

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

242492

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Public Record

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

Complainants,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

NOR 42152

ANSWER

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January 19, 2017

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

Complainants,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

Union Pacific Railroad Company (“Union Pacific”) hereby answers the Complaint of Tesoro Refining & Marketing Company LLC, Tesoro Great Plains Gathering & Marketing LLC, and Dakota Prairie Refining, LLC filed on December 30, 2016. To the extent that Union Pacific does not specifically admit an allegation in the Complaint, that allegation is denied.

Union Pacific responds to the allegations in each separately numbered paragraph of the Complaint as follows:

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Commerce Commission Termination Act of 1995 and to the jurisdiction of the Surface Transportation Board; and that it regularly provides rail transportation in tank cars it does not own. Union Pacific denies that it requires shippers or receivers to enter into any particular ownership or lease arrangements with regard to the tank cars used to transport their products.

3. Union Pacific admits that in 2016 it received over \$1.5 billion in revenue from customers for providing transportation services involving shipments in tank cars.

4. Union Pacific admits that it does not hold itself out to furnish tank cars to customers, consistent with the Interstate Commerce Commission's recognition that "[a]s a rule carriers have never furnished these cars, and it has come to be mutually understood that they should not do so." *In the Matter of Private Cars*, 50 I.C.C. 652 (1918). Union Pacific denies the remaining allegations in Paragraph 4, including any allegation that it is obligated to furnish tank cars to customers.

5. Paragraph 5 states legal conclusions to which no response is necessary.

6. Union Pacific admits that the Interstate Commerce Commission issued a decision in a proceeding that was docketed as Ex Parte No. 328, in *Investigation of Tank Car Allowance System*, 3 I.C.C.2d 196 (1986). Union Pacific asserts that the decision speaks for itself. Union Pacific denies the remaining allegations in Paragraph 6, including any allegation that it is obligated to pay mileage allowances to the owners of private tank cars or to shippers that furnish leased tank cars when it provides transportation under rates commonly referred to as zero-mileage rates or zero-allowance rates.

7. Union Pacific admits that movements of tank cars pursuant to Union Pacific contracts or tariffs are made in private tank cars under zero-mileage rates and that it does not pay mileage allowances when it provides transportation under zero-mileage rates. Union Pacific

denies the remaining allegations in Paragraph 7, including any allegation that it is obligated to pay mileage allowances to the owners of private tank cars or to shippers that furnish leased tank cars when it provides transportation under zero-mileage rates or that it is required to establish rates under which it would pay a mileage allowance when it has established zero-mileage rates.

8. Union Pacific admits that it does not hold itself out to furnish tank cars to customers; that most movements of tank cars pursuant to Union Pacific contracts or tariffs are made in private tank cars under zero-mileage rates; and that it does not pay mileage allowances when it provides transportation under zero-mileage rates. Union Pacific denies the remaining allegations in Paragraph 8, including any allegation that it is obligated to furnish tank cars to its customers or that it is obligated to pay mileage allowances to the owners of private tank cars or to shippers that furnish leased tank cars when it provides transportation under zero-mileage rates.

9. Union Pacific admits that Tariff UP 6004-C, Item 55-C provides for mileage-based charges on empty movements of tank cars to and from repair facilities, except when the empty movement is immediately preceded by a loaded line-haul revenue movement on Union Pacific and under certain other specified circumstances. Union Pacific further asserts that Item 55-C is consistent with the Interstate Commerce Commission's decisions in *General American Transportation Corp. v. Indiana Harbor Belt Railroad Co.*, 3 I.C.C.2d 599 (1987), and *Charges for Movement of Empty Cars, Buffalo & Pittsburgh Railroad, Inc.*, 7 I.C.C.2d 18 (1990), which recognize that charging shippers directly for repair movements encourages efficiency by giving shippers more incentive to consider transportation costs in selecting repair facilities, promotes individual market pricing of different aspects of rail service consistent with the Staggers Act, and eliminates the harmful cross-subsidization inherent in the recovery of costs associated with repair movements through Freight Tariff RIC 6007-Series and the mileage equalization provisions of

the National Tank Car Allowance Agreement. Union Pacific denies the remaining allegations in Paragraph 9, including any allegation that shippers are not compensated when they furnish private tank cars, that shippers that furnish private tank cars are entitled to additional compensation in connection with Union Pacific's publication of Tariff UP 6004-C, Item 55-C, or that Union Pacific previously received no compensation for empty movements of private tank cars to repair facilities. Union Pacific asserts that compensation to Union Pacific for empty movements of private tank cars was provided through Freight Tariff RIC 6007-Series and in accordance with the mileage equalization provisions of the National Tank Car Allowance Agreement. *See Investigation of Tank Car Allowance System*, 3 I.C.C.2d 196 (1986). Union Pacific further asserts that when it adopted Item 55-C it also established an exception to Freight Tariff RIC 6007-Series, so that any empty miles for which Union Pacific imposes charges under Item 55-C would be excluded from mileage equalization accounting under Freight Tariff RIC 6007-Series.

10. Paragraph 10 states legal conclusions to which no response is necessary.
11. Paragraph 11 states legal conclusions to which no response is necessary.
12. Paragraph 12 states legal conclusions to which no response is necessary.
13. Paragraph 13 states legal conclusions to which no response is necessary.
14. Union Pacific incorporates by reference its responses to the allegations in the preceding paragraphs.

15. Union Pacific admits that it adopted UP Tariff 6004-C, Item 55-C, effective January 1, 2015. Union Pacific asserts that Item 55-C speaks for itself.

16. Union Pacific admits that UP Tariff 6004-C, Item 55-C refers to line-haul charges provided in UPRR 4703-Series. Union Pacific asserts that UPRR 4703-Series speaks for itself.

Union Pacific denies that the minimum round trip charge under Item 55-C for a movement to and from a repair facility is \$2,634 for a one mile movement. Union Pacific asserts that the minimum round trip charge is \$0.

17. Union Pacific denies the allegations in Paragraph 17. Union Pacific asserts that prior to January 1, 2015, empty tank car movements of the types identified in Item 55-C(A), (B) and (C) were subject to line-haul charges. Union Pacific further asserts that compensation to Union Pacific for empty movements of private tank cars was provided through Freight Tariff RIC 6007-Series and in accordance with the mileage equalization provisions of the National Tank Car Allowance Agreement. *See Investigation of Tank Car Allowance System*, 3 I.C.C.2d 196 (1986).

18. Union Pacific denies the allegations in Paragraph 18.

19. Union Pacific denies the allegations in Paragraph 19, including any allegation that shippers are not compensated when they furnish private tank cars or that shippers that furnish private tank cars are entitled to additional compensation in connection with Union Pacific's adoption of Tariff UP 6004-C, Item 55-C. Union Pacific asserts that when it adopted Item 55-C it also established an exception to Freight Tariff RIC 6007-Series, so that any empty miles for which Union Pacific imposed charges under Item 55-C would be excluded from mileage equalization accounting under Freight Tariff RIC 6007-Series. With respect to the allegations in Paragraph 19(a), Union Pacific admits that most movements of tank cars pursuant to Union Pacific contracts or tariffs are made in private tank cars under zero-mileage rates and that it does not pay mileage allowances when it provides transportation under zero-mileage rates. Paragraph 19(b) states legal conclusions to which no response is necessary. Union Pacific denies the remaining allegations in Paragraph 19(b). Union Pacific asserts that, all other things being equal,

the rates it charges for transportation under zero-mileage rates are lower than the rates that it would charge for the same transportation under rates that provided for payment of mileage allowances.

20. Union Pacific denies the allegations in Paragraph 20. Union Pacific asserts that, all other things being equal, the rates it charges for transportation under zero-mileage rates are lower than the rates that it would charge for the same transportation under rates that provided for payment of mileage allowances.

21. Union Pacific denies the allegations in Paragraph 21.

RESPONSE TO COMPLAINANTS' REQUEST FOR RELIEF

Union Pacific denies that Complainants are entitled to any of the relief they seek.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim for Relief)

1. Complainants fail to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

(Jurisdiction)

2. The Board lacks jurisdiction over Complainants' claims to the extent the claims involve movements pursuant to contracts.

THIRD AFFIRMATIVE DEFENSE

(Estoppel, Waiver)

3. Complainants' claims are barred, in whole or in part, by the doctrines of estoppel and waiver.

FOURTH AFFIRMATIVE DEFENSE

(Filed Rate Doctrine)

4. Complainants' claims for reparations and damages are barred by the filed rate doctrine.

FIFTH AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

5. Complainants are barred from recovery by reason of their failure to mitigate, minimize, or avoid the damages alleged in the Complaint.

SIXTH AFFIRMATIVE DEFENSE

(Set-Off)

6. To the extent Complainants have suffered any damages, such damages should be set off by the amounts that would be owed to Defendant for empty miles Defendant excluded from mileage equalization accounting under Freight Tariff RIC 6007-Series because it adopted Item 55-C.

WHEREFORE, Union Pacific requests that the Complaint be dismissed with prejudice; that no relief of any kind be awarded to Complainants; that Union Pacific be awarded its costs; and that the Board grant Union Pacific such other and further relief as may be appropriate.

Respectfully submitted,

/s/ Michael L. Rosenthal

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January 19, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January, 2017, I caused a copy of the foregoing document to be served by e-mail on all of the parties of record in NOR 42152.

/s/ Michael L. Rosenthal
Michael L. Rosenthal