

August 1, 2017

Via Hand Delivery

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street S.W.
Washington, DC 20423

244024
ENTERED
Office of Proceedings
August 1, 2017
Part of
Public Record

RE: Complaint for Filing

NOR 42153

Dear Ms. Brown:

Please accept for filing the enclosed complaint under reserved docket number NOR 42153. We have enclosed the executed original complaint, 10 photocopies of the complaint, one copy of the complaint to be stamped and returned to us, and a check for the filing fee. For the copy marked stamp and return, please date stamp it and provide it to the delivering messenger, who will return it to our office.

If you have any questions, please do not hesitate to contact me at 202-263-4143.

Sincerely,

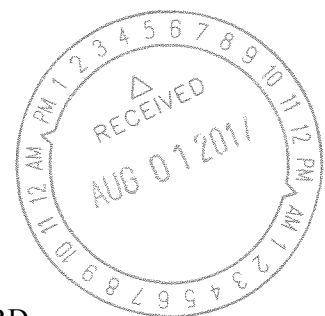


Jason D. Tutrone

Enclosures

FEE RECEIVED
August 1, 2017
SURFACE
TRANSPORTATION BOARD

FILED
August 1, 2017
SURFACE
TRANSPORTATION BOARD



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Arkema Inc.

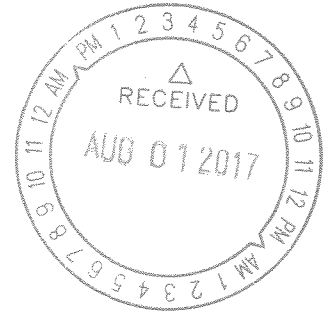
Complainant

vs.

Docket No. NOR 42153

Union Pacific Railroad Company

Defendant



COMPLAINT

COMES NOW Arkema Inc. (“Arkema”), 900 First Avenue, King of Prussia, PA 19406, and files this Complaint against Union Pacific Railroad Company (“UP”), 1400 Douglas Street, Omaha, NE 68179. Complainant brings this Complaint pursuant to 49 U.S.C. §§ 10702, 11101, 11121, 11122, 11704, and 49 C.F.R. Part 1111. In support of this Complaint, Arkema, by and through its attorneys, Thompson Hine LLP, states as follows:

The Parties

1. Arkema is a corporation organized under the laws of the Commonwealth of Pennsylvania and has its principal place of business in King of Prussia, Pennsylvania. The Arkema group is a diversified, worldwide chemical manufacturer and is a leading supplier of high performance materials that are used in a range of industries and applications. In the U.S., the Arkema Group operates 35 business, manufacturing and/or distribution facilities, including 2 research and development facilities, in 19 states and provides employment for 3,200 persons. Arkema’s products and materials serve a variety of industries and end-markets, including: automotive, packaging, consumer goods, the chemical industry, hygiene and beauty, electronics, agrochemicals, paper, construction, infrastructure, water treatment, energy and sports and leisure.

2. Arkema regularly tenders its chemical products to UP in rail tank cars for rail transportation. Because UP does not provide rail tank cars, Arkema must supply the rail tank cars necessary for such transportation.

3. UP is a common-carrier railroad engaged in the transportation of property in intrastate and 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”). 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 via a lease or other basis.

Nature of the Action

4. This is an action to: (a) declare UP’s assessment of charges for movements of Arkema’s empty rail tank cars to and from repair facilities an unreasonable practice under 49 U.S.C. § 10702 and a violation of UP’s statutory obligation under 49 U.S.C. § 11122(b) to compensate private car owners for use of their tank cars; and (b) obtain reparations under 49 U.S.C. § 11704(b) for Arkema’s payment of such charges.

5. UP does not provide the rail tank cars necessary for it to transport the commodities offered for transportation by Arkema. Instead, UP relies entirely upon tank cars supplied to it by Arkema to provide rail transportation services.

6. In Ex Parte No. 328, *Investigation of Tank Car Allowance System*, slip op. (served June 15, 1979), *amended* 3 I.C.C.2d 196 (1986) (“Ex Parte No. 328”), the Interstate Commerce Commission (“ICC”) adopted a negotiated agreement for the calculation and payment of mileage allowances by railroads to tank car owners as compensation for the railroads’ use of private tank cars in compliance with 49 U.S.C. §§ 11121 and 11122, which require rail carriers either to

supply the tank cars necessary for their provision of transportation services or to compensate tank car owners for the tank cars that they supply.

7. In Ex Parte No. 328, the ICC also adopted a negotiated agreement for the calculation and payment of mileage equalization charges by tank-car owners to railroads as compensation for empty tank-car miles that exceed loaded miles by more than six percent.

8. In *General American Transp. Corp. v. Indiana Harbor Belt R.R. Co.*, 3 I.C.C. 2d 599 (1987), the ICC permitted certain terminal railroads to charge for tank car movements to and from repair facilities because those terminal railroads handled a disproportionately large number of tank car moves to and from repair facilities located on their rail lines relative to their participation in loaded revenue tank car movements. The ICC concluded that the assessment of charges on those repair moves by those terminal railroads would not violate 49 U.S.C. §§ 11121 and 11122 so long as the tank car owners recouped those charges through mileage allowance payments.

9. Upon information and belief, UP collects over \$3 billion in revenue annually from its customers who transport commodities in tank cars. In 2015 and 2016, collectively, Arkema paid over \$50 million to UP for transporting commodities in tank cars, including related services such as rail car storage and transaction fees.

10. Upon information and belief, even though most, if not all, tank car shipments are transported by UP using private tank cars, UP does not pay mileage allowances on those shipments. Those shipments instead move under so-called “zero-mileage” or “zero-allowance” rates where, pursuant to a contract or tariff, UP does not pay mileage allowances to the car owner or lessee as compensation for UP’s use of their private cars. For most of its transportation service

in private tank cars, UP does not offer an alternative to zero-mileage rates that gives shippers the option to receive transportation service in UP-supplied tank cars.

11. Effective January 1, 2015, UP published Tariff UP 6004, Item 55-C (attached as Exhibit A to this Complaint), which imposed charges for transporting empty tank cars to and from repair facilities. UP previously provided the transportation described in Item 55-C without charge for such movements. UP recouped the cost of providing such transportation through its line-haul rates on loaded tank car movements, just as it does for other rail car types that UP itself leases or owns.

12. Also, effective, January 1, 2015, UP simultaneously “flagged-out” of the mileage equalization provisions of the RIC-6007-Series tariff to reflect the fact that UP would separately charge for transporting empty tank cars to and from repair facilities under UP 6004, Item 55-C. As a result of this flag-out, the empty miles associated with transporting empty tank cars to and from repair facilities for which UP assesses a charge pursuant to Tariff UP 6004, Item 55-C, are omitted from the calculation of a tank car owner’s liability for mileage equalization charges. The rates that UP charges for transporting empty tank cars to and from repair facilities in Item 55-C exceed the mileage equalization rates in Tariff RIC-6007-Series, Item 187.

13. Through Tariff UP 6004, Item 55-C, UP unlawfully has shifted responsibility for the cost of transporting empty tank cars to and from repair facilities from UP to the providers of private tank cars, including Arkema. Furthermore, UP has not implemented measures to ensure that tank car providers, including Arkema, are compensated for the new UP charge in Item 55-C for transporting their tank cars to and from repair facilities.

Jurisdictional Allegations

14. The Board has jurisdiction under 49 U.S.C. §§ 11101 and 11121 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 tank cars.

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

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

17. The Board has jurisdiction under 49 U.S.C. §§ 10701, 10702, 10704 and 10707 over the rates made applicable to empty tank car movements to Repair Facilities by UP Tariff 6004, Item 55-C.

18. The Board has jurisdiction under 49 U.S.C. § 11704(b) to award damages to Arkema.

COUNT I

UP's Repair Facility Charge—Unreasonable Practice

19. Arkema re-alleges and incorporates by reference the allegations in the foregoing paragraphs.

20. UP Tariff 6004, item 55-C, effective January 1, 2015, applies per car and mileage based charges in UP Tariff 4703-series to all empty rail tank car moves by UP to and from Repair Facilities except: (1) empty movements immediately preceded by a loaded line-haul revenue movement 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.”

21. Under UP Tariff 4703, the charges for empty rail tank-car movements occurring from January 1, 2015 through December 31, 2015 were calculated as follows:

0-250 miles	\$1,317 per car
251-500 miles	\$1,477 per car
501 miles or greater	\$2.96 per mile

22. Under UP Tariff 4703, Item 1200, the charges for empty rail tank-car movements occurring from January 1, 2016 through December 31, 2016 were calculated as follows:

0-250 miles	\$1,363 per car
251-500 miles	\$1,529 per car
501 miles or greater	\$3.06 per mile

23. Under UP Tariff 4703, Item 1200-A, the charges for empty rail tank-car movements occurring from January 1, 2017 through December 31, 2017 are calculated as follows:

0-250 miles	\$1,411 per car
251-500 miles	\$1,583 per car
501 miles or greater	\$3.17 per mile

24. Before January 1, 2015, UP provided the transportation services covered by UP Tariff 6004, Item 55-C, to Arkema without charge. From January 1, 2015 until July 31, 2015, UP assessed charges against Arkema for transportation of Arkema’s empty tank cars to and from “Repair Facilities” pursuant to a contract with Arkema. Since August 1, 2015, UP has assessed charges against Arkema for transportation of Arkema’s empty tank cars to and from “Repair

Facilities” pursuant to Item 55-C. Item 55-C requires Arkema to pay UP for a service that UP otherwise would provide for itself, without charge, if UP were to provide the tank cars.

25. UP transports tens of thousands of loaded tank car shipments annually, including 6,028 loaded tank car shipments for Arkema in 2015 and 6,260 loaded tank car shipments for Arkema in 2016. The number of tank car shipments to Repair Facilities that UP transported in that same time frame was a small fraction of the loaded tank car shipments UP transported.

26. UP does not pay mileage allowances to Arkema for UP’s use of tank cars provided by Arkema, or otherwise compensate Arkema for providing tank cars for the benefit of UP.

27. UP did not accompany the publication of UP Tariff 6004, Item 55-C with any measures to compensate Arkema for the use of its tank cars, including UP Tariff 6004, Item 55-C, which imposes a new cost of ownership upon Arkema that is not part of any compensation paid to Arkema.

28. UP’s implementation of the January 1, 2015 modification to UP 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, Arkema prays that the Board require that 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:

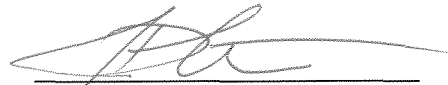
A. find that UP’s implementation of UP Tariff 6004, Item 55-C, is an unreasonable practice under 49 U.S.C. § 10702 and violates 49 U.S.C. §§ 11121 and 11122;

B. order UP immediately to rescind UP Tariff 6004, Item 55-C, effective January 1, 2015;

C. order UP, pursuant to 49 U.S.C. § 11704(b), to pay reparations to Arkema of charges UP has assessed and collected from Arkema under UP Tariff 6004, Item 55-C, on and after August 1, 2015; and

D. grant to Arkema such other and further relief as the Board may deem proper based on the record.

Respectfully submitted,



Jeffrey O. Moreno
Jason D. Tutrone
Thompson Hine LLP
1919 M St. NW, Suite 700
Washington, DC 20036
(202) 331-8800

Counsel for Arkema Inc.

Dated: August 1, 2017

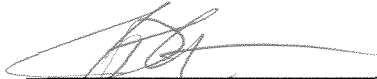
CERTIFICATE OF SERVICE

I hereby certify that on this August 1, 2017, I have served a copy of the foregoing
Complaint via overnight mail to the chief legal officer 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

A courtesy copy also has been served by e-mail upon:

Michael L. Rosenthal
Covington & Burling LLP
One CityCenter
850 10th Street, NW
Washington, D.C. 20001
mrosenthal@cov.com



Jason D. Tutrone