AFPM Member, identify each movement for which the member has been assessed a charge under Item 55-C and for which the member is seeking reparations under Count I, and identify the amount of the charge, the Repair Facility to or from which the car moved, and the work performed at the Repair Facility.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this

proceeding. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 16

Separately for each AFPM Member, identify each movement for which the member has been assessed a charge by a railroad other than Union Pacific for the movement of a private tank car to a Repair Facility, and identify the railroad that assessed the charge, and amount of the charge, and whether the member paid the charge.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. In addition, transactions with railroads other than UP are irrelevant to the claims in this proceeding. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 17

Separately for each AFPM Member that is a Car Owner, and separately by each car reporting mark assigned to the member, and separately for each year from 1987 through 2014, with respect to that member's tank cars, state:

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

to or from Repair Facilities.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. AFPM also objects to this Interrogatory as overbroad and unduly burdensome because it requests information separately by AFPM Member, reporting mark, and year back to 1987. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 18

Separately for each AFPM Member that leased tank cars from another Person, and separately by each car reporting mark for tank cars the member furnished to Union Pacific or other railroads but did not own, and separately for each year from 1987 through 2014, state:

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

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. AFPM also objects to this Interrogatory as overbroad and unduly burdensome

because it requests information separately by AFPM Member, reporting mark, and year back to 1987. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 19

Separately for each AFPM Member, and separately by each car reporting mark assigned to the member, state the amount billed to the member pursuant to the Freight Tariff RIC 6007-Series for empty mileage associated with movements of tank cars, separately for each year from 1987 through 2014.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. AFPM also objects to this Interrogatory as overbroad and unduly burdensome because it requests information separately by AFPM Member, reporting mark, and year back to 1987. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 20

Separately for each AFPM Member, and separately by each car reporting mark assigned to the member, state the amount the member charged Persons leasing the member's tank cars for cost associated with empty mileage movements by those cars, separately for each such lessee, separately for each year from 1987 through 2014.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this

proceeding. Furthermore, the multitude of commercial arrangements between Car Owners and lessees are irrelevant to the issues in this proceeding, which concern the lawfulness of UP's decision to charge for empty tank car movements to Repair Facilities and whether UP is paying compensation for the use of private rail cars. AFPM also objects to this Interrogatory as overbroad and unduly burdensome because it requests information separately by AFPM members, reporting mark, and year back to 1987. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 21

Separately for each AFPM Member, and separately by each car reporting mark for tank cars the member furnished to Union Pacific or other railroads but that were not owned by the member, state the amount the Car Owner billed the member to cover costs associated with empty mileage movements by those cars, separately for each year from 1987 through 2014, and separately for each lease agreement, if cars were subject to different lease agreements during a calendar year.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Furthermore, the multitude of commercial arrangements between Car Owners and lessees are irrelevant to the issues in this proceeding, which concern the lawfulness of UP's decision to charge for empty tank car movements to Repair Facilities and whether UP is paying compensation for the use of private rail cars. AFPM also objects to this Interrogatory as overbroad and unduly burdensome because it requests information separately by AFPM

members, reporting mark, and year back to 1987. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 22

Separately for each AFPM Member, identify all communications regarding Union Pacific's adoption of charges for empty movements of tank cars in Item 55-C with:

- a. Other Persons within the member's company
- b. Persons to whom the member leases tank cars
- c. Persons from whom the member leases tank cars
- d. Repair Facilities
- e. Union Pacific
- f. AFPM
- g. Other AFPM members
- h. Other Complainants

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Moreover, such communications are irrelevant to the lawfulness of UP's decision to charge for empty tank car movements to Repair Facilities and whether UP is paying compensation for the use of private rail cars. Furthermore, AFPM objects to this Interrogatory as overbroad and unduly burdensome because it is not narrowly tailored to the issues in this proceeding and given the number of AFPM members. Subject to its objections, AFPM will identify responsive non-privileged communications within its possession or control that are responsive to this Interrogatory.

Interrogatory No. 23

Separately for each AFPM Member, describe all changes in the member's practices related to sending tank cars to Repair Facilities that have resulted from Union Pacific's adoption of Item 55-C.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Moreover, the practices of AFPM members related to sending tank cars to Repair Facilities are irrelevant to the lawfulness of UP's decision to charge for empty tank car movements to Repair Facilities. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 24

Separately for each AFPM Member, identify all communications between the member and Union Pacific in which the member asked Union Pacific to establish rates for movements in tank cars that included payment of a mileage allowance.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. AFPM further objects to the relevance of this Interrogatory because the car compensation requirements imposed by 49 U.S.C. § 11122 do not require the car provider to request compensation as a condition-precedent to the railroad's duty to compensate. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 25

Separately for each AFPM Member, identify all communications between the member and a railroad other than Union Pacific in which the member asked the railroad to establish rates for movements in tank cars that included payment of a mileage allowance.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. AFPM further objects to the relevance of this Interrogatory because the car compensation requirements imposed by 49 U.S.C. § 11122 do not require the car provider to request compensation as a condition-precedent to the railroad's duty to compensate. Moreover, whether or not any AFPM member requested a railroad other than UP to establish rates for movements in tank cars that included payment of a mileage allowance is irrelevant to Complainants' claims against UP. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 26

Separately for each AFPM Member, identify all communications between the member and Union Pacific in which the member asked Union Pacific to establish reduced line-haul rates to reflect the member's furnishing tank cars.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. AFPM further objects to the relevance of this Interrogatory because the car compensation requirements imposed by 49 U.S.C. § 11122 do not require the car provider to

request compensation as a condition-precedent to the railroad's duty to compensate. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 27

Separately for each AFPM Member, identify all communications between the member and a railroad other than Union Pacific in which the member asked the railroad to establish reduced line-haul rates to reflect the member's furnishing tank cars.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. AFPM further objects to the relevance of this Interrogatory because the car compensation requirements imposed by 49 U.S.C. § 11122 do not require the car provider to request compensation as a condition-precedent to the railroad's duty to compensate. Moreover, whether or not any AFPM member requested a railroad other than UP to establish reduced line-haul rates in tank cars to reflect the member's furnishing of the tank cars is irrelevant to Complainants' claims against UP. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 28

Separately for each AFPM Member, identify each movement for which the member seeks damages under Count II, the price document (*i.e.*, contract, tariff, exempt quotation) under which the movement occurred, and state whether the member paid the line-haul transportation charge and whether the member was the Car Owner or leased the car from the Car Owner. If the member did not pay the line-haul transportation charge, identify the Person that paid the charge.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding.

Interrogatory No. 29

Separately for each car movement identified in response to Interrogatory No. 28, state (a) the amount Union Pacific charged for line-haul transportation of the movement, and (b) the amount the member contends Union Pacific should have charged for line-haul transportation of the movement under zero-mileage rates to compensate the member for furnishing the car.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding.

Interrogatory No. 30

Separately for each AFPM Member that is a Car Owner, with regard to each tank car owned by the member, state:

- a. Car number
- b. Year the car was built
- c. Year the car was acquired
- d. Car's cost as acquired
- e. Costs of any subsequent modifications or additions to the car
- f. Total loaded miles moved, separately for each year from 2005 through 2014
- g. Total empty miles moved, separately for each year from 2005 through 2014

- h. Costs for programmed maintenance of valves, separately for each year from 2005 through 2014
- i. Other maintenance costs, separately for each year from 2005 through 2014
- j. Costs for car cleaning, separately for each year from 2005 through 2014
- k. Repair costs, separately for each year from 2005 through 2014
- l. Storage costs, separately for each year from 2005 through 2014
- m. Taxes paid on the car, separately for each year from 2005 through 2014
- n. Total number of empty movements to or from Repair Facilities, separately for each year from 2005 through 2014
- o. Total number of miles associated with empty movements to or from Repair Facilities, separately for each year from 2005 through 2014
- p. Total payments received from lessees, if any, separately for each year from 2005 through 2014
- q. Payments received from lessees for maintenance and repair costs incurred by the Car Owner, separately for each year from 2005 through 2014
- r. Payments to/credits to lessees for maintenance and repair costs incurred by lessees, separately for each year from 2005 through 2014
- s. The lease agreement(s) that governed use of the car in each year from 2005 through 2014

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 31

Separately for each AFPM member that is a lessee of tank cars, for each tank car used by the member pursuant to a lease, state:

- a. Car number
- b. Loaded miles moved, separately for each year from 2005 through 2014
- c. Empty miles moved, separately for each year from 2005 through 2014
- d. Costs for programmed maintenance of valves incurred by the lessee, separately for each year from 2005 through 2014
- e. Other maintenance costs incurred by the lessee, separately for each year from 2005 through 2014
- f. Costs for car cleaning incurred by the lessee, separately for each year from 2005 through 2014
- g. Repair costs incurred by the lessee, separately for each year from 2005 through 2014
- h. Storage costs incurred by the lessee, separately for each year from 2005 through 2014
- i. Number of empty movements to or from repair shops, separately for each year from 2005 through 2014
- j. Number of miles associated with empty movements to or from Repair Facilities, separately for each year from 2005 through 2014
- k. Total payments to the lessor, separately for each year from 2005 through 2014
- l. Payments/credits received from the lessor for maintenance and repair costs as reimbursement for costs incurred by the lessee, separately for each year from 2005 through 2014
- m. Payments made to the lessor for maintenance and repair costs incurred by the lessor, separately for each year from 2005 through 2014
- n. The lease agreement(s) that governed use of the car in each year from 2005 through 2014

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 32

Separately for each AFPM Member that is a Car Owner, separately for each year from 2005 through 2014, state:

- a. Number of tank cars owned
- b. Total number of rail cars owned
- c. Taxes on fixed property used for repair, cleaning, maintenance, or storage of (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)
- d. Depreciation on fixed property used for repair, cleaning, maintenance, or storage of (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)
- e. Insurance on fixed property used for repair, cleaning, maintenance, or storage of (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)
- f. Rentals on track and other property when used for repair, cleaning, maintenance, or storage of (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)
- g. Insurance paid on (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)
- h. Market value of machinery used for repair, cleaning, or maintenance of (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)
- i. Costs for repair of shop machinery used for repair, cleaning, or maintenance of (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)
- j. Market value of material inventory used for repair, cleaning, or maintenance of (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)
- k. Wages and benefits paid to employees engaged in repair, cleaning, or maintenance of (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)
- l. Payroll taxes paid in connection with employees engaged in repair, cleaning, or maintenance of (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)
- m. Payments for injuries or death during repairs when not covered by insurance for repairs of (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)

- n. Payments to third parties that are not directly allocated to specific cars for tank car (i) repair, (ii) cleaning, (iii) maintenance, or (iv) storage (or payments to third parties for repair, cleaning, etc. for all cars, if separate data for tank cars are not available)
- o. Any costs of owning and operating tank cars owned by the member that are not addressed in subsections a-n

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 33

Separately for each AFPM Member that is a lessee of tank cars, and separately for each year from 1987 through 2014, state:

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

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 34

Separately for each AFPM Member, and separately for each year from 1987 through 2014, state:

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

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 35

With regard to the allegation in Paragraph 17 of the Complaint that “the cost of owning and maintaining tank cars . . . has increased” over the past 30 years, state on an annual basis:

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

Response

Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 36

With regard to the allegation in Paragraph 33 of the Complaint that Union Pacific “does not offer or negotiate reduced line-haul rates on movements using Association Complainants’

members' rail tank cars . . . in lieu of paying mileage allowances, in order to compensate for such use as required by law," state the amount by which You contend Union Pacific's line-haul rates should have been reduced to compensate for the use of rail tank cars furnished by AFPM Members and explain the basis for that amount.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. AFPM also objects to this Interrogatory as premature because it requests that AFPM formulate its position prior to completing discovery of UP. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

DOCUMENT REQUESTS

Document Request No. 1

Produce all documents identified in Your answers to the Interrogatories.

Response

AFPM incorporates by reference its specific objections to each Interrogatory. AFPM further objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members. Subject to and without waiving its objections, AFPM will produce any responsive documents that are within its custody, possession or control.

Document Request No. 2

Produce all documents, regardless of date, supporting Your allegation in Paragraph 17 of the Complaint that “the cost of owning and maintaining tank cars” has increased “over the past 30 years.”

Response

AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members and lack of date limitation. AFPM also objects to this Request as irrelevant because the Complaint seeks compensation for tank cars in accordance with Ex Parte No. 328, not for any increased cost of ownership.

Document Request No. 3

Produce all documents, regardless of date, supporting Your allegation in Paragraph 33 of the Complaint that Union Pacific “does not offer or negotiate reduced line-haul rates on movements using Association Complainants’ members’ rail tank cars.”

Response

AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members and lack of date limitation. Subject to and without waiving any of its objections, AFPM will produce responsive documents to the extent they exist and can be found by a reasonable search.

Document Request No. 4

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

Response

AFPM objects to this Document Request as irrelevant because Complainants have not challenged the level of compensation adopted by the ICC in Ex Parte No. 328, but only the failure of UP to provide that compensation. AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members and lack of date limitation. Subject to and without waiving any of its objections, AFPM will produce responsive documents to the extent they exist and can be found by a reasonable search.

Document Request No. 5

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

Response

AFPM objects to this Document Request as irrelevant because Complainants have not challenged the level of compensation adopted by the ICC in Ex Parte No. 328, but only the failure of UP to provide that compensation. AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members and lack of

date limitation. Subject to and without waiving any of its objections, AFPM will produce responsive documents to the extent they exist and can be found by a reasonable search.

Document Request No. 6

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

Response

AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members and lack of date limitation. AFPM further objects to this Request as irrelevant to the extent that it is not limited to tank cars. Subject to and without waiving any of its objections, AFPM will produce responsive documents to the extent they exist and can be found by a reasonable search.

Document Request No. 7

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

Response

AFPM objects to this Document Request as irrelevant because Complainants have not challenged the level of compensation adopted by the ICC in Ex Parte No. 328, but only the failure of UP to provide that compensation. AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or

damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members and lack of date limitation. Subject to and without waiving any of its objections, AFPM will produce responsive documents to the extent they exist and can be found by a reasonable search.

Document Request No. 8

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

Response

AFPM objects to this Document Request as irrelevant because Complainants have not challenged the level of compensation adopted by the ICC in Ex Parte No. 328, but only the failure of UP to provide that compensation. AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members and lack of date limitation. AFPM further objects to this Document Request as irrelevant to the extent that it is not limited to tank cars. Subject to and without waiving any of its objections, AFPM will produce responsive documents to the extent they exist and can be found by a reasonable search.

Document Request No. 9

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

Response

AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and

those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members and lack of date limitation. In addition, AFPM objects to the phrase “cost of moving empty cars” as vague and ambiguous because it is unclear whether this refers to a railroad’s cost of moving empty cars or a railroad’s charge for the empty movement. Regardless of which definition UP intends, AFPM also objects to this Document Request as irrelevant because the issue in this proceeding is not the cost of moving empty cars, but which entity bears that cost. AFPM further objects to this Document Request as irrelevant to the extent that it is not limited to tank cars. Subject to and without waiving any of its objections, AFPM will produce responsive documents to the extent they exist and can be found by a reasonable search.

Document Request No. 10

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

Response

AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members and lack of date limitation. AFPM further objects to the relevance of this Request because the car compensation requirements imposed by 49 U.S.C. § 11122 do not require the car provider to request compensation as a condition- precedent to the railroad’s duty to compensate.

Document Request No. 11

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

Response

AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members and lack of date limitation. AFPM further objects to the relevance of this Request because the car compensation requirements imposed by 49 U.S.C. § 11122 do not require the car provider to request compensation as a condition- precedent to the railroad's duty to compensate. In addition, transactions with railroads other than UP are irrelevant to the claims in this proceeding.

Document Request No. 12

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

Response

AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members and lack of date limitation. AFPM further objects to the relevance of this Request because the car compensation requirements imposed by

49 U.S.C. § 11122 do not require the car provider to request compensation as a condition-
precedent to the railroad's duty to compensate.

Document Request No. 13

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

Response

AFPM objects to this Document Request to the extent it extends to AFPM members
because AFPM is no longer requesting reparations or damages on behalf of its members and
those members are not parties to this proceeding and because it is overbroad and unduly
burdensome given the number of AFPM members and lack of date limitation. AFPM further
objects to the relevance of this Request because the car compensation requirements imposed by
49 U.S.C. § 11122 do not require the car provider to request compensation as a condition-
precedent to the railroad's duty to compensate. In addition, transactions with railroads other than
UP are irrelevant to the claims in this proceeding.

Document Request No. 14

Produce a copy of each lease under which an AFPM Member is the lessee of tank cars
furnished to Union Pacific in any year from 1987 through 2015.

Response

AFPM objects to this Document Request as irrelevant because AFPM is no longer
requesting reparations or damages on behalf of its members and those members are not parties to
this proceeding. Furthermore, the multitude of commercial arrangements between tank car
lessors and lessees are irrelevant to the issues in this proceeding, which concern the lawfulness of

UP's decision to charge for empty tank car movements to Repair Facilities and whether UP is paying compensation for the use of private tank cars. AFPM also objects to this Request as overbroad and unduly burdensome given the number of AFPM members and the 28 year date range. Subject to and without waiving its objections, AFPM has no information responsive to this request.

Document Request No. 15

Produce a copy of each lease under which an AFPM Member is the lessor of tank cars furnished to Union Pacific in any year from 1987 through 2015.

Response

AFPM objects to this Document Request as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Furthermore, the multitude of commercial arrangements between tank car lessors and lessees are irrelevant to the issues in this proceeding, which concern the lawfulness of UP's decision to charge for empty tank car movements to Repair Facilities and whether UP is paying compensation for the use of private tank cars. AFPM also objects to this Request as overbroad and unduly burdensome given the number of AFPM members and the 28 year date range. Subject to and without waiving its objections, AFPM has no information responsive to this request.

Document Request No. 16

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

Response

AFPM incorporates by reference its objections and responses to Document Request Nos. 14 and 15.

Document Request No. 17

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

Response

AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members. Subject to and without waiving any of its objections, AFPM will produce responsive documents to the extent they exist and can be found by a reasonable search.

Document Request No. 18

Separately for each year from 1987 through 2014, produce documents sufficient to show Your costs of owning tank cars, as well as the extent to which those costs are reimbursed by lessees of Your tank cars.

Response

AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members. AFPM objects to this Request as irrelevant because Complainants have not challenged the level of compensation adopted by the ICC in Ex Parte No. 328, but only the failure of UP to provide that compensation. Furthermore, the

compensation received by a tank car lessor from its lessees is irrelevant to whether UP has provided the compensation required of it by law. Subject to and without waiving its objections, AFPM has no information responsive to this request.

Document Request No. 19

Separately for each year from 1987 through 2014, produce documents sufficient to show Your costs of maintaining tank cars that You own or lease to another Person, as well as the extent to which those costs are reimbursed by lessees of Your tank cars.

Response

AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members. AFPM objects to this Request as irrelevant because Complainants have not challenged the level of compensation adopted by the ICC in Ex Parte No. 328, but only the failure of UP to provide that compensation. Furthermore, the compensation received by a tank car lessor from its lessees is irrelevant to whether UP has provided the compensation required of it by law. Subject to and without waiving its objections, AFPM has no information responsive to this request.

Document Request No. 20

Separately for each year from 1987 through 2014, produce document sufficient to show Your costs of maintaining tank cars that that You lease from another Person, as well as the extent to which those costs are reimbursed by the lessor.

Response

AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members. AFPM objects to this Request as irrelevant because Complainants have not challenged the level of compensation adopted by the ICC in Ex Parte No. 328, but only the failure of UP to provide that compensation. Furthermore, the compensation paid by a tank car lessor to its lessees is irrelevant to whether UP has provided the compensation required of it by law. Subject to and without waiving its objections, AFPM has no information responsive to this request.

Document Request No. 21

Separately for each year from 1987 through 2014, for tank cars that You lease from another Person, produce documents sufficient to show Your payments to the lessor as reimbursement for the lessor's costs of owning the cars.

Response

AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members. AFPM objects to this Request as irrelevant because Complainants have not challenged the level of compensation adopted by the ICC in Ex Parte No. 328, but only the failure of UP to provide that compensation. Furthermore, the compensation received by a tank car lessor from its lessees is irrelevant to whether UP has

provided the compensation required of it by law. Subject to and without waiving its objections, AFPM has no information responsive to this request.

Document Request No. 22

Separately for each year from 1987 through 2014, for tank cars that You lease from another Person, produce documents sufficient to show Your payments to the lessor as reimbursement for the lessor's costs of maintaining the cars.

Response

AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members. AFPM objects to this Request as irrelevant because Complainants have not challenged the level of compensation adopted by the ICC in Ex Parte No. 328, but only the failure of UP to provide that compensation. Furthermore, the compensation received by a tank car lessor from its lessees is irrelevant to whether UP has provided the compensation required of it by law. Subject to and without waiving its objections, AFPM has no information responsive to this request.

Document Request No. 23

Produce all documents relating to payments made pursuant to the Freight Tariff RIC 6007-Series for empty mileage associated with movements of tank cars from 1987 through 2014.

Response

AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly

burdensome given the number of AFPM members and the request for information back to 1987. In addition, mileage equalization payments by any individual tank car owner are irrelevant to the issues in this proceeding, and to the extent mileage equalization payments may be relevant at all, it is at the system-wide level, which cannot be ascertained through discovery of Complainants or their individual members. Subject to and without waiving its objections, AFPM has no information responsive to this request.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of June, 2015, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, on all of the parties of record in NOR 42144.

/s/ Justin A. Savage
Justin A. Savage

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August 18, 2016

Michael L. Rosenthal
Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, D.C. 20001-4956

Re: STB Docket No. NOR42144, North American Freight Car Association, et al. v. Union
Pacific Railroad Company

Dear Mr. Rosenthal:

We are conveying the comments and supporting analyses that AFPM submitted to DOT's HM-251 rulemaking docket. As Union Pacific was a major stakeholder in the HM-251 process, we are certain that the company has had access to them. These materials are also publicly available. Nonetheless, as you requested, we are producing these comments to you, and doing so in Bates-stamped format to ensure that they are properly tracked in this litigation.

We have also conferred, once again, with AFPM regarding your document requests. We can confirm that AFPM has no additional responsive, non-privileged information in its custody, possession or control. Please let me know if you have any questions.

Sincerely,



Justin A. Savage
Partner
justin.savage@hoganlovells.com
D (202) 637-5558

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**UNION PACIFIC’S OPPOSITION TO COMPLAINANTS’
MOTION TO HOLD PROCEEDINGS IN ABEYANCE
AND UNION PACIFIC’S MOTION FOR CONSOLIDATION**

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January 26, 2017

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TESORO REFINING & MARKETING
 COMPANY LLC; TESORO GREAT PLAINS
 GATHERING & MARKETING LLC; and
 DAKOTA PRAIRIE REFINING, LLC,

 Complainants,

 v.

 UNION PACIFIC RAILROAD COMPANY,

 Defendant.

The Board should deny the motion to hold this proceeding in abeyance filed by Tesoro Refining & Marketing Company LLC, Tesoro Great Plains Gathering & Marketing LLC, and Dakota Prairie Refining, LLC (collectively, “Tesoro”). In the interest of promoting fair, accurate, and expeditious regulatory decisions, the Board should consolidate this matter with *North America Freight Car Association, et al. v. Union Pacific Railroad Company*, NOR 42144 (“NAFCA”), in which the procedural schedule has been stayed to permit the parties to complete discovery. The Board should reject Tesoro’s transparent attempt to deprive Union Pacific and the Board of evidence bearing on the common issues in the two cases. If the Board allows Tesoro’s tactics to succeed, then parties in future cases will have a roadmap for avoiding discovery—they will pursue complaints through trade associations, rather than as individuals—and the Board’s ability to rely on the party discovery process to unearth facts relevant to its proceedings will be severely compromised.

I. INTRODUCTION

Tesoro chose to wait until two years after Union Pacific adopted the tariff charge it is challenging to file its complaint, while a trade association to which it belongs pursued an identical claim on its behalf in *NAFCA*. Yet, immediately after Union Pacific served discovery, Tesoro asked the Board to hold the matter in abeyance. The effect of an abeyance would be prejudicial to Union Pacific: Tesoro would avoid providing Union Pacific with discovery regarding the common issues raised in *NAFCA* and its own case, while ensuring that its claim for damages is not barred by the statute of limitations. *See* Mot. at 8 (“Complainants, for their part, can preserve their full claims to damages before the statute of limitations begins to run.”).

Tesoro does not try to disguise its effort to avoid providing discovery of the type that is occurring in *NAFCA*. Its main argument is that discovery would be “duplicative” (Mot. at 5-7), and thus an abeyance “would not prejudice any party” and “is the fairest outcome,” *id.* at 7.

However, discovery of Tesoro would not be duplicative, and allowing Tesoro to stand on the sidelines, ready to spring into action to collect damages, but unwilling to provide discovery regarding the common legal and policy issues in *NAFCA*, would be unfair and prejudicial.

Union Pacific has vigorously pursued discovery in *NAFCA* ever since the Board denied our motion to dismiss on the ground that the case could not be decided without discovery and presentation of evidence regarding industry conditions. But our ability to obtain discovery has been severely constrained. The *NAFCA* complainants that are trade associations possess very little relevant information, they refused to collect and produce information from their members who had relevant information, and only *three* shippers (out of hundreds of trade association members) joined in the *NAFCA* complaint and were thus subject to party discovery.

Tesoro’s decision to file a complaint raising the same issues as the *NAFCA* complaint provides a significant opportunity for Union Pacific to obtain the type of discovery the Board

considered relevant to its decision in *NAFCA*. Depriving Union Pacific of the right to conduct discovery regarding issues the Board considered relevant to its decision in *NAFCA* would be unfair and prejudicial. The Board would also be depriving itself of relevant information. By contrast, Tesoro will suffer no harm if this case moves forward. A party filing a complaint should expect to provide discovery related to its claim.

Under the circumstances here, the best way to address any concerns about efficiency and fairness is to consolidate this case with the *NAFCA* case. Consolidation will allow the Board to address the issues raised in this case and the *NAFCA* case in a single proceeding based on the most complete record possible. Tesoro will not be harmed by consolidation—its claims will be resolved faster than if they were held in abeyance. The complainants in *NAFCA* will not be harmed—discovery is still ongoing, and discovery regarding Tesoro should proceed quickly because the most contentious issues have been resolved by the administrative law judge in *NAFCA*. Finally, Union Pacific will not be harmed. To the contrary, consolidation will help mitigate the prejudice it faces, given the constraints on its ability to obtain discovery, in addressing the issues that led the Board to deny its motion to dismiss in *NAFCA*.

II. BACKGROUND

In *NAFCA*, five trade associations and three shippers allege that Union Pacific committed an unreasonable practice by adopting charges for certain movements of empty tank cars to and from repair facilities in Tariff 6004-C, Item 55-C, without compensating shippers for the costs imposed by those charges through payment of mileage allowances or reduced-line haul rates in lieu of mileage allowances.¹ Tesoro's complaint makes the same allegations. *See* Mot. at 2. The

¹ *See* First Am. Compl. ¶¶ 23-29, 32-33, *N. Am. Freight Car Ass'n v. Union Pac. R.R.*, NOR 42144 (June 2, 2015).

identical nature of the allegations is no coincidence—Tesoro is a member of the American Fuel & Petrochemical Manufacturers (“AFPM”), one of the trade association complainants in *NAFCA*,² and Tesoro’s legal counsel also represents AFPM.

Union Pacific moved to dismiss the *NAFCA* complaint on the grounds that its adoption of Item 55-C and use of zero-mileage rates, rather than rates that include mileage allowances, were lawful under Board precedent.³ In the alternative, Union Pacific asked the Board to require the complainants to make the complaint more definite to clarify their allegations and simplify discovery.⁴

In opposing Union Pacific’s motion to dismiss, the *NAFCA* complainants argued that the case requires “development of facts *through discovery* and the presentation of evidence.”⁵ They argued that the precedent upon which Union Pacific had relied is “inapposite due to different facts and circumstances, including substantial changes that have occurred in the rail industry over the past 25 years,”⁶ and that a proper consideration of their arguments “can only proceed *after discovery* and presentation of evidence of applicable industry conditions.”⁷

In denying Union Pacific’s motion, the Board said that arguments about “whether UP is complying with [Board] precedent and whether that precedent is applicable” are “fact-specific

² See Membership Directory, American Fuel & Petrochemical Manufacturers, *available at* <https://www.afpm.org/membership-directory/> (last visited Jan. 17, 2017).

³ Mot. to Dismiss at 8-17, *N. Am. Freight Car Ass’n v. Union Pac. R.R.*, NOR 42144 (Apr. 20, 2015).

⁴ *Id.* at 21-24.

⁵ Reply to Mot. to Dismiss at 5, *N. Am. Freight Car Ass’n v. Union Pac. R.R.*, NOR 42144 (June 1, 2015) (emphasis added).

⁶ *Id.* at 7.

⁷ *Id.* at 15 (emphasis added).

and, as such can only be sufficiently addressed after the development of a full record.”⁸ The Board also suggested that it would consider arguments about “whether that precedent should stand given changes in the railroad industry, an issue that has not been fully briefed.”⁹ Finally, the Board declined to order the *NAFCA* complainants to make their complaint more definite, agreeing with complainants that Union Pacific was seeking “*information more appropriately obtained in discovery*.”¹⁰

The *NAFCA* case remains in the discovery phase. The parties engaged in extensive negotiation and litigation regarding the scope of discovery. The parties appear to have resolved all of their disputes regarding the scope of discovery through negotiations and extensive motions practice before Administrative Law Judge John P. Dring. They are currently in the process of producing information and conducting depositions.¹¹ In addition, Union Pacific is awaiting the production of information from four tank car owners upon which it served subpoenas, which were also the subject of extensive litigation before Judge Dring.¹² The Board has stayed the procedural schedule to allow the parties to resolve their discovery issues.¹³

Tesoro’s complaint duplicates the complaint in *NAFCA*. Like the shipper parties in *NAFCA*, Tesoro claims that Union Pacific committed an unreasonable practice by adopting the

⁸ *N. Am. Freight Car Ass’n v. Union Pac. R.R.*, NOR 42144, slip op. at 3 (STB served Dec. 21, 2015).

⁹ *Id.*

¹⁰ *Id.* at 5 (emphasis added).

¹¹ For example, on January 19, 2017, Union Pacific served notices of deposition on Ethanol Products, LLC d/b/a Poet Ethanol Products, Poet Nutrition, Inc., and Cargill Incorporated.

¹² See Union Pacific Railroad Company’s Petition for Subpoenas, *N. Am. Freight Car Ass’n v. Union Pac. R.R.*, NOR 42144 (May 17, 2016); Transcript of Oral Argument, *N. Am. Freight Car Ass’n v. Union Pac. R.R.*, NOR 42144 (Sept. 20, 2016).

¹³ See *N. Am. Freight Car Ass’n v. Union Pac. R.R.*, NOR 42144 (STB served June 10, 2016).

charges in Item 55-C without compensating shippers for the costs imposed by Item 55-C through payment of mileage allowances or reduced-line haul rates, and it seeks damages for the charges imposed under Item 55-C.¹⁴ The only difference between the two complaints is that Tesoro does not seek damages for the alleged failure to compensate tank car owners for the use of their cars. However, Tesoro’s complaint includes the *NAFCA* complaint’s key allegations regarding the compensation issue, because Tesoro links its claim that Item 55-C charges are an unreasonable practice with the alleged failure to compensate tank car owners for use of their cars.¹⁵

On January 6, 2017, Union Pacific served discovery requests on Tesoro. Later that same day, Tesoro filed its motion to hold this proceeding in abeyance. On January 11, Tesoro sent Union Pacific a letter stating that it would not respond to Union Pacific’s discovery requests until the Board rules on its motion.¹⁶ On January 18, Union Pacific responded that Tesoro’s refusal to respond to discovery was unjustified and that Union Pacific was willing to agree that Tesoro could simply search for and produce the same materials that the shipper parties agreed to search for and produce in *NAFCA*.¹⁷

III. ARGUMENT

A. The Board Should Not Hold This Proceeding In Abeyance.

The Board enjoys broad discretion in deciding whether to hold a case in abeyance, and its decisions depend “on the facts and circumstances of the case.” *Intermountain Power Agency v. Union Pac. R.R.*, NOR 42136, slip op. at 2 (STB served Dec. 14, 2012). In addressing abeyance

¹⁴ See Compl. ¶¶ 14-21.

¹⁵ See Mot. at 2-3 (explaining that Tesoro seeks a ruling that Item 55-C charges are an unreasonable practice because “UP in no way compensates [shippers] for the additional costs imposed on shippers by those charges.”); see also Compl. ¶¶ 7, 8, 9, 10, 11, 19, and 21.

¹⁶ Letter from Justin A. Savage to Michael L. Rosenthal (Jan. 11, 2017) (Exhibit A hereto).

¹⁷ Letter from Michael L. Rosenthal to Justin A. Savage (Jan. 18, 2017) (Exhibit B hereto).

requests, the Board considers issues of fairness, policy, and efficiency. *See id.* at 2-4; *E.I. DuPont de Nemours & Co. v. Norfolk S. Ry.*, NOR 42125, slip op. at 5-7 (STB served Nov. 29, 2012). Granting Tesoro's motion would be fundamentally unfair to Union Pacific, would deprive the Board of potentially important evidence, and would not produce legitimate efficiencies.

1. Holding this proceeding in abeyance would unfairly deprive Union Pacific of the opportunity to obtain discovery from Tesoro.

Holding this case in abeyance would unfairly deny Union Pacific the opportunity to obtain discovery of precisely the types of evidence the Board believed necessary to address the issues raised in *NAFCA* and repeated in Tesoro's complaint. In *NAFCA*, the Board agreed with the complainants that the legal and policy issues raised by the case could not be decided without discovery and without the presentation of evidence regarding industry conditions and changes in industry conditions over time.¹⁸ Tesoro's allegations parallel the allegations in *NAFCA*. Union Pacific has thus asked Tesoro to search for and produce the same categories of information that the shipper parties are searching for and are producing to Union Pacific in *NAFCA*.¹⁹

Tesoro's position appears to be that it should not have to provide discovery regarding the common legal and policy issues raised by its complaint and the *NAFCA* complaint because Union Pacific will obtain adequate discovery in *NAFCA*. However, Union Pacific has obtained only limited discovery in *NAFCA*—in large part because Tesoro and most other shippers are participating in *NAFCA* only indirectly, through their trade associations.

Union Pacific has attempted to obtain discovery from the trade associations in *NAFCA* regarding industry-wide conditions relating to movements of empty tank cars to repair facilities

¹⁸ *See N. Am. Freight Car Ass'n v. Union Pac. R.R.*, NOR 42144, slip op. at 3 (STB served Dec. 21, 2015).

¹⁹ *See* Exhibit B hereto.

and compensation for tank car ownership costs. But it has largely come up empty. In response to discovery requests, the association complainants nearly universally and uniformly responded that they do not possess the information requested.²⁰ Rather, they said any information would be in the possession of their members. AFPM, of which Tesoro is a member, produced just *one* document, consisting of AFPM's comments and analyses relating to a Department of Transportation rulemaking regarding tank car retrofitting. AFPM confirmed it has no other responsive, non-privileged information in its possession, custody or control responsive to any of the 39 interrogatories and 35 document requests submitted by Union Pacific.²¹

Administrative Law Judge Dring acknowledged Union Pacific's difficult position in discussing a motion that Union Pacific filed in an attempt to compel the trade associations to produce documents on behalf of their members:

Presiding Judge: Thank you. Mr. Rosenthal, I believe I said the last time we were here essentially what Mr. Donovan has just said, that ***I can't grant motions to compel against the Complainants when they don't have the information, they don't have what you're seeking, their members have that.*** I can't reach their members through a motion to compel. Okay? So let's -- go ahead.

...

Mr. Rosenthal: And we want to be prepared. When they file their evidence, we want to be able to respond. As you point out, we're in a bit of a bind, because most of the people on the other side are associations.

Presiding Judge: I can't help you with that.

²⁰ See, e.g., Responses and Objections of The American Fuel & Petrochemicals Manufacturers to Union Pacific's First Set of Discovery Requests, *N. Am. Freight Car Ass'n v. Union Pac. R.R.*, NOR 42144 (June 23, 2015) (Responses to Interrogatory Nos. 3, 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 30, 31, 32, 33, 34, 35 and 36, and Responses to Document Request Nos. 14, 15, 16, 18, 19, 20, 21, 22, and 23) (Exhibit C hereto).

²¹ See Letter from Justin A. Savage to Michael L. Rosenthal (Aug. 18, 2016) (Exhibit D hereto).

Mr. Rosenthal: I understand.

Presiding Judge: I would love to help you. I don't mind getting down into the weeds with folks, but I can't do this.²²

Because the *NAFCA* trade associations refused to collect and produce information from their members who had relevant information, Union Pacific will obtain discovery from only three of the hundreds of shippers represented by those trade associations—the shipper complainants in *NAFCA*.²³

Tesoro's decision to file a complaint gives Union Pacific an opportunity to obtain at least some of the discovery it has been precluded from obtaining in *NAFCA*. That discovery could be significant, especially given the paucity of information Union Pacific obtained from individual shippers thus far. Notably, Tesoro participates in different rail transportation markets than the shipper complainants in *NAFCA*. An abeyance would unfairly deprive Union Pacific of the opportunity to defend against Tesoro's claims by obtaining relevant discovery from Tesoro.

By contrast, allowing this case to proceed involves no unfairness to Tesoro. Tesoro is not being asked to expend resources to litigate parallel claims—it is not a party in *NAFCA*. Tesoro would not be required to do any more than any individual complainant in any case before the Board. Indeed, Tesoro would benefit from work done by the parties in *NAFCA* to narrow the

²² Transcript of Status Conference at 35:18–37:11, *N. Am. Freight Car Ass'n v. Union Pac. R.R.*, NOR 42144 (Aug. 22, 2016) (emphasis added).

²³ As discussed in the next section, Board precedent contemplates the possibility of serving subpoenas on a trade association's members, but that is not a realistic possibility in *NAFCA*, where the five trade associations together have several hundred members.

Union Pacific is using subpoenas to obtain discovery from four companies that own tank cars and lease them to shippers, but they do not have the same types of information that shippers would have, and Judge Dring strictly limited Union Pacific's discovery from non-parties. *See, e.g.*, Transcript of Oral Argument at 48:16-18, *N. Am. Freight Car Ass'n v. Union Pac. R.R.*, NOR 42144 (Sept. 20, 2016) (“But I have to balance my sympathy for your understandable desire to get this information against the burden imposed on the car owners.”).

scope of discovery—it would just be getting a little less of a free ride than the one it seeks from any abeyance.

2. Holding this proceeding in abeyance would deprive the Board of relevant information and would establish precedent that allows parties to avoid discovery related to the merits of their claims.

Holding this case in abeyance would also affect the Board. It would preclude the Board from deciding the legal and policy issues raised by *NAFCA* and Tesoro's complaint based on the most complete record reasonably available. This should be a particular concern here, where the Board has emphasized the need for discovery and development of a factual record, and where Union Pacific's efforts to help build that record have been hindered by the lack of cooperation from the *NAFCA* trade associations.²⁴

Holding this case in abeyance would also be bad policy. It would provide a road map for other shippers to pursue claims without providing the discovery required for the Board to decide cases on a full record. In past cases, when trade associations have pursued claims on behalf of their members, they have voluntarily provided discovery on behalf of their members,²⁵ or they have been small enough that it was practical to subpoena all their members.²⁶ But if shippers know they can prompt a large trade association to pursue a claim on their behalf, while they avoid discovery that might well undermine their claims, that is what they will do. And if that

²⁴ Union Pacific previously reached a compromise with North America Freight Car Association to coordinate discovery on behalf of the association's members in STB Docket NOR 42119.

²⁵ See n.24, *supra*.

²⁶ See *Reasonableness of BNSF Ry. Co. Coal Dust Mitigation Tariff Provisions*, FD 35557, slip op. at 3-7 (STB served June 25, 2012).

happens, the Board will be unable to rely on the party discovery process to create the record it needs to resolve cases.²⁷

3. Holding this proceeding in abeyance would not produce legitimate efficiencies.

Tesoro's primary argument for holding this case in abeyance involves the efficiencies in avoiding duplicative litigation. As discussed in the next section, the best way to avoid duplicative litigation while simultaneously addressing the many factors that counsel against holding this case in abeyance would be to consolidate this case with *NAFCA*. Consolidation was not an option in any of the cases Tesoro cites to support its efficiency arguments because the cases were pending before different courts and agencies.²⁸

Moreover, Tesoro is not actually seeking to avoid duplicative litigation. Tesoro is seeking to avoid producing discovery that might help the Board address the issues raised by both *NAFCA* and Tesoro's complaint. Tesoro's motion wrongly implies that the Board already has a complete record in *NAFCA*, when Tesoro is really seeking a tactical advantage by avoiding discovery that would reduce its chance of obtaining its desired outcome in *NAFCA* and its own proceeding. In

²⁷ Cf. *Nat'l R.R. Passenger Corp.—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian Nat'l Ry.*, NOR 42134, slip op. at 3 (STB served Jan. 3, 2013) (declining to issue Board subpoenas to initiate an investigation because the Board's "standard practice in complaint-type proceedings is to have the record built through party-directed discovery" and the Board "expects both parties to be forthcoming and to make full disclosure in responding to reasonable requests for discovery").

²⁸ See *Basardh v. Gates*, 545 F.3d 1068 (D.C. Cir. 2008) (describing habeas petitioner's separate request for direct review of his detention by the Court of Appeals while his habeas case was still pending in a district court); *Petition of the Nat'l R.R. Passenger Corp. for Relief Pursuant to 49 U.S.C. § 24905 ("Amtrak")*, FD 36048, slip op. at 3-4 (STB served Oct. 3, 2016) (deciding to conserve the Board's and parties' resources while a litigation proceeded in a district court); *Ocean Logistics Mgmt., Inc.—Petition for Declaratory Order—Certain Rates & Practices of NPR, Inc.*, WCC-102, slip op. at 1 (STB served Nov. 6, 1998) (holding Board proceeding in abeyance to allow jurisdictional arguments to be resolved by district court); *In re Latimer*, 489 B.R. 844, 868 (Bankr. N.D. Ala. 2013) ("Considerations of the economic burden which the debtor will have to bear in order to litigate *in two forums at the same time* are, therefore, particularly acute.") (emphasis added).

other words, Tesoro is not seeking to avoid duplicative litigation—it is seeking to avoid providing discovery that might undermine its case.

Finally, none of the cases Tesoro cites in support of its efficiency argument are relevant to this case. The cases Tesoro cites involve situations where the party seeking abeyance would otherwise be required to participate in two cases at once, and proceeding sequentially would potentially reduce the party's costs.²⁹ Here, Tesoro is not participating in *NAFCA*. It is not incurring duplicative costs. Tesoro is seeking to free-ride on the efforts of others, conduct litigation by proxy, and avoid subjecting its claims to the test of discovery.

B. The Board Should Consolidate This Proceeding With *NAFCA*.

The most fair and efficient way for the Board to address the issues raised by Tesoro's complaint would be to consolidate this proceeding with *NAFCA*. In deciding whether to grant a request for consolidation, the Board considers whether the proceedings involve common facts, issues, and parties; whether consolidation would promote efficiency; and whether consolidation would “unduly delay” the proceedings or “prejudice any party.” *Honey Creek R.R.—Petition for Declaratory Order*, FD 34869, slip op. at 3 (STB served June 4, 2008); *see also Bobs Candies*,

²⁹ *See Amtrak*, slip op. at 4 (holding Board proceeding in abeyance because district court proceeding could result in the operative statute being rendered unconstitutional); *Ocean Logistics*, slip op. at 1 (holding Board proceeding in abeyance because pending district court litigation would resolve the issues if allowed to move forward); *Basardh*, 545 F.3d at 1069 (holding detainee's request for direct review of his detention in abeyance because pending habeas petition could moot direct review petition); *Latimer*, 489 B.R. at 868 (staying bankruptcy proceeding because ongoing arbitration could moot proceeding in bankruptcy court).

Tesoro particularly mischaracterizes *Ocean Logistics*. Contrary to Tesoro's assertion (Mot. at 6), the Board did not stay that case because it merely involved reparations and a liability determination would be made in another proceeding. Rather, the petitioner initially filed its claims in a district court, and it subsequently filed a complaint and a motion to hold the proceeding in abeyance at the Board to preserve its rights after the defendant moved to dismiss the district court claim on jurisdictional grounds. Moreover, the defendant consented to the request. *See Ocean Logistics*, slip op. at 1; *see also Ocean Logistics Mgmt., Inc. v. NPR, Inc.*, 38 F.Supp.2d 77, 91 (D.P.R. 1999) (dismissing several claims because they fell under the Board's jurisdiction).

Inc. v. Nat'l Motor Freight Traffic Ass'n, No. 40777, 1992 WL 139638, *1 (ICC served June 24, 1992).

Tesoro concedes the issues raised in its complaint are the same as the issues in *NAFCA*; indeed, identity of issues is the basis for Tesoro's argument that this case should be held in abeyance. The facts in both cases should be the same, since both cases raise the same industry-wide legal and policy issues. Union Pacific is the sole defendant in each case.

Consolidation of these proceedings is the most fair and efficient way to move forward.³⁰ Union Pacific should be allowed, as a matter of basic fairness, to obtain discovery from Tesoro to defend its challenged practices in this proceeding and in *NAFCA*. As discussed above, the Board denied Union Pacific's motion to dismiss in *NAFCA* on the grounds that discovery and development of a full record were required to address the industry-wide legal and policy issues raised by these cases. The discovery Union Pacific obtains from Tesoro could be important to the Board's decision on the merits in both cases, especially given the paucity of discovery Union Pacific has been able to obtain in *NAFCA* from shippers affected by the challenged practices. It would be fundamentally unfair to allow shippers to shield themselves from providing discovery regarding issues raised by their claims by litigating cases through trade associations, but to reap the benefits of that litigation by subsequently filing copycat claims to obtain reparations. Furthermore, to the extent discovery produced by Tesoro reveals meaningful differences between Tesoro and the three shippers that were subject to discovery in *NAFCA*, it would be extremely inefficient for the Board to issue a decision in *NAFCA*, only to have to backtrack or qualify that decision once additional evidence becomes available from Tesoro.

³⁰ Union Pacific is simultaneously filing a motion to consolidate a parallel proceeding in STB Docket No. NOR 42150, *Valero Marketing and Supply Company and Valero Rail Partners, LLC v. Union Pacific Railroad Company*, with *NAFCA*.

Consolidation would not unduly delay proceedings in *NAFCA*. Discovery in *NAFCA* has not been completed. Union Pacific has not yet received all the discovery material promised by the three shipper parties, and it has not scheduled depositions of shipper witnesses.³¹ Union Pacific also has not yet received any discovery material from any of the four tank car owners upon which it served subpoenas that were subject to extensive litigation before Judge Dring.

If Tesoro's case is consolidated with *NAFCA*, Tesoro can move expeditiously to provide discovery because of the framework established by Union Pacific, the complainants in *NAFCA*, and Judge Dring. There have been extensive negotiations among the parties over the scope of discovery, as well as four motions to compel, a petition for subpoenas, and four hearings before Judge Dring. Union Pacific has no intention of relitigating these issues. Indeed, Union Pacific has told Tesoro that it is willing to agree that Tesoro could search for and produce the same materials that the shipper parties agreed to search for and produce in *NAFCA*.³²

Moreover, even if there were any delay in *NAFCA* from the process of obtaining discovery from Tesoro, it would not constitute *undue* delay. Discovery from Tesoro may provide information that is highly relevant to the Board's resolution of the issues in *NAFCA*. Given the extremely limited number of shippers that have produced discovery in *NAFCA* and the Board's interest in providing an accurate, informed ruling on the merits, the delay would be well justified.

Finally, consolidation would not prejudice any party. Tesoro would be treated the same as the shipper parties that joined in the complaint in *NAFCA* and would obtain a decision faster than if its case were held in abeyance. The *NAFCA* complainants would not be prejudiced.

Tesoro's complaint raises no new issues, and Tesoro's interests are fully aligned with those of

³¹ As noted above, Union Pacific has served notices of deposition on the shipper parties in *NAFCA*. See n.11, *supra*.

³² See Exhibit B hereto.

the *NAFCA* complainants—indeed, Tesoro’s counsel represents one of the *NAFCA* associations. Any claims of prejudice from delay would be entirely speculative, because the *NAFCA* procedural schedule has been stayed. In any event, as discussed above, any delay in *NAFCA* would be minor and would be well justified by the public interest in fair and fully informed regulatory decision-making.

IV. CONCLUSION

The Board should deny Tesoro’s motion to hold this case in abeyance. Union Pacific should be allowed to obtain discovery from Tesoro to address the common legal and policy issues presented by this case and *NAFCA*. Under the circumstances, the best way to address concerns about fairness and efficiency is to consolidate this case with *NAFCA*.

Respectfully submitted,

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Attorneys for Union Pacific Railroad Company

January 26, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January, 2017, I caused a copy of the foregoing document to be served by e-mail or first class mail, postage pre-paid, on all of the parties of record in NOR 42152 and NOR 42144.

/s/ Michael L. Rosenthal
Michael L. Rosenthal



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January 11, 2017

By Electronic Mail

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Re: STB Docket No. NOR 42152 - First Set of Union Pacific Discovery Requests

Dear Mike:

I write to reiterate our objections to Union Pacific's First Set of Discovery Requests to Tesoro Refining & Marketing Company LLC, Tesoro Great Plains Gathering & Marketing LLC, and Dakota Prairie Refining, LLC (collectively, "Tesoro") communicated to you by phone on January 6, 2017. As you know, we filed a motion to hold the proceedings in abeyance pending the outcome of a liability determination in STB Docket No. NOR 42144, *North America Freight Car Association v. Union Pacific Railroad Company*. No ruling has yet been issued on that motion. Nor have the parties conferred on a protective order, schedule, or other procedural matters necessary for the case to proceed. Discovery would be premature, unduly burdensome, and a waste of the parties' resources until these issues have been resolved. This is particularly the case because Union Pacific's voluminous discovery to Tesoro appears to be the same as that served on the parties in the *NAFCA* case, even though there is an additional claim in that litigation that is not at issue here. Until the Board rules on the pending motion to hold the proceedings in abeyance, and, should that motion be denied, the parties confer on procedural issues, Tesoro stands on its objections.

Regards,

A handwritten signature in red ink, appearing to read "Justin A. Savage", with a long horizontal flourish extending to the right.

Justin A. Savage

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COVINGTON

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By Electronic Mail

January 18, 2017

Justin A. Savage, Esq.
Hogan Lovells US LLP
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555 Thirteenth Street, NW
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Re: STB Docket Nos. NOR 42150 & NOR 42152

Dear Justin:

This responds to your January 11, 2017 letters on behalf of Valero Marketing and Supply Company and Valero Rail Partners, LLC ("Valero") and Tesoro Refining & Marketing Company LLC, Tesoro Great Plains Gathering & Marketing LLC, and Dakota Prairie Refining, LLC ("Tesoro") regarding Union Pacific's first set of discovery requests to Valero and Tesoro.

Under the Surface Transportation Board's rules, Valero's and Tesoro's motions to hold proceedings in abeyance do not suspend Valero's and Tesoro's obligations to respond to Union Pacific's discovery requests.

Discovery in these cases need not be complicated. The legal issues appear to be nearly identical to the issues being litigated in STB Docket No. NOR 42144. As counsel for one of the parties in that matter, you know that the scope of discovery was extensively discussed by the parties, and the most contentious issues were ultimately resolved by an administrative law judge. If Valero and Tesoro agree to search for and produce the same materials that the individual complainants agreed to search for and produce in NOR 42144, we can rapidly complete discovery and focus on the substance of the claims in all of these proceedings.

Sincerely,



Michael L. Rosenthal

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**NORTH AMERICA FREIGHT CAR
ASSOCIATION; AMERICAN FUEL &
PETROCHEMICALS MANUFACTURERS;
THE CHLORINE INSTITUTE; THE
FERTILIZER INSTITUTE; AMERICAN
CHEMISTRY COUNCIL; ETHANOL
PRODUCTS, LLC D/B/A POET ETHANOL
PRODUCTS; POET NUTRITION, INC.; and
CARGILL INCORPORATED**

vs.

**UNION PACIFIC RAILROAD
COMPANY**

Docket No. NOR 42144

**RESPONSES AND OBJECTIONS OF
THE AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS TO
UNION PACIFIC'S FIRST SET OF DISCOVERY REQUESTS**

Complainant, the American Fuel & Petrochemical Manufacturers ("AFPM"), hereby submits its Responses and Objections to Defendant Union Pacific Railroad Company's ("UP's") First Set of Discovery Requests ("Requests"). AFPM's responses to the Discovery Requests are based on information presently known. Because AFPM continues to investigate the facts and information relating to the issues in this case, AFPM reserves the right to modify and/or supplement any of its responses as the existence of additional responsive information becomes known.

The following General Objections, Objections to Definitions, and Objections to Instructions are incorporated into the specific responses and/or objections to each Interrogatory and Document Request.

Dated: June 23, 2015.

Respectfully submitted,

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**Counsel for Complainant American Fuel
& Petrochemical Manufacturers**

GENERAL OBJECTIONS

The following general objections and statements apply to each of the particular document requests and interrogatories propounded by Defendant and are hereby incorporated within each specific response set forth below:

1. Complainant objects to Defendant's Requests to the extent they seek to impose upon Complainant any obligation or responsibility other than those mandated by 49 C.F.R. § 1114.21 *et seq.*

2. Complainant objects to Defendant's Requests for Information from members of AFPM who are not named Complainants in this proceeding through discovery requests directed at AFPM.

3. Complainant objects to Defendant's Requests to the extent they purport to impose on Complainant the burden to collect, produce, or disclose information that cannot be found in the course of a reasonable search.

4. Complainant objects to Defendant's Requests to the extent they call for information outside Complainant's possession, custody or control.

5. Complainant objects to Defendant's Requests to the extent they are not limited by date and seek information from outside the relevant time period for this proceeding.

6. Complainant objects to Defendant's Requests to the extent they seek information that is already within Defendant's possession, custody, or control, equally available to Defendant, or that is more appropriately sought from third parties to whom discovery requests may be directed.

7. Complainant objects to Defendant's Requests to the extent they may be construed to require Complainant to search for and disclose or produce information that is a matter of public record or otherwise as accessible to Defendant as to Complainant.

8. Complainant objects to Defendant's Requests to the extent they seek discovery more appropriately obtained by means other than requests for the production of documents or interrogatories.

9. Complainant objects to Defendant's Requests insofar as they seek production or disclosure of information subject to the attorney-client privilege, work product doctrine, or any other applicable privilege, rule, doctrine or immunity, whether created by statute or common law. All Requests have been read to exclude discovery of such privileged information. By responding to any Request, Defendant does not waive the attorney-client privilege, the work product doctrine, or any other applicable privilege, doctrine, immunity or law as to that Request or as to any other Request or any future Request. Inadvertent production of any such information shall not constitute a waiver of any privilege or any other ground for objecting to discovery with respect to such information, nor shall inadvertent production waive the right of Complainant to object to the use of any such information in any proceeding.

10. Complainant objects to Defendant's Requests to the extent they call for the production or disclosure of trade secrets, proprietary, personal, commercially sensitive, or other confidential information. Complainant will produce confidential information that is responsive, non-privileged, relevant, and not otherwise protected from discovery, if any, only pursuant to the terms of a Protective Order issued by the Board in this proceeding and reserves the right to seek further entrance of protective orders by the Board should the need arise.

11. By responding to any Request, Complainant does not adopt Defendant's definitions of words and phrases contained in these Requests. Complainant objects to words and phrases to the extent they are undefined and/or inconsistent with (a) the ordinary and customary meaning of such words and phrases and/or (b) the rules governing the permissible scope of discovery.

12. Complainant objects to Defendant's Requests to the extent that they use language incorporating or calling for a legal conclusion or making an erroneous statement of law. Complainant's responses herein shall be as to matters of fact only and shall not be construed as stating or implying any conclusions of law concerning the matters referenced in any discovery request or concerning any matter relevant to this proceeding.

13. Nothing in Complainant's responses shall be construed as constituting or implying an admission of any allegation or agreement with any assertion or characterization in Defendant's Requests.

14. Complainant's discovery and investigation into the matters specified is ongoing. These answers and objections are made as of the date stated and include information located or obtained up to that time after reasonable inquiry. Complainant does not purport to have reviewed and extracted information from every potentially relevant document. Further information responsive to Defendant's Requests may be ascertained or identified at a later time, and Complainant reserves the right to amend its answers and objections to rely on such information and to assert additional objections as necessary.

15. The information and documents supplied in response to Defendant's Requests are for this proceeding only and for no other purpose.

The applicable foregoing General Objections are incorporated into each of the specific objections and answers that follow. The assertion of the same, similar, or additional objections and specific objections to an individual Request, or the failure to assert any additional objection to an individual Request, shall not be construed as a waiver of any objection by Complainant.

OBJECTIONS TO DEFINITIONS

The following objections to Defendant's Definitions, and the following statements, apply to each of the particular Requests propounded by Defendant and are hereby incorporated within each specific response set forth below:

1. Complainant objects to the definition of "Communication" to the extent that it exceeds the scope of discoverable material under, or seeks to impose any obligation or responsibility in excess of those required under, 49 C.F.R. § 1114.21 *et seq.*

2. Complainant objects to the definition of "Document" to the extent that it exceeds the scope of discoverable material under, or seek to impose any obligation or responsibility in excess of those required under, 49 C.F.R. § 1114.21 *et seq.*

3. Complainant objects to the definitions of "Identify," as set forth in Definitions E through G, to the extent that they seek to impose any obligation or responsibility in excess of those required under 49 C.F.R. § 1114.21 *et seq.*

4. Complainant objects to the definition of "AFPM Member" as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence in that it seeks discovery on Complainant's members and "any subsidiary or affiliate" thereof, who are not party or relevant to this proceeding.

5. Complainant objects to the definition of "Repair Facility" to the extent that it exceeds the scope of facilities described by Item 55-C in Union Pacific's Tariff 6004.

6. Complainant objects to the definitions of “You” and “Your” as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence in that they include Complainant’s members, outside attorneys, advisers, consultants, and other persons or entities not within Complainant’s control, as well as Complainant’s members’ parent companies, subsidiaries, and other persons or entities not party or relevant to this proceeding.

OBJECTIONS TO INSTRUCTIONS

The following objections to Defendant’s Instructions, and the following statements, apply to each of the particular Requests propounded by Defendant and are hereby incorporated within each specific response set forth below:

1. Complainant objects to Instruction No. 1 to the extent that it is overly broad, unduly burdensome, and not reasonably limited in time, as it seeks discovery “from January 1, 1987.” Complainant will produce responsive information or documents that can be obtained without undue burden or expense and that are located after a reasonable search, as required by 49 C.F.R. § 1114.21 *et seq.*

2. Complainant objects to Instruction No. 2 to the extent that it requires Complainant to produce documents in the custody, possession or control of an AFPM member.

3. Complainant objects to Instruction No. 2 to the extent that it requires identification and description of “the source of the documents” and thus seeks to impose any obligation or responsibility in excess of those required under 49 C.F.R. § 1114.21 *et seq.*

4. Complainant objects to Instruction No. 3 to the extent that it requires identification and description of documents withheld “for any reason” and documents withheld

“on the basis of a claimed privilege or attorney work product,” and thus seeks to impose any obligation or responsibility in excess of those required under 49 C.F.R. § 1114.21 *et seq.*

5. Complainant objects to Instruction No. 4 to the extent that it requires identification and indexing of “all persons who provided information for each response” and the “response(s) the person provided information for” and thus seeks to impose any obligation or responsibility in excess of those required under 49 C.F.R. § 1114.21 *et seq.*

INTERROGATORIES

Interrogatory No. 1

Identify each current AFPM Member and the number of tank cars each member currently (a) owns or (b) uses pursuant to a lease agreement.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. AFPM further objects to this Interrogatory as irrelevant and unduly burdensome to the extent it requests the number of tank cars that each of AFPM’s members owns or leases because the number of such cars is irrelevant to the issue of whether UP is providing compensation for its use of those cars as required by statute. Subject to and without waiving its objections, AFPM will provide a list of its members, as is publicly available on AFPM’s website.

Interrogatory No. 2

Is AFPM or any AFPM Member seeking reparations or damages for transportation provided under contracts under Count I of the Complaint? If so, identify the member(s) and contract(s).

Response

In accordance with the First Amended Complaint, filed on June 2, 2015, AFPM is no longer requesting reparations or damages on behalf of its members.

Interrogatory No. 3

Does any AFPM Member that leases tank cars to another Person have a lease agreement under which the Car Owner will retain some or all of any mileage allowances paid on those cars? If so, identify the member(s) and the lease agreement(s).

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 4.

Does any AFPM Member that leases tank cars to another Person have a lease agreement under which the Car Owner must pass along to the lessee some or all of any mileage allowances paid on those cars? If so, identify the member(s) and the lease agreement(s).

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 5

Does any AFPM Member that leases tank cars from another Person have a lease agreement under which the Car Owner will retain some or all of any mileage allowances paid on those cars? If so, identify the member(s) and the lease agreement(s).

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 6.

Does any AFPM Member that leases tank cars from another Person have a lease agreement under which the Car Owner must pass along to the lessee some or all of any mileage allowances paid on those cars? If so, identify the member(s) and the lease agreement(s).

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 7

Does any AFPM Member that leases tank cars to another Person have a lease agreement under which the lessee must make a payment to the Car Owner if the total empty miles moved by the lessee's cars that are subject to lease exceed the total loaded miles moved by the lessee's cars

that are subject to the lease by more than a specified amount or percentage? If so, identify the member(s) and the lease agreement(s).

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 8

Does any AFPM Member that leases tank cars to another Person have a lease agreement under which the lessee is not required to make a payment to the Car Owner if the total empty miles moved by the lessee's cars that are subject to the lease exceed the total loaded miles moved by the lessee's cars that are subject to the lease by more than a specified amount or percentage? If so, identify the member(s) and the lease agreement(s).

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 9

Does any AFPM Member that leases tank cars from another Person have a lease agreement under which the lessee must make a payment to the Car Owner if the total empty miles moved by the lessee's cars that are subject to the lease exceed the total loaded miles moved

by the lessee's cars that are subject to the lease by more than a specified amount or percentage?
If so, identify the member(s) and the lease agreement(s).

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 10

Does any AFPM Member that leases tank cars from another Person have a lease agreement under which the lessee is not required to make a payment to the Car Owner if the total empty miles moved by the lessee's cars that are subject to the lease exceed the total loaded miles moved by the lessee's cars that are subject to the lease by more than a specified amount or percentage? If so, identify the member(s) and the lease agreement(s).

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 11

Does AFPM contend that when a private tank car is furnished to Union Pacific by a Person that is a lessee of the car, Union Pacific is required to pay a mileage allowance to (a) the lessee, or (b) the lessor? If AFPM contends that the answer depends on the circumstances, state the circumstances that AFPM contends are relevant.

Response

AFPM objects to this Interrogatory as premature because it requests that AFPM formulate its position prior to completing discovery of UP. Subject to and without waiving its objections, AFPM states that the answer depends upon which entity owns the reporting marks on the subject tank car, because Freight Tariff RIC 6007-Series specifies that mileage allowances are paid only to the owner of the reporting marks.

Interrogatory No. 12

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

Response

AFPM objects to this Interrogatory as premature because it requests that AFPM formulate its position prior to completing discovery of UP. AFPM also objects to the phrase “costs associated with the empty miles” as vague and ambiguous because it is unclear whether this refers to UP’s actual cost of service for the empty movement, its tariff rate for the empty movement, or other such costs. AFPM further objects to this Interrogatory as irrelevant to the extent that “costs” refers to UP’s actual cost of service for the empty movement. Subject to and without waiving its objections, AFPM contends that the costs associated with empty miles are UP’s responsibility as a matter of law.

Interrogatory No. 13

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

Response

AFPM objects to this Interrogatory as premature because it requests that AFPM formulate its position prior to completing discovery of UP.

Interrogatory No. 14

Separately for each AFPM Member, identify each movement of an empty tank car owned or leased by the member to or from a Repair Facility, and identify the Repair Facility to or from which the car moved and the work performed at the Repair Facility.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Moreover, the work performed at the Repair Facility is also irrelevant.

Interrogatory No. 15

Separately for each AFPM Member, identify each movement for which the member has been assessed a charge under Item 55-C and for which the member is seeking reparations under Count I, and identify the amount of the charge, the Repair Facility to or from which the car moved, and the work performed at the Repair Facility.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this

proceeding. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 16

Separately for each AFPM Member, identify each movement for which the member has been assessed a charge by a railroad other than Union Pacific for the movement of a private tank car to a Repair Facility, and identify the railroad that assessed the charge, and amount of the charge, and whether the member paid the charge.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. In addition, transactions with railroads other than UP are irrelevant to the claims in this proceeding. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 17

Separately for each AFPM Member that is a Car Owner, and separately by each car reporting mark assigned to the member, and separately for each year from 1987 through 2014, with respect to that member's tank cars, state:

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

to or from Repair Facilities.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. AFPM also objects to this Interrogatory as overbroad and unduly burdensome because it requests information separately by AFPM Member, reporting mark, and year back to 1987. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 18

Separately for each AFPM Member that leased tank cars from another Person, and separately by each car reporting mark for tank cars the member furnished to Union Pacific or other railroads but did not own, and separately for each year from 1987 through 2014, state:

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

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. AFPM also objects to this Interrogatory as overbroad and unduly burdensome

because it requests information separately by AFPM Member, reporting mark, and year back to 1987. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 19

Separately for each AFPM Member, and separately by each car reporting mark assigned to the member, state the amount billed to the member pursuant to the Freight Tariff RIC 6007-Series for empty mileage associated with movements of tank cars, separately for each year from 1987 through 2014.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. AFPM also objects to this Interrogatory as overbroad and unduly burdensome because it requests information separately by AFPM Member, reporting mark, and year back to 1987. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 20

Separately for each AFPM Member, and separately by each car reporting mark assigned to the member, state the amount the member charged Persons leasing the member's tank cars for cost associated with empty mileage movements by those cars, separately for each such lessee, separately for each year from 1987 through 2014.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this

proceeding. Furthermore, the multitude of commercial arrangements between Car Owners and lessees are irrelevant to the issues in this proceeding, which concern the lawfulness of UP's decision to charge for empty tank car movements to Repair Facilities and whether UP is paying compensation for the use of private rail cars. AFPM also objects to this Interrogatory as overbroad and unduly burdensome because it requests information separately by AFPM members, reporting mark, and year back to 1987. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 21

Separately for each AFPM Member, and separately by each car reporting mark for tank cars the member furnished to Union Pacific or other railroads but that were not owned by the member, state the amount the Car Owner billed the member to cover costs associated with empty mileage movements by those cars, separately for each year from 1987 through 2014, and separately for each lease agreement, if cars were subject to different lease agreements during a calendar year.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Furthermore, the multitude of commercial arrangements between Car Owners and lessees are irrelevant to the issues in this proceeding, which concern the lawfulness of UP's decision to charge for empty tank car movements to Repair Facilities and whether UP is paying compensation for the use of private rail cars. AFPM also objects to this Interrogatory as overbroad and unduly burdensome because it requests information separately by AFPM

members, reporting mark, and year back to 1987. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 22

Separately for each AFPM Member, identify all communications regarding Union Pacific's adoption of charges for empty movements of tank cars in Item 55-C with:

- a. Other Persons within the member's company
- b. Persons to whom the member leases tank cars
- c. Persons from whom the member leases tank cars
- d. Repair Facilities
- e. Union Pacific
- f. AFPM
- g. Other AFPM members
- h. Other Complainants

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Moreover, such communications are irrelevant to the lawfulness of UP's decision to charge for empty tank car movements to Repair Facilities and whether UP is paying compensation for the use of private rail cars. Furthermore, AFPM objects to this Interrogatory as overbroad and unduly burdensome because it is not narrowly tailored to the issues in this proceeding and given the number of AFPM members. Subject to its objections, AFPM will identify responsive non-privileged communications within its possession or control that are responsive to this Interrogatory.

Interrogatory No. 23

Separately for each AFPM Member, describe all changes in the member's practices related to sending tank cars to Repair Facilities that have resulted from Union Pacific's adoption of Item 55-C.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Moreover, the practices of AFPM members related to sending tank cars to Repair Facilities are irrelevant to the lawfulness of UP's decision to charge for empty tank car movements to Repair Facilities. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 24

Separately for each AFPM Member, identify all communications between the member and Union Pacific in which the member asked Union Pacific to establish rates for movements in tank cars that included payment of a mileage allowance.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. AFPM further objects to the relevance of this Interrogatory because the car compensation requirements imposed by 49 U.S.C. § 11122 do not require the car provider to request compensation as a condition-precedent to the railroad's duty to compensate. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 25

Separately for each AFPM Member, identify all communications between the member and a railroad other than Union Pacific in which the member asked the railroad to establish rates for movements in tank cars that included payment of a mileage allowance.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. AFPM further objects to the relevance of this Interrogatory because the car compensation requirements imposed by 49 U.S.C. § 11122 do not require the car provider to request compensation as a condition-precedent to the railroad's duty to compensate. Moreover, whether or not any AFPM member requested a railroad other than UP to establish rates for movements in tank cars that included payment of a mileage allowance is irrelevant to Complainants' claims against UP. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 26

Separately for each AFPM Member, identify all communications between the member and Union Pacific in which the member asked Union Pacific to establish reduced line-haul rates to reflect the member's furnishing tank cars.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. AFPM further objects to the relevance of this Interrogatory because the car compensation requirements imposed by 49 U.S.C. § 11122 do not require the car provider to

request compensation as a condition-precedent to the railroad's duty to compensate. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 27

Separately for each AFPM Member, identify all communications between the member and a railroad other than Union Pacific in which the member asked the railroad to establish reduced line-haul rates to reflect the member's furnishing tank cars.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. AFPM further objects to the relevance of this Interrogatory because the car compensation requirements imposed by 49 U.S.C. § 11122 do not require the car provider to request compensation as a condition-precedent to the railroad's duty to compensate. Moreover, whether or not any AFPM member requested a railroad other than UP to establish reduced line-haul rates in tank cars to reflect the member's furnishing of the tank cars is irrelevant to Complainants' claims against UP. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 28

Separately for each AFPM Member, identify each movement for which the member seeks damages under Count II, the price document (*i.e.*, contract, tariff, exempt quotation) under which the movement occurred, and state whether the member paid the line-haul transportation charge and whether the member was the Car Owner or leased the car from the Car Owner. If the member did not pay the line-haul transportation charge, identify the Person that paid the charge.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding.

Interrogatory No. 29

Separately for each car movement identified in response to Interrogatory No. 28, state (a) the amount Union Pacific charged for line-haul transportation of the movement, and (b) the amount the member contends Union Pacific should have charged for line-haul transportation of the movement under zero-mileage rates to compensate the member for furnishing the car.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding.

Interrogatory No. 30

Separately for each AFPM Member that is a Car Owner, with regard to each tank car owned by the member, state:

- a. Car number
- b. Year the car was built
- c. Year the car was acquired
- d. Car's cost as acquired
- e. Costs of any subsequent modifications or additions to the car
- f. Total loaded miles moved, separately for each year from 2005 through 2014
- g. Total empty miles moved, separately for each year from 2005 through 2014

- h. Costs for programmed maintenance of valves, separately for each year from 2005 through 2014
- i. Other maintenance costs, separately for each year from 2005 through 2014
- j. Costs for car cleaning, separately for each year from 2005 through 2014
- k. Repair costs, separately for each year from 2005 through 2014
- l. Storage costs, separately for each year from 2005 through 2014
- m. Taxes paid on the car, separately for each year from 2005 through 2014
- n. Total number of empty movements to or from Repair Facilities, separately for each year from 2005 through 2014
- o. Total number of miles associated with empty movements to or from Repair Facilities, separately for each year from 2005 through 2014
- p. Total payments received from lessees, if any, separately for each year from 2005 through 2014
- q. Payments received from lessees for maintenance and repair costs incurred by the Car Owner, separately for each year from 2005 through 2014
- r. Payments to/credits to lessees for maintenance and repair costs incurred by lessees, separately for each year from 2005 through 2014
- s. The lease agreement(s) that governed use of the car in each year from 2005 through 2014

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 31

Separately for each AFPM member that is a lessee of tank cars, for each tank car used by the member pursuant to a lease, state:

- a. Car number
- b. Loaded miles moved, separately for each year from 2005 through 2014
- c. Empty miles moved, separately for each year from 2005 through 2014
- d. Costs for programmed maintenance of valves incurred by the lessee, separately for each year from 2005 through 2014
- e. Other maintenance costs incurred by the lessee, separately for each year from 2005 through 2014
- f. Costs for car cleaning incurred by the lessee, separately for each year from 2005 through 2014
- g. Repair costs incurred by the lessee, separately for each year from 2005 through 2014
- h. Storage costs incurred by the lessee, separately for each year from 2005 through 2014
- i. Number of empty movements to or from repair shops, separately for each year from 2005 through 2014
- j. Number of miles associated with empty movements to or from Repair Facilities, separately for each year from 2005 through 2014
- k. Total payments to the lessor, separately for each year from 2005 through 2014
- l. Payments/credits received from the lessor for maintenance and repair costs as reimbursement for costs incurred by the lessee, separately for each year from 2005 through 2014
- m. Payments made to the lessor for maintenance and repair costs incurred by the lessor, separately for each year from 2005 through 2014
- n. The lease agreement(s) that governed use of the car in each year from 2005 through 2014

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 32

Separately for each AFPM Member that is a Car Owner, separately for each year from 2005 through 2014, state:

- a. Number of tank cars owned
- b. Total number of rail cars owned
- c. Taxes on fixed property used for repair, cleaning, maintenance, or storage of (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)
- d. Depreciation on fixed property used for repair, cleaning, maintenance, or storage of (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)
- e. Insurance on fixed property used for repair, cleaning, maintenance, or storage of (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)
- f. Rentals on track and other property when used for repair, cleaning, maintenance, or storage of (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)
- g. Insurance paid on (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)
- h. Market value of machinery used for repair, cleaning, or maintenance of (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)
- i. Costs for repair of shop machinery used for repair, cleaning, or maintenance of (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)
- j. Market value of material inventory used for repair, cleaning, or maintenance of (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)
- k. Wages and benefits paid to employees engaged in repair, cleaning, or maintenance of (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)
- l. Payroll taxes paid in connection with employees engaged in repair, cleaning, or maintenance of (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)
- m. Payments for injuries or death during repairs when not covered by insurance for repairs of (i) tank cars, or (ii) all cars (if separate data for tank cars are not available)

- n. Payments to third parties that are not directly allocated to specific cars for tank car (i) repair, (ii) cleaning, (iii) maintenance, or (iv) storage (or payments to third parties for repair, cleaning, etc. for all cars, if separate data for tank cars are not available)
- o. Any costs of owning and operating tank cars owned by the member that are not addressed in subsections a-n

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 33

Separately for each AFPM Member that is a lessee of tank cars, and separately for each year from 1987 through 2014, state:

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

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 34

Separately for each AFPM Member, and separately for each year from 1987 through 2014, state:

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

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 35

With regard to the allegation in Paragraph 17 of the Complaint that “the cost of owning and maintaining tank cars . . . has increased” over the past 30 years, state on an annual basis:

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

Response

Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

Interrogatory No. 36

With regard to the allegation in Paragraph 33 of the Complaint that Union Pacific “does not offer or negotiate reduced line-haul rates on movements using Association Complainants’

members' rail tank cars . . . in lieu of paying mileage allowances, in order to compensate for such use as required by law," state the amount by which You contend Union Pacific's line-haul rates should have been reduced to compensate for the use of rail tank cars furnished by AFPM Members and explain the basis for that amount.

Response

AFPM objects to this Interrogatory as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. AFPM also objects to this Interrogatory as premature because it requests that AFPM formulate its position prior to completing discovery of UP. Subject to and without waiving its objections, AFPM has no information responsive to this Interrogatory.

DOCUMENT REQUESTS

Document Request No. 1

Produce all documents identified in Your answers to the Interrogatories.

Response

AFPM incorporates by reference its specific objections to each Interrogatory. AFPM further objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members. Subject to and without waiving its objections, AFPM will produce any responsive documents that are within its custody, possession or control.

Document Request No. 2

Produce all documents, regardless of date, supporting Your allegation in Paragraph 17 of the Complaint that “the cost of owning and maintaining tank cars” has increased “over the past 30 years.”

Response

AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members and lack of date limitation. AFPM also objects to this Request as irrelevant because the Complaint seeks compensation for tank cars in accordance with Ex Parte No. 328, not for any increased cost of ownership.

Document Request No. 3

Produce all documents, regardless of date, supporting Your allegation in Paragraph 33 of the Complaint that Union Pacific “does not offer or negotiate reduced line-haul rates on movements using Association Complainants’ members’ rail tank cars.”

Response

AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members and lack of date limitation. Subject to and without waiving any of its objections, AFPM will produce responsive documents to the extent they exist and can be found by a reasonable search.

Document Request No. 4

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

Response

AFPM objects to this Document Request as irrelevant because Complainants have not challenged the level of compensation adopted by the ICC in Ex Parte No. 328, but only the failure of UP to provide that compensation. AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members and lack of date limitation. Subject to and without waiving any of its objections, AFPM will produce responsive documents to the extent they exist and can be found by a reasonable search.

Document Request No. 5

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

Response

AFPM objects to this Document Request as irrelevant because Complainants have not challenged the level of compensation adopted by the ICC in Ex Parte No. 328, but only the failure of UP to provide that compensation. AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members and lack of

date limitation. Subject to and without waiving any of its objections, AFPM will produce responsive documents to the extent they exist and can be found by a reasonable search.

Document Request No. 6

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

Response

AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members and lack of date limitation. AFPM further objects to this Request as irrelevant to the extent that it is not limited to tank cars. Subject to and without waiving any of its objections, AFPM will produce responsive documents to the extent they exist and can be found by a reasonable search.

Document Request No. 7

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

Response

AFPM objects to this Document Request as irrelevant because Complainants have not challenged the level of compensation adopted by the ICC in Ex Parte No. 328, but only the failure of UP to provide that compensation. AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or

damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members and lack of date limitation. Subject to and without waiving any of its objections, AFPM will produce responsive documents to the extent they exist and can be found by a reasonable search.

Document Request No. 8

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

Response

AFPM objects to this Document Request as irrelevant because Complainants have not challenged the level of compensation adopted by the ICC in Ex Parte No. 328, but only the failure of UP to provide that compensation. AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members and lack of date limitation. AFPM further objects to this Document Request as irrelevant to the extent that it is not limited to tank cars. Subject to and without waiving any of its objections, AFPM will produce responsive documents to the extent they exist and can be found by a reasonable search.

Document Request No. 9

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

Response

AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and

those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members and lack of date limitation. In addition, AFPM objects to the phrase “cost of moving empty cars” as vague and ambiguous because it is unclear whether this refers to a railroad’s cost of moving empty cars or a railroad’s charge for the empty movement. Regardless of which definition UP intends, AFPM also objects to this Document Request as irrelevant because the issue in this proceeding is not the cost of moving empty cars, but which entity bears that cost. AFPM further objects to this Document Request as irrelevant to the extent that it is not limited to tank cars. Subject to and without waiving any of its objections, AFPM will produce responsive documents to the extent they exist and can be found by a reasonable search.

Document Request No. 10

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

Response

AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members and lack of date limitation. AFPM further objects to the relevance of this Request because the car compensation requirements imposed by 49 U.S.C. § 11122 do not require the car provider to request compensation as a condition- precedent to the railroad’s duty to compensate.

Document Request No. 11

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

Response

AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members and lack of date limitation. AFPM further objects to the relevance of this Request because the car compensation requirements imposed by 49 U.S.C. § 11122 do not require the car provider to request compensation as a condition- precedent to the railroad's duty to compensate. In addition, transactions with railroads other than UP are irrelevant to the claims in this proceeding.

Document Request No. 12

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

Response

AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members and lack of date limitation. AFPM further objects to the relevance of this Request because the car compensation requirements imposed by

49 U.S.C. § 11122 do not require the car provider to request compensation as a condition-
precedent to the railroad's duty to compensate.

Document Request No. 13

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

Response

AFPM objects to this Document Request to the extent it extends to AFPM members
because AFPM is no longer requesting reparations or damages on behalf of its members and
those members are not parties to this proceeding and because it is overbroad and unduly
burdensome given the number of AFPM members and lack of date limitation. AFPM further
objects to the relevance of this Request because the car compensation requirements imposed by
49 U.S.C. § 11122 do not require the car provider to request compensation as a condition-
precedent to the railroad's duty to compensate. In addition, transactions with railroads other than
UP are irrelevant to the claims in this proceeding.

Document Request No. 14

Produce a copy of each lease under which an AFPM Member is the lessee of tank cars
furnished to Union Pacific in any year from 1987 through 2015.

Response

AFPM objects to this Document Request as irrelevant because AFPM is no longer
requesting reparations or damages on behalf of its members and those members are not parties to
this proceeding. Furthermore, the multitude of commercial arrangements between tank car
lessors and lessees are irrelevant to the issues in this proceeding, which concern the lawfulness of

UP's decision to charge for empty tank car movements to Repair Facilities and whether UP is paying compensation for the use of private tank cars. AFPM also objects to this Request as overbroad and unduly burdensome given the number of AFPM members and the 28 year date range. Subject to and without waiving its objections, AFPM has no information responsive to this request.

Document Request No. 15

Produce a copy of each lease under which an AFPM Member is the lessor of tank cars furnished to Union Pacific in any year from 1987 through 2015.

Response

AFPM objects to this Document Request as irrelevant because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding. Furthermore, the multitude of commercial arrangements between tank car lessors and lessees are irrelevant to the issues in this proceeding, which concern the lawfulness of UP's decision to charge for empty tank car movements to Repair Facilities and whether UP is paying compensation for the use of private tank cars. AFPM also objects to this Request as overbroad and unduly burdensome given the number of AFPM members and the 28 year date range. Subject to and without waiving its objections, AFPM has no information responsive to this request.

Document Request No. 16

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

Response

AFPM incorporates by reference its objections and responses to Document Request Nos. 14 and 15.

Document Request No. 17

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

Response

AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members. Subject to and without waiving any of its objections, AFPM will produce responsive documents to the extent they exist and can be found by a reasonable search.

Document Request No. 18

Separately for each year from 1987 through 2014, produce documents sufficient to show Your costs of owning tank cars, as well as the extent to which those costs are reimbursed by lessees of Your tank cars.

Response

AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members. AFPM objects to this Request as irrelevant because Complainants have not challenged the level of compensation adopted by the ICC in Ex Parte No. 328, but only the failure of UP to provide that compensation. Furthermore, the

compensation received by a tank car lessor from its lessees is irrelevant to whether UP has provided the compensation required of it by law. Subject to and without waiving its objections, AFPM has no information responsive to this request.

Document Request No. 19

Separately for each year from 1987 through 2014, produce documents sufficient to show Your costs of maintaining tank cars that You own or lease to another Person, as well as the extent to which those costs are reimbursed by lessees of Your tank cars.

Response

AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members. AFPM objects to this Request as irrelevant because Complainants have not challenged the level of compensation adopted by the ICC in Ex Parte No. 328, but only the failure of UP to provide that compensation. Furthermore, the compensation received by a tank car lessor from its lessees is irrelevant to whether UP has provided the compensation required of it by law. Subject to and without waiving its objections, AFPM has no information responsive to this request.

Document Request No. 20

Separately for each year from 1987 through 2014, produce document sufficient to show Your costs of maintaining tank cars that that You lease from another Person, as well as the extent to which those costs are reimbursed by the lessor.

Response

AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members. AFPM objects to this Request as irrelevant because Complainants have not challenged the level of compensation adopted by the ICC in Ex Parte No. 328, but only the failure of UP to provide that compensation. Furthermore, the compensation paid by a tank car lessor to its lessees is irrelevant to whether UP has provided the compensation required of it by law. Subject to and without waiving its objections, AFPM has no information responsive to this request.

Document Request No. 21

Separately for each year from 1987 through 2014, for tank cars that You lease from another Person, produce documents sufficient to show Your payments to the lessor as reimbursement for the lessor's costs of owning the cars.

Response

AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members. AFPM objects to this Request as irrelevant because Complainants have not challenged the level of compensation adopted by the ICC in Ex Parte No. 328, but only the failure of UP to provide that compensation. Furthermore, the compensation received by a tank car lessor from its lessees is irrelevant to whether UP has

provided the compensation required of it by law. Subject to and without waiving its objections, AFPM has no information responsive to this request.

Document Request No. 22

Separately for each year from 1987 through 2014, for tank cars that You lease from another Person, produce documents sufficient to show Your payments to the lessor as reimbursement for the lessor's costs of maintaining the cars.

Response

AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly burdensome given the number of AFPM members. AFPM objects to this Request as irrelevant because Complainants have not challenged the level of compensation adopted by the ICC in Ex Parte No. 328, but only the failure of UP to provide that compensation. Furthermore, the compensation received by a tank car lessor from its lessees is irrelevant to whether UP has provided the compensation required of it by law. Subject to and without waiving its objections, AFPM has no information responsive to this request.

Document Request No. 23

Produce all documents relating to payments made pursuant to the Freight Tariff RIC 6007-Series for empty mileage associated with movements of tank cars from 1987 through 2014.

Response

AFPM objects to this Document Request to the extent it extends to AFPM members because AFPM is no longer requesting reparations or damages on behalf of its members and those members are not parties to this proceeding and because it is overbroad and unduly

burdensome given the number of AFPM members and the request for information back to 1987. In addition, mileage equalization payments by any individual tank car owner are irrelevant to the issues in this proceeding, and to the extent mileage equalization payments may be relevant at all, it is at the system-wide level, which cannot be ascertained through discovery of Complainants or their individual members. Subject to and without waiving its objections, AFPM has no information responsive to this request.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of June, 2015, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, on all of the parties of record in NOR 42144.

/s/ Justin A. Savage
Justin A. Savage

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August 18, 2016

Michael L. Rosenthal
Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, D.C. 20001-4956

Re: STB Docket No. NOR42144, North American Freight Car Association, et al. v. Union
Pacific Railroad Company

Dear Mr. Rosenthal:

We are conveying the comments and supporting analyses that AFPM submitted to DOT's HM-251 rulemaking docket. As Union Pacific was a major stakeholder in the HM-251 process, we are certain that the company has had access to them. These materials are also publicly available. Nonetheless, as you requested, we are producing these comments to you, and doing so in Bates-stamped format to ensure that they are properly tracked in this litigation.

We have also conferred, once again, with AFPM regarding your document requests. We can confirm that AFPM has no additional responsive, non-privileged information in its custody, possession or control. Please let me know if you have any questions.

Sincerely,



Justin A. Savage
Partner
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D (202) 637-5558