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Ex Parte No. 328

INVESTIGATION OF TANK CAR
ALLOWANCE SYSTEM

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

RHONDA S. FERGUSON
CRAIG V. RICHARDSON
DANIELLE E. BODE
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
(402) 544-7004

MICHAEL L. ROSENTHAL
Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, D.C. 20001
(202) 662-6000

Attorneys for Union Pacific Railroad Company

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I. Introduction

Union Pacific Railroad Company hereby petitions the Surface Transportation Board to terminate our obligation to comply with the mileage equalization provisions of the National Tank Car Allowance Agreement adopted by the Interstate Commerce Commission in *Investigation of Tank Car Allowance System* (“System - 1986”), 3 I.C.C.2d 196 (1986). If the Board grants this petition, Union Pacific will apply the same rules to charging for empty movements of private tank cars that we apply to empty movements of all other private cars (*i.e.*, cars not owned by railroads).

Union Pacific applies a “one free empty” rule to empty movements of private cars other than tank cars: after a loaded movement on which we receive line-haul revenue, Union Pacific will route the empty car back to the loading point, or to any Union Pacific-served station or offline junction, for no charge. For any subsequent (or “back-to-back”) empty movements, Union Pacific imposes a mileage-based charge.¹

¹ There are two situations in which we do not charge for back-to-back empty moves: we do not charge for moving empty cars to and from repair facilities when cars are damaged by Union Pacific or waybilled to a shop by Union Pacific personnel after being taken out of service following a Union Pacific inspection.

Charges for empty movements of private tank cars are currently governed by a complex set of rules called mileage equalization.² Under mileage equalization, loaded and empty mileage for private tank cars is aggregated annually across all railroads for each tank car owner.³ A car owner pays no empty mileage charges unless its ratio of empty-to-loaded mileage exceeds 106%. If an owner's aggregate empty mileage exceeds its aggregate loaded mileage by more than 6%, the owner must pay for the excess empty miles at a prescribed rate. The total payments from all owners are then divided among railroads with aggregate empty mileage that exceeds aggregate loaded mileage by more than 6%. Adding to the complexity, certain types of empty movements are excluded from equalization accounting, including movements of new or rebuilt cars prior to their first loaded movement; movements of cars for sale or scrap; and, if individual railroads so choose, movements of cars to and from repair shops. Railroads independently establish charges for these other types of empty movements.⁴

In *System - 1986*, the Commission prescribed the 106% equalization ratio, the excess mileage charge, and two specific accounting rules. The current equalization rules also include several additional rules governing equalization accounting. The Commission did not prescribe the additional rules; rather, they are the product of agreement among railroads. The full set of rules is published in Items 187 and 190 of Freight Tariff RIC 6007-series. Nearly one hundred

² See Freight Tariff RIC 6007-O, Items 187 & 190. The current and prior versions of RIC 6007-series are available at <https://www.railinc.com/rportal/national-tariffs-ric-6007-o>.

³ All railroad cars are marked with a two to four letter "standard carrier alpha code," commonly called a "reporting mark." The reporting mark identifies the car's owner. As a result of mergers and acquisitions, some owners have multiple assigned reporting marks.

⁴ Railroads' right to establish charges for tank cars moving to and from repair shops is being challenged in *North America Freight Car Association v. Union Pacific Railroad* ("NAFCA v. Union Pacific"), NOR 42144 *et al.* Union Pacific is asking the Board to grant this petition regardless of the outcome in that proceeding.

railroads participate in the tariff, though many of those railroads, including Union Pacific, have excepted themselves from participation in certain of the non-prescribed equalization rules.

Mileage equalization is a regulatory dinosaur. It was intended to compensate railroads for handling empty tank car movements and to encourage efficient fleet management by car owners and shippers. But it pursues these valid goals by embracing concepts of collective responsibility and cross-subsidization that are wholly inconsistent with the modern statutory framework. Also, the aggregation of mileage by car owner across the industry dilutes the link between car owners' and shippers' fleet management decisions and the resulting equalization charges, thus diluting incentives to operate efficiently. The link between actions and consequences is further diluted because car owners and shippers are not billed for mileage equalization until five months after the end of the year in which their empty movements occurred. And any small impact mileage equalization actually has on efficiency is outweighed by the substantial costs of administering this complex system.

Union Pacific's rules for empty movements of private cars other than tank cars are vastly superior to mileage equalization. They are easy to understand and apply. With the one free empty movement following a loaded movement, shippers can have their car returned to the original loading site for reloading, repositioned to a different loading site, or sent to a repair facility, regardless of the empty mileage involved. The rules promote efficient fleet management by relying on market-based rates in situations where empty mileage charges are imposed. They further enhance efficiency because neither Union Pacific nor shippers need to devote their resources to resolving disputes about mileage reporting or routing decisions.

In Part II of this petition, Union Pacific describes the mileage equalization system. We discuss why mileage equalization was developed and how certain rules came to be prescribed.

We then discuss Commission and Board decisions defining the boundaries of the prescribed rules in light of modern statutory principles – decisions that undermine any justification for binding railroads to the prescribed rules. In Part III, Union Pacific explains why the Board should terminate our obligation to participate in mileage equalization and allow us to adopt a market-based approach to charging for empty movements of private tank cars. In Part IV, we propose a procedural schedule for considering our petition. Because the requested relief will modify the Commission’s order in *System - 1986*, and because persons in addition to Union Pacific will be affected, we suggest the Board give notice it is commencing a proceeding to consider our petition in the *Federal Register*. We provide a draft notice in Appendix A.

II. Background

A. The development of mileage equalization.

From the earliest days of railroading, railroad tariffs required shippers to “equalize” loaded and empty mileage of private tank cars – that is, “to give each route, or each carrier in the route, a loaded mile for each empty mile of haul, under penalty of paying rates for hauling empty equipment only.” *In the Matter of Private Cars*, 50 I.C.C. 652, 686 (1918). Then, as now, empty tank cars often returned to their preceding origin by the reverse route of their loaded movements, which equalized loaded and empty miles. However, reverse routing would not be followed if the shipper directed a railroad to move an empty car to a different loading point or a repair facility, or to return a car to the preceding origin using a circuitous route.⁵ Thus, mileage equalization helped advance two related objectives: (i) compensate railroads, which are generally paid only

⁵ As discussed in Section II.B.1, until the 1960s, railroads paid shippers mileage allowances – *i.e.*, compensation for use of shipper-provided cars – on both loaded and empty cars. As a result, shippers that did not need their cars returned immediately for reloading had an incentive to direct railroads to return the cars using circuitous routes to earn greater mileage allowance payments. *See, e.g., Tank Car Allowances, Southern Ry. System*, 329 I.C.C. 466, 497 (1967).

for loaded movements, for “excess” empty miles; and (ii) encourage shippers to manage their fleets more efficiently and reduce empty mileage.⁶

B. The transition to prescribed rules for mileage equalization.

Prior to 1979, railroads could propose changes to their mileage equalization rules, and those changes were subject to challenge before the Commission. Since 1979, core provisions of the equalization rules have been locked in place as the result of agreements among railroads, car owners, and shippers that were given prescriptive force by the Commission. The transition to prescribed rules resulted from litigation that began in the 1960s.

In the 1960s, out of concern the then-existing system of uniform mileage allowances was inhibiting construction and acquisition of new cars and inauguration of technological advances, railroads began proposing multilevel systems of allowances. In conjunction with their proposed changes to mileage allowances, railroads also began proposing changes to mileage equalization. The Commission’s responses to these proposals helped lay the groundwork for the mileage equalization rules the Commission prescribed in *System - 1986*.

1. The Commission supports elimination of mileage equalization in *Tank Car Allowances, Southern Railway System*.

Mileage equalization appeared to be on the verge of elimination after the Commission’s decision in *Tank Car Allowances, Southern Railway System*, 329 I.C.C. 466 (1967). That case involved the Commission’s review of two proposed multilevel systems of mileage allowances, “radical departure[s] from the prior method under which a single uniform allowance on all tank cars had been set on the basis of an overall average of ownership costs for the entire fleet.” *Id.* at

⁶ See, e.g., *Mileage Allowances, Tank Cars Between Points in the United States* (“*Mileage Allowances, Tank Cars*”), 337 I.C.C. 23, 33 (1970) (noting “the need for the carriers having a discipline to regulate empty mileage”); *id.* at 59 (describing “[t]he theoretical basis for an equalization rule, to impose an economically useful discipline upon those who furnish private tank cars to the railroads”).

470. One proposal included two other novel, related features: payment of allowances on loaded miles only and elimination of mileage equalization. The Commission embraced these features, stating: “the payment of allowances on the basis of loaded miles only will encourage more efficient use of equipment in revenue service” and “will also eliminate any necessity for continuing the equalization rule and, consequently, the required detailed recordkeeping.” *Id.* at 482. The Commission said the equalization rule had not effectively protected railroads from excessive empty movements. *Id.*⁷ It said railroads concerned about being unduly burdened with nonrevenue movements could adopt “appropriate tariff provisions . . . requiring a prior or subsequent loaded movement.” *Id.* The Commission also agreed in theory with the use of multilevel allowances, but it found fault with the methodology used to establish the allowance levels. It therefore ordered the railroads to cancel the proposed allowances and to establish new allowances reflecting the guidance provided in its decision. *See id.* at 483-84.

2. The Commission lays the groundwork for the core provisions of the mileage equalization system in *Mileage Allowances, Tank Cars*.

By the time multilevel allowance issues returned to the Commission, railroads were no longer proposing to eliminate mileage equalization. The Commission addressed challenges to the railroads’ revised proposals for multilevel allowances and rules relating to movements of empty cars in *Mileage Allowances, Tank Cars*, 337 I.C.C. 23 (1970).

In the challenged rules relating to empty car movements, the railroads proposed to distinguish between empty cars moving as “commercial movements” and empty cars moving as

⁷ Under then-existing rules, car owners almost never paid mileage equalization, even when they had excess empty miles. Any excess empty miles at the end of the 12-month equalization period would be carried over and accumulated as long as the car owner tendered an equivalent number of *loaded miles* during the succeeding 6 months. The rule did *not* require car owners to equalize excess empty miles by tendering an *excess of loaded miles*. *See id.* at 498.

“instruments of transportation.” *Id.* at 31.⁸ For cars moving as commercial movements, including movements of new or rebuilt cars before their first loaded movement, movements to facilities for lining, relining or modification, and movements for sale or scrap, the railroads proposed charging tariff rates applicable to other movements of empty equipment on its own wheels. *See Mileage Allowances, Tank Cars*, 337 I.C.C. at 31 & n.9. For cars moving as instruments of transportation, including movements before or after a loaded haul, movements to and from repair facilities, and movements between shippers jointly using the cars, the railroads proposed a “100-percent equalization rule.” *See id.* at 31 n.10 & 32-33. Under the proposed 100-percent rule, loaded and empty miles would be aggregated each year by individual railroad according to car reporting marks. Railroads would charge tariff rates for empty miles exceeding 100% of loaded miles, with a provision for a refund if the car owner provided excess loaded miles in the first six months of the subsequent year. *See id.* at 32-33.

The Commission concluded railroads could charge tariff rates for commercial movements of empty cars. *See id.* at 31, 57-58.⁹ It also accepted the conclusion of its hearing examiners that railroads needed “a discipline to regulate empty mileage,” even if they were paying allowances on loaded miles only. *Id.* at 33. However, the Commission rejected the proposed 100-percent

⁸ The distinction appears to reflect an attempt to address an earlier ICC holding that tank cars moving in bad order status for repairs were not subject to charges for line-haul movements or switching movements within terminals. *See Union Tank Car Co. Terminal Service*, 268 I.C.C. 338, 341-42 (1947) (holding empty tank cars moving for repairs were not “property,” for which free service would be unlawful, but instead were “instrumentalities of transportation”). Notably, an even earlier ICC decision indicated private cars moving empty to and from repair shops were subject to transportation charges. *See Use of Private Passenger Train Cars*, 155 I.C.C. 775, 786-87 (1929).

⁹ However, the ICC rejected the category of “lining, relining, or modification.” *Id.* at 35. The agency apparently agreed with its hearing examiners that movements for “lining” were covered as movements of cars prior to the first loaded movement, movements for “relining” were more like movements for repair, for which tariff charges were not appropriate, and the term “modification” was too vague. *See id.* at 62.

equalization rule as inconsistent with its view that the cost of repair moves should be borne by railroads, not car owners. It agreed with its hearing examiners that “some mileage in excess of 100 percent is directly related to matters such as ordinary repairs, moving bad order cars to and from shop facilities, which are transportation services the carriers should provide without extra charge.” *Id.* (footnote omitted). The Commission also agreed with its hearing examiners that equalizing loaded and empty miles by individual railroad “would impose administrative costs and burdens on car owners which are not justified.” *Id.*

With regard to mileage allowances, the Commission found the railroads had not shown their proposal to be just and reasonable and prescribed interim allowances to give the railroads time to supplement the record with additional data. *See id.* at 29.

3. The railroads and private car interests generally follow the Commission’s guidance in settling *Manufacturing Chemists Association v. Aberdeen & Rockfish Railroad*.

The Commission next touched on mileage equalization in connection with *Manufacturing Chemists Association, Inc. v. Aberdeen & Rockfish Railroad Co.*, 350 I.C.C. 886 (1975), where it directed an interim increase in tank car allowances and found a rulemaking should be instituted to settle more definitively the issues raised by the tank car allowance system. *See id.* at 887.

After the Commission issued its decision, the railroads and private car interests entered into a settlement. As part of the settlement, the parties agreed to publication of equalization rules similar in form to the current rules. Specifically, the parties agreed to a 105-percent equalization rule (rather than the 100-percent rule rejected in *Mileage Allowances, Tank Cars*), with a charge of 18 cents per mile for excess empty miles (well below tariff rates for commercial movements of empty cars approved in *Mileage Allowances, Tank Cars*). Empty movements to shops were included in equalization accounting (despite statements in *Mileage Allowances, Tank Cars* that railroads should transport cars for ordinary repairs without charge). Loaded and empty miles

were aggregated by car reporting mark for all railroads collectively, rather than for each railroad individually (consistent with statements in *Mileage Allowances, Tank Cars*).¹⁰

4. The Commission prescribes mileage equalization as part of a broader compromise addressing mileage allowances in *System* - 1979.

In July 1976, the Commission instituted the rulemaking contemplated in *Manufacturing Chemists*. However, at the suggestion of interested parties, the Commission held the proceeding in abeyance and ordered the formation of “a committee . . . composed of representatives of railroads, tank car leasing interests, and shipper interests, . . . to study the issues raised by the notice of proposed rulemaking and submit proposed solutions to the Commission for approval.” *Investigation of Tank Car Allowance System*, Ex Parte No. 328 (ICC served Sept. 16, 1976). The committee became known as the Joint Negotiating Committee (“JNC”).

Shortly after the JNC was formed, the Commission decided *General American Transportation Corp. v. Indiana Harbor Belt Railroad Co.* (“*IHB-I*”), 357 I.C.C. 102 (1977), *aff’d sub nom. Ind. Harbor R.R. v. Gen. Am. Transp.*, 577 F.2d 394 (7th Cir. 1978). In *IHB-I*, the Commission strongly endorsed the *Manufacturing Chemists* settlement’s mileage equalization provisions, likely ensuring they would become part of any final agreement.

IHB-I involved a challenge to tariff charges the Indiana Harbor Belt Railroad (“IHB”) had instituted for empty movements of tank cars to and from repair facilities. The Commission held IHB’s charges were unlawful. It said responsibility for repair moves must be apportioned among all railroads that derived more than a *de minimus* amount of revenue from the movement of privately owned cars. *See id.* at 136. It said the equalization rule adopted in the *Manufacturing Chemists* settlement appeared to be a workable solution, and it ruled: “IHB, along with all other

¹⁰ The settlement is described in *General American Transportation Corp. v. Indiana Harbor Belt Railroad Co.*, 357 I.C.C. 102, 128 & App. A (1977).

railroads which derive direct or indirect economic benefit from the use of privately owned tank cars, must participate in [the equalization system] so that [IHB] and all other lines will be justly and reasonably compensated for its share of the costs of maintaining a privately owned car fleet.” *Id.* at 137. The Commission was so enamored with the equalization settlement it found there was “an urgent need to establish a similar provision or provisions for privately owned cars other than tank cars.” *Id.*

Against this background, the JNC negotiated an agreement the Commission approved in *Investigation of Tank Car Allowance System* (“System - 1979”), Ex Parte No. 328 (ICC served June 15, 1979). The agreement focused on mileage allowances. However, it also addressed certain aspects of mileage equalization, building on the *Manufacturing Chemists* settlement and the Commission’s decision in *IHB-I*. Specifically, the equalization provisions of the agreement established: (i) a 106% equalization ratio and provisions for revisiting the ratio; (ii) an indexing process for updating an 18 cent charge for excess empty miles; and (iii) provisions for a penalty if non-railroads “short-routed” empty cars back to the immediately prior loading point, and an adjustment to the equalization account when reverse empty routing was not followed by carriers and excess empty mileage was incurred due to the use of different interchange points or carriers.

5. The Commission prescribes mileage equalization again as part of a broader compromise in *System - 1986*.

The mileage allowance provisions of the agreement prescribed in *System - 1979* did not last very long. In 1982, the Commission reopened *System - 1979* for renegotiation after railroads expressed concern that the mileage allowance formula was overcompensating tank car owners. *See Investigation of Tank Car Allowance System*, 367 I.C.C. 48 (1982).

After several years of negotiations, a new JNC sent the Commission a revised National Tank Car Allowance Agreement (the “Agreement”). The Commission approved the Agreement and prescribed its terms in *System - 1986*.

The Agreement focused on mileage allowances. The mileage equalization provisions approved in *System - 1979* were carried forward into Section 1 of the Agreement essentially unchanged. As the Commission explained, “the mileage equalization system (only limited aspects of which are addressed by the agreement) was not a subject of the present round of negotiations, but was deferred for the future.” *System - 1986*, 3 I.C.C.2d at 202.

In sum, as a result of *System - 1986*, the limited aspects of mileage equalization addressed in the Agreement were prescribed, but railroads remained free to vary other aspects of the mileage equalization system, and shippers remained free to challenge them. *See id.*

C. The Commission recognizes *IHB-I*’s “free repair move” rule is inconsistent with Congressional direction in the 4R Act and Staggers Act.

The railroads’ continued freedom to vary non-prescribed aspects of mileage equalization was an important, intended feature of *System - 1986*. The Commission had reopened *IHB-I* in 1984 and, concurrently with the JNC process, it was reconsidering, and it ultimately rejected, what had become known as the “free repair move” rule.

1. The Commission reverses *IHB-I* and allows tariff charges for empty repair moves in *IHB-II*.

In *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), the Commission reversed *IHB-I* and held railroads *could* file tariffs with charges for moving empty, privately owned cars to and from repair facilities. The Commission recognized the foundation of its decision in *IHB-I* – the custom of handling railroad equipment costs through “collective responsibility” – had been “established in an era when rate averaging and cross

subsidy were commonplace, often encouraged and clearly deemed acceptable.” *Id.* at 607.¹¹

However, as the Commission observed, times had changed, leaving *IHB-I*’s rationale “in direct conflict with Congressional direction in the statutory provisions of the 4R Act and the Staggers Act.” *Id.* at 611. Specifically, the Commission concluded *IHB-I*’s approach improperly “requires carriers to establish rates or free movements which do not contribute to going concern value . . . , prohibits individual pricing for distinct services . . . , encourages cross-subsidization . . . , and promotes inefficiency by giving private car owners little or no incentive to consider transportation costs in selecting repair facilities.” *Id.*; *see also id.* (“[*IHB-I*’s] method of compensation for cars moving empty in repair moves is directly contrary to current statutory provisions that require the Commission to encourage efficient pricing”). The Commission assumed its decision would affect mileage equalization because repair moves subject to charges would be excluded from equalization accounting.¹² But it knew the parties in Ex Parte No. 328 were already planning “to restudy the 106% equalization ratio,” so it left the matter “to the parties in interest.” *Id.* at 619.

¹¹ Notably, the Commission recognized that, for at least two reasons, “free empty repair moves” were never necessarily “free” under the mileage equalization system. First, such moves would contribute to empty mileage charges, to the extent a car mark’s aggregated empty miles exceeded loaded miles by 5%. *See id.* at 605. Second, railroads could attempt to recover the costs through line-haul rates, although the ICC recognized that “[l]ine-haul rates frequently are set at levels determined by competitive factors without necessarily tracking all costs closely.” *Id.* at 614.

¹² That is, the 106% ratio was developed when mileage for empty repair moves counted towards the 106% threshold. If mileage for empty repair moves no longer counts towards non-revenue empty miles, it is far less likely any car owner would ever exceed the 106%, despite potential inefficiencies associated with other types of non-revenue empty repair moves, such as empty moves to reposition cars among origin locations.

2. The Commission confirms its intent to allow all railroads to charge for empty repair moves under all circumstances in *Buffalo & Pittsburgh*.

The Commission confirmed the breadth of its *IHB II* ruling in *Charges for Movement of Empty Cars, Buffalo & Pittsburgh Railroad, Inc.* (“*Buffalo & Pittsburgh*”), 7 I.C.C.2d 18 (1990). The question in *Buffalo & Pittsburgh* was whether the railroad’s tariff imposing charges for empty repair moves, adopted in *IHB-II*’s wake, was a “departure tariff.” Classifying the new tariff as a departure tariff would have delayed its implementation because the Agreement made departure tariffs subject to Commission investigation and required railroads to justify such tariffs by a showing of “special circumstances.” *Id.* at 18 (citing Agreement § 8).

The Commission concluded the repair move tariff was not a departure tariff. It said the departure tariff requirements apply to the Agreement’s mileage allowance provisions, not the mileage equalization provisions. The Commission also said requiring repair move tariffs to be “individually investigated and meet a special circumstances test would be inconsistent with the rationale underling [its] reversal of *IHB-I*: the elimination of inequities, undesirable cross-subsidies and inefficiencies.” *Id.* at 28. Thus, “[i]f the *IHB-II* decision is to have its intended remedial effect, all carriers with potential for repair moves must be free to impose charges.” *Id.*¹³

3. The Board endorses use of market-based charges to discourage excess movements of empty tank cars and encourage efficient fleet-management in *NAFCA v. BNSF*.

After *Buffalo & Pittsburgh*, neither the Commission nor the Board addressed the Agreement’s mileage equalization provisions until *North America Freight Car Association – Protest & Petition for Investigation – Tariff Publications of the Burlington Northern & Santa Fe*

¹³ The Commission also opined it was “economically inevitable” that most rail carriers would move to a system of charging for empty repair moves, “since any railroad with a potential for repair move traffic will have everything to gain and nothing to lose by publishing such tariffs.” *Id.* at 23 n.9.

Railway, NOR 42060 (STB served Aug. 13, 2004). That case involved challenges to BNSF tariff provisions that, among other things, imposed a diversion charge on movements of empty private tank cars. A diversion occurs when a customer changes the bill of lading and redirects the cars. BNSF's tariff allowed one free diversion, then imposed a charge for any subsequent diversion requests. *See id.* at 6. NAFCA contended BNSF's diversion charge constituted a departure tariff because BNSF intended the charge to curtail excess movements of empty cars, and, under the Agreement, payment for empty miles exceeding 106% of loaded miles was the agreed-upon penalty for excess empty movements. *See id.*

The Board concluded the Agreement did not preclude BNSF's use of diversion charges. Looking to the Agreement's terms, it found the mileage equalization provision was narrow: the parties "expressly agreed to an approach where empty cars would be permitted to return to their origination point at no additional charge, or if they traveled a longer distance, that the car owner would be charged for each additional mile when the distance exceeded the loaded route by 6%." *Id.* at 7. The Board said the Agreement did not address other types of costs a railroad might incur in moving empty cars, such as reclassification and administrative costs associated with multiple diversions. *See id.* The Board also said construing the Agreement to preclude diversion charges would be inconsistent with the purpose of mileage equalization, which is "to encourage private tank car owners to manage their fleets more efficiently to reduce excessive empty mileage." *Id.* at 7. Finally, the Board said construing the Agreement to preclude diversion charges could create cross subsidies: "car owners that manage their tank car fleet well could be subsidizing those owners that manage their fleet poorly." *Id.*

D. Mileage equalization issues resurface at the Board in complaints about accounting for empty miles in *Cargill*.

The Board's next encounter with mileage equalization began in 2010, when several shippers complained railroads were unreasonably including in mileage equalization accounting certain empty miles they should have excluded. Specifically, the shippers said railroads should be excluding excess empty miles incurred when railroads chose to return empty cars to the origin using a longer route than was used for loaded cars. The shippers also said railroads unreasonably refused to exclude the empty miles incurred when shippers direct cars to shops to comply with Department of Transportation, Federal Railroad Administration, or Association of American Railroads repair, inspection, or retrofit programs. See *First Am. Compl., Cargill, Inc. v. Aberdeen & Rockfish R.R.*, NOR 42117 (filed Feb. 17, 2010). The case was settled voluntarily in a way that did not require any changes to the Agreement and was dismissed with prejudice. See *Cargill, Inc. v. Aberdeen & Rockfish R.R.*, NOR 42117 (STB served Aug. 29, 2013).

E. Mileage equalization issues surface again in complaints about Union Pacific's adoption of charges for empty repair moves.

The Board is presently considering a mileage equalization dispute in *NAFCA v Union Pacific*, NOR 42144 *et al.* That case began when the complainants challenged Union Pacific's adoption of the same type of empty repair move charge authorized in *IHB-II*. Based on publicly available information, most Class I railroads currently appear to charge for some empty repair moves. Several Class I railroads charged for empty repair moves before Union Pacific. Others appear to have adopted similar charges after Union Pacific. Specifically:

- Canadian Pacific long ago excepted itself from mileage equalization rules providing for movements of empty tank cars without charge to and from repair facilities unless the empty movement is immediately preceded by a loaded revenue movement on Canadian Pacific. See Freight Tariff RIC 6007-N, Supp. 7, Item 99-A (effective Jan. 1, 2010).

- KCS long ago excepted itself from mileage equalization rules providing for free switching of empty tank cars to or from repair facilities. *See* Freight Tariff RIC 6007-N, Item 124 (effective Mar. 1, 2009). In addition, in February 2017, KCS adopted charges for private tank cars moving empty on KCS immediately preceding an empty move on KCS resulting in back to back empty moves (e.g., empty moves to repair facilities preceding empty moves from repair facilities). *See* Tariff KCS 37 B, Item 120 (effective Feb. 1, 2017).¹⁴
- Since at least March 1, 2011, Norfolk Southern has imposed round trip handling charges of \$350 when private cars, including empty tank cars, move between a Norfolk Southern classification yard or interchange track and repair, storage, or cleaning facilities within the same switching district, unless it receives line haul revenue to or from the repair or storage area. *See* Freight Tariff RIC 6007-N, Item 135 (effective Mar. 1, 2009); *see also* Freight Tariff NS 8002-A, Item 3000 (effective Mar. 1, 2011).¹⁵
- Since March 1, 2015, BNSF has excepted itself from mileage equalization rules providing for movements of empty tank cars without charge to and from repair facilities unless the empty movement is immediately preceded by a loaded line haul revenue movement on BNSF. *See* Freight Tariff RIC 6007-O, Item 71 (effective Mar. 1, 2015).
- Since September 1, 2015, Canadian National has excepted itself from mileage equalization rules providing for movements of empty tank cars without charge to and from repair facilities unless the empty movement is immediately preceded by a loaded line haul revenue movement on Canadian National. *See* Freight Tariff RIC 6007-O, Item 90 (effective Sept. 1, 2015).

Union Pacific is the only railroad whose charges for empty repair moves have been challenged at the Board.

In *NAFCA v. Union Pacific*, the complainants argue either *IHB-II* does not allow railroads to impose charges for empty repair moves unless they are paying mileage allowances (which is rarely the case for Union Pacific), or the Board should reverse *IHB-II*. Union Pacific contends *IHB-II* and subsequent decisions make clear the payment of mileage allowances has no

¹⁴ Available at http://www.kcsouthern.com/KCS_Applications/Web/Web%20Sites/MyKCS.Manuals.WebSite/Manuals_Sources/Tariffs/2017/KCS%2037%20B%20Effective%202.1.17.pdf

¹⁵ Available at <http://www.nscorp.com/nscorphtml/publications/NS8002-A.pdf>

bearing on the right to charge for empty repair moves, and the Board should reaffirm *IHB-II*. But regardless of the outcome in *NAFCA v. Union Pacific*, the Board should terminate the obligation of Union Pacific (and other railroads, if they so request) to comply with the mileage equalization provisions of the Agreement adopted in *System - 1986*. Such a ruling would allow Union Pacific to exit participation in the convoluted and archaic mileage equalization system and treat empty private tank cars just like other empty private cars that traverse our network.

F. Current mileage equalization rules.

The current mileage equalization rules are set forth in Items 187 and 190 of Freight Tariff RIC 6007-O. The rules have remained largely unchanged over the past three decades. Item 187.A.1 sets out the basic rule, including the 106% equalization ratio and the principle of aggregating loaded and empty mileage by owner of reporting marks:

Should the aggregate empty mileage accumulated by tank cars carrying any of the reporting marks assigned to any one person or company during a calendar year exceed the aggregate loaded mileage during the same calendar year by more than six (6) percent, such excess mileage must be paid for by the person or company to whom the reporting marks are assigned at the rate of ninety-five (95) cents per mile, without minimum, subject to the procedures outlined in Part D

The remaining sections in Part A of Item 187 address particular circumstances in which empty mileage will not be included in the equalization account and other accounting procedures. Item 187.A.2 provides “[m]ileage on empty cars moving on revenue billing will not be included in the equalization account.” Item 187.A.3 identifies several circumstances in which empty mileage for cars moving to and from repair facilities will not be included in the equalization account. Item 187.A.4 provides adjustments will not be made for empty mileage caused by railroad errors; mileage accumulated on cars moving to or from repair facilities due to railroad damage; or mileage accumulated due to longer routes for railroad convenience, detours, and

Board service orders. Item 187.A.5 describes the process for addressing mileage accounting errors. Part B requires carriers to submit monthly reports to the assignee of each reporting mark. Part C addresses accounting procedures when cars change owners. Part D addresses the annual equalization billing and collection process and provides for distributing collected charges to the participating carriers “in direct proportion to such carriers[’] portion of excess empty mileage to the total accumulated excess empty mileage.”

Item 190 provides rules for handling of empty tank cars, including the “free empty repair” rule. Item 190.1 establishes that, in the absence of timely instructions from the car owner or lessee, the carrier at the unloading point “is authorized to forward the empty car to the origin point of the last load via reverse of the loaded route.” Item 190.2.A sets out the default rule that carriers will not separately charge for empty moves, including empty repair moves, stating:

Except as otherwise provided in this tariff, cars covered by this section will be moved empty without charge between stations or junction points upon receipt of instructions from the car owner or lessee confirmed in writing.

Item 190.2.B specifically identifies several types of empty movements that will be treated as revenue moves – *i.e.*, new or restenciled cars moving prior to their first loaded move and cars moving for sale or scrap. Item 190.2.C contains the two accounting-related rules prescribed in *System - 1979* and incorporated in § 1 of the Agreement – *i.e.*, provisions for (i) a penalty if the car owner or lessee issues instructions to return cars to the origin of the last load by a specific routing other than the reverse routing of the loaded movement, and (ii) the exclusion of any resulting excess empty miles from equalization accounting if the carriers depart from the destinations, junctions, or carriers of the reverse route of the load.

Tariff RIC 6007-O also contains Items creating carrier-specific exceptions to certain rules, including Item 190’s “free empty repair” rule. *See, e.g.*, Item 35 (multiple carriers); Item

71 (BNSF Railway); Item 75 (Buffalo & Pittsburgh Railroad); Item 80 (Cedar Rapids & Iowa City Railway); Item 90 (Canadian National Railway); Item 99 (Canadian Pacific Railway); Item 104 (Chicago South Shore & South Bend Railroad); Item 120 (Iowa Interstate Railroad); Item 124 (Kansas City Southern Railway); Item 135 (Norfolk Southern Railway); Item 150 (ST Rail System); Item 170 (Union Pacific Railroad).

If the Board grants this petition, Union Pacific would join the list of carriers not participating in the provisions of Item 187, *see* Item 35 (listing multiple carriers), and amend Item 170 to make clear we would handle empty tank cars under our “one free empty” rule, rather than the specific provisions of Item 190.

III. The Reasons For Union Pacific’s Petition

As Union Pacific explains in *NAFCA v. Union Pacific*, the prospect of large numbers of empty tank cars moving over our network to repair facilities prompted us to take a fresh look at mileage equalization and to question whether empty movements of private tank cars should be treated differently from empty movements of other private cars.

Union Pacific concluded mileage equalization does not provide appropriate compensation for handling empty tank cars, was designed to meet the demands of a regulatory framework that was abandoned as flawed long ago, and is an unnecessarily complex and costly way to address responsibility for empty movements. We concluded the “one free empty” rule we apply to all other types of private equipment was a better way to encourage efficient fleet management and charge appropriately for moving empty cars.

In January 2015, Union Pacific took a step towards treating empty movements of private tank cars like empty movements of other private cars. As allowed by *IHB-II*, and consistent with our “one free empty” rule, Union Pacific instituted mileage-based charges for empty movements of tank cars to and from repair facilities, when those movements are not immediately preceded

by a loaded movement. That is, after Union Pacific handles a loaded car moving from origin to destination, the shipper can use its one free empty movement to send the car wherever it wants – the original loading point, a different loading point, or a shop – but the shipper will be charged for any subsequent empty movements before the next loaded movement.

Union Pacific wanted to apply our “one free empty” rule to all empty movements of private tank cars, not just movements to and from repair facilities. However, we concluded we could not safely apply our “one free empty” rule more broadly to all empty movements of tank cars without first obtaining relief from the mileage equalization provisions of the Agreement. Although the Agreement addresses only limited aspects of mileage equalization and the boundaries of the prescription may be subject to debate, the basic principle of mileage equalization was part of the Commission’s prescription of the Agreement in *System - 1986*. We participated in that proceeding through the Association of American Railroads, so we believe we cannot simply adopt a different method of addressing empty movements of private tank cars. Union Pacific is thus filing this petition to terminate our obligation to participate in the mileage equalization provisions of the Agreement.¹⁶

¹⁶ To the extent Union Pacific must meet the requirements of 49 C.F.R. § 1115.4 to obtain the requested relief, this petition describes the substantially changed circumstances that have occurred in the statutory and regulatory framework since the Board prescribed the mileage equalization system over 30 years ago. We ask the Board to make any required determination that such changed circumstances constitute “substantially changed circumstances” under section 1115.4. In addition, as this petition also shows, railroads’ widespread adoption of charges for empty repair moves as permitted by *IHB-II* undermines the prescribed mileage equalization system and also constitutes “substantially changed circumstances” within the meaning of section 1115.4, and the Board should make such a determination on those separate and independent grounds as well.

A. Tank car mileage equalization is an economically flawed and inefficient way to address movements of empty private tank cars, especially compared with Union Pacific’s preferred “one free empty” rule.

Mileage equalization is economically and practically inferior to Union Pacific’s preferred “one free empty” rule for addressing empty movements of tank cars. Mileage equalization does not allow railroads to charge market-based rates for moving empty tank cars; it overemphasizes excess miles and underemphasizes extra movements; and its reliance on aggregation of loaded and empty miles by car owner for the whole rail network produces cross-subsidies. All these flaws in mileage equalization mean railroads are undercompensated for their costs of moving empty tank cars, and car owners and shippers never bear the full consequences of their fleet management decisions. Mileage equalization is also more costly and more complicated to administer than our preferred alternative. We discuss these issues below.

1. Mileage equalization does not allow railroads to charge market-based rates for moving empty tank cars.

Mileage equalization does not allow railroads to charge market-based rates, so it does not provide market-based compensation to railroads or market-based incentives to car owners and shippers to manage their fleets efficiently. Mileage equalization charges are calculated using a prescribed rate. The rate is not market-based. It reflects a base rate negotiated in the late 1970s (\$0.18/mile), adjusted annually using an index that compares railroads’ current costs with 1978 costs. *See* Agreement § 1(c).¹⁷ Presently, the prescribed rate is just \$0.95/mile. In comparison,

¹⁷ *See also* Freight Tariff RIC 6007-O, Item 187 (effective Sept. 1, 2018) (current per mile rate); *IHB-I*, 357 I.C.C. at 128 (discussing \$0.18/mile figure as part of a compromise solution in the *Manufacturing Chemists* case that was published, effective January 1, 1977).

The basis for the \$0.18/mile charge is not clear, but the charge was well below contemporaneous rates for commercial movements of empty tank cars. *See Mileage Allowances, Tank Cars*, 337 I.C.C. at 57-58 (rates for “commercial movements” of empty tank cars were “25 cents east of the Rocky Mountains and 39 cents west thereof” in the late 1960s).

Union Pacific’s market-based rate for moving empty tank cars not subject to equalization, such as new or rebuilt cars moving prior to their first loaded movement and cars moving for sale or scrap, is \$3.49/mile for moves over 500 miles, and more for shorter moves.¹⁸ Our rate for moving empty covered hopper cars and other private equipment (other than tank cars) is \$3.65 mile for moves over 500 miles, and more for shorter moves.¹⁹

Requiring railroads to charge below-market rates for moving empty tank cars undermines the basic objectives mileage equalization is supposed to advance: railroads are not appropriately compensated for moving empty cars (which consumes resources the railroads could otherwise use to move loaded cars), and car owners and shippers are not appropriately incentivized to manage their empty movements efficiently (because they are not paying a market-based price for the resources those movements consume). Although car owners and shippers often have some incentives other than empty mileage charges to minimize their empty movements, unless their fleet management decisions account for the market price of railroad resources their movements consume, their decisions will not incorporate the full economic costs they cause. As a result, car owners and shippers will over-consume empty miles – they will lack incentives to manage their fleets as efficiently as possible – and others will be left to absorb the costs.

By contrast, Union Pacific’s preferred “one free empty” rule is a market-based response to issues created by movements of empty tank cars. Our preferred rule is market-based in that it incorporates a market-based rate rather than a prescribed, collectively established rate. It is also market-based in that the structure of our preferred rule – *i.e.*, charging for distinct movements, rather than excess empty miles – reflects a market-based determination about how to obtain

¹⁸ See Tariff UPRR 4703, Item 1200-C (effective Jan. 1, 2019).

¹⁹ See Tariff UPRR 4703, Item 1100-Q (effective Jan. 1, 2019).

appropriate compensation for moving empty cars and how to promote efficient fleet management. This structural feature is particularly important, as discussed next.

2. Mileage equalization overemphasizes excess miles and underemphasizes extra movements.

Mileage equalization's exclusive focus on the concept of charging for excess empty miles can preclude railroads from obtaining compensation and encouraging efficient fleet management even in cases of plainly inefficient empty movements. As an example, consider the simplified railroad network illustrated in Figure 1:

Figure 1

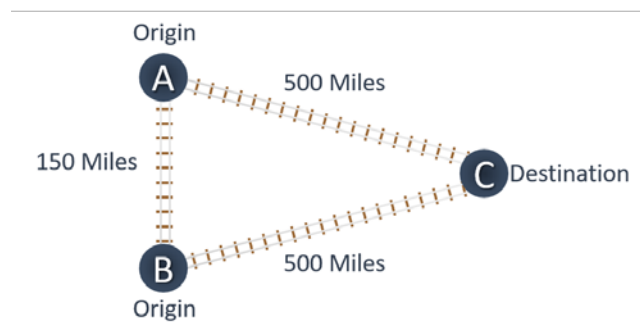


Figure 1 shows the network used by Shipper 1: origin facilities (Points A and B), which are 150 rail miles apart, and a destination facility (Point C), which is 500 rail miles from each origin. All the points are on Railroad 1.

Suppose Shipper 1 directs a loaded car from Point A to Point C, knows the next load will come from Point B, but does not tell Railroad 1. Railroad 1 moves the loaded car from Point A to Point C, returns the empty car to Point A, then, at Shipper 1's request, repositions the car to Point B. If Shipper 1 owned the car it used, and if this were its only movement for the year, Shipper 1 would pay the below-market prescribed rate for 120 excess empty miles caused by its inefficient

150-mile movement.²⁰ (As discussed below in Section III.A.3, under slightly altered assumptions, Shipper 1 would pay nothing.)

Now suppose Shipper 1 “only” requires an inefficient repositioning for one of every five loaded movements. How much would Shipper 1 pay under mileage equalization? Nothing.²¹ Indeed, Shipper 1 could repeat the pattern all year long, with multiple tank cars – it could have 1,000 loaded movements and 200 inefficient empty repositioning movements – and it would still pay nothing. Under these and similar circumstances, mileage equalization fails to achieve either of its basic objectives: the railroad is not compensated for expending extra resources, and the shipper is not given appropriate incentives to manage its fleet efficiently.

By contrast, application of Union Pacific’s preferred “one free empty” rule would advance mileage equalization’s objectives. If Shipper 1 tells the railroad in advance when it wants a just-emptied car moved from Point C to Point B, it would pay nothing to get the car to Point B. If Shipper 1 does not plan ahead and, consequently, requires Railroad 1 to provide an extra 150-mile empty move from Point A to Point B, it will pay a market-based rate for moving the empty car from Point A to Point B. In sum, Railroad 1 would be compensated at a market-based rate for each extra empty movement, and Shipper 1 would bear the market-based costs of its fleet management decisions.

3. Mileage equalization’s reliance on aggregation deprives railroads of compensation, distorts pricing signals, and creates cross-subsidies.

Mileage equalization’s reliance on aggregation of loaded and empty miles by car owner for all railroads also undermines the basic objectives of equalization and creates a potential for cross-subsidies. As an example, consider the simplified railroad network illustrated in Figure 2:

²⁰ 650 empty miles - (500 x 1.06) equalized miles = 120 excess empty miles.

²¹ 2650 empty miles - (2500 x 1.06) equalized miles = 0 excess empty miles.

Figure 2

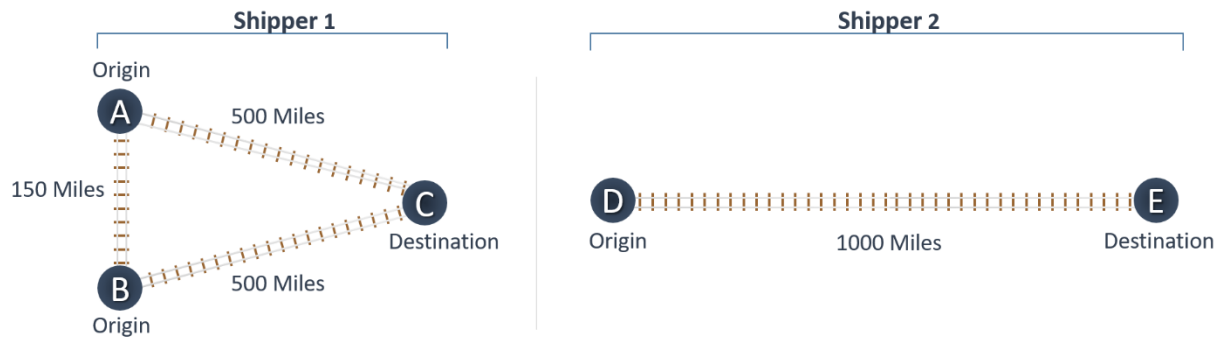


Figure 2 expands Figure 1 to add the network used by Shipper 2: an origin facility (Point D) and a destination facility (Point E) that are 1000 rail miles apart. All the facilities are on Railroad 1. In this example, Shipper 1 and Shipper 2 both lease tank cars from the same car owner, Lessor X.

Suppose, as in the example discussed above, Railroad 1 moves a loaded car from Point A to Point C, returns the empty car to Point A, then, at Shipper 1's request, repositions the empty car to Point B. Now suppose Railroad 1 also moves two loaded cars for Shipper 2 from Point D to Point E, then returns the empty cars to Point D. If these are the only movements for the year for tank cars owned by Lessor X, Lessor X would pay nothing under mileage equalization. What happens to the 120 excess empty miles attributable to Shipper 1? They are cancelled out by loaded and empty miles attributable to Shipper 2.²² Equalization deprives Railroad 1 of any compensation for Shipper 1's inefficient fleet management and fails to provide Shipper 1 any incentive to improve its fleet management. In addition, Railroad 1 might seek to recover the costs of Shipper 1's inefficient empty movements by raising rates to other shippers, in which case Shipper 2 might end up subsidizing Shipper 1's inefficient movements.

²² $(650 + 2000)$ empty miles - $((500 + 2000) \times 1.06)$ equalized miles = 0 excess empty miles.

The problems with mileage equalization's reliance on aggregation become even more apparent when a second railroad enters the picture. That is, suppose everything in the example above remains the same, except Railroad 2 moves Shipper 2's traffic between Points D and E. Under those circumstances, Railroad 1 is even worse off: it will not receive any compensation for the excess empty miles generated by Shipper 1 because of Shipper 2's movements, yet Railroad 1 does not obtain any revenue at all from Shipper 2.

In addition, just as entry of a second shipper into the picture creates potential cross subsidies among shippers, entry of a second railroad creates potential cross subsidies among railroads. As an example, consider the simplified railroad network illustrated in Figure 3.

Figure 3

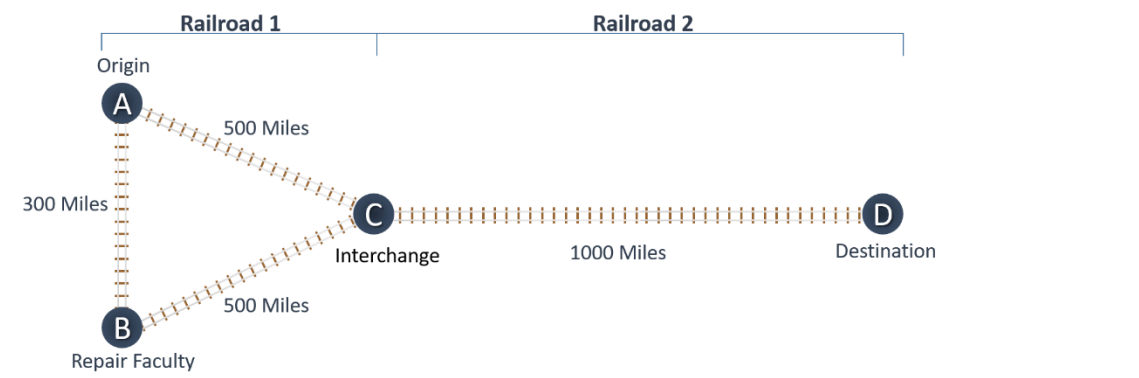


Figure 3 shows the network used by Shipper 3: an origin facility (Point A) and a repair shop (Point B), which are 300 rail miles apart, an interchange point (Point C), which is 500 rail miles from Point A and Point B, and a destination facility (Point D), which is 1000 miles from Point C. Railroad 1 serves Points A, B, and C. Railroad 2 serves Points C and D.

Suppose Railroad 1 moves loaded cars from Point A to Point C for interchange with Railroad 2, which delivers the cars to Point D, and then returns the empty cars to Point C for interchange with Railroad 1. Also suppose Railroad 1 returns four of every five empty cars to Point A, but moves every fifth empty car to the repair shop at Point B, then from Point B to Point

A. After one cycle of five cars, Shipper 3 would have 150 excess empty miles on Railroad 1.²³

But under mileage equalization, Shipper 3's excess empty miles on Railroad 1 are more than entirely cancelled out by its loaded and empty miles on Railroad 2.²⁴ Railroad 1 thus ends up subsidizing Railroad 2 – that is, Railroad 1 bears the cost of repair moves that benefit Railroad 2.

The cross subsidization problem becomes even more striking when Railroad 1 has even fewer loaded movements – for example, when shippers whose loaded cars move primarily on Railroad 2 nonetheless use shops located on Railroad 1. These were the very circumstances that led the Commission to permit railroads to charge for empty repair moves in *IHB-II*.

Application of Union Pacific's preferred "one free empty" rule would avoid the problems created by mileage equalization's reliance on aggregation of loaded and empty miles. Railroads performing extra empty movements would be compensated at market-based rates, and their compensation would not be reduced (or increased) because of services provided by other railroads or for other shippers. At the same time, the car owners and shippers responsible for generating extra empty movements would directly, immediately incur the market-based costs of their fleet management decisions. Their incentives to manage their fleets efficiently would not be diluted by prescribed, non-market-based rates or aggregation rules that create cross-subsidies among railroads and shippers. In short, they would receive a clear, accurate, and immediate price signal for their utilization of scarce railroad resources, in sharp contrast to the "noise" of the convoluted mileage equalization system.

²³ 2800 empty miles - (2500 x 1.06) equalized miles = 150 "excess" empty miles.

²⁴ (2800 + 5000) empty miles - ((2500 + 5000) x 1.06) equalized miles = -150 "excess" empty miles.

4. Mileage equalization is costly to administer.

Mileage equalization is more costly to administer than a “one free empty” rule. Mileage equalization requires expenditure of significant resources to track, record, report, monitor, audit, and reconcile loaded and empty miles for every movement of every tank car over the U.S. rail network.²⁵ Equalization focuses on excess empty miles, not extra empty movements, so each loaded and empty mile is potentially meaningful. Indeed, some car owners and shippers appear to expend considerable resources to identify movements for which adjustments to equalization accounting may be warranted: they hire companies to audit the reports provided under mileage equalization rules, reconcile the reports with their own records, and challenge perceived errors on a movement-by-movement basis.²⁶

In addition, in many circumstances, a car owner’s or shipper’s expenditures for auditing, reconciling, and challenging mileage records will be wasted. For example, a car owner or shipper might audit its records throughout the year, only to learn it owes nothing because it fell below the 106% threshold for the full year. Also, a car owner or shipper might challenge more movements than necessary to reduce its empty mileage below the 106% threshold in case some challenges are rejected. Or a shipper might expend resources to monitor and audit equalization records for

²⁵ Mileage equalization rules require each railroad to submit a monthly mileage report to the owner of each car reporting mark. See RIC 7007-O, Item 187, Part B. In practice, Railinc, a subsidiary of the Association of American Railroads, tracks loaded and empty miles using railroad-reported data and performs the reporting service for the railroads. See Railinc, Guide for Railroads (<https://www.railinc.com/rportal/documents/18/260641/GuideforRailroads.pdf>).

Shippers that lease cars typically receive regular mileage reports on their cars from leasing companies.

²⁶ See, e.g., Alltranstek Car Accounting (http://www.alltranstek.com/uploads/4/5/1/7/45171167/car_accounting.pdf); GBX Car Hire Accounting (<https://www.gbrx.com/services/management-services/car-hire-accounting/>); QTS Freight Procedure & Auditing (<http://www.qts.com/fpa>).

its leased fleet, only to learn much later it owes nothing because the lessor's total empty miles were well below the 106% threshold.

Railroads also incur unnecessary costs as a result of mileage equalization. They bear the administrative costs of supporting a separate system that addresses only a subset of empty moves for one car type. They also expend resources to respond to challenges to equalization accounting. Indeed, railroads must respond to challenges even when their own aggregate empty miles fall below the 106% threshold, so they do not stand to share in the pool of equalization payments.

Application of Union Pacific's preferred "one free empty" rule would significantly reduce the administrative costs of addressing empty movements because it focuses on extra empty movements rather than excess empty miles. The primary sources of excess empty miles are:

- railroad decisions to depart from the reverse route of the load (or railroad errors) in returning the car to the original loading point;
- shipper decisions to direct a just-emptied car somewhere other than the original loading point; and
- shipper decisions to direct an empty car to a different location after an initial empty movement – *i.e.*, a "back-to-back" empty movement.

The first two sources involve empty movements immediately following a loaded movement.

Under the "one free empty" rule, shippers would *never* be charged for excess empty miles arising from either source. The "one free empty" rule would thus eliminate the need to devote resources to auditing and reconciling mileage records for empty car movements immediately following loaded movements. As for "back-to-back" empty movements, under the "one free empty" rule, railroads and shippers would handle billing just as they do for movements of all other types of empty private equipment, as well as movements of empty tank cars that are not subject to

mileage equalization, such as movements of new or rebuilt cars prior to their first loaded movement and movement of cars for sale or scrap.

In sum, Union Pacific's "one free empty" rule is less costly and more straightforward to administer than mileage equalization. And Union Pacific, car owners, and shippers are already well-versed in administering the "one free empty" rule, because Union Pacific already applies the rule to empty movements of all types of private cars except tank cars.

B. Requiring railroads to participate in tank car mileage equalization is inconsistent with the rail transportation policy and other provisions of the ICC Termination Act.

Tank car mileage equalization is a vestige of the disastrously overregulated railroad environment predating the 4R Act and the Staggers Act. Mileage equalization is an unnecessarily complex, collective, cross-subsidizing way of addressing two basic issues – how to compensate railroads for handling empty movements, and how to encourage efficient fleet management by car owners and shippers – railroads have independently and successfully addressed for all other private equipment types. Union Pacific has applied our "one free empty" rule to all other private equipment types without controversy or complaint for as long as anyone can remember. Indeed, despite the Commission's claim in *IHB-I* of "an urgent need to establish a [mileage equalization system] for privately owned cars other than tank cars," 357 I.C.C. at 137, the railroads never established a similar system for other cars, and no one seemed to care.

Mileage equalization might have made sense in early days of railroading, when shippers could require railroads to route private empty cars circuitously to collect mileage allowances on the empty movements; technological limitations created difficulties in assigning empty miles on specific railroads to specific shippers, especially given the number of railroads and route; and use of cross-subsidies and collective ratemaking were accepted norms. Mileage equalization also might have been the only viable alternative at the time of *IHB-I*, when Commission precedent

prohibited railroads from separately charging for empty repair moves, so railroads disproportionately burdened by empty repair moves had limited options for recovering their costs, much less earning a reasonable return, for moving empty tank cars

However, the conditions that might have justified the existence of mileage equalization changed with Congress's enactment of the 4R Act and the Staggers Act. The very same policy concerns that led the Commission to reverse the "free repair move" rule in *IHB-II* apply to the whole mileage equalization system. Reliance on the industry-wide mileage equalization system, with its prescribed charges to compensate railroads for extra empty movements, is inconsistent with modern statutory policies that encourage flexible, demand-based pricing and discourage cross-subsidization. See *IHB-II*, 3 I.C.C.2d at 610-11. In addition, directly imposing market-based costs of extra empty movements on shippers will give them stronger incentives "to find ways to reduce those costs by becoming more efficient." *Id.* at 616. Railroads did not ask the Commission to revisit the entire mileage equalization system in *IHB-II*, but if they had, the system likely would have collapsed under the weight of the same scrutiny applied to the "free empty repair" rule. Cf. *LO Shippers v. Aberdeen & Rockfish Ry. Co., et al.*, 4 I.C.C.2d 1 (1987) (denying request for prescription of uniform nationwide allowances on private covered hopper cars), *aff'd sub nom. LO Shippers Action Comm. v. ICC*, 857 F.2d 802 (D.C. Cir. 1988).

Congressional policies strongly favoring individual, market-based pricing, efficient fleet management, and the avoidance of cross subsidies were reinforced and strengthened with the enactment of the ICC Termination Act. The ICCTA encourages railroads to price their services independently, eliminate cross-subsidies, and encourage efficient equipment usage. See 49 U.S.C. § 10101(1) (policy "to allow, to the maximum extent possible, competition and the demand for rail services to establish reasonable rates for transportation by rail"); *id.* § 10101(5)

(policy “to foster sound economic conditions in transportation”) *id.* § 10101(9) (policy “to encourage honest and efficient management of railroads”); *id.* § 10101(10) (policy “to require rail carriers, to the maximum extent practicable, to rely on individual rate increases”); *cf. id.* § 10701(c) (with limited exceptions, “a rail carrier . . . may establish any rate for transportation or other service provided by the rail carrier”). The ICCTA also directs the Board to pursue opportunities to further deregulate the railroad industry. *See id.* § 10101(2) (policy “to minimize the need for Federal regulatory control over the rail transportation system”); *cf. id.* § 10502(a) (the Board should use its authority to exempt persons, transactions, or service from regulation “to the maximum extent consistent with this part”).

The objectives served by the mileage equalization system remain important: railroads should be compensated for the services they provide, and efficient fleet management should be encouraged. However, consistent with congressional directives, railroads should be allowed to decide for themselves how to advance these objectives. The Board should not require railroads’ continued participation in a system of collectively set rates and cross subsidies. The requirement that railroads continue to participate in mileage equalization is especially inappropriate because railroads have long used independently established rules and individually established rates to address empty movements of all types of private equipment – other than tank cars.

C. Union Pacific’s continued participation in mileage equalization will jeopardize the system’s viability for others who want to continue participating.

Although Union Pacific no longer wants to participate in mileage equalization, we do not want to preclude other railroads’ continued participation. However, Union Pacific’s adoption of separate charges for empty repair moves while continuing to participate in mileage equalization has the potential to undermine equalization’s continued viability for carriers that choose not to

adopt such charges. Allowing Union Pacific to terminate our participation in mileage equalization would eliminate that potential unintended consequence.

Union Pacific's adoption of charges for empty repair moves potentially undermines mileage equalization's viability because it eliminated a large number of empty miles from equalization accounting, while leaving the number of loaded miles essentially unchanged.²⁷ As a result, car owners are less likely to exceed the 106% threshold, and those exceeding the threshold have fewer excess empty miles, even if their actual loaded and empty miles are unchanged. From the railroads' perspective, this means equalization produces even less compensation for empty moves and even lower incentives for car owners and shippers to manage their fleets efficiently, while the railroads experience the same level of loaded and empty miles. Under these circumstances, railroads that have not adopted separate charges for empty repair moves will be under even stronger pressure to adopt such charges rather than rely on equalization.

In *IHB-II*, the Commission recognized the adoption of separate charges for empty repair moves would affect the mileage equalization system. Specifically, the Commission suggested the 106% threshold likely would have to be renegotiated once miles for empty repair moves were no longer included in mileage accounting. *See IHB-II*, 3 I.C.C.2d at 619.²⁸ This petition presents an alternative to a potentially long, complicated, and costly renegotiation process. If Union Pacific can terminate our participation in equalization, equalization accounting will not be distorted by

²⁷ As the Commission noted in *Buffalo & Pittsburgh*, when repair moves are charged as revenue moves under separate tariffs, "repair moves will no longer be eligible for the equalization rule." *Buffalo & Pittsburgh*, 7 I.C.C.2d at 23; *see also* Freight Tariff RIC 6007-O, Item 187.2 ("Mileage on empty cars moving on revenue billing will not be included in the equalization account.").

²⁸ In *Buffalo & Pittsburgh*, the Commission noted that it had not required renegotiation and that "the effect of *IHB-II* on equalization accounting is essentially adverse to railroads, since charging for repair moves eliminates mileage that would have applied to the 106% threshold." *Buffalo & Pittsburgh*, 7 I.C.C.2d at 28.

excluding some of our empty mileage; instead, all our empty and loaded mileage would be excluded, so there would be no need for the remaining participants to renegotiate the 106% threshold or abandon mileage equalization.

IV. Proposed Procedural Schedule

The requested relief will modify the Commission's order in *System - 1986* and affect persons other than Union Pacific. Accordingly, we suggest the Board provide interested parties notice it is commencing a proceeding to consider our petition through publication in the *Federal Register*. We suggest any comments be filed within 30 days of *Federal Register* publication. Replies to comments should be permitted within 15 days from the receipt of comments. We provide a draft notice in Appendix A.

V. Conclusion

The Board should institute a proceeding to consider Union Pacific's petition, and at the conclusion of the proceeding should terminate Union Pacific's obligation to comply with the mileage equalization provisions of *System - 1986*.

Respectfully submitted,

RHONDA S. FERGUSON
CRAIG V. RICHARDSON
DANIELLE E. BODE
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
(402) 544-7004

/s/ Michael L. Rosenthal
MICHAEL L. ROSENTHAL
Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, D.C. 20001
(202) 662-6000

Attorneys for Union Pacific Railroad Company

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SURFACE TRANSPORTATION BOARD

[Docket No. EP 328]

Investigation of Tank Car Allowance System

SUMMARY: On April 25, 2019, Union Pacific Railroad Company (UP) filed with the Board a petition seeking to terminate UP's obligation to comply with the mileage equalization provisions of the National Tank Car Allowance Agreement adopted by the Interstate Commerce Commission in *Investigation of Tank Car Allowance System*, 3 I.C.C.2d 196 (1986). By issuance of this notice, the Board is instituting a proceeding to consider UP's petition.

DATES: Comments are due by [30 days of *Federal Register* publication]. Replies to comments are due [within 15 days from the due date for Comments].

ADDRESSES: Comments may be submitted either via the Board's e-filing format or in paper format. Any person using e-filing should attach a document and otherwise comply with the instructions found on the Board's website at "www.stb.gov" at the "E-FILING" link. Any person submitting a filing in paper format should send an original copy of the filing to: Surface Transportation Board, Attn: Docket No. EP 328, 395 E Street SW, Washington, DC 20423-0001. Written comments and replies will be posted on the Board's website and can also be obtained by contacting the Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC) at RCPA@stb.gov or (202) 245-0238.

FOR FURTHER INFORMATION CONTACT:

SUPPLEMENTARY INFORMATION: Charges for empty movements of private tank cars are currently governed by a set of rules called mileage equalization. Under mileage equalization, loaded and empty mileage for private tank cars, with some exceptions, is aggregated annually across all railroads for each owner of private tank cars. A car owner pays no empty mileage charges unless its ratio of empty-to-loaded mileage exceeds 106%. If an owner's aggregate empty mileage exceeds its aggregate loaded mileage by more than 6%, the owner must pay for the excess empty miles at a rate determined by a prescribed formula.

In *Investigation of Tank Car Allowance System*, 3 I.C.C.2d 196 (1986), the Interstate Commerce Commission prescribed the 106% equalization ratio, the excess mileage charge, and two specific accounting rules. The full set of rules is published in Items 187 and 190 of Freight Tariff RIC 6007-series. In its petition, UP seeks to terminate its obligation to comply with the prescribed mileage equalization rules so it can treat empty movements of private tank cars more like empty movements of other types of private equipment.

Authority: 49 U.S.C. §§ 1321 and 11122