

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Ex Parte No. 328 (Sub-No. 2)

**INVESTIGATION OF TANK CAR
ALLOWANCE SYSTEM**

**RAILWAY SUPPLY INSTITUTE'S REPLY TO
UNION PACIFIC RAILROAD COMPANY'S PETITION TO MODIFY ORDER
ADOPTING NATIONAL TANK CAR ALLOWANCE AGREEMENT**

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I. Introduction

In accordance with the regulations of the Surface Transportation Board (“STB” or “Board”), the Railway Supply Institute (“RSI”) Committee on Tank Cars (“RSI-CTC”) hereby files its reply in opposition to Union Pacific Railroad Company’s (“UP”) petition to modify the order adopting the National Tank Car Allowance Agreement (hereafter, the “Petition”). By its Petition, UP is improperly seeking to terminate its obligation to comply with the mileage equalization provisions of the National Tank Car Allowance Agreement adopted by the Interstate Commerce Commission (“ICC”) in *Investigation of Tank Car Allowance System*, 3 I.C.C. 2d 196 (1986) (hereafter, “1986 Decision” adopting the “Ex Parte 328 Agreement” or “Agreement”).

UP’s petition is an improper attempt to amend the Ex Parte 328 Agreement as it disregards the mechanisms for amendment set forth in the Agreement itself and affirmed in the ICC’s 1986 Decision and Order adopting the Agreement. In addition, the Petition is premature

because it is presumes as settled law certain issues that are currently pending before the Board and actively being litigated by numerous complainants in Docket NOR 42144, *North America Freight Car Assn, et al v. Union Pacific Railroad Company*, and in Dockets NOR 42150, 42152, and 42153, which have been consolidated with NOR 42144 (hereafter, “*NAFCA v. Union Pacific*”). For these reasons, RSI respectfully requests that the Board deny UP’s petition.

II. Identity and Interest of the RSI-CTC

RSI is the international trade association of the railway supply industry. Its members provide all types of goods and services to freight and passenger railroads, rail shippers and freight car manufacturers and lessors. The members of the RSI-CTC collectively build more than ninety-five percent (95%) of all new railroad tank cars and own and provide for lease over seventy percent (70%) of railroad tank cars operating in North America. The RSI-CTC members consist of: American Railcar Industries; CIT Rail; GATX Corporation; The Greenbrier Companies; SMBC Rail Services, LLC; Trinity Rail Group, LLC; and Union Tank Car Company. RSI’s predecessor, the Railway Progress Institute (“RPI”) was a member of the Joint Negotiating Committee (“JNC”) that successfully negotiated the Ex Parte 328 Agreement in 1986 after three years of deliberations. Accordingly, RSI has a strong interest in ensuring that the tank car owners are adequately represented in any proceeding or petition that seeks to amend the Ex Parte 328 Agreement.

III. UP’s Petition Should be Denied Because it is an Improper Attempt to Amend the Ex Parte 328 Agreement

The mileage equalization program was originally promulgated for railroad tank cars in the National Tank Car Allowance Agreement, which was adopted by the ICC by order in the Ex Parte No. 328 proceeding, *Investigation of Tank Car Allowance System*, slip op. (ICC served June 15, 1979) and subsequently updated in 3 I.C.C. 2d 196 (1986). The Ex Parte 328

Agreement addressed two issues. First, it adopted a formula for the semi-annual calculation of nationally applicable tank car mileage allowance rates, which effectively constitutes a “safe harbor” for compliance with the railroads’ statutory car compensation requirement. *See Ex Parte No. 328*, slip op. at 19 (served June 15, 1979) (“[W]e find that private tank car allowances determined under this agreement will be reasonable and otherwise in accordance with 49 U.S.C. §§ 11122 and 10747, and that our adoption of this agreement is warranted.”). Second, the Ex Parte 328 Agreement set forth the parameters of the mileage equalization program, designed to compensate railroads for excessive empty tank car miles.

The 1986 revisions to the Ex Parte 328 Agreement were the “product of three years of intense Commission-directed and supervised negotiations between the railroads and virtually all tank car owners and users,” including RSI’s predecessor, RPI. 1986 Decision at 200. As the ICC has acknowledged, the Ex Part 328 Agreement enjoyed “the almost unanimous support of rail, shipper, and tank car interests” and represented a clear “compromise in which virtually all parties acquiesce.” *Id.* Moreover, the ICC concluded that the Agreement was consistent with rail carriers’ obligations under 49 U.S.C § 11122 in that it met “the requirement that tank car compensation be based upon the expense of ownership and maintenance” and that it satisfied the Board’s obligation to consider the “transportation use, national level of ownership and other factors affecting the adequacy of the national tank car supply.” *Id.* at 201.

When the JNC renegotiated the Ex Parte 328 Agreement in 1986, the resulting modifications to the original 1979 agreement largely consisted of changes to the mileage allowance provisions of the agreement. In 1986, “the mileage equalization system...was not a subject of the present round of negotiations, but was deferred to the future.” *Id.* at 202. Accordingly, the mileage equalization provisions that were approved in the original 1979

agreement were carried forward into Section 1 of the 1986 Ex Parte 328 Agreement and remained virtually unchanged. At that time, the ICC acknowledged that railroads (or other interested parties) remained “free to challenge the mileage equalization system by filing a complaint under the Act, or seek[ing] renegotiation of the agreement.” *Id.*

Section 9 of the Ex Parte 328 Agreement provides the procedural mechanism through which interested parties may reopen negotiations. Specifically, the Board is required to “reopen negotiations on the national mileage allowance formula and system adopted in this order whenever the [Board] receives petition(s) by any three or more interested parties, without requiring that such parties demonstrate good cause for renegotiation.” *Id.* at 211 (Ex Parte 328 Agreement § 9). The ICC called the Section 9 renegotiation procedures “essential.” *Id.* at 199. Given that mileage equalization is part of the “system” that the ICC adopted in the 1986 Decision, Section 9 is applicable to those seeking to amend the order, including UP.

Moreover, because the Ex Parte 328 Agreement reflects the collective interests and compromise of the entire industry – railroads, tank car owners, and shippers – efforts to unwind the Agreement must also be examined on an industry-wide basis. Any determination that one party, *i.e.*, one railroad, may defect from the mileage equalization provisions¹ will have an impact on the entire industry and therefore must be examined in a holistic manner looking at the system-wide impacts on shippers, car owners, and railroads collectively. The Board has expressly recognized this, which is why it stated that the JNC “will continue to study [mileage equalization] and, when and if consensus is reached, will present the agreed resolution to the

¹ The Agreement permits carriers to institute tariffs filed by individual railroads that set allowances other than those based on the national allowance formula and provides a mechanism for investigation of such “departure tariffs” by the Board. See Ex Parte 328 Agreement § 8. Departure tariffs are not at issue here as they are limited to departures from the mileage allowance portion of the Ex Parte 328 Agreement. Departures tariffs from the mileage equalization provisions are not contemplated by the Agreement.

Commission in a manner similar to the joint petition.” *Id.* at 199. UP’s unilateral effort to terminate its mileage equalization obligation is contrary to that process and flies in the face of the Board’s clear preference for an industry-wide effort.

In addition, as the ICC said in approving the Ex Parte 328 Agreement it favors privately negotiated solutions. *Id.* at 201. The Board has expressed the same view on countless occasions. If a party can obviate the renegotiation provisions of an approved industry agreement, parties in future disputes regarding similarly complex issues will be hesitant to rely on a privately negotiated solution and it is more likely the Board will be compelled to decide them.

UP’s Petition is improper and should be denied because UP’s request to terminate its obligations under the mileage equalization provisions of the Ex Parte 328 Agreement is an effort to amend the Agreement without following the prescribed mechanisms. The terms of the Agreement itself foreclose the use of a petition to reopen an administratively final action.² Rather, amending the Agreement must be accomplished by either a formal complaint or a request to renegotiate the Agreement pursuant to Section 9. UP has made neither and thus its Petition should be denied.

IV. UP Wrongfully Presumes as Settled Issues that are Actively Under Consideration by the Board

In its Petition, UP relies heavily on *General American Transportation Corp. v. Indiana Harbor Belt Railroad Co.* (“IHB-II”), 3 I.C.C. 2d 599 (1987), *aff’d sub nom Gen Am. Transp. Corp. v. ICC*, 872 F.2d 1048 (D.C. Cir. 1989), for the assertion that all railroads may file tariffs with charges for moving empty, privately owned cars to and from repair facilities regardless of

² UP invokes 49 C.F.R. § 1115.4 as the basis for its Petition, but then disregards important Board requirements for such a petition. UP has disregarded the Board’s twenty-page limit and the Board’s requirement that a petition exceeding ten pages include a preface and summary of argument not to exceed three pages. 49 C.F.R. § 1115.4 (requiring the Petition comply with the requirements of § 1115.3 (d)).

the circumstances, and exclude those miles from mileage equalization. However, UP's reliance on this case is flawed because it presumes that the Board has already addressed the question of whether UP has the right to charge for the movement of empty tank cars to and from repair facilities. In reality, this very question is presently before the Board in *NAFCA v. Union Pacific*, NOR 42144 *et. al.* Numerous trade associations and individual shipper complainants are actively litigating the question of whether UP's repair move charges constitute an unlawful attempt to subvert the Ex Parte 328 Agreement on mileage equalization. Not only did UP file this Petition one day before UP filed its reply evidence in *NAFCA v. Union Pacific*, but also UP included in the Petition many of the arguments that it raised in its reply evidence. As such, the legality of whether UP (and other railroads) may charge for empty tank car movements to and from repair shops and may remove the miles associated with such moves from the mileage equalization formula remains an unsettled question presently before the Board. UP's reliance on such arguments are premature in this petition and therefore are an improper basis for UP's requested relief.

V. UP's Proposed Schedule is too Short to Allow Full Consideration and Responses by Interested Parties

In the event the Board decides to grant UP's Petition, it should allow *at least* 90 days for comments. UP has taken an unknown amount of time to prepare its arguments in this petition yet proposes that interested parties get only 30 days to file comments on an action that would materially change an industry-wide agreement that has been in place for over 30 years. UP's proposed schedule is far too short to allow full consideration by industry and adequate time to develop thorough substantive responses.

VI. Conclusion

The Board should deny UP's petition to terminate its obligation to comply with the mileage equalization provisions of Ex Part 328 and dismiss the petition as improper and procedurally deficient.

Respectfully submitted,

/s R. Latane Montague

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2019, I have caused a copy of the foregoing to be served by hand, e-mail, or first class mail on counsel for the parties of record for EP 328.

/s/ Emily E. Kimball

Emily E. Kimball