

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

242639

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

vs.

**UNION PACIFIC RAILROAD
COMPANY**

NOR 42144

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**COMPLAINANTS' REPLY TO
UNION PACIFIC'S MOTION TO CONSOLIDATE PROCEEDINGS**

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NORTH AMERICA FREIGHT CAR	)	
ASSOCIATION; AMERICAN FUEL &	)	
PETROCHEMICAL MANUFACTURERS;	)	
THE CHLORINE INSTITUTE; THE	)	
FERTILIZER INSTITUTE; AMERICAN	)	
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PRODUCTS, LLC D/B/A POET ETHANOL	)	NOR 42144
PRODUCTS; POET NUTRITION, INC.; and	)	
CARGILL INCORPORATED	)	
	)	
vs.	)	
	)	
UNION PACIFIC RAILROAD	)	
COMPANY	)	

Complainants¹ in the above-captioned proceeding hereby reply in opposition to “Union Pacific’s Motion to Consolidate Proceedings,” filed by the Defendant, Union Pacific Railroad Company (“UP”), on January 26, 2017 (“UP Motion”). The UP Motion seeks to consolidate this complaint proceeding with the following two recently-filed complaint proceedings: Docket NOR 42150, *Valero Marketing and Supply Co. et al. v. Union Pac. R.R. Co.* and Docket NOR 42152 (“Valero”), *Tesoro Refining & Marketing Co. LLC et al. v. Union Pac. R.R. Co.* (“Tesoro”).

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The UP Motion consists of a two paragraph document that references and attaches UP's simultaneous, and more detailed, pleadings in the *Valero* and *Tesoro* cases, each titled "Union Pacific's Opposition to Complainants' Motion to Hold Proceedings in Abeyance and Union Pacific's Motion for Consolidation." In those proceedings, Valero and Tesoro separately filed motions to hold their cases in abeyance pending resolution of this proceeding. UP has combined its replies to the Valero and Tesoro motions with its motions to consolidate those proceedings with this one, and then submitted those pleadings in support of its Motion to Consolidate in this proceeding.

In this Reply, Complainants are responding in opposition to UP's pleadings in the *Valero* and *Tesoro* cases to the extent they request consolidation of the three cases.² Complainants take no position on the motions to hold the *Valero* and *Tesoro* cases in abeyance, but strongly object to consolidating those proceedings with this one due to the inevitable delay and consequent prejudice of consolidation to this proceeding, which already has been pending for nearly two years, and because UP will not be prejudiced given the extensive volume of discovery it already has received and UP's failure to establish any need for discovery of Valero and Tesoro in this proceeding.

I. BACKGROUND

Complainants initiated this proceeding by Complaint filed on March 31, 2015, as amended on June 2, 2015. UP concurrently filed its Answer and a "Motion to Dismiss Complaint or to Make Complaint More Definite" ("Motion to Dismiss") on April 20, 2015.

² Although UP filed separate replies in the *Valero* and *Tesoro* cases, the content of those replies is identical except for the references to each complainant. In this Reply to the UP Motion, Complainants cite only to UP's pleading in the *Valero Case* as the "*UP/Valero Reply*." The page citations in the *UP/Valero Reply* are identical to UP's reply in the *Tesoro Case*.

Complainants replied to the Motion to Dismiss on June 1, 2015 (“Reply to Motion to Dismiss”).³ The Board denied the Motion to Dismiss by decision served on December 21, 2015 (“*Dec. 21 Decision*”). Both before and after the *Dec. 21 Decision*, the parties have engaged in discovery through interrogatories, document requests, depositions, and, in UP’s case, third party subpoenas. The Board referred all discovery matters to FERC Administrative Law Judge John P. Dring in a decision served on February 11, 2016.

UP initially sought discovery from the Individual Complainants, the Association Complainants, and the individual members of the Association Complainants through each Association. The Association Complainants produced documents in their possession and responded that the Associations lack custody or control over information belonging to their members. The parties engaged in extensive discussions over the terms by which the Association Complainants would voluntarily produce materials from their members, but were unable to reach agreement. On May 17, 2016, UP simultaneously filed a “Motion to Compel Discovery of Member Information From Association Complainants” (“Motion to Compel”) and a “Petition for Subpoenas” against four members of NAFCA who own and/or lease tank cars (“Tank Car Owners” or “TCOs”).⁴ UP complained that its Petition for Subpoenas was necessitated by its inability to obtain discovery from these four members of NAFCA and other individual members of the Association Complainants, who are not parties to this case, through discovery served on the Association Complainants. Petition for Subpoenas at 2. Notably, for purposes of UP’s

³ UP also moved to dismiss the amended Complaint in a *pro forma* pleading that incorporated by reference UP’s prior motion.

⁴ Attached as exhibits to the Motion to Compel and the Petition for Subpoenas are copies of numerous correspondence between counsel for parties which, among other things, demonstrate the significant and ultimately unsuccessful efforts of Association Complainants to obtain an agreement from UP on what information it would accept as voluntary production from association members.

current Motion, UP expressly reserved the right to obtain discovery from members of all of the Association Complainants through additional subpoenas, but no such additional discovery was ever sought. *Id.* at note 1.

The Board held the procedural schedule in abeyance pending resolution of these discovery disputes in a decision served on June 10, 2016. Judge Dring held discovery hearings on June 23, August 22, September 20, and October 18, 2016. At the September 20 hearing, he denied UP's Motion to Compel the Association Complainants to respond to UP's discovery on behalf of their members.⁵ In addition, Judge Dring facilitated agreements between UP and the four TCO's on multiple subpoena requests and, in a decision served October 13, 2016, he resolved the remaining subpoena disputes for which there was incomplete agreement. Also, in a decision served on October 11, 2016, Judge Dring resolved a separate motion to compel filed against the Individual Complainants in this proceeding. Neither UP, Complainants, nor the TCOs appealed these decisions to the Board.

While UP is correct that discovery has not been completed in this proceeding, UP overstates the amount of discovery remaining. As explained in the "Status Report to Administrative Law Judge and Request for Establishment of Discovery End Dates," and the "Second Status Report and Request for Re-Establishment of Procedural Schedule" filed by Complainants in this case on February 7, 2017, the discovery phase of this case is nearly complete, and has progressed to the point that end dates for document and deposition discovery may be established and the procedural schedule reinstated. Complainants have asked Judge Dring and the Board, respectively, to establish such dates.

II. **ARGUMENT**

⁵ Transcript of Oral Argument at 8:13-24 (Sept. 20, 2016); *see also*, Transcript of Status Conference at 35:18 – 36:4 (Aug. 22, 2016).

Contrary to UP's claim, consolidation of this case with the *Valero* and *Tesoro* cases is neither "fair," nor "efficient." See *UP/Valero Reply* at 12. Consolidation is inherently unfair and inefficient when it would impose serious delay on any party involved. Cf. *R.R. Salvage & Restoration, Inc. – Pet. for Declaratory Order – Reasonableness of Demurrage Charges*, Docket No. 42102, slip op. at *2 (STB served Dec. 20, 2007). This case has been pending for nearly two years and is ripe for re-institution of a procedural schedule that would allow the submission of evidence in this case to be completed by late summer. Consolidation would further delay the presentation of evidence in this case while UP, Valero, and Tesoro negotiate and/or litigate their discovery differences, and then engage in the production of documents and presumably, the noticing, scheduling, and taking of depositions. All of the foregoing could have occurred in a manner that did not further delay this case had UP sought the issuance of third party subpoenas to these two members of AFPM in May of 2016. UP's election to not do so demonstrates that it did not deem information from these two companies essential to its defense of the Complaint in *this proceeding*.

A. Consolidation Will Cause Unwarranted Delay To This Case.

Consolidating the *Valero* and *Tesoro* cases with this case will certainly result in delay. In the interim, UP will continue to collect tens of millions of dollars in unlawful charges annually from tank car providers for movements to and from repair facilities. The Board therefore should deny UP's request for consolidation. Cf. *St. Bernard Gen. Hosp., Inc. v. Hosp. Serv. Ass'n of New Orleans, Inc.*, 712 F.2d 978, 990 (5th Cir. 1983) (affirming denial of a motion to consolidate due to the "delay to the instant action, which has already languished in the federal court system" for years).

While UP acknowledges there will be some delay to this proceeding from consolidating the three cases, it misleadingly downplays the potential disruption to this case that consolidation

would cause. *UP/Valero Reply* at 14. As explained above and in the recent filings by Complainants regarding the discovery and procedural schedules, the discovery phase of this case is on the verge of being completed. Moreover, Complainants already are preparing their Opening Evidence so as to be able to file within 30 days of the end date for deposition discovery. Consolidation therefore will create unacceptable delay in this proceeding, and for that reason alone the Board should reject UP's Motion. See *Hiram Walker & Sons, Inc. – Pet. for Declaratory Order*, Docket No. MC-C 30061 et al., 1988 WL 226436, at *1 (I.C.C. June 3, 1988).⁶

The only unknown variable in the discovery process is when the four Tank Car Owners that were the target of UP's Petition for Subpoenas will complete their document production to UP. However, that information is being sought solely by UP for its preparation of arguments in response to Complainants' Opening Evidence. Even if the TCOs do not complete their responses until April, UP still will have three months to analyze and incorporate their information into its Reply Evidence under the intervals for the submission of evidence and argument previously agreed to by the parties and proposed again by Complainants in their "Second Status Report and Request for Reestablishment of Procedural Schedule." If there is an unanticipated longer delay in the TCO production, UP can move to extend the due dates in the procedural schedule at that time.

⁶ The ICC's decision in *Hiram Walker & Sons* is particularly instructive. There, the Commission denied consolidation of five proceedings that, although they involved the same carrier and issues, were at distinct procedural stages by the time the carrier moved to consolidate. The Commission particularly noted that "[t]o await the closing of the record in the last proceeding (which was only recently filed) would unduly delay the resolution of the other four proceedings. Moreover, the records in the other four cases close at various times In two the records will close shortly. There is no reason to delay our disposition of them." *Hiram Walker & Sons, Inc.*, 1988 WL 226436, at *1. Consolidating the *Valero* and *Tesoro* actions would create the same problems for this case.

UP also is downplaying the duration of a delay to this case while it engages in discovery of Valero and Tesoro. Document production alone could consume several months based upon the experience of the Individual Complainants in this proceeding, after which UP will want time to review and digest those documents before scheduling depositions. A best case scenario, assuming no discovery disputes and seamless production, is a six month delay. Furthermore, if the Board accedes to UP's request to consolidate this proceeding with the *Valero* and *Tesoro* cases, and then other individual companies who have been charged for empty tank car repair moves file additional complaints against UP, nothing precludes UP from seeking to consolidate those cases as well, thereby imposing further delays to all then-pending cases to pursue discovery of the new complainants.

Further, UP cannot say for certain that there will not be any discovery disputes with Valero or Tesoro. First, UP claims to seek the same scope of discovery from Valero and Tesoro that it has obtained from the Individual Complainants in this proceeding. *UP/Valero Reply* at 6, 14. But Valero and Tesoro have alleged in their complaints only the first of two counts alleged by the Complainants in this proceeding. Thus, Valero and Tesoro may object to the relevance of UP discovery requests that pertain only to Count II in this proceeding, which will cause delay while that dispute is resolved.

Second, UP misleadingly claims that "discovery regarding Valero [and Tesoro] should proceed quickly because the most contentious issues have been resolved by the [ALJ]" in this case. *UP/Valero Reply* at 3. This claim is both speculative and inaccurate. The Complainants vigorously objected to large swaths of UP's discovery requests as irrelevant and/or burdensome. In ruling on these objections, Judge Dring elected to take a liberal view of relevance so as not to foreclose a full record for the Board, but nevertheless attempted to control the volume of

materials produced by Complainants by examining the burden of complying with each contested request.⁷

The Complainants did not appeal Judge Dring's broad relevance determinations to the Board for two reasons. First, for the Association Complainants, it was easier to respond than to appeal. Second, although the Individual Complainants had a greater discovery burden, they concluded that the constraints Judge Dring placed on their responses to UP due to burden made production of responsive materials more palatable than the uncertainty and additional delay to this case associated with a Board appeal. Valero and Tesoro, however, are not bound by any discovery agreements made by other parties, or discovery-related actions taken by other complainants. Having just filed their respective cases, they might be more inclined to appeal an ALJ's ruling of relevance or insufficient burden and wait for a Board decision, *see* 49 C.F.R. § 1113.9, and the Complainants case would wait with them.

In addition, UP takes the overly-simplistic position that "Valero [and Tesoro] could search for and produce the same materials that the shipper parties agreed to search for and produce" in this case. *UP/Valero Reply* at 14. Assuming that Valero and Tesoro were even inclined to agree to this general approach, there is no single document that spells out an agreement between UP and all the Individual Complainants. Rather, there were multi-faceted agreements reached with each Individual Complainant at different times over the past two years through a series of back-and-forth correspondence, the aforementioned discovery hearings, and

⁷ In describing his role, Judge Dring declared: "So I look at my role or my opportunity to narrow the scope of these cases as to relevance very carefully. I'm more inclined to let something in because of who I am than I might do in a FERC proceeding." Transcript of Oral Argument at 27:18-20 (Sept. 20, 2016). *See also, id.* at 26:14 – 28:10 (providing full context of Judge Dring's reasoning), and *id.* at 48:14-15, 114:20 – 115:4, 171:24 – 172:9, and 202:1-3 (examples of Judge Dring invoking this reasoning whenever relevance objections arose during discovery hearing).

face-to-face meetings between counsel. UP cannot realistically expect Valero and Tesoro to simply accept UP's word as to the scope of such discovery agreements. Nor are Valero and Tesoro necessarily motivated by the same factors as the Individual Complainants. This additional point of potential contention in the *Valero* and *Tesoro* cases imposes a real risk of further delay for this case if they are consolidated.

B. UP Will Not Be Prejudiced By Denial of Its Motion.

UP cannot credibly claim to be prejudiced in this proceeding if this case is not consolidated with the *Valero* and *Tesoro* cases. UP claims that its "ability to obtain discovery has been severely constrained," *UP/Valero Reply* at 2, and that "basic fairness" requires consolidation so that it can conduct discovery of Valero and Tesoro to defend the challenged practices in this proceeding. *Id.* at 13. UP also claims that such discovery is essential for the Board to decide the legal and policy issues raised by this proceeding "based on the most complete record reasonably available." *Id.* at 10. These claims are all red-herrings.

As the Petition for Subpoenas demonstrates, UP has not been constrained from seeking discovery of Valero or Tesoro, or any other association member for that matter. If UP really believed that discovery from these two AFPM members was critical to its defense of the Complaint filed in this proceeding, it could have sought a third party subpoena, just as it did of the four TCOs which are members of NAFCA. Judge Dring has granted UP extensive discovery of the TCOs, in addition to the substantial discovery that UP has received from the Individual Complainants. UP instead protests that it "is not a realistic possibility" to serve subpoenas on "several hundred [Association] members." *UP/Valero Reply* at 9, note 23. But that complaint misses the point: UP easily *could* have sought to serve subpoenas on *some* other association members, including Valero and Tesoro. UP has no credible excuse for not doing so contemporaneous with its subpoenas of the TCOs. It simply chose not to do so, probably

because it did not *need* to do so in this case. Accordingly, UP's protests that it will be prejudiced in this proceeding absent discovery of Valero and Tesoro are disingenuous and should be rejected.

1. UP has obtained ample discovery in this case.

UP incorrectly asserts that it has obtained only a "paucity" of discovery in this proceeding. *UP/Valero Reply* at 9 and 13. The fact is that UP has had ample discovery in this proceeding. UP focuses solely upon the fact that the Association Complainants did not possess extensive amounts of responsive information to conclude otherwise. But, the Individual Complainants have produced a voluminous amount of information to UP. In addition, UP will obtain much of its alleged discovery needs from the nation's four largest tank car owners through favorable rulings of the ALJ on UP's Petition for Subpoenas. Finally, the Association Complainants and UP have agreed to numerous stipulations that have satisfied a large portion of UP's discovery requests. *See Exhibit 1.*

First, the Individual Complainants in this case have produced a substantial volume of information. POET Ethanol has produced over 100,000 pages of documents to UP, many of which are Microsoft Excel spreadsheets containing thousands of data points and other information, including data concerning the costs of maintaining their respective tank car fleets. Between them, POET Nutrition and POET Ethanol have produced over four gigabytes of electronic data to UP. Both POET entities' production to UP also includes all of their railcar leases and subleases, despite Complainants' objections that the terms and conditions of tank car leases are utterly irrelevant to their claims.⁸ As for Cargill, to date it has produced over 11 gigabytes of data, constituting over *50 million* records pertaining to tank car leases, mileage and

⁸ *See In the Matter of Private Cars*, 50 I.C.C. 652, 674 (1918) ("So far as the carrier is concerned it can make no difference whether the shipper is owner or lessee [of a rail tank car.]").

car location data, tank car ownership and repair costs and other information requested by UP. Cargill is in the process of finalizing its production of emails and additional documents, which it expects to complete by the end of February. Finally, as UP acknowledges, it has noticed the depositions of representatives from POET Nutrition, POET Ethanol, and Cargill, which will provide still more information to UP.

Second, in addition to discovery responses from the Individual Complainants, UP will receive an extensive amount of information from the nation's four largest tank car owners as a result of its Petition for Subpoenas: GATX Corporation, Union Tank Car Company, Trinity Industries, Inc., and American Railcar Industries, Inc. These companies own the vast majority of tank cars in North America and lease those cars to shippers. The "Order of Presiding Administrative Law Judge Regarding Discovery," served in this docket on October 13, 2016, provides a complete inventory of the type of information that UP will receive.

Third, the Complainants and UP have agreed to a list of stipulations to satisfy UP's alleged need for certain categories of discovery. The UP Motion does not even mention these stipulations, which are attached as Exhibit 1. The agreed-upon stipulations are to be filed with the Board.

UP has not demonstrated that the foregoing discovery is insufficient to defend the challenged practices in this proceeding. Rather, UP's argument boils down to the simple notion that "more is better." If the foregoing discovery in this case were not sufficient, one would have expected UP to appeal Judge Dring's decisions to the Board, which UP did not do. Alternatively, one would have expected UP to include Valero and Tesoro in its Petition for Subpoenas, which UP did not do. Nor does the UP Motion make much of an attempt to explain

the value of additional discovery from these two companies, much less balance that value against the harmful delays caused by consolidation.⁹

Additional discovery responses from Valero and Tesoro will be incremental at best to the catalogue of discovery information UP already possesses and soon will receive. UP itself effectively concedes this point when it asserts that “[t]he facts in both cases should be the same, since both cases raise the same industry-wide legal and policy issues.” *UP/Valero Reply* at 13. No valuable purpose would be served by delaying this proceeding so that UP can obtain discovery from two additional shippers that will not add significantly, if at all, to information already produced in this proceeding.

2. UP has obtained more discovery from more sources in this case than it could in the *Valero* and *Tesoro* cases.

The alleged unfairness to UP of not having the benefit of discovery from Valero and Tesoro in this proceeding is not unfair at all. It is indisputable that any single tank car provider, regardless of whether or not that provider is a member of any Association Complainant, could have filed the very same complaint in its own name and as the sole complainant. In such a case, UP would have access to even less information through party discovery of that complainant than it will obtain in this case from five Association Complainants and three Individual Complainants. And even if the *Valero* and *Tesoro* actions are consolidated with this case, UP still faces the risk of further shippers filing suit after the resolution of this case. That risk will never dissipate,

⁹ The extent to which UP explains its need for such discovery is a single sentence in which UP asserts that “Valero participates in different rail transportation markets than the shipper complainants in *NAFCA*.” *UP/Valero Reply* at 9. When it comes to the transportation of empty tank cars to repair facilities, however, there is only a single market for that transportation; there is no difference between whether the owner or lessee of the tank car uses the car to transport crude oil, as in the case of Valero and Tesoro, or ethanol, as in the case of the Individual Complainants. Indeed, the fact that the challenged UP tariff applies equally regardless of tank car type or use demonstrates that UP itself does not draw such distinctions.

regardless of how much discovery UP collects. Nor is it in any way a function of trade association complainants; any shipper that seeks to enjoin UP's charges effectively represents the interests of other shippers as well.

In addition, UP has parlayed the presence of the Association Complainants into obtaining discovery of four non-party tank car owners who are members of NAFCA. In other words, UP has obtained more discovery in this proceeding due to the presence of the Association Complainants than it would receive in a proceeding brought by just one, or even a few, individual complainants. UP's unfairness claims are hollow.

Finally, if the Board were to give credence to UP's unfairness claims in this proceeding, it would have to conclude that any future complaint that challenges a railroad practice of general applicability would be unfair to the defendant railroad unless the defendant can obtain discovery from every other customer that is subject to the same practice. Such a proposition is absurd on its face.

3. The *Dec. 21 Decision* denying UP's Motion to Dismiss does not support UP's Motion for Consolidation.

UP inaptly cites to the Board's *Dec. 21 Decision* denying UP's Motion to Dismiss to bolster its fairness argument based upon an alleged need for discovery of Valero and Tesoro in this case. *UP/Valero Reply* at 2-3, 4-5, 7-10, 13. In denying that motion, the Board cited to Complainants' asserted need for discovery of UP to determine "whether UP is complying with [] precedent and whether that precedent is applicable here," and if applicable "whether that precedent should stand given changes in the railroad industry...." *Dec. 21 Decision* at 3. UP has not explained how discovery of Valero and Tesoro would inform these issues or materially enhance the discovery it already has received in this proceeding.

The Board also refused to order Complainants to make their Complaint more definite because “UP seeks information more appropriately obtained in discovery.” *Id.* at 5. This is the only place in the *Dec. 21 Decision* where the Board alluded to UP’s discovery of Complainants. But the information that UP sought by requesting that the Complaint be made more definite is not information that Valero or Tesoro would possess.

As to Count I, UP argued that the Board “should require Complainants to make more definite any allegations that they or their members have been improperly charged for movements of empty cars to or from repair facilities in connection with transportation provided under common carrier rates,” as opposed to contract rates. *Id.*, *quoting* Motion to Dismiss at 21. In response to UP’s Motion to Dismiss, Complainants explained that Count I of the Complaint encompasses common carrier transportation. *See, e.g.*, Reply to Motion to Dismiss at 17-20. To the extent that Valero or Tesoro seeks reparations for unlawful repair move charges in their cases, and UP contends such transportation is the subject of a contract, such discovery is relevant only to those cases, not this proceeding.

As to Count II, UP requested that Complainants make more definite allegations in three respects:

1. “Make more definite any allegation that UP failed to pay mileage allowances in situations where [Complainants] or their members ship traffic under common carrier rates that are not zero-mileage rates.” (*Id.* at 22.)
2. Make more definite any allegation that “UP refused reasonable requests to establish rates that include a mileage allowance.” (*Id.*)
3. Require Complainants “to identify the specific rates, routes, tank car types, car ownership costs, and car ownership conditions as to which they allege that UP is not adequately compensating them or their members for supplying tank cars.” (*Id.* at 3, 22)

Dec. 21 Decision, slip op. at 5, *quoting* Motion to Dismiss at 3, 22 (underline added). Again, discovery of Valero and Tesoro will not make any of the foregoing allegations in *this* proceeding

more definite. Furthermore, Valero and Tesoro have not even alleged Count II, having repeated only Count I of the Complaint from this proceeding.¹⁰

III. CONCLUSION

The Board should deny UP's Motion to consolidate this proceeding with the *Valero* and *Tesoro* cases because consolidation will unfairly delay this proceeding, UP has not demonstrated a need for discovery of Valero and Tesoro in this proceeding, and UP has not been prejudiced by the amount of discovery it has received in this proceeding.

¹⁰ Although UP acknowledges this fact, it nevertheless suggests that such discovery remains relevant because the Valero and Tesoro complaints include allegations regarding the compensation issue. *UP/Valero Reply* at 6. But as to Item #1, Complainants have alleged precisely the opposite, *i.e.*, that UP's employment of zero-mileage rates, purportedly in lieu of paying mileage allowances, is unlawful. As to Item #2, Complainants and UP have agreed to litigate this proceeding under the stipulated assumption that no Association Complainant member has requested a mileage allowance, in exchange for UP's acceptance of that stipulation as a full response to UP's discovery requests on this issue. *See*, Exhibit 1, Stipulation Nos. 3-5. As to Item #3, Complainants are not challenging UP's practice at the requested level of specificity. Therefore, discovery from Valero and Tesoro cannot shed any light on the information sought by Item #3 as to the Complaint in this proceeding.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February 2017, I caused a copy of the foregoing “Complainants’ Reply To Union Pacific’s Motion To Consolidate Proceedings” to be served by first-class mail, postage prepaid, or a more expeditious manner of delivery, on all parties of record in Docket No. NOR 42144 as identified in the official service list prepared for this case.

I also caused a copy of the foregoing document to be served by e-mail and by hand delivery upon Administrative Law Judge John P. Dring, Federal Energy Regulatory Commission Office of Administrative Law Judges, 888 First Street, N.E., Washington, DC 20426.

/s/ Jeffrey O. Moreno
Jeffrey O. Moreno

Exhibit 1

NORTH AMERICA FREIGHT CAR	)	
ASSOCIATION; AMERICAN FUEL &	)	
PETROCHEMICALS MANUFACTURERS;	)	
THE CHLORINE INSTITUTE; THE	)	
FERTILIZER INSTITUTE; AMERICAN	)	
CHEMISTRY COUNCIL; ETHANOL	)	
PRODUCTS, LLC D/B/A POET ETHANOL	)	NOR 42144
PRODUCTS; POET NUTRITION, INC.; and	)	
CARGILL INCORPORATED	)	
	)	
vs.	)	
	)	
UNION PACIFIC RAILROAD	)	
COMPANY	)	

Complainants¹ and Defendant² in the above-captioned proceeding hereby enter into this “Stipulation Agreement” pursuant to which they have agreed to litigate the claims in this proceeding based upon certain stipulations of facts, that those stipulations shall be accepted by the parties as establishing complete, or in some instances partial, responses to discovery requests, and that the stipulated facts shall be taken as true without the need for production of evidence, shall not be rebutted or contradicted by the parties in this proceeding, and shall be binding on the Board in its subsequent management of this proceeding and in any final decision, all as set forth herein. A party may move to strike the evidence of any other party that contravenes this

² The Defendant is Union Pacific Railroad Company (“UP”).

Stipulation Agreement. The parties of course remain free to litigate the legal significance of the stipulated facts.

Stipulation #1: In the ordinary course of business, from at least 2010 to the present, Defendant seldom, if ever, quantified the rates it would have charged individual shippers for transportation under rates that provided for payment of a mileage allowance.

Complainants accept the foregoing Stipulation #1 as a complete response to Complainants' Document Request No. 9, with the understanding that Defendant also will search for and produce responsive "studies and analyses" not involving individual customers, and will produce responsive documents pertaining to individual customers that Defendant identifies during its search for documents Defendants have otherwise agreed to produce.

Stipulation #2: In the ordinary course of business from at least 2010 to the present, Defendant seldom, if ever, established tariff rates or proposed contract rates that offered a choice between a line-haul rate with full mileage allowance payments or zero-mileage³ rates.

Complainants accept the foregoing Stipulation #2 as a complete response to Complainants' Interrogatory No. 1. It also is intended to constitute a partial response to Complainants' Document Request No. 2, with the understanding that Defendant also will search for and produce responsive "studies and analyses" not involving individual customers, and will produce responsive documents pertaining to individual customers that Defendant identifies during its search for documents Defendants have otherwise agreed to produce.

Stipulation #3: From at least 2010 to the present, most, if not all, Association Complainant members seldom, if ever, have requested that Defendant establish rates for movement in tank cars that provided for payment of a mileage allowance.

Stipulation #4: There is no evidence that Defendant has refused a request to establish rates for movements in tank cars that provide for payment of a mileage allowance.

Stipulation #5: From at least 2010 to the present, most, if not all, Association Complainant members seldom, if ever, have requested that railroads other than Defendant establish rates for movement in tank cars that provide for payment of a mileage allowance.

Stipulation #6: From at least 2010 to the present, most, if not all, Association Complainant members seldom, if ever, expressly requested that Defendant establish reduced line-haul rates for movements in tank cars to reflect the members' furnishing of the cars to Defendant.

³ Throughout this proceeding, the parties have used the terms "zero-mileage" and "zero-allowance" interchangeably to mean the same thing. The use of one term over the other in this Agreement is not intended to be a substantive distinction.

Stipulation #7: From at least 2010 to the present, most, if not all, Association Complainant members seldom, if ever, expressly requested that railroads other than Defendant establish reduced line-haul rates for movements in tank cars to reflect the members' furnishing of the cars to those railroads.

Stipulation #8: From at least 2010 to the present, most, if not all, transportation in tank cars provided to Association Complainant members by railroads other than Defendant moved pursuant to line-haul rates that did not provide for payment of a mileage allowance.

Stipulation #9: In the experience of most, if not all, Association Complainant members, there essentially is no difference between Defendant and other railroads regarding the proportion of movements for which the members receive mileage allowances.

Defendant accepts the foregoing Stipulation Nos. 3 through 9 as providing complete responses to Defendant's Interrogatory Nos. 24-27, and 34, and Document Request Nos. 3, 6, and 10-13, with the understanding that Complainants will not submit any Opening argument or evidence in this case, including testimony by expert or by fact witnesses, that relies on or refers to information that is responsive to these Interrogatories or Document Requests, but that is not produced in discovery. Furthermore, if Complainants identify a need to submit Rebuttal argument or evidence that includes such information, they agree to permit appropriate discovery at that time, and to allow UP to file appropriate surrebuttal argument and evidence. Complainants also confirm that Union Pacific would also have the right to file a motion to strike the Rebuttal argument or evidence (which Complainants may oppose).

Stipulation #10: From at least 2010 to the present, Defendant seldom has established rates for movement in tank cars that provide for payment of a mileage allowance.

Stipulation #11: From at least 2010 to the present, Defendant seldom, if ever, expressly informed shippers that the rates it established for movements in tank cars were reduced in lieu of paying mileage allowances.

Defendant is willing to enter into the foregoing Stipulation Nos. 10-11 with the understanding that it may produce documents responsive to Complainants' discovery requests addressing circumstances in which it has established rates for movements in tank cars that provide for payment of a mileage allowances or expressly informed shippers that the rates it established for movements in tank cars were reduced in lieu of paying mileage allowances.

Stipulation #12: In addition to handling line-haul movements of tank cars, for which it receives freight revenue, Union Pacific also provides switching or haulage for other tank car movements, for which it receives switching or haulage revenue that is not reflected in UP's production of revenue data in this case.

Complainants and Defendant disagree whether Document Request No. 6(m) encompasses switching and haulage revenue. The parties are entering into Stipulation No. 12 as an alternative to Complainants filing a motion to compel or serving additional discovery requests.

The foregoing stipulations constitute all stipulations entered into by the Complainants and Defendant as of the date of this Stipulation Agreement.

DATED: September 20, 2016



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NORTH AMERICA FREIGHT CAR	)	
ASSOCIATION; AMERICAN FUEL &	)	
PETROCHEMICALS MANUFACTURERS;	)	
THE CHLORINE INSTITUTE; THE	)	
FERTILIZER INSTITUTE; AMERICAN	)	
CHEMISTRY COUNCIL; ETHANOL	)	
PRODUCTS, LLC D/B/A POET ETHANOL	)	NOR 42144
PRODUCTS; POET NUTRITION, INC.; and	)	
CARGILL INCORPORATED	)	
	)	
vs.	)	
	)	
UNION PACIFIC RAILROAD	)	
COMPANY	)	

Complainants¹ and Defendant² in the above-captioned proceeding hereby enter into this “Stipulation Agreement” pursuant to which they have agreed to litigate the claims in this proceeding based upon certain stipulations of facts, that those stipulations shall be accepted by the parties as establishing complete, or in some instances partial, responses to discovery requests, and that the stipulated facts shall be taken as true without the need for production of evidence, shall not be rebutted or contradicted by the parties in this proceeding, and shall be binding on the Board in its subsequent management of this proceeding and in any final decision, all as set forth herein. A party may move to strike the evidence of any other party that contravenes this

² The Defendant is Union Pacific Railroad Company (“UP”).

Stipulation Agreement. The parties of course remain free to litigate the legal significance of the stipulated facts.

Stipulation #1: In the ordinary course of business, from at least 2010 to the present, Defendant seldom, if ever, quantified the rates it would have charged individual shippers for transportation under rates that provided for payment of a mileage allowance.

Complainants accept the foregoing Stipulation #1 as a complete response to Complainants' Document Request No. 9, with the understanding that Defendant also will search for and produce responsive "studies and analyses" not involving individual customers, and will produce responsive documents pertaining to individual customers that Defendant identifies during its search for documents Defendants have otherwise agreed to produce.

Stipulation #2: In the ordinary course of business from at least 2010 to the present, Defendant seldom, if ever, established tariff rates or proposed contract rates that offered a choice between a line-haul rate with full mileage allowance payments or zero-mileage³ rates.

Complainants accept the foregoing Stipulation #2 as a complete response to Complainants' Interrogatory No. 1. It also is intended to constitute a partial response to Complainants' Document Request No. 2, with the understanding that Defendant also will search for and produce responsive "studies and analyses" not involving individual customers, and will produce responsive documents pertaining to individual customers that Defendant identifies during its search for documents Defendants have otherwise agreed to produce.

Stipulation #3: From at least 2010 to the present, most, if not all, Association Complainant members seldom, if ever, have requested that Defendant establish rates for movement in tank cars that provided for payment of a mileage allowance.

Stipulation #4: There is no evidence that Defendant has refused a request to establish rates for movements in tank cars that provide for payment of a mileage allowance.

Stipulation #5: From at least 2010 to the present, most, if not all, Association Complainant members seldom, if ever, have requested that railroads other than Defendant establish rates for movement in tank cars that provide for payment of a mileage allowance.

Stipulation #6: From at least 2010 to the present, most, if not all, Association Complainant members seldom, if ever, expressly requested that Defendant establish reduced line-haul rates for movements in tank cars to reflect the members' furnishing of the cars to Defendant.

³ Throughout this proceeding, the parties have used the terms "zero-mileage" and "zero-allowance" interchangeably to mean the same thing. The use of one term over the other in this Agreement is not intended to be a substantive distinction.

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Stipulation #8: From at least 2010 to the present, most, if not all, transportation in tank cars provided to Association Complainant members by railroads other than Defendant moved pursuant to line-haul rates that did not provide for payment of a mileage allowance.

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Defendant accepts the foregoing Stipulation Nos. 3 through 9 as providing complete responses to Defendant's Interrogatory Nos. 24-27, and 34, and Document Request Nos. 3, 6, and 10-13, with the understanding that Complainants will not submit any Opening argument or evidence in this case, including testimony by expert or by fact witnesses, that relies on or refers to information that is responsive to these Interrogatories or Document Requests, but that is not produced in discovery. Furthermore, if Complainants identify a need to submit Rebuttal argument or evidence that includes such information, they agree to permit appropriate discovery at that time, and to allow UP to file appropriate surrebuttal argument and evidence. Complainants also confirm that Union Pacific would also have the right to file a motion to strike the Rebuttal argument or evidence (which Complainants may oppose).

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Stipulation #11: From at least 2010 to the present, Defendant seldom, if ever, expressly informed shippers that the rates it established for movements in tank cars were reduced in lieu of paying mileage allowances.

Defendant is willing to enter into the foregoing Stipulation Nos. 10-11 with the understanding that it may produce documents responsive to Complainants' discovery requests addressing circumstances in which it has established rates for movements in tank cars that provide for payment of a mileage allowances or expressly informed shippers that the rates it established for movements in tank cars were reduced in lieu of paying mileage allowances.

Stipulation #12: In addition to handling line-haul movements of tank cars, for which it receives freight revenue, Union Pacific also provides switching or haulage for other tank car movements, for which it receives switching or haulage revenue that is not reflected in UP's production of revenue data in this case.

Complainants and Defendant disagree whether Document Request No. 6(m) encompasses switching and haulage revenue. The parties are entering into Stipulation No. 12 as an alternative to Complainants filing a motion to compel or serving additional discovery requests.

The foregoing stipulations constitute all stipulations entered into by the Complainants and Defendant as of the date of this Stipulation Agreement.

DATED: September 20, 2016



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