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December 30, 2016

**By Hand Delivery**

Cynthia Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D.C. 20024

**Re: Tesoro Refining & Marketing Company LLC, Tesoro Great Plains Gathering & Marketing LLC, and Dakota Prairie Refining, LLC v. Union Pacific Railroad Company, NOR-\_\_ 42152**

Dear Ms. Brown:

Per the Surface Transportation Board's procedures for filing a formal complaint, 49 C.F.R. Part 1111, I have enclosed an original and eleven copies of a complaint against Union Pacific Railroad Company for an unreasonable practice and for violation of its statutory obligation to compensate car owners. I request that you acknowledge receipt and filing of the complaint by stamping the eleventh copy with the date of receipt and return it to the courier in the enclosed envelope.

I have also enclosed a check in the amount of \$350 for the applicable filing fee.

Sincerely,



**FILED**  
December 30, 2016  
**SURFACE**  
**TRANSPORTATION BOARD**

Justin A. Savage

Partner  
justin.savage@hoganlovells.com  
D +1 202 637 5558

**FEE RECEIVED**  
December 30, 2016  
**SURFACE**  
**TRANSPORTATION BOARD**

Enclosures



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

**VS.**

1

company with its principal place of business in Dickinson, ND. Tesoro Refining & Marketing Company LLC is a leading independent refiner and marketer of petroleum products in the United States. Dakota Prairie Refining, LLC and Tesoro Great Plains Gathering & Marketing LLC are also refiners and marketers of petroleum products in the United States. As such, Complainants require rail tank cars to transport products on the UP rail network, and, since UP does not provide rail tank cars, Complainants must provide rail tank cars to UP if their products are to move by rail.

2. UP is a common carrier railroad engaged in the transportation of freight in interstate commerce. UP is subject to the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. § 10101, et seq., and to the jurisdiction of the Surface Transportation Board (the “Board”). As further described herein, UP regularly and extensively provides rail transportation in rail tank cars that it does not own, but requires shippers and receivers to either own directly or obtain from car owners on a leased basis.

### **NATURE OF THE ACTION**

3. On information and belief, UP collects over \$1.5 billion in revenues each year from its customers who ship their commodities by rail tank car.

4. UP does not provide the rail tank cars necessary for it to meet its common carrier obligation to move commodities offered for transportation by Complainants and other shippers. Instead, UP relies almost entirely upon tank cars supplied to it by Complainants and other shippers to fulfill its common carrier obligation.

5. Pursuant to 49 U.S.C. §§ 11121 and 11122, as interpreted by the precedent of this agency and the courts, UP must either supply the tank cars necessary for its provision of transportation services or compensate tank car owners for the tank cars that they supply. The rate

of compensation must be determined by the expense of owning and maintaining tank cars and must consider factors that affect the adequacy of the national freight car supply.

6. In Ex Parte No. 328, *Investigation of Tank Car Allowance System*, 3 I.C.C.2d 196 (1986), the Interstate Commerce Commission adopted a negotiated agreement for the calculation and payment of mileage allowances by railroads to tank car owners as compensation for the use of private tank cars in accordance with the statute.

7. Upon information and belief, even though well over 90% of tank car shipments are made by UP using private tank cars provided to it for this transportation, UP does not pay mileage allowances on shipments. Those shipments instead move under so-called “zero-mileage” rates where, pursuant to a contract or tariff, UP does not pay mileage allowances to the car owner or car lessee in exchange for UP’s use of their private tank cars. For most of its transportation service in private tank cars, UP does not offer an alternative to zero-mileage rates that gives Complainants the option to receive mileage allowance payments.

8. UP’s refusal to provide railroad tank cars for service to its customers has increased the need for private non-railroad investment in such cars over the past 30 years. While the cost of owning and maintaining tank cars also has increased during this time, UP has systematically all but ceased to pay any compensation to those entities supplying the rail tank cars that UP uses to meet its common carrier obligation.

9. The lack of compensation for UP’s use of private tank cars is exacerbated by UP’s adoption of Tariff UP 6004, Item 55-C, effective January 1, 2015 (attached as Exhibit A to this Complaint), which shifts the cost of transporting empty tank cars to and from repair facilities from UP to the providers of private tank cars, including Complainants, without compensating them for UP’s use of their cars. UP previously provided this transportation service without

charge, just as it does for rail cars that UP itself leases or owns. However, UP has not implemented measures to ensure that the parties providing them with tank cars are compensated for this additional expense associated with UP's use of their tank cars.

### **JURISDICTIONAL ALLEGATIONS**

10. The Board has jurisdiction to require that UP provide the rail tank cars that are reasonably necessary to furnish safe and adequate transportation of commodities that must be transported in rail tank cars under 49 U.S.C. §§ 11101 and 11121.

11. The Board has jurisdiction to encourage the purchase, acquisition and efficient use of rail tank cars under 49 U.S.C. § 11122(a), and to establish the rate of compensation to be paid for UP's use of private rail tank cars under 49 U.S.C. § 11122(b).

12. The Board has jurisdiction to prohibit UP from charging for the movement of empty rail tank cars to repair facilities under 49 U.S.C. §§ 10702, 11101, 11121 and 11122.

13. The Board has jurisdiction to award damages to Complainants pursuant to 49 U.S.C. § 11704(b).

### **COMPLAINT COUNT I** **UP's New Repair Facility Charge**

14. Complainants re-allege and incorporate by reference the allegations in the foregoing paragraphs.

15. UP Tariff 6004, Item 55-C, effective January 1, 2015, applies per car and mileage based charges to all empty rail tank car moves by UP to and from repair facilities except: (1) empty movements immediately preceded by loaded line-haul revenue movements on UP; (2) if UP's Mechanical Department removes a defective car from service and waybills the defective car under AAR Interchange Rule 1; or (3) if UP damaged the car. The tariff defines "Repair

Facilities” as “any facility that cleans, lines, relines, maintains, modifies repairs, or retrofits tank cars.”

16. The new charges, as published in UP Tariff 4703, are calculated as follows:

|                      |                 |
|----------------------|-----------------|
| 1-250 miles          | \$1,317 per car |
| 251-500 miles        | \$1,477 per car |
| 501 miles or greater | \$2.96 per mile |

Thus, a minimum round trip charge for a movement to and from a repair facility is \$2,634 for a one mile movement.

17. Prior to January 1, 2015, UP provided the transportation services covered by Tariff 6004, Item 55-C, without charging a line-haul rate for those services.

18. UP Tariff 6004, Item 55-C, require Complainants to pay UP for a service that UP otherwise would provide for itself, without charge, if UP were to provide the tank cars.

19. The publication of UP Tariff 6004, Item 55-C, was not accompanied by any measures to compensate Complainants for the use of their tank cars, including UP’s repair facility transportation charges. UP Tariff 6004, Item 55-C, imposes a new cost of ownership upon private car owners that is not part of any compensation owed to tank car owners, whether in mileage allowances or in another form.

a. UP does not pay mileage allowances for its use of most, if not all, of Complainants’ rail tank cars subject to charges under Tariff 6004, Item 55-C.

b. UP does not offer or negotiate reduced line-haul rates on movements using Complainants’ rail tank cars in lieu of paying mileage allowances, in order to compensate for such use as required by law.

20. Complainants have no choice except to provide their own tank cars for use by UP, without compensation for charges incurred under UP Tariff 6004, Item 55-C, to enable their products to be transported by rail to and/or from locations served by UP.

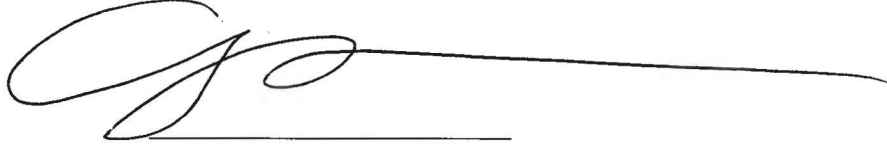
21. UP's implementation of the January 1, 2015 modification to Tariff 6004, Item 55-C, namely the adoption of separate tariff charges for the movement of empty tank cars to "Repair Facilities" as defined by UP, is (a) an unreasonable practice in violation of 49 U.S.C. § 10702, and (b) a violation of UP's statutory obligations to compensate private car owners for the use of their tank cars set forth in 49 U.S.C. § 11122(b).

### **REQUEST FOR RELIEF**

WHEREFORE, Complainants pray that the Board require that Defendant, UP, answer the charges alleged herein, and after a hearing and investigation conducted pursuant to 49 U.S.C. § 10704(a)(1) and the Board's implementing regulations, the Board:

- (1) find that UP's implementation of Tariff 6004, Item 55-C is an unreasonable practice under § 10702, and that it also violates 49 U.S.C. §§ 11121 and 11122;
- (2) order UP immediately to rescind Tariff 6004, Item 55-C effective January 1, 2015;
- (3) order UP, pursuant to 49 U.S.C. § 11704(b), to pay reparations to Complainants for the tariff charges adopted by UP after January 1, 2015; and
- (4) grant to Complainants such other and further relief as the Board may deem proper based on the record.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Justin A. Savage', with a long horizontal line extending to the right.

Justin A. Savage, Esq.  
Houston Shaner, Esq.  
Hogan Lovells US LLP  
Columbia Square  
555 Thirteenth Street, NW  
Washington, DC 20004  
(202) 637-5558

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

## EXHIBIT A



## **TARIFF UP 6004-C**

**Cancels UP 6004-B**

**(Revision 1)**

**Applying On**

### **ACCESSORIAL SERVICES - RULES AND CHARGES**

Governed, except as otherwise provided herein, by UFC 6000-series and  
OPSL 6000-series.

Issued By:

**E. A. HUNTER - MANAGER PRICING SERVICES**

**B. A. ROMMEL - MANAGER PRICING SERVICES**

Union Pacific Railroad Company  
1400 Douglas Street Omaha, NE 68179

Issued: March 26, 2008  
Effective: April 1, 2008

**UP 6004-C**



UP 6004-C

**Item: 55-C**  
**MOVEMENT OF EMPTY TANK CARS WITH PRIVATE MARKINGS**

### **MOVEMENT OF EMPTY TANK CARS**

**[i]**

Empty tank car movements provided below are subject to Union Pacific line-haul charges, as provided in UPRR 4703-series, for the portion of the empty movement that occurs on Union Pacific:

- A. New tank cars moving prior to their first loaded move in commercial service (STCC 3742213);
- B. Restenciled tank cars moving prior to their first loaded move in commercial service (STCC 3742213);
- C. Tank cars moving for dismantling, sale, or scrap (STCC 3742293); and
- D. Empty tank cars moving to and from Repair Facilities (STCC 3742217) except that (i) empty movements that are immediately preceded by a loaded line-haul revenue movement on Union Pacific will move free of charge to Repair Facilities, (ii) empty tank cars taken out of service by Union Pacific inspection and waybilled by Union Pacific's Mechanical Department under Rule 1 of the Association of American Railroads Interchange Rules will move free of charge to and from Repair Facilities, and (iii) empty tank cars damaged by Union Pacific will move free of charge to and from Repair Facilities.

For purposes of this Item, the capitalized term "Repair Facilities" means any facility that cleans, lines, relines, maintains, modifies, repairs, or retrofits tank cars.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 30<sup>th</sup> day of December, 2016, I have served a copy of the foregoing Complaint via express overnight courier to the chief legal counsel for Defendant at the following address:

Rhonda S. Ferguson, Esq.  
Executive Vice President and Chief Legal Officer  
Union Pacific Railroad Company  
1400 Douglas Street  
Omaha, NE 68179

  
\_\_\_\_\_  
Houston Shaner