



247158
247160
247162
247164

ENTERED
Office of Proceedings
February 22, 2019
Part of
Public Record

ATTORNEYS AT LAW
THE FOUNDRY BUILDING 1055 THOMAS JEFFERSON STREET, NW WASHINGTON, DC 20007
TELEPHONE: 202.342.5200 FACSIMILE: 202.342.5219

RICHARD BAR
BRENDAN COLLINS
EDWARD D. GREENBERG
MATTHEW T. JOURNY
KATHARINE FOSTER MEYER
DAVID K. MONROE
TROY A. ROLF
KEITH G. SWIRSKY
THOMAS W. WILCOX
CHRISTOPHER B. YOUNGER

OLIVER KRISCHIK
KRISTINE O. LITTLE
RYAN D. SWIRSKY

OF COUNSEL:
STEVEN JOHN FELLMAN

MINNESOTA OFFICE:
114 FIRST STREET SOUTH
BUFFALO, MN 55313
TELEPHONE: 763-682-6620

FACSIMILE: 763-682-6261
WRITER'S DIRECT E-MAIL ADDRESS

TWILCOX@GKGLAW.COM
WRITER'S DIRECT DIAL NUMBER
(202) 342-5248

February 22, 2019

By E-Filing

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

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

Dear Ms. Brown:

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

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

Sincerely,

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

Thomas W. Wilcox
Attorney for POET Nutrition Inc.

Cc All parties on the applicable official service lists

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42144

NORTH AMERICA FREIGHT CAR ASSOCIATION; AMERICAN FUEL &
PETROCHEMICAL MANUFACTURERS; THE CHLORINE INSTITUTE; THE
FERTILIZER INSTITUTE; AMERICAN CHEMISTRY COUNCIL; ETHANOL PRODUCTS,
LLC D/B/A POET ETHANOL PRODUCTS; POET NUTRITION, INC.; AND CARGILL
INCORPORATED v. UNION PACIFIC RAILROAD COMPANY

Docket No. NOR 42150

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

Docket No. NOR 42152

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

Docket No. NOR 42153

ARKEMA INC. v. UNION PACIFIC RAILROAD COMPANY

**SUPPLEMENTAL OPENING EVIDENCE AND
ARGUMENT OF POET NUTRITION, INC.**

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

Nutrition hereby adopts and incorporates by reference Complainants' Joint Opening Evidence and Argument submitted by POET Nutrition and the other complainants in Docket Nos. NOR 42144, 42150, 42152 and 42153 ("Joint Opening"). This Supplemental Opening Evidence and Argument provides additional factual information that is particular to POET Nutrition and its dispute with Defendant Union Pacific Railroad Company ("UP"). It also demonstrates that POET Nutrition is entitled to relief from UP's violation of 49 U.S.C. §§10702, 11121, and 11122, for the reasons set forth in the Joint Opening and as set forth below. This Supplemental Opening Evidence and Argument is supported by the attached Verified Statement of Mr. Jeff Siebrecht, who is Senior Rail Distribution Manager of POET Nutrition ("Siebrecht V.S."), and the Verified Statement of Mr. John Kieras, a former 42-year employee of Union Tank Car Company ("Kieras V.S.").

I. SUMMARY OF POET NUTRITION SUPPLEMENTAL OPENING EVIDENCE AND ARGUMENT

POET Nutrition is a division of POET, LLC with its principal place of business in Sioux Falls, South Dakota. It formerly operated under the trade name Dakota Gold Marketing. POET Nutrition was formed in 2006 and is engaged in the business of marketing and selling co-products resulting from the manufacturing of ethanol, such as distillers' grains and corn oil. These commodities are produced primarily in 27 facilities located in the Midwestern United States. POET Nutrition also operates five corn oil transload sites. Siebrecht V.S. at 1. These facilities collect corn oil trucked from POET biorefineries and other corn oil production locations, which is transloaded into railroad tank cars. Corn oil is the only commodity shipped by POET Nutrition in tank cars. POET Nutrition began requiring rail transportation for its corn oil in 2013. *Id.*

Currently, POET Nutrition's corn oil that is shipped by railroad is being transported primarily by UP to two destinations in New Orleans, Louisiana— one that receives corn oil for

export and another that receives corn oil to process it into biodiesel.¹ The corn oil export facility is served only by UP. The biodiesel facility is located on tracks served by the Kansas City Southern Railway that are connected to UP. *Id.* at 2. Due to the location of its origin facilities with access to UP's system, and one of its two destinations being physically located only on UP's system, POET Nutrition must rely primarily on UP for rail transportation of its corn oil. POET Nutrition does not have any rail transportation contracts with UP. All of the rail tank cars that are transported by UP do so pursuant to UP's common carrier rates and service terms, including UP Tariff 4053 Series. *Id.*

Because UP does not own or lease any railroad tank cars, POET Nutrition must acquire and provide tank cars to UP in order to receive railroad service from UP. As explained in more detail below, POET Nutrition expends approximately [REDACTED] per year to lease, manage and maintain a fleet of [REDACTED] tank cars to fulfill POET Nutrition rail transportation needs. *Id.* at 3-4.

POET Nutrition asserts two separate, but related, claims against UP. In Count II of the First Amended Complaint filed in Docket No. NOR 42144, POET Nutrition asserts that UP has violated its statutory obligations under 49 U.S.C. §§ 11121 and 11122 by failing to properly compensate POET Nutrition for supplying railroad tank cars to UP for use in revenue service. In particular, UP has failed to directly reimburse POET Nutrition for any of the costs it incurs in providing tank cars to UP. Nor does UP fulfill its statutory obligations by paying mileage allowances on loaded revenue movements in tank cars as set forth in the industry-wide agreement approved by the Interstate Commerce Commission in Ex Parte No. 328, *Investigation of Tank Car*

¹ Some of POET Nutrition's production is sold to domestic purchasers, but this production is typically transported by truck due to the infeasibility and comparatively high cost of shipping it by railroad.

Allowance System (“*Ex Parte* 328”). The rules and procedures implementing the *Ex Parte* 328 agreement are set forth in the Tariff RIC 6007-series published by Railinc, a subsidiary of the Association of American Railroads. UP’s actions have resulted in POET Nutrition not receiving any compensation for its provision of tank cars to UP through provisions of its tank car leases.

In Count I of the Amended Complaint, POET Nutrition alleges that UP violated 49 U.S.C. §§10702, 11121, and 11122 when it adopted, effective January 1, 2015,² Tariff UP 6004, Item 55-C, Subpart D (hereafter “Item 55-C”), which began assessing charges set forth in UP Tariff 4703 for certain movements of empty tank cars to and from car repair shops. Such charges had not previously been assessed by UP, and they have historically been prohibited under applicable law and precedent. The imposition of these charges was purely for the purpose of [REDACTED], and UP misled POET Nutrition and other shippers as to this true purpose of Item 55-C. There was also no reasonable business or policy basis for the charges. UP has renewed and increased these charges in 2016, 2017, 2018 and 2019. While POET Nutrition has yet to be assessed any charges pursuant to Item 55-C, it is eligible to do so in the future when UP transports the tank cars POET Nutrition supplies to it to and from “Repair Facilities” under Item 55-C.

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

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

For all the reasons set forth in the Joint Opening and this Supplemental Opening Evidence and Argument, POET Nutrition is entitled to an order from the Board declaring that UP's implementation of Item 55-C is unlawful under §§10702, 11121 and 11122. In addition, pursuant to 49 U.S.C. §11122 and the Board's rules, POET Nutrition is entitled to be reimbursed by UP for POET Nutrition's costs of providing tank cars for UP's use in revenue service from March 31, 2013³ to the date of the decision issued by the STB finding UP has violated its statutory obligations. Current law requires such reimbursement to be in the form of mileage allowances calculated pursuant to the formula set forth in *Ex Parte 328* and Tariff RIC 6007. UP should be further directed to henceforth appropriately compensate POET Nutrition or its car lessors for the costs incurred by POET Nutrition to supply UP tank cars in accordance with applicable law.

II. SUPPLEMENTAL RELEVANT FACTS⁴

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

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

POET Nutrition relies extensively on the nation's rail system to transport its corn oil distances greater than 700 miles. Approximately [REDACTED] of POET Nutrition's rail-originated traffic is transported by UP due to the location of POET Nutrition's transloading facilities and rail destinations on UP's system. Siebrecht V.S. at 3. POET Nutrition currently tenders between [REDACTED] and [REDACTED] tank car loads of corn oil to UP each year for transportation on UP's system. In its arrangements with customers POET Nutrition typically pays UP the rates and other charges

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

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

to transport its products, and then charges its customers a price that includes POET Nutrition's costs of transportation. *Id.* Since commencing shipping tank cars on UP's system in 2013, POET Nutrition has paid UP approximately [REDACTED] in rates and charges for rail transportation in tank cars provided to it by POET Nutrition. *Id.*

Over the relevant time period for purposes of POET Nutrition's claims in this proceeding UP has provided rail transportation service to POET Nutrition in tank cars pursuant to UP's common carrier tariffs, namely UP Tariff 4053 Series and the various common carrier tariffs and documents referenced and incorporated by reference therein.

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

As stated above, UP does not offer transportation in rail tank cars owned or leased by UP. In order to ship its corn oil by rail in tank cars, POET Nutrition is required to provide privately-owned – *i.e.* non-railroad owned - rail tank cars so UP can provide tank car service to POET Nutrition. Accordingly, POET Nutrition has acquired by lease, and currently manages and maintains, a total of [REDACTED] rail tank cars that it supplies to UP and other Class I railroads. POET Nutrition initially leased 158 rail tank cars from four rail lessors beginning in late 2012 when POET Nutrition's need for rail transportation of corn oil commenced. *Id.* Due to market constraints on the availability of suitable tank cars at that time due to the boom in crude oil by railroad service, most of the 158 cars tank cars initially leased by POET Nutrition were constructed specifically for POET Nutrition and were therefore newly constructed when placed into service. *Id.* at 3-4. Starting in 2017 and continuing into 2018, partially due to poor service by UP and other carriers, POET Nutrition added [REDACTED] tank cars to its existing lease with [REDACTED] and leased [REDACTED] newly manufactured tank cars from a new lessor. This brought

the total number of tank cars it currently supplies to UP and other carriers for transportation of POET Nutrition corn oil to [REDACTED]. *Id.* at 4.

a. Lease rental and other Costs Paid by POET Nutrition to Supply Tank Cars to UP

In order to provide rail tank cars to UP POET Nutrition incurs an annual lease rental expense of approximately [REDACTED]. *Id.* In addition, POET Nutrition incurs certain costs to manage and perform some maintenance of the leased tank cars as required by the terms of its leases. These costs average approximately [REDACTED] per year. *Id.* In POET Nutrition's experience, lease agreements for tank cars are largely standardized containing "boilerplate" provisions that are not subject to significant negotiation. The provisions of POET Nutrition's railroad tank car leases are therefore very similar in terms of allocating the responsibilities and obligations of the lessor and lessee. One area common to its tank car leases is the allocation of maintenance responsibility. In general, the bulk of the maintenance and repairs of the leased tank cars is performed at the expense of the car owner/lessor at repair shops or other locations they select or approve. However, consistent with industry standards, POET Nutrition's rail car leases generally make POET Nutrition responsible for the repair of certain components of the cars that could be affected by POET's use of them. These are typically valves, fittings, plugs, chains and any equipment handled and/or managed by POET Nutrition employees when loading tank cars, or handled by customers unloading tank cars. POET Nutrition is also responsible for the cost to clean rail tanks cars when necessary. *Id.* The lessor is responsible for the cost of the 10-year qualifying inspection and periodic maintenance. These inspections and maintenance must be performed at a repair facility and cannot be conducted at POET Nutrition facilities. As a result, if during the lease term a rail tank car's recertification is due, POET Nutrition must cover the expense of the

movement of the rail tank car from its facility to a repair facility for recertification in addition to the cleaning and valve replacements that are done, if necessary. *Id.*

The original 158 cars leased by POET Nutrition are sufficiently new, having been brought on line in 2012. Most have yet to be transported to a repair shop for repairs or maintenance or requalification. Specifically, as of October, 2018, eight of POET Nutrition's original 158 railcars had been sent to a repair shop located on short line railroads for requalification. These cars were not transported by UP, and so the terms of Item 55-C did not apply. *Id.* at 5. Further, POET Nutrition avoided any other charges by sending the cars to the facility after they had been unloaded and were on their free empty return move under the line haul rate. *Id.* Other than these eight cars, all other repairs or maintenance have been performed at POET Nutrition facilities via mobile repairs.

b. Lease treatment of mileage allowances payment responsibilities

POET Nutrition's leases contain terms which provide POET Nutrition with the right to receive credits to its account for mileage allowance payments received by the lessor from UP and other railroads over the lease term. A collection of the relevant provisions from POET Nutrition's leases of the original 158 tank cars that were provided to UP in discovery in this proceeding is provided in Exhibit A to Mr. Siebrecht's Verified Statement.⁵ Accordingly, although POET Nutrition is not entitled to direct payment of mileage allowances by UP pursuant to *Ex Parte 328* and Tariff RIC 6007, it has a contractual right to credits for such payments when they are made to POET Nutrition's lessors. However, as explained above and in the Joint Opening, UP long ago

⁵ Document production from POET Nutrition to UP was completed in early 2016, but discovery between UP and other complainants whose cases were consolidated with Docket No. NOR 42144 by the Board continued to the end of 2018. In the event the Board grants the relief requested by POET Nutrition for compensation, such relief will also be subject to the lease terms applicable to the [REDACTED] additional tank cars referenced previously.

stopped paying any mileage allowances to the vast majority of car owners or any other party that provides UP with tank cars, including POET Nutrition. Because UP has ceased paying mileage allowances, POET Nutrition is being deprived of compensation for UP's use of POET Nutrition tank cars by operation of the lease provisions that require such payments to be passed on or credited to POET Nutrition.

c. POET Nutrition's tank car fleet management

As a general business goal, POET Nutrition strives to maximize the efficiency with which its rail tank cars are utilized for service to its customers. Toward this end, POET Nutrition closely tracks the whereabouts and status of the tank cars in its fleet both internally and using third-party providers. In general, the loaded movement of POET Nutrition rail tank cars vary between [REDACTED] miles to [REDACTED] miles per year, per car. Typically, a rail tank car completes [REDACTED] [REDACTED] a month and typically completes [REDACTED] loaded moves a year.

Id. at 5.

Ultimately, except for certain minor repairs for which POET Nutrition hires mobile repair companies to perform at its own facilities when practicable, the lessor has the final decision on where a rail tank car is being repaired or requalified to meet regulatory requirements. *Id.* at 6. Lessors also approve who POET Nutrition may use to conduct mobile repairs. When POET Nutrition's leased cars require repairs, POET Nutrition and its lessors coordinate to manage repairs so as to maintain efficiency and meet customer commitments. When a rail tank car is sent to a repair facility, POET Nutrition strives for the fastest turnaround time for the car to be returned into service. The main focus for POET Nutrition is to minimize the amount of car movements made in order to maximize efficiency. Therefore, when a rail tank car needs to be transported to a repair

facility POET Nutrition will look at potential diversions to a facility when the tank car is returning empty from a loaded move. *Id.* at 6.

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

POET Nutrition also manages its fleet movements so the empty miles do not exceed the loaded miles by 106%, the threshold for being assessed charges under the mileage equalization program established by *Ex Parte* 328. This program was designed and implemented for the purpose of incentivizing owners and lessees of private tank cars to manage the movement of their tank cars to minimize the number of empty miles relative to loaded miles, calculated on an annual fleet-wide basis. Accordingly, in the normal course of business, POET Nutrition has always tracked its loaded and empty miles to ensure that it remains below the 106% threshold so as to avoid any charges. *Id.* at 7.

As noted, POET Nutrition also tries to maximize the number of movements that entail a loaded movement and with an empty movement that is included in the loaded line haul rate, as opposed to a separate movement of an empty car that incurs a separate charge. As a result of these car fleet management practices, POET Nutrition has rarely exceeded the 106% threshold and accordingly rarely has had to pay the associated mileage equalization charges established by *Ex Parte* 328. *Id.* at 7-8.

POET Nutrition seeks to efficiently manage its tank car fleet not only to avoid paying equalization charges, but also to maximize utilization of its tank cars for loaded moves carrying

POET Nutrition products. Maximizing the efficient utilization of its tank cars allows POET Nutrition to ship products to its customers using the fewest number of tank cars. In particular, POET Nutrition seeks to minimize the number of empty miles its tank cars travel to repair facilities because the more miles a tank car must travel to move to a shop, the more time it will remain out of service. *Id.*

In addition, POET Nutrition facilities conduct pre and post load inspections on each tank car before they are offered into transportation. These inspections are done on site and only require movement to a repair facility if a maintenance issue is found. However, as stated above, POET Nutrition attempts to have the repairs completed via mobile repair units. *Id.*

B. UP's Adoption of Item 55-C

On December 10, 2014, UP informed POET Nutrition and its other customers that starting January 1, 2015, UP would begin, for the first time, assessing charges for certain movements of empty tank cars to repair shops, based on how many miles the empty tank car was transported by UP. POET Nutrition objected to this announcement through NAFCA, which, along with the Fertilizer Institute, Railway Supply Institute, and the Chlorine Institute sent a letter on behalf of the organizations and their members to Mr. Eric Butler of UP on December 22, 2014 demanding that UP immediately withdraw the proposed publication of Item 55-C. Joint Opening at 17.

UP rejected all demands for it to withdraw the tariff and return to the prior industry practice of not charging for movements of empty tank cars to and from repair shops. Item 55-C established substantial mileage-based charges for the movement of empty tank cars to and from repair facilities, effective on January 1, 2015:

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

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

The current 2019 Item 55-C charges are:

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

UP also assesses a fuel surcharge on each empty tank car movement in addition to Item 55-C charges. Item 55-C charges do not apply to the first empty move following a loaded line-haul revenue move on UP. However, Item 55-C defines “Repair Facility” broadly to include facilities at which tank cars are sent to be cleaned before being routed to a repair shop.

The Joint Opening explains in detail how Item 55-C is contrary to the mileage equalization program, and UP’s adoption of Item 55-C was accompanied by the unreasonable practice of unilaterally removing the miles associated with empty movements covered by Item 55-C from the mileage equalization calculation. Joint Opening at 44-49. Additional argument in opposition of Item 55-C is also contained at pages 14 to 16 in the Supplemental Opening Evidence and Argument of Ethanol Products, LLC d/b/a POET Ethanol Products, which POET Nutrition also adopts and incorporates by reference.

C. UP does not compensate POET Nutrition for the use of POET Nutrition Tank Cars

UP not does not reimburse POET Nutrition for any of the costs it incurs to provide tank cars to UP. First, UP does not compensate the vast majority of its customers and other parties that supply it tank cars through the payment of mileage allowances required to be calculated and paid pursuant to *Ex Parte* 328 and Tariff 6007 Series. This is evidenced in the common carrier rate documents governing POET Nutrition transportation, specifically Tariff UP 4053, which states as to the rates applicable to corn oil, “Mileage allowance payment on private equipment shall not

apply.”⁶ POET Nutrition’s belief is that UP considers the terms of UP Tariff 4053 to be non-negotiable. Siebrecht V.S. at 8. To POET Nutrition’s knowledge, UP has never paid any of POET Nutrition tank car lessors a mileage allowance as compensation for UP’s use of the tank cars they lease to POET Nutrition. *Id.* Had UP ever paid mileage allowances to POET Nutrition’s lessors the provisions of POET Nutrition leases would have operated to credit POET Nutrition for the amount of the allowance payment. Neither of these events has occurred since POET Nutrition began tendering traffic to UP in 2013.

Second, UP does not compensate POET Nutrition for the use of its leased tank cars in any other manner. UP has asserted in this proceeding that it fulfills its statutory obligations under §11122 to compensate parties who provide it tank cars by charging discounted “zero allowance” line haul rates in lieu of compensating them by paying mileage allowances. Leaving aside the question of whether UP may legally fulfill its obligations under §11122 in this manner for tank cars,⁷ this cannot be the case from a practical standpoint. UP cannot offer POET Nutrition or any other rail shipper a true choice of actual rates – a “zero allowance rate” in a UP-provided tank car or a “full mileage” rate (*i.e.* a rate accompanied by mileage allowance payments pursuant to *Ex Parte 328*) in a private tank car – because UP does not offer tank car transportation in tank cars

⁶ See, UP Tariff 4053-series, Item 1030-KU, at page 2 of 16.

⁷ There exists a threshold question, discussed in the Joint Opening Evidence at 29-32, whether it is even lawful for UP to engage in the practice of discounting its rates for the purposes of complying with 49 U.S.C. §§11121 and 11122 as applied to railroad tank cars. No STB or judicial precedent supports this practice for railroad tank cars. Since UP has not owned and supplied tank cars to its customers for over 100 years, UP has no “dual rate” system in place as is found in other industries where transportation can be and is provided in either UP-owned cars or shipper-provided cars. Thus, there is no zero allowance rate for transportation in a UP tank car to discount, or from which to ascertain whether a purported discount exists or is sufficient to comply with sections 11121 and 11122. Accordingly, this practice cannot be applied to tank cars.

owned or leased by UP. Moreover, even if UP could lawfully comply with §11122 by discounting rates, UP does not even offer POET Nutrition a choice of rates in the tank cars POET Nutrition supplies to UP – that is, a choice of a rate accompanied by an mileage allowances to POET Nutrition or its lessor or a discounted zero allowance rate. UP has always established only one rate for tank car movements of corn oil in POET Nutrition provided tank cars – a freight rate not accompanied by a mileage allowance payment. *Id.* at 8-9.

Moreover, UP has never represented to POET Nutrition that the corn oil freight rates in Tariff UP 4053 are discounted off a higher rail rate for the purpose of compensating POET Nutrition of the use of its tank cars, let alone ever quantified the amount by which its rates are supposedly discounted or how such purported discounts are calculated – even after this case was initiated in 2015. *Id.* at 8. Indeed, POET Nutrition is aware of no evidence that UP even considers mileage allowances or its statutory obligation to pay any of the costs incurred by POET Nutrition to provide tank cars to UP when UP establishes rates for POET Nutrition shipments. To the contrary, based on POET Nutrition’s experience in its dealings with UP, UP sets all of its freight rates for tank car shipments based solely on what it believes the market will bear in order to maximize UP’s revenues and profit. *Id.* at 8-9. Indeed, UP and other railroads have publicly acknowledged that they “price to the market” – in other words, that UP’s rates are established at the maximum level UP believes shippers like POET Nutrition will pay without decreasing or shifting production, altering its selling or distribution patterns, or reducing its use of rail transportation. Thus, the transportation rates POET Nutrition pays are the maximum market rates and UP has never maintained or represented otherwise to POET Nutrition.

As stated previously, POET Nutrition has not yet incurred charges under UP’s tariff 55-C. However, if one of its tank cars was required to go a Repair Facility on UP’s system POET

Nutrition would be subject to the terms of Item 55-C and the charges in tariff 4703. If UP was actually discounting its freight rates for tank car shipments to compensate POET Nutrition for the costs incurred in providing tank cars to UP, UP would have reduced its rates in Tariff 4053 in January 2015 to reflect the new additional cost to POET Nutrition of paying to move empty tank cars to repair facilities. However, UP did not reduce its freight rates for tank car shipments of corn oil when it began charging for moving empty tank cars to repair facilities in 2015. Nor did UP reduce its tank car freight rates when it increased the charges under Item 55-C and Tariff 4703 in 2016, 2017, 2018 and 2019. In fact, since 2015, UP has *increased* POET Nutrition's transportation rates an average of 3-5%% per year in 2016, 2017, and 2018. *Id.* at 9.

III. ARGUMENT

A. UP's Imposition and Implementation of Item 55-C, Part D Violates 49 U.S.C. §§10702, 11121, and 11122, *Ex Parte No. 328*, and the Interstate Commerce Commission's Decision in *IHBII*.⁸

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

As set forth more fully in the Joint Opening, UP has a statutory obligation as a common carrier railroad to provide adequate car service, or in the alternative, to adequately compensate providers of private rail cars that UP uses to provide revenue-producing rail transportation services. 49 U.S.C. §§11121 and 11122. UP's car service obligations require that it provide an adequate number of railroad-owned tank cars to handle POET Nutrition's tank car shipments, or in the alternative, be responsible for the costs incurred by POET Nutrition to provide tank cars

⁸ *General American Transp. Corp v. Indiana Harbor Belt Railroad Co*, 3 I.C.C 2d 599 (1987)(“*IHBII*”), which as the Joint Opening explains UP heavily relies upon for authority to implement Item 55-C.

used in UP's revenue service. The costs associated with using POET Nutrition tank cars include not only POET Nutrition's costs in acquiring and maintaining its fleet of tank cars, but also the costs of moving empty tank cars to repair facilities for required inspections, maintenance, repair or retrofit.⁹ Indeed, if UP provided tank car service in UP-owned tank cars, UP would obviously be responsible for the cost of moving its own tank cars for necessary repairs.

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

Under current law, railroads are required to compensate parties who provide them railroad tank cars in the form of mileage allowance payments calculated pursuant to *Ex Parte 328* and Tariff 6007. UP does not pay mileage allowances in exchange for its use of POET Nutrition's tank cars. Indeed, UP has stated that it has no legal obligation to compensate rail tank car providers through the payment of mileage allowances.¹⁰ Instead, UP maintains it is fulfilling its statutory obligations under §§11121 and 11122 solely through the establishment of discounted, "zero mileage" or "zero allowance" rates for tank car transportation. However, as summarized above, at no time during its transportation of POET Nutrition leased tank cars has UP ever stated that its transportation rates are discounted off of a rate UP would charge if it supplied railroad tank cars or paid mileage allowances. Indeed, UP has never established such higher rates in any of tariffs and other common carrier documents that have applied to POET Nutrition's transportation, so

⁹ See *IHB II* at 608 (the costs of moving empty tank cars to repair facilities must ultimately be borne by railroads that use those tank cars in revenue service).

¹⁰ Motion to Dismiss Complaint or to Make Complaint More Definite, at 13.

there is no reason for POET Nutrition to request rates for shipments in UP railroad tank cars. Nor has UP ever offered or established rail rates for transportation in POET Nutrition's tank cars that are accompanied by a promise to pay mileage allowances. On the contrary, the *only* rates UP has *ever* offered or established for service to POET Nutrition have been rates accompanied by a *refusal* to pay mileage allowances.

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

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

Nutrition's account. This would restore the balance intended by the statutory and regulatory scheme.

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

POET Nutrition adopts and incorporates by reference the discussion in the Joint Opening Evidence demonstrating that UP's adoption and implementation of Item 55-C was an unreasonable practice in violation of §10702 because (1) UP's sole internal reason for Item 55-C was to increase profits by [REDACTED] and (2) UP misled POET Nutrition and other rail shippers of this true purpose. As additional grounds for this finding, POET Nutrition asserts that applying Item 55-C and the associated charges to POET Nutrition tank car fleet would be unreasonable because there was absolutely no business or other justification for it.

Prior to 2015 POET Nutrition was managing the tank car fleet it provided to UP at maximum efficiency under the standard established by *Ex Parte* 328, i.e., consistently keeping its empty miles below 106% of the loaded miles. There was therefore no business basis for UP to impose an additional charge on POET Nutrition in order to incentivize it to further increase fleet management efficiency or reduce empty miles. Moreover, as stated by Mr. Siebrecht, POET Nutrition strives to have repairs performed by mobile repair or at shops that are closest to its facilities. Siebrecht V.S. at 6. Item 55-C, by imposing charges for movements of empty tank cars to repair shops following the first movement after a loaded revenue movement, dictates that empty tank cars should be moved to a repair shop close to the tank car's next anticipated loading point in order to minimize subsequent mileage charges under the new charges. Since POET Nutrition already engages in this practice, the substantial new charges imposed by UP in Item 55-C and

Tariff 4703 are largely just a huge additional cost that POET Nutrition would have to pay UP if it is to receive service from UP.

B. POET Nutrition is entitled to relief from UP's Implementation of Item 55-C and its Failure to Compensate POET Nutrition for the Use of its Leased Tank Cars

1. Item 55-C Should be Declared Unlawful as of its Effective Date

For all the reasons set forth in the Joint Opening, as supplemented by this Supplemental Evidence and Argument, POET Nutrition urges the Board to issue an order (1) finding that Item 55-C was unlawful as of its effective date and (2) directing UP to delete Item 55-C from Tariff 6004.

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

In addition to the foregoing, the Board should also determine that UP has failed to compensate any party for the use of the tank cars POET Nutrition has provided to UP for its transportation of POET Nutrition's corn oil. Under current law, the amount of proper compensation in compliance with §11122 are mileage allowances calculated pursuant to the formula established by *Ex Parte* 328. POET Nutrition is entitled to damages in the form of the amount of allowances that should have been paid by UP to POET Nutrition's car lessors over the relevant time period, which is from March 31, 2013 to present, subject to the terms of POET Nutrition's car leases in effect over this time period. Pursuant to the terms of POET Nutrition's leases its lessors, upon receiving mileage allowance payments from UP, would to pass those amounts on to POET Nutrition in the form of rental credits. POET Nutrition is therefore entitled to recover its rightful portion of the mileage

allowances owed by UP to POET Nutrition's lessors as a third-party beneficiary of UP's obligations to the car lessors.

POET Nutrition does not possess the data necessary to calculate the mileage allowances owed on its tank cars over the relevant period of March 31, 2013 to present. However, this calculation may be made using data collected by Railinc, a subsidiary of the Association of American Railroads, and mileage allowance calculations conducted by Railinc and supplied to UP in the normal course of business. The accompanying Verified Statement of John Kieras ("Kieras V.S."), an employee of Union Tank Car Company for 42 years who administered the mileage allowance program for that company, provides a summary explanation of how Railinc administers the mileage rate allowance program through data collection and analysis pursuant to the *Ex Parte* 328 procedures. Mr. Kieras also explains how Railinc provides UP and other railroads with a monthly file, denominated the Car Hire Accounting Rate Master ("CHARM") which is the official source for time and mileage rates on all freight cars in service, including tank cars. Kieras V.S. at 3. POET Nutrition does not have access to the CHARM database. Mr. Kieras further explains how the amount of unpaid allowances to POET Nutrition's lessors may be calculated by UP by multiplying the mileage allowance rates calculated by Railinc for each of POET Nutrition's leased tank cars times the loaded miles each car has been transported by UP since March, 2013. *Id.* at 5-6. In addition to being directed to pay past allowance amounts owed on POET Nutrition's cars, UP should also be directed to continue such payments on a going forward basis from the date of the STB's decision, unless and until the Board determines an alternative means by which parties who provide UP tank cars are adequately compensated pursuant to 49 U.S.C. §11122.

IV. CONCLUSION

Currently, POET Nutrition has no choice but to provide its own leased tank cars for use by UP to enable its corn oil to be transported by rail to and/or from locations and interchanges served by UP. UP's adoption of Item 55-C is an unreasonable practice in violation of 49 U.S.C. §10702 and it is also a violation of UP's statutory obligation under §§11121 and 11122 to compensate parties who provide it with railroad cars, since UP does not intend to pass any of the amounts it collects pursuant to Item 55-C to any party who provides it tank cars. UP has also violated §11122 because it does not otherwise compensate POET Nutrition for the use of tank cars leased by it and provided to UP to transport POET Nutrition's commodities. For all the reasons set forth in the Joint Opening as supplemented by this Supplemental Opening Evidence and Argument, the Board should find UP has violated §§10702, 11121 and §11122 and grant the relief requested by POET Nutrition set forth hereinabove.

Respectfully submitted,



Thomas W. Wilcox, Esq.
David K. Monroe, Esq.
Kristine O. Little, Esq.
GKG Law, P.C.
1055 Thomas Jefferson Street NW
Suite 500
Washington, DC 20007
(202) 342-5248

Attorneys for POET Nutrition, Inc.

February 22, 2019

HIGHLY CONFIDENTIAL VERSION SUBJECT TO PROTECTIVE ORDER

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42144

NORTH AMERICA FREIGHT CAR ASSOCIATION; AMERICAN FUEL &
PETROCHEMICAL MANUFACTURERS; THE CHLORINE INSTITUTE; THE
FERTILIZER INSTITUTE; AMERICAN CHEMISTRY COUNCIL; ETHANOL PRODUCTS,
LLC D/B/A POET ETHANOL PRODUCTS; POET NUTRITION, INC.; AND CARGILL
INCORPORATED v. UNION PACIFIC RAILROAD COMPANY

Docket No. NOR 42150

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

Docket No. NOR 42152

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

Docket No. NOR 42153

ARKEMA INC. v. UNION PACIFIC RAILROAD COMPANY

VERIFIED STATEMENT OF JEFF SIEBRECHT

My name is Jeff Siebrecht. I am Senior Rail Distribution Manager of POET Nutrition, Inc. (“POET Nutrition”). In that position I have responsibility for managing POET Nutrition’s entire rail car fleet of approximately 2000 hopper cars, and currently of [REDACTED] rail tank cars. I also have responsibility for POET Nutrition’s rail transportation logistics. These duties include managing our relationships with Union Pacific Railroad Company (“UP”) and other railroads that

serve our facilities. It also includes responsibility for acquiring and managing our rail car fleet and the leases associated with that. In this verified statement I provide certain factual information about POET Nutrition, its rail operations, our railroad tank car fleet, and our current dispute with UP.

A. Background

POET Nutrition is a division of POET, LLC, with its principal place of business in Sioux Falls, South Dakota.¹ It formerly operated under the trade name Dakota Gold Marketing. POET Nutrition was formed in 2006 and is engaged in the business of marketing and selling co-products resulting from the manufacturing of ethanol, such as distillers' grains and corn oil. These commodities are produced primarily in 27 facilities located in the Midwestern United States. We also operate five corn oil transload sites, which collect product trucked from different POET Nutrition and POET, LLC facilities and other locations and then transloaded it into railroad tank cars. POET Nutrition began requiring rail transportation for its corn oil in 2013. Corn oil is the only commodity shipped by POET Nutrition in tank cars.

Currently, much of POET Nutrition's corn oil that is shipped by railroad is being transported by UP to two destinations in New Orleans, Louisiana— one that receives corn oil for export and another that receives corn oil to process it into biodiesel.² The corn oil export facility is served only by UP. The biodiesel facility is located on tracks served by Kansas City Southern Railway that are connected to UP. Due to the location of its origin facilities with access to UP's

¹ POET Nutrition is also a member of Complainant North America Freight Car Association ("NAFCA").

² Some of POET Nutrition's production is sold to domestic purchasers, but this production is typically transported by truck due to the infeasibility and comparatively high cost of shipping it by railroad.

system, and one of its two destinations being physically located only on UP's system, POET Nutrition must rely on UP for rail service.

B. POET Nutrition's reliance on transportation in railroad tank cars

POET Nutrition relies extensively on rail to transport our corn oil distances greater than 700 miles. Approximately [REDACTED] of POET Nutrition's rail-originated traffic is transported by UP due to the location of POET Nutrition's transloading facilities and rail destinations on UP's system. POET Nutrition currently tenders between [REDACTED] and [REDACTED] tank car loads of corn oil to UP each year for transportation on UP's system. Over the relevant time period for purposes of POET Nutrition's claims in this proceeding UP has provided rail transportation service to POET Nutrition in tank cars pursuant to UP's common carrier tariffs, namely UP Tariff 4053 Series, and the various common carrier tariffs and documents it references and incorporates by reference.

In its arrangements with customers POET Nutrition typically pays UP the rates and other charges to transport its products, and then charges its customers a price that includes POET Nutrition's costs of transportation. Since commencing shipping tank cars on UP's system in 2013, POET Nutrition has paid UP approximately [REDACTED] in rates and charges for rail transportation in tank cars we have provided to it.

C. POET Nutrition's Leased Tank Car Fleet

Because UP does not own or lease any railroad tank cars, POET Nutrition must acquire and provide tank cars to UP in order to receive railroad service from UP. Accordingly, we expend approximately [REDACTED] million per year to lease, manage and maintain a fleet of [REDACTED] tank cars we supply to UP and other Class I railroads to fulfill POET Nutrition's rail transportation needs. POET Nutrition initially leased 158 rail tank cars from four rail lessors beginning in late 2012 when POET Nutrition's need for rail transportation of corn oil in tank cars commenced. Due

to market constraints on the availability of suitable tank cars at that time due to the boom in crude oil by railroad service, most of the 158 cars tank cars initially leased by POET Nutrition were constructed specifically for POET Nutrition and were therefore newly constructed when placed into service. Starting in May 2017 and continuing into July 2018, we leased an additional [REDACTED] railroad tank cars by adding [REDACTED] tank cars to our existing lease with [REDACTED] and leasing [REDACTED] newly manufactured tank cars from a new lessor. This increased the total number of tank cars we presently supply to UP to [REDACTED].

POET Nutrition incurs an annual lease rental expense of approximately [REDACTED] for its tank cars. In addition, we incur certain costs to manage and perform some maintenance of the leased tank cars as required by its lease terms. These costs average approximately [REDACTED] per year. In POET Nutrition's experience, lease agreements for tank cars are largely standardized containing "boilerplate" provisions that are not subject to significant negotiation. The provisions of POET Nutrition's railroad tank car leases are therefore very similar in terms of allocating the responsibilities and obligations of the lessor and lessee. One area common to its tank car leases is the allocation of maintenance responsibility. In general, the bulk of the maintenance and repairs of the leased tank cars is performed at the expense of the car owner/lessor at repair shops or other locations they select or approve. However, consistent with industry standards our rail car leases generally make POET Nutrition responsible for the repair of certain components of the cars that could be affected by our use of them, primarily during the loading process. These are typically valves, fittings, plugs, chains and any equipment handled and/or managed by POET Nutrition employees when loading or handled by customers unloading tank cars. POET Nutrition is also responsible for the cost to clean rail tanks cars when necessary. The lessor is responsible for the cost of the 10-year qualifying inspection and periodic maintenance. The inspections must be

performed at a repair facility and cannot be conducted at POET Nutrition facilities. As a result, if during the lease term a rail tank's recertification is due, POET Nutrition must cover the expense of the movement of the rail tank car from our facility to a repair facility for recertification.

The cars leased by POET Nutrition are sufficiently new that most have yet to be transported to a repair shop for repairs or maintenance or requalification. Specifically, as of October 2018, only eight of POET Nutrition's railcars had been sent to a repair shop located on short line railroads for requalification. These cars were not transported by UP, and POET Nutrition avoided any charges for sending the cars to the facility after they had been unloaded and were on their free empty return move under the line haul rate. Other than these eight cars, all other repairs or maintenance have been performed at POET Nutrition facilities via mobile repairs.

Four of POET Nutrition's leases contain a provision which provides POET Nutrition with the right to receive credits to its account for mileage allowance payments received by the lessor from UP and other railroads over the lease term. A collection of the relevant provisions from POET Nutrition's leases is provided in Exhibit A to my verified statement. Accordingly, although POET Nutrition is not entitled to direct payment of mileage allowances by UP, we have contractual rights to such payments if they are made to our car lessors. UP's refusal to pay mileage allowances to the car providers we lease our tank cars from means that POET Nutrition is being deprived of compensation for UP's use of POET Nutrition tank cars.

As a general business goal, POET Nutrition strives to maximize the efficiency with which our rail tank cars are utilized. Toward this end, we closely track the whereabouts and status of the tank cars in our fleet both internally and using third-party providers. In general, the loaded movement of POET Nutrition rail tank cars vary between 8,000 miles to 12,000 miles per year,

per car. Typically, a rail tank car completes [REDACTED] a month and typically completes [REDACTED] loaded moves a year.

Except for certain minor repairs which POET Nutrition hires mobile repair companies to perform at our facilities when practicable, the lessor has the final decision on where a rail tank car is being repaired or requalified to meet regulatory requirements. Lessors also approve who we may use to conduct mobile repairs. When POET Nutrition's leased cars require repairs, we coordinate with our lessors to manage repairs so as to maintain efficiency and meet customer commitments. When a rail tank car is sent to a repair facility, we strive for the fastest turnaround time for the car to be returned into service. The main focus for POET Nutrition is to minimize the amount of car movements made in order to maximize efficiency. Therefore, when a rail tank car needs to be transported to a repair facility POET Nutrition will look at potential diversions when the tank car is returning empty from a loaded move and divert a rail tank car to a repair facility.

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

POET Nutrition also manages its tank car fleet movements so the empty miles do not exceed the loaded miles by 106%, the threshold for being assessed charges under the mileage equalization program established by Ex Parte 328, *Investigation of Tank Car Allowance System*³, and included in Freight Tariff RIC 6007 Series administered by Railinc. This program was designed and implemented for the purpose of incentivizing owners of private tank cars to manage

³ 3 I.C.C. 2d 196 (1986)(“*Ex Parte 328*”).

the movement of their tank cars to minimize the number of empty miles relative to loaded miles, calculated on an annual fleet-wide basis. Accordingly, in the normal course of business, POET Nutrition has always tracked its loaded and empty miles to ensure that it remains within the 106% so as to avoid any charges.

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

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

In addition, POET Nutrition's facilities conduct pre and post load inspections on each tank car before they are offered into transportation. These inspections are done onsite and only require movement to a repair facility if a maintenance issue is found. However, as stated above, we attempt to have the repairs completed via mobile repair units.

UP does not reimburse POET Nutrition for any of the costs it incurs to provide tank cars to UP. First, the common carrier rate documents governing POET Nutrition transportation,

specifically Tariff UP 4053, states as to the rates applicable to corn oil, “Mileage allowance payment on private equipment shall not apply.”⁴ Our belief is that UP considers the terms of UP Tariff 4053 to be non-negotiable. To POET Nutrition’s knowledge, UP has never paid any of our tank car lessors a mileage allowance as compensation for UP’s use of the tank cars they lease to POET Nutrition. Had UP ever paid mileage allowances to our lessors the relevant provisions of our tank car leases would have operated to credit POET Nutrition for the amount of the allowance payment. Neither of these has occurred since POET Nutrition began tendering traffic to UP in 2013.

Second, UP does not compensate POET Nutrition for the use of our leased tank cars in any other manner. I understand that UP has asserted in this proceeding that it fulfills its statutory obligations under §11122 to compensate parties who provide it tank cars by charging discounted “zero allowance” line haul rates. UP has never represented to me, or to my knowledge, others at POET Nutrition that the corn oil freight rates in Tariff UP 4053 are discounted off a higher rail rate for the purpose of compensating POET Nutrition for the use of its tank cars, let alone ever quantified the amount by which its rates are supposedly discounted or how such purported discounts are calculated – even after this case was initiated in 2015. Indeed, POET Nutrition is aware of no evidence that UP even considers its statutory obligation to pay costs incurred by POET Nutrition to provide tank cars to UP when UP establishes rates for POET Nutrition shipments. To the contrary, based on POET Nutrition’s experience in its dealings with UP, UP sets all of its freight rates for tank car shipments based solely on what it believes the market will bear in order

⁴ See, UP Tariff 4053-series, Item 1030-KU, at page 2 of 16.

to maximize UP's revenues and profit. UP has never maintained or represented otherwise to POET Nutrition.

UP's conduct since it began imposing charges pursuant to UP Tariff 6004, Item 55-C Subpart D ("Item 55-C") and UP Tariff 4703, Item 1200 also demonstrates that UP is not offering discounted rates in lieu of paying mileage allowances or otherwise satisfying its obligation to compensate POET Nutrition for providing tank cars used in UP's revenue service. UP did not reduce its freight rates for tank car shipments of corn oil when it began charging for moving empty tank cars to and from repair facilities in 2015. Nor did UP reduce its tank car freight rates when it increased the charges under Item 55-C and Tariff 4703 in 2016, 2017, 2018 and 2019. In fact, since 2015, UP has *increased* POET Nutrition's transportation rates an average of 3-5% per year in 2016, 2017, and 2018.

POET Nutrition has not yet incurred 55-C charges. However, under POET Nutrition's leases, if one of our tank cars was required to go a "Repair Facility" on UP's system as defined by Item 55-C POET Nutrition would be subject to the terms of Item 55-C and the charges in UP Tariff 4703, Item 1200.

VERIFICATION

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

Executed on this 19 day of February, 2019.



Jeff Siebrecht
Senior Rail Distribution Manager

Exhibit A

REDACTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42144

NORTH AMERICA FREIGHT CAR ASSOCIATION; AMERICAN FUEL &
PETROCHEMICAL MANUFACTURERS; THE CHLORINE INSTITUTE; THE
FERTILIZER INSTITUTE; AMERICAN CHEMISTRY COUNCIL; ETHANOL PRODUCTS,
LLC D/B/A POET ETHANOL PRODUCTS; POET NUTRITION, INC.; AND CARGILL
INCORPORATED v. UNION PACIFIC RAILROAD COMPANY

Docket No. NOR 42150

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

Docket No. NOR 42152

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

Docket No. NOR 42153

ARKEMA INC. v. UNION PACIFIC RAILROAD COMPANY

VERIFIED STATEMENT OF JOHN M. KIERAS

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

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

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

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

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

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

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

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

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

2. Submittal of Mileage Rate Allowance Information to the Railroads

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

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

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

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

3. Loaded and Empty Mileage Data

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

4. Railroad Use of Mileage and Allowance Data

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

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

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

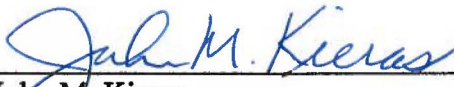
In my opinion, if the Surface Transportation Board found that UP or any other railroad had violated applicable law by refusing to pay mileage compensation for its use of railroad tank cars provided to it, a calculation of the past mileage compensation amounts owed by the railroad could be accomplished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

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

VERIFICATION

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

Executed on this 15th day of February, 2019.



John M. Kieras

CERTIFICATE OF SERVICE

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


Thomas W. Wilcox