

## 242674

NOR 42144

Defendant.

## February 22, 2017

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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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,

Complainants,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

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NOR 42144

**UNION PACIFIC’S REPLY TO COMPLAINANTS’ STATUS REPORT TO  
ADMINISTRATIVE LAW JUDGE AND REQUEST FOR ESTABLISHMENT OF  
DISCOVERY END DATES**

Complainants’ request to establish discovery end dates is premature. On January 26, 2017, Union Pacific filed a motion to consolidate this case with recently filed actions by Valero Marketing and Supply Company et al. (“Valero”) and Tesoro Refining & Marketing Company LLC, et al. (“Tesoro”). That motion is pending before the Board. As Union Pacific’s motion explains, all three cases involve common facts, issues, and parties, and consolidation would (i) allow Union Pacific to obtain discovery relevant to the merits of this case from Valero and Tesoro, two members of an Association Complainant; and, (ii) ensure the Board has a complete administrative record on which to make a decision. If the Board grants Union Pacific’s motion, defining discovery end dates for this case now would prove to be a wasted effort.

In addition, significant discovery remains outstanding, including discovery from the Tank Car Owners (“TCOs”) that Your Honor granted after the Association Complainants objected to providing discovery on behalf of their members. Complainants’ proposed end dates do not allow sufficient time for discovery from the TCOs to be completed. Complainants’ proposal is also inconsistent with the parties’ negotiated agreement regarding production of privilege logs.

## **I. STATUS OF OUTSTANDING DISCOVERY**

Only the Association Complainants have completed their document productions. The rest of the parties and the TCOs are continuing to search for and produce documents and privilege logs, and deposition discovery is underway.

In particular, the following discovery is still pending:

1. *Document productions from Individual Complainants.* Although Complainants state that POET Ethanol and POET Nutrition “completed their document production to UP in January, 2017” (Status Report at 2), POET Ethanol and POET Nutrition each produced additional documents in February.<sup>1</sup> Cargill does not even claim to have completed its document production. In addition, neither POET Ethanol nor Cargill has fully responded to Union Pacific’s requests for information necessary to decipher their data productions.<sup>2</sup> Furthermore, Cargill has not yet provided updated responses to Union Pacific’s Requests for Admission, which they agreed to do on the record before Your Honor. They have not

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<sup>1</sup> Letter from Thomas Wilcox to Michael Rosenthal, Feb. 2, 2017 (attached as Exhibit A).

<sup>2</sup> Letters from Kavita Pillai to Thomas Wilcox, Feb. 13, 2017 (attached as Exhibits B and C); Letter from Thomas Wilcox to Michael Rosenthal, Feb. 17, 2017 (attached as Exhibit D).

even responded to Union Pacific's follow-up request regarding these Requests for Admission.<sup>3</sup>

2. *Document production from Union Pacific.* Union Pacific expects to complete its production of documents and produce an update to its previously produced traffic data by early March. In accordance with the parties' negotiated "Protocol for the Production of Electronically-Stored Information and Paper Documents,"<sup>4</sup> Union Pacific will complete the production of its privilege log within 60 days after the document production has been completed.
3. *Depositions.* Union Pacific noticed depositions of designated representatives from Cargill, POET Ethanol, and POET Nutrition on January 19. POET Ethanol and POET Nutrition have identified deponents and proposed dates, but the depositions have not yet been firmly scheduled. Cargill has not yet responded to Union Pacific's deposition notice.
4. *TCO discovery.* Union Pacific and the four TCOs that Union Pacific subpoenaed are continuing to work to resolve discovery issues. For example, on February 7, counsel for Union Tank Car Company ("UTC") and American Railcar Industries, Inc. ("ARI") identified concerns about the search terms to be used for electronic searches of discovery material. Union Pacific, UTC, and ARI have conferred, and are continuing to confer in good faith, about potential revisions to the search terms. However, no TCO has yet produced any documents in this case (although UTC has offered to begin production on a rolling basis). In addition, after extended discussions regarding the terms under which the

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<sup>3</sup> Transcript of September 29, 2016 Hearing, at 72:12-20; Email from Kavita Pillai to Thomas Wilcox and David Monroe, January 27, 2017 (attached as Exhibit E).

<sup>4</sup> Protocol for the Production of Electronically-Stored Information and Paper Documents (attached as Exhibit F).

TCOs would respond to certain subpoena requests by authorizing Railinc to produce certain TCO-related data, the TCOs finalized the authorization on January 24, and Railinc is in the process of developing the requested data.

5. *Privilege logs.* A discovery protocol agreed to by the parties in June 2016 states that privilege logs shall be produced within 60 days of completion of document production.<sup>5</sup> Accordingly, Union Pacific, Cargill, POET Ethanol, and POET Nutrition, have not yet produced privilege logs. Moreover, two Association Complainants, North America Freight Car Association (“NAFCA”) and American Fuel & Petrochemical Manufacturers (“AFPM”), have not yet produced privilege logs. This is despite NAFCA and AFPM having made their one and only productions in July 2016 and August 2016, respectively.

## **II. DISCUSSION**

The facts above demonstrate that Your Honor should decline Complainants’ request to set discovery end dates. First, Your Honor would have to revisit the schedule if the Board grants Union Pacific’s motion to consolidate. Second, Complainants’ proposed schedule does not allow sufficient time to complete TCO discovery, and it purports to override the parties’ agreement regarding privilege logs. The parties should be able to agree upon appropriate discovery end dates once the Board rules on Union Pacific’s motion and TCO discovery is further along.

### **A. Discovery end dates should not be set until the Board rules on Union Pacific’s motion for consolidation.**

Your Honor should not set a discovery end date until the full extent of required discovery becomes clear. The full extent of required discovery will not be clear until the Board rules on Union Pacific’s motion for consolidation.

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<sup>5</sup> See Exhibit F at 7.

In December 2016, Valero and Tesoro filed complaints that mirror the complaint in this case. On January 6, Valero and Tesoro asked the Board to hold their cases in abeyance, pending the resolution of this case. On January 26, Union Pacific asked the Board to consolidate all three cases and allow Union Pacific to obtain discovery from Valero and Tesoro, so the Board could address the issues presented by these cases on a more complete factual record.<sup>6</sup> The Association Complainants replied to the motion on February 15. Valero and Tesoro filed replies that same day. Briefing on consolidation, therefore, is complete. The practical and efficient setting of a procedural schedule should logically await the Board's decision on consolidation.

Valero and Tesoro, which are represented by the same counsel as AFPM, have agreed that procedural schedules in their cases should be deferred until the Board's decision on their motion to hold the cases in abeyance and Union Pacific's motion to consolidate.<sup>7</sup> The same considerations counsel against establishing discovery end dates in this case.

**B. Complainants' proposed discovery end dates are not consistent with the current status of discovery.**

In addition, the discovery end dates proposed by Complainants are unrealistic and inconsistent with the parties' negotiated "Protocol for the Production of Electronically-Stored Information and Paper Documents."

Complainants' proposal fails to account for the status of TCO discovery. The TCOs and Union Pacific are continuing to work to resolve their discovery issues. For example, two of the

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<sup>6</sup> Cf. *N. Am. Freight Car Ass'n v. Union Pac. R.R.*, NOR 42144, slip op. at 3 (STB served Dec. 21, 2015) (denying Union Pacific's motion to dismiss because arguments about the applicability of Board precedent and whether Union Pacific is in compliance are "fact-specific and, as such can only be sufficiently addressed after the development of a full record").

<sup>7</sup> See Joint Status Report, *Valero Marketing and Supply Co. v. Union Pacific R.R.*, NOR 42150 (Jan. 30, 2017) (attached as Exhibit G); Joint Status Report, *Tesoro Refining & Marketing Co. LLC v. Union Pacific R.R.*, NOR 42152 (Feb. 6, 2017) (attached as Exhibit H).

TCOs and Union Pacific have been engaged in discussions about modifying certain terms for searching electronic information as part of the process Your Honor established when granting Union Pacific's discovery requests. The TCOs and Union Pacific are working in good faith and making progress, but it seems inconceivable that the TCOs will complete their document productions by the February 28 end date proposed by Complainants.

Moreover, Complainants are wrong when they say that "production from non-parties should have no bearing on the end dates for party discovery." Status Report at 4. Complainants are separately asking the Board to restart the procedural schedule and establish dates for briefing on the merits of this case.<sup>8</sup> The dates in that request are tied to the proposed discovery end dates.<sup>9</sup> For that reason, the proposed end date to party discovery is, practically speaking, an end date to all discovery. Otherwise, Union Pacific could be forced to develop its evidence and arguments without the benefit of non-party discovery. Your Honor granted non-party discovery precisely because Union Pacific could not obtain much of the relevant discovery it sought from the parties. The impact of Your Honor's ruling would be effectively nullified if this case moves forward before non-party discovery is completed.

Furthermore, it seems unlikely that Complainants can meet their own proposed discovery end dates. Cargill does not claim to have completed its discovery production, and it has not yet responded to Union Pacific's Requests for Admission. Cargill also has not yet responded to Union Pacific's requests for information necessary to decipher data it has produced so far. Cargill has not even responded to Union Pacific's notice of deposition.

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<sup>8</sup> See Second Status Report and Request for Re-Establishment of Procedural Schedule (Feb. 7, 2017) (requesting a schedule that sets the date for Complainants' Opening Evidence and Argument at 30 days after the close of deposition discovery).

<sup>9</sup> See *id.* at 4.

Finally, the proposed schedule conflicts with the parties' express agreement regarding the production of privilege logs. The parties agreed that privilege logs were to be produced within 60 days of the completion of document production. Accordingly, even with a February 28 end date, Union Pacific's privilege log would not be due until the end of April, not March 7. NAFCA and AFPM have, themselves, not managed to produce privilege logs within the allotted 60 days, having completed their productions in July and August 2016. Furthermore, Complainants' proposal for resolving privilege disputes appears to be unrealistic. Complainants appear to give parties 10 days to object to privilege log entries, and 10 days (including two weekends) to file replies, and they allow almost no time for Your Honor to resolve any disputes.

With so much discovery still in progress, rushing to set discovery end dates makes no sense, except perhaps as a tactic to bolster Complainants' argument against consolidation.<sup>10</sup>

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<sup>10</sup> Indeed, Complainants self-servingly cite this Status Report and Request in their reply to Union Pacific's motion to consolidate as evidence that "the discovery phase of this case is nearly complete" and consolidation, therefore, is inappropriate. *See* Complainants' Reply to Union Pacific's Motion to Consolidate Proceedings at 4 (Feb. 15, 2017).

### III. CONCLUSION

For the foregoing reasons, Union Pacific respectfully requests that Your Honor deny Complainants' request to set discovery end dates.

Respectfully submitted,

RHONDA S. FERGUSON  
LOUISE A. RINN  
CRAIG V. RICHARDSON  
DANIELLE E. BODE  
Union Pacific Railroad Company  
1400 Douglas Street  
Omaha, Nebraska 68179  
(402) 544-3309

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

*Attorneys for Union Pacific Railroad Company*

February 22, 2017

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 22nd day of February, 2017, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or a more expeditious manner of delivery, on all of the parties of record in NOR 42144.

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

/s/Michael L. Rosenthal  
Michael L. Rosenthal



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February 2, 2017

**VIA HAND DELIVERY**

Michael L. Rosenthal  
Covington & Burling LLP  
One City Center  
850 Tenth Street, NW  
Washington, DC 20001-4956

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

Dear Mike:

Contemporaneous with this letter we are producing to you additional documents and information from complainants POET Ethanol (PEP12742 - PEP107526) and POET Nutrition (PNI00122 - PNI00127).

The POET Ethanol production consists of additional car tracing data and cover emails per our recent discussions. Please note that out of an abundance of caution all of this material has been designated Highly Confidential under the Protective Order entered in this case. Please contact me if you believe some of the material should be re designated after you have reviewed it. The POET Nutrition production consists of additional lease documents.

Also pursuant to our discussions, our understanding is that these are the final productions from POET Ethanol and POET Nutrition. We will produce privilege logs for each complainant in due course.

Michael Rosenthal  
February 2, 2017  
Page 2

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

Sincerely,



Thomas W. Wilcox

cc: Jeffrey Moreno  
Paul M. Donovan  
Justin A. Savage  
Louise A. Rinn  
(w/o enclosures)

## COVINGTON

BEIJING BRUSSELS LONDON LOS ANGELES  
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kpillai@cov.com

**By Email**

February 13, 2017

Thomas W. Wilcox, Esq.  
GKG Law  
1055 Thomas Jefferson Street NW, Suite 500  
Washington, DC 20007

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

Dear Tom:

We have reviewed Cargill's productions of discovery material to date, and we have several questions about the data that have been produced. Please respond to the questions below or requests as soon as possible so that we can complete our review. We are also available for a call to discuss these issues.

1. Please explain what each unique value represents in the "SIGHTING\_CODE" field of the "clm\_extract" datasets.
2. Please explain what each unique value represents in the below fields in the "mileage\_extract" dataset:
  - a. "ACCOUNT\_TYPE"
  - b. "RATE\_SOURCE"
  - c. "SOURCE\_TYPE"
  - d. "DOCUMENT\_TYPE"
  - e. "PAYMENT\_ACTION"
  - f. "MILEAGE\_SETTLEMENT"
  - g. "SUMMARY\_LEVEL"
3. Please explain what each unique value represents in the "TRANSACTION\_PURPOSE" field in the "mileage\_extract" dataset and whether those values have specific significance when aggregating or reconciling data within this dataset.
4. Please identify how the datasets listed below were created. If they were generated based on querying the "mileage\_extract" dataset, or a source database thereof,

**COVINGTON**

Thomas W. Wilcox, Esq.  
February 13, 2017  
Page 2

please provide the code used to perform this query and explanation where necessary of the logic used:

- a. "mileage\_by\_cgl\_mark\_extract.txt"
  - b. "mileage\_paid\_extract.txt"
  - c. "owned\_tank\_car\_properties\_extract.txt"
  - d. "owned\_tank\_car\_mileage\_totals\_extract.txt"
  - e. "leased\_tank\_car\_properties\_extract.txt"
  - f. "leased\_tank\_car\_mileage\_totals\_extract.txt"
5. If the "CONTRACT" and/or "CONTRACT\_DATA" fields in the "mileage\_extract" dataset may be used to identify charges under Item 55-C, please describe how, and state whether this method would cover all such charges assessed to Cargill.
  6. Please explain how the "LOADED\_MILES" and "EMPTY\_MILES" field values are measured and which railroad is associated with those values in the "mileage\_extract" dataset in cases where the railroads in the "CYCLE\_START\_ROADMARK" and "CYCLE\_END\_ROADMARK" fields differ. Does the "RAILROAD" field identify the railroad associated with the miles listed for a given record? Is this consistent with the method used to generate the file?
  7. Please explain how the "MILEAGE\_RATE" field in the "mileage\_extract" dataset is derived based on other fields in this dataset, and how the "TIME\_VALUE" and "MILEAGE\_VALUE" fields in the "mileage\_extract" dataset are calculated.
  8. Please explain what the unique values in the "OWNERSHIP\_TYPE" field—including "Net", "FSvc", and "Owned"—in the "shopping\_extract" dataset represent. Please explain any ways these definitions differ from how ownership is defined in the "OWNER\_MARK" field in the "mileage\_extract" dataset and explain how to accurately define car ownership in the "mileage\_extract" dataset, including if necessary the use of information from other fields such as "DOCUMENT\_IDENTIFIER" and "OWNER\_MARK."
  9. Please explain how records in the "mileage\_extract" dataset where the "CYCLE\_START\_ROADMARK" or "CYCLE\_END\_ROADMARK" field is populated with "SHOP" relate to records in the "shopping\_extract" dataset. Does the "shopping\_extract" dataset provide records for all shop visits for all of Cargill's leased and owned cars for the time period covered? Do such "SHOP" records in the "mileage\_extract" dataset cover a subset of shop visits contained in "shopping\_extract" dataset? If otherwise, please explain.

**COVINGTON**

Thomas W. Wilcox, Esq.  
February 13, 2017  
Page 3

Sincerely,

A handwritten signature in blue ink that reads "Kavita Pillai". The signature is fluid and cursive, with a small dot at the end.

Kavita Pillai

## COVINGTON

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**By Email**

February 13, 2017

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1055 Thomas Jefferson Street NW, Suite 500  
Washington, DC 20007

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

Dear Tom:

We have reviewed Poet Ethanol's productions of discovery material to date, and we have several questions about the data that have been produced. Please respond to the questions below as soon as possible so that we can complete our review. We are also available for a call to discuss these issues.

1. Do the "weekly trace data" include any cars not leased by Poet Ethanol at the time reported? Are there additional cars leased by Poet Ethanol that are not included in this data? If the answer to either question is "yes," please identify the cars.
2. Do records in the "weekly trace data" where the "Train.ID" field is listed as "SHOP" identify all shop visits for Poet Ethanol cars? If not, please identify the additional shop visits.
3. Please provide a decoder that includes an item description for each unique value in the "Event" field of the "weekly trace data"
4. Does the spreadsheet "PEPo6280.xlsx," originally entitled "Empty Bill Charges for Shop Cars.xlsx," contain information on all charges for empty shop moves which Poet Ethanol has been assessed in 2015 and 2016? If spreadsheet covers some other timeframe, please specify the timeframe. If the spreadsheet is not comprehensive for the covered time period, please provide comparable information for all empty shop moves not included in this document.
5. Does the spreadsheet "PEP10046.xlsx," originally entitled "2012-15 Bad Order Summary.xlsx," contain information for all Poet Ethanol leased cars that were bad-ordered and sent to repair facilities during the 2012 to 2015 timeframe?

**COVINGTON**

Thomas W. Wilcox, Esq.  
February 13, 2017  
Page 2

Sincerely,

A handwritten signature in blue ink, appearing to read "Kavita Pillai". The signature is fluid and cursive, with a period at the end.

Kavita Pillai



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February 17, 2017

**VIA E-Mail**

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850 Tenth Street, N.W.  
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Re: STB Docket No. NOR 42144, *North America Freight Car Association, et al. v. Union Pacific Railroad Company*

Dear Mike:

This letter responds to your letter to me of February 13, 2017 listing five questions (with subparts) about POET Ethanol's document production to UP. The answers to each question are as follows:

1. The "weekly trace data" includes some cars that are not leased by POET Ethanol. There are no additional cars leased by POET Ethanol that are not included in this data. The cars that are not leased by POET Ethanol that show up in the data can be identified by UP by reviewing documents produced to UP that contain the car numbers for all cars leased by POET Ethanol.
2. The records in the "weekly trace data" where the "Train.ID" field is listed as "SHOP" do not identify all the shop visits for POET Ethanol cars. POET does not possess information that

Letter to Michael Rosenthal  
February 17, 2017  
Page 2

identifies all shop visits of the cars it leases, so it cannot identify shop visits that are not included in the trace data.

3. POET Ethanol will supply a “decoder” or other documentation that should provide the information requested.
4. The answer to the first question posed is “Yes,” so there is no need to address the remainder of this question.
5. The answer is “No.” As with question 2, POET Ethanol has some of this data but not all of it since this is data typically collected by the car owner. Also, this spreadsheet includes cars that were bad-ordered but repaired using mobile repair crews.

Please give me a call or email me with any questions or if you want to discuss.

Sincerely,

A handwritten signature in blue ink that reads "Tom Wilcox".

Thomas W. Wilcox

**From:** [Pillai, Kavita](#)  
**To:** [twilcox@gkglaw.com](mailto:twilcox@gkglaw.com); [David K. Monroe \(dmonroe@gkglaw.com\)](mailto:dmonroe@gkglaw.com)  
**Cc:** [Rosenthal, Michael](#)  
**Subject:** Cargill discovery (NAFCA v. UP)  
**Date:** Friday, January 27, 2017 11:05:22 AM

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Counsel:

Following up on outstanding discovery, we have not yet received Cargill's updated responses to Union Pacific's requests for admission for those requests to which Cargill agreed to respond following our September 26 meet and confer and the September 29 hearing before Judge Dring. The requests at issue are RFA Nos. 2, 4 and 5. Additionally, please let us know if Cargill will be producing more documents and/or information. If so, please let us know what we can expect and when. Thank you and have a good weekend.

Best regards,

Kavita

**Kavita Pillai**

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**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 PRODUCTS; POET NUTRITION, INC.; and CARGILL INCORPORATED**

**VS.**

**UNION PACIFIC RAILROAD  
COMPANY**

DOCKET NO. NOR 42144

## PROTOCOL FOR THE PRODUCTION OF ELECTRONICALLY-STORED INFORMATION AND PAPER DOCUMENTS

## I. GENERAL PROVISIONS

A. Except as specifically limited herein, the procedures and protocols (the “Protocol”) set forth below govern the production of electronically-stored information (“ESI”) and paper documents by all parties in, and during the pendency of, this matter.

**B. Preservation of Rights.** Nothing in this Protocol shall be interpreted to require disclosure of wholly irrelevant information or relevant information protected by the attorney-client privilege, work-product doctrine, or any other applicable privilege or immunity. The parties do not waive any objections as to the production, discoverability, relevancy, admissibility, or confidentiality of paper documents and ESI.

C. **Right to Supplement.** This Protocol, including terms and procedures set forth herein, are based on the parties' knowledge and understanding of the facts at this time. The

parties specifically reserve their rights to supplement and/or amend this Protocol based on information that becomes known to the parties through discovery or otherwise.

D. Any production made pursuant to this Protocol will also be subject to the requirements and protections set forth in the *Protective Order* agreed to by the parties and entered by the Board now or in the future.

E. **Definitions.** The following definitions serve to further clarify the scope of this Protocol:

1. The term “Document” has the same full meaning as construed by Fed. R. Civ. P. 34.

2. A “Document Family” means any group of two or more documents intended to be analyzed together in the normal course of business; including, but not limited to, facsimile cover sheets and attachments, paper letters and original enclosures, and email messages and all attached files.

3. The term “Native File(s)” means ESI in the electronic format of the application in which such ESI is normally created.

F. **Applicable Bates Labeling.** For purposes of this Matter, the parties agree to use the following Bates number prefixes:

| Party                                             | Shall use the Bates Number Prefix: |
|---------------------------------------------------|------------------------------------|
| North American Freight Car Association            | NAFCA                              |
| American Fuel & Petrochemicals Manufacturers      | AFPM                               |
| The Chlorine Institute                            | TCI                                |
| The Fertilizer Institute                          | TFI                                |
| American Chemistry Counsel                        | ACC                                |
| Ethanol Products, LLC d/b/a Poet Ethanol Products | PEP                                |
| Poet Nutrition, Inc.                              | PNI                                |
| Cargill Incorporated                              | CI                                 |
| Union Pacific Railroad Company                    | UPRR                               |

The parties agree that Bates numbers will appear in the lower right-hand corner of each document image.

## II. PRODUCTION OF ELECTRONICALLY STORED INFORMATION

A. **De-Duplication.** For ESI, a party is required to produce only one copy of a responsive Document Family. Parties will de-duplicate responsive ESI globally based on MD5 hash values at the Document Family level.

B. **Metadata Fields and Processing.** The parties will produce for each document the Metadata fields set forth in Appendix A.

C. **TIFFs.** Images of native files shall be generated from the native file. Single page Group IV TIFFs should be provided, at 300 dpi. Each image should have a unique file name corresponding with the Bates number of the document. Original document orientation should be maintained (i.e., portrait to portrait and landscape to landscape).

D. **Extracted Text Files.** For each document, an extracted text file should be provided along with the image files and Metadata. The text file name should be the same as the page Bates number on the first page of the document. File names should not have any special characters or embedded spaces. The text of Native Files should be extracted directly from the Native File. However, if a document has been redacted, OCR of the redacted document will suffice in lieu of extracted text.

E. **Load Files.** Documents should be provided with (a) a delimited data file (.txt, .dat, or .csv), and (b) an image load file. Each TIFF in a production must be referenced in the corresponding load file. The total number of documents referenced in a production's data load file should match the total number of designated document breaks in the Image Load files in the production.

F. **Bates Numbering.** All images must be assigned a Bates number that must always: (1) be unique across the entire document production; (2) maintain a constant length (0-padded) across the entire production; (3) contain no special characters or embedded spaces; and (4) be sequential within a given document. The producing party shall notify recipients of any gaps or missing numbers within the produced Bates range or alternatively provide a slip sheet noting the intentional gap in the Bates numbers.

G. **Parent-Child Relationships.** Parent-child relationships (the association between an attachment and its parent document) should be preserved as they are maintained. For example, if a party is producing an e-mail with its attachments, the attachments should be processed in order behind the e-mail.

H. **Spreadsheets.** Spreadsheet documents will be produced in native format. Native copies of spreadsheets should be produced with a link in the NativeLink field, along with extracted text and applicable Metadata fields set forth in Appendix A.

I. **Audio and Video Files.** Audio and video files will be produced in their native format.

J. **Requests for other Native Files.** Other than as specifically set forth above, a producing party need not produce documents in native format. If good cause exists to request production of specified files in native format, the party may request such production and provide an explanation of the need for Native File review, which request shall not unreasonably be denied. The requesting party will provide a specific Bates range for documents it wishes to be produced in native format. Any Native Files that are produced should be produced with a link in the NativeLink field, along with all extracted text and applicable Metadata fields set forth in Appendix A.

K. **Printing Native Documents.** To the extent that any native documents are printed by the receiving party each page of the print-out shall bear the original document Bates number and any confidentiality designation, which should be embossed on the header or footer of each page of the printed document.

L. **Color Images.** TIFF images of documents containing color in their original form need not be produced initially in color. However, if an original document contains color necessary to understand the meaning or content of the document, the producing party will honor reasonable requests for a color image of the document. Documents produced in native format do not need to be produced as a color TIFF.

### III. PRODUCTION OF HARD COPY DOCUMENTS

A. **TIFFs.** Single page Group IV TIFFs should be provided, at least 300 dpi. Each image should have a unique file name corresponding to the Bates number of the document. Original document orientation should be maintained (i.e., portrait to portrait and landscape to landscape).

B. **Coding Fields.** The following information shall be produced in the delimited data files accompanying hard copy documents: (a) ProdBeg, (b) ProdEnd, (c) BegAttach, (d) EndAttach, (e) Custodian, (f) Confidentiality and (g) OCR text.

C. **Load Files.** Documents should be provided with (a) a delimited data file (.txt, .dat, or .csv), and (b) an image load file, as detailed in Appendix 1. Each TIFF in a production must be referenced in the corresponding load file. The total number of documents referenced in a production's data load file should match the total number of designated document breaks in the Image Load files in the production.

D. **Bates Numbering.** All documents must be assigned a Bates number that must always: (1) be unique across the entire document production; (2) maintain a constant length (0-

padded) across the entire production; (3) contain no special characters or embedded spaces; and (4) be sequential within a given document. If a Bates number or set of Bates numbers is skipped in a production, the producing party will so note in a cover letter, production log or privilege log accompanying the production.

E. **Unitizing of Documents.** In scanning paper documents, distinct documents should not be merged into a single record, and single documents should not be split into multiple records (i.e., paper documents should be logically unitized). In the case of an organized compilation of separate documents – for example, a binder containing several separate documents behind numbered tabs – the document behind each tab should be scanned separately, but the relationship among the documents in the binder should be reflected in proper coding of the beginning and ending document and attachment fields. The parties will reasonable efforts to unitize documents correctly.

#### IV. MISCELLANEOUS PROVISIONS

A. **Modifications.** Any practice or procedure set forth herein may be varied by agreement of the parties, confirmed in writing, where such variance is deemed appropriate to facilitate the timely and economical exchange of documents or ESI.

B. **Non-Party Discovery.** The parties will undertake best efforts to persuade non-party document or ESI custodians, from which a party to this Protocol seeks discovery pursuant to subpoena or other means, to conform such non-party production to the terms set forth herein.

C. **No Effect on Cost Shifting.** Nothing in this Agreement shall affect, in any way, a producing party's right to seek reimbursement for costs associated with collection, review, and/or production of documents or ESI.

D. **Non-Responsive Attachments.**

1. Non-responsive attachments to a document may be withheld from production. Any attachments so withheld shall be described with reasonable particularity in a non-responsive attachment log(s).

2. Logs shall be produced within sixty (60) days after document production has been completed in the case, or within any other time period mutually agreed upon by the parties. Logs shall be produced in “.pdf” format, and shall contain one entry for each attachment withheld. If available, the following information shall be included on logs for each attachment withheld: a description of the Document Family, the title or heading of the attachment, and the general subject-matter of the attachment or a description of the withheld information.

**E. Withholding of Documents or Partial Redaction of Produced Documents based on Privilege.** A producing party need not produce a slip-sheet in place of any document withheld for privilege. Redactions for privilege must appear on TIFF images as a black box with the word “REDACTED” in white text.

**F. Privilege Logs.**

1. All documents withheld or redacted on the grounds of attorney-client privilege, work-product doctrine or any other applicable privilege, immunity or protection from disclosure recognized by law or any other reasonable basis shall be described with reasonable particularity on a privilege log(s).

2. Logs shall be produced within sixty (60) days after document production has been completed in the case, or within any other time period mutually agreed upon by the parties. Logs shall be produced in “.pdf” format, and shall contain one entry for each Document Family withheld or redacted. If available, the following information shall be included on logs for each document withheld or redacted: the date the document was created (or in case of emails, the date

that the withheld/redacted email was sent), author, recipient, copyee, blind copyee, the general subject-matter of the documents or a description of the withheld or redacted information, and the basis for withholding or redacting the document.

3. Single documents containing email exchanges or discussion strings need be logged only as one entry, with the meta-data from most recent email appearing on the log. An email thread for which a party claims a privilege may be logged in a single entry.

4. Written or oral communications between a party and its in-house and/or outside counsel after commencement of this litigation, and work product material created after commencement of this litigation or the any litigation relating to this litigation, need not be included on a privilege log.

F. **Non-Waiver.** The production of privileged or work-product protected documents, including ESI, whether inadvertent or otherwise, is not a waiver of the privilege or protection from discovery in this case or in any other proceeding. In the event that a party produces material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, the producing party within a reasonable time may make a written request that another party return the privileged material. A party that received the privileged material must either return the material or destroy it immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the material, the receiving party is not conceding that the material is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the production waived the privilege. The protections in this paragraph are intentionally broader than the protections set forth in Paragraph 9 of the *Protective Order* dated and filed with the Board on January 28, 2016.

G. **Production Delivery Format.** A producing party shall produce documents on a CD-ROM, DVD, external hard drive, or such other readily accessible computer or electronic media as the parties may hereafter agree upon, or via a Secure File Transfer Protocol or other file sharing software. Information that shall be identified on the face of the production media, or in a cover e-mail or letter, shall include: (1) the case number for this case; (2) the producing party's name; (3) the production date; (4) the Bates number range(s) of the documents, and (5) the confidentiality designation pursuant to any protective order entered by the Court or any confidentiality agreement entered into by the parties in this case, if the production contains protected information.

\* \* \* *Signature Page Follows* \* \* \*



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Appendix A

| Meta-Data Field Type              | Standardized Field Name | Email | Non-Email E-Documents | Paper Files |
|-----------------------------------|-------------------------|-------|-----------------------|-------------|
| Custodian                         | Cust                    | X     | X                     | X           |
| Email Author                      | Email_Sent              | X     |                       |             |
| Email Recipient                   | Email_Received          | X     |                       |             |
| Email Copyee                      | Email_cc                | X     |                       |             |
| Email Blind Copyee                | Email_bcc               | X     |                       |             |
| Email Subject or "Re" Line        | Email_Subject           | X     |                       |             |
| Email Date Sent                   | Email_SentDate          | X     |                       |             |
| Email Time Sent                   | Email_SentTime          | X     |                       |             |
| Beginning Bates Number            | BegDoc                  | X     | X                     | X           |
| Ending Bates Number               | EndDoc                  | X     | X                     | X           |
| Beginning Attachment Bates Number | BegDoc_Attach           | X     | X                     | X           |
| Ending Attachment Bates Number    | EndDoc_Attach           | X     | X                     | X           |
| Page Count                        | Page_Count              | X     | X                     | X           |
| Attachment Count                  | Attach_Count            | X     | X                     | X           |
|                                   |                         |       |                       |             |
| Text File Path                    | Meta_Text_Path          | X     | X                     | X           |
| Confidentiality                   | Conf_Desig              | X     | X                     | X           |
| MD5 Hash Tag Value                | MD5_Hash                | X     | X                     | X           |
| OCR                               |                         |       |                       | X           |
| File Name                         | Meta_File_Name          | X     | X                     |             |
| File Extension                    | Meta_File_Ext           | X     | X                     |             |
| Native File Size                  | Meta_File_Size          | X     | X                     |             |
| Native File Link                  | Meta_File_Link          | X     | X                     | X           |
| Author                            | Meta_Author             |       | X                     |             |
| Title                             | Meta_Title              |       | X                     |             |
| Original File Path                | Meta_File_Path          |       | X                     |             |
| Date Created                      | Meta_Create_Date        |       | X                     |             |
| Time Created                      | Meta_Create_Time        |       | X                     |             |
| Date Last Modified                | Meta_Modify_Date        |       | X                     |             |
| Time Last Modified                | Meta_Modify_Time        |       | X                     |             |

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BEFORE THE  
SURFACE TRANSPORTATION BOARD

ENTERED  
Office of Proceedings  
January 30, 2017  
Part of  
Public Record

VALERO MARKETING AND SUPPLY )  
COMPANY and VALERO RAIL PARTNERS, )  
LLC )

Docket No. NOR-42150

vs. )

UNION PACIFIC RAILROAD )  
COMPANY )

JOINT STATUS REPORT

Pursuant to 49 C.F.R. § 1111.10(a), the parties conferred telephonically on January 13, 2017 and again on January 23, 2017 to discuss discovery and procedural matters in this case. On January 6, 2017, Defendant Union Pacific Railroad Company served discovery requests. That same day, Complainants Valero Marketing and Supply Company and Valero Rail Partners, LLC filed a motion to hold these proceedings in abeyance (including Union Pacific's discovery requests), to which Union Pacific replied on January 26, 2017. Also on January 26, 2017, UP moved to consolidate this proceeding with STB Docket No. NOR-42144, *North America Freight Car Association v. Union Pacific Railroad Company*. The parties have agreed that a procedural schedule in this case should be deferred until the Board's decision on the outstanding procedural motions. The parties therefore jointly request that the Board defer further action on a procedural schedule until such time as it has resolved the outstanding motions.

Respectfully submitted,

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