

244373
244374
244375

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
September 19, 2017
Part of
Public Record

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

vs.

**UNION PACIFIC RAILROAD
COMPANY**

NOR 42144, 42150, 42152

**TESORO’S RESPONSE TO UNION PACIFIC’S SUPPLEMENT IN SUPPORT OF ITS
MOTION TO CONSOLIDATE**

Complainants Tesoro Refining & Marketing Company LLC, Tesoro Great Plains Gathering & Marketing LLC, and Dakota Prairie Refining, LLC (collectively, “Tesoro”) object to Defendant Union Pacific Railroad Company’s (“Union Pacific”) September 8, 2017 “supplement” in support of its Second Motion to Consolidate Proceedings (“the Second Motion”). The strategically titled supplement is an impermissible surreply in support of the Second Motion poorly disguised as Union Pacific’s attempt to provide a “complete record,”¹ see 49 C.F.R. § 1104.13(c), and it rests on three demonstrably false premises. The STB should therefore disregard the putative “supplement.”

¹ Supplement to Union Pac.’s Mot. to Consolidate at 2.

Union Pacific first claims that a supplemental brief was needed because the Board had not been apprised of Tesoro’s second set of discovery requests.² But Union Pacific fails to acknowledge that Tesoro reported to the Board the service of its second set of discovery requests in no fewer than three status reports prior to the “supplement.”³ The status reports, and not supplemental briefs to the Board, are the proper means to update the Board on the status of discovery—an action the parties jointly undertake on a weekly basis.⁴ Indeed, Union Pacific has acknowledged that the Board reviews the weekly status reports.⁵

Union Pacific next claims that, “regardless of whether agree [*sic*] to or are ordered to produce documents in response to Tesoro’s latest wave of requests, discovery in the NAFTA [c]ase will now continue beyond the period [Union Pacific] anticipated” and “for longer than complainants in the NAFTA [c]ase suggested in their reply.”⁶ This is not true. There are no established dates for the conclusion of discovery or Union Pacific’s expectation of when discovery will conclude. Complainants did not commit to a date certain for the close of all discovery in the currently consolidated cases,⁷ as even Union Pacific later acknowledges in its “supplement.”⁸ Nonetheless, Tesoro remains committed to concluding the discovery process soon. Regarding its second set of discovery requests, Tesoro has been especially judicious in

² See *id.*

³ See Joint Weekly Status Report ¶ 3 (Aug. 17, 2017); Joint Weekly Status Report ¶ 3 (Aug. 31, 2017); Joint Weekly Status Report ¶ 3 (Sept. 7, 2017).

⁴ See Joint Weekly Status Report ¶ 3 (Sept. 14, 2017).

⁵ See Union Pac.’s Second Mot. to Consolidate Att. 1 at 7.

⁶ Supplement to Union Pac.’s Mot. to Consolidate at 3.

⁷ See Complainants’ Reply to Union Pac.’s Second Mot. to Consolidate at 6 (noting only that discovery should be completed “relatively soon”).

⁸ See Supplement to Union Pac.’s Mot. to Consolidate at 4 (quoting Complainants’ Reply to Union Pac.’s Second Mot. to Consolidate at 6).

limiting the effort required of Union Pacific. When the parties met to confer on Union Pacific's responses and objections to the second set of discovery requests, Tesoro took pains to provide Union Pacific with detailed information to aid Union Pacific in locating responsive documents and minimizing any burden from the search. This information included individual car numbers, dates of relevant incidents, Union Pacific's internal record-keeping numbers for the incidents, names and positions of likely custodians, and even *subject lines* of typical email communications known to be responsive. Union Pacific has filed no further "supplement" after Tesoro's proposals to update the Board on Tesoro's efforts in the interests of a "complete record."⁹

Union Pacific finally claims that there is no risk of evidence losing its probative value because Union Pacific "updated [its] production of traffic data on March 10, 2017" and might do so again.¹⁰ This statement is irrelevant to the complainant's point. Whatever the value of the March traffic data, it remains the case that much more of the information produced thus far in the various proceedings is *not* traffic data. Thus, Tesoro and the other complainants were and still are correct that the communications, financial information, operational information, contracts, deposition testimony, and other types of information may lose their probative value for the Board as their original context disappears and witness memories fade.

For the foregoing reasons, the Board should disregard the Supplement to Union Pacific's Motion to Consolidate.

⁹ *Id.* at 2.

¹⁰ *See id.* at 12.

Dated September 19, 2017

Respectfully submitted,

/s/ Peter Whitfield
Peter Whitfield, Esq.
Houston Shaner, Esq.
Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600

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

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2017, I have caused a copy of the foregoing to be served by hand, email, or first-class mail on counsel for the parties of record for NOR 42144, NOR 42150, and NOR 42152. I further certify that I have caused a copy of the foregoing to be served by email on the Honorable John P. Dring of the Federal Energy Regulatory Commission.

/s/ Houston Shaner
Houston Shaner