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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
September 8, 2017
Part of
Public Record

ARKEMA INC.,)
)
Complainant,)
)
v.)
)
UNION PACIFIC RAILROAD COMPANY,)
)
Defendant.)

STB Docket No. NOR 42153

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,)
)
Complainants,)
)
v.)
)
UNION PACIFIC RAILROAD COMPANY,)
)
Defendant.)

STB Docket Nos. NOR 42144, *et al.*
(Consolidated)

SUPPLEMENT TO UNION PACIFIC'S MOTION TO CONSOLIDATE

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

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

September 8, 2017

Union Pacific submits this supplement to our August 9, 2017, motion to consolidate NOR 42153 with the already-consolidated proceedings in NOR 42144, NOR 42150, and NOR 42152 (“NAFCA Case”). Three relevant developments occurred after we filed our motion, but before complainants filed their replies. Complainants failed to mention these developments. To allow the Board to decide our motion based on a complete record, we describe them below.

First, on August 14, Arkema served discovery on Union Pacific. Arkema made only five requests: three for information regarding its own traffic; one for related documents; and one for “all of [Union Pacific’s] responses to discovery requests served upon Union Pacific in NOR 42144, 42150 and 42152.”¹ Arkema’s own discovery thus confirms NOR 42153 raises the same issues as the NAFCA Case.

Arkema’s discovery also shows discovery in NOR 42153 would not unduly delay the NAFCA Case if the proceedings were consolidated. Arkema seeks information Union Pacific will produce expeditiously, with one exception. The exception is Arkema’s request for information regarding Union Pacific’s measures of profitability for line-haul rates charged to Arkema—information the Board has repeatedly ruled irrelevant.²

Second, on August 16, Tesoro, a complainant in the NAFCA Case, served new discovery requests on Union Pacific.³ Union Pacific has objected to the new requests on several grounds.

¹ Arkema’s discovery requests are attached as Exhibit A.

² See, e.g., *Total Petrochemicals USA, Inc. v. CSX Transp., Inc.*, NOR 42121, slip op. at 3-4 (STB served Dec. 23, 2010); *M&G Polymers USA, LLC v. CSX Transp., Inc.*, NOR 42123, slip op. at 3-4 (STB served Dec. 23, 2010); *Entergy Arkansas, Inc. v. Union Pac. R.R.*, NOR 42104, slip op. at 4-5 (May 7, 2008).

³ Tesoro’s discovery requests are attached as Exhibit B.

Tesoro is represented by the same outside counsel in the NAFCA Case as American Fuel & Petrochemical Manufacturers (“AFPM”), one of the four original association complainants in (continued...)

Regardless of whether agree to or are ordered to produce documents in response to Tesoro's latest wave of requests, discovery in the NAFCA Case will now continue beyond the period we anticipated when we moved to consolidate NOR 42153 with the NAFCA Case. This is the result of complainant Tesoro's choice to extend discovery, not Union Pacific's choice. Discovery will also continue for longer than complainants in the NAFCA Case suggested in their reply when they claimed the only outstanding discovery was the Cargill deposition, completion of Valeo's and Tesoro's document productions, and depositions of Valero and Tesoro employees.⁴ Those claims are no longer true and accurate.

Third, on August 18, Arkema served its responses and objections to Union Pacific's discovery requests.⁵ Arkema claims Union Pacific's representations of our willingness to work with Arkema to simplify discovery are "at odds with [Union Pacific's] conduct thus far."⁶ However, Arkema fails to acknowledge that on the very same day we received Arkema's discovery responses, a Friday, we suggested a discovery call "towards the middle or end of [the] next week."⁷ Arkema also fails to acknowledge that on Tuesday, August 22, we sent a list of 22 requests for which we were willing to narrow the date range, as well as a spreadsheet showing the requests to which Cargill and the POET entities ultimately agreed to respond, or ultimately

NOR 42144, so Tesoro's decision to seek additional discovery from Union Pacific at this stage of the proceedings is apparently not contrary to the interests of AFPM.

⁴ See Reply to Union Pacific's Second Motion for Consolidation at 6, NOR 42144, *et al.* (Aug. 29, 2017); see also *id.* at 2 (asserting there is only a "small amount of discovery that remains").

⁵ Union Pacific agrees with complainants in the NAFCA Case that the Board's rule regarding separate charges for empty repair moves should *not* depend "on differences among shipper commodities or car types." See *id.* at 13. However, information regarding a wider range of shippers should help the Board decide whether to maintain or change its rule.

⁶ Reply of Arkema Inc. to Union Pacific's Motion for Consolidation at 2, NOR 42153 (Aug. 29, 2017).

⁷ See Email from Michael Rosenthal to Jason Tutrone (Aug.18, 2017) (Attached as Exhibit C).

were ordered to respond, in NOR 42144.⁸ Arkema still has not replied to our attempts to simplify and expedite discovery.

Arkema's failure in this regard, as well as its prediction discovery would take "at least an additional 9 months"⁹ is indicative of the foot-dragging we have seen from complainants in the NAFCA Case. We served our first discovery requests on April 30, 2015. The POET entities were still producing responsive documents two years later, in April 2017. Depositions of POET employees revealed yet more documents that should have been produced, so discovery continued until June 8, 2017.¹⁰ Cargill's document production was not completed until August 3, 2017.¹¹ We do not yet know what depositions of Cargill personnel will reveal about possible additional documents. Valero and Tesoro refused to respond to Union Pacific's discovery requests until the Board served its consolidation order on March 31, 2017. Now, they say document discovery will be completed "relatively soon."¹² If true, discovery should take Arkema six months at most—not the two-plus years the POET entities and Cargill have taken, or the nine months Arkema says it needs.¹³

As discussed above, if Union Pacific agrees to or is ordered to produce documents responsive to Tesoro's new discovery requests, discovery in the NAFCA Case will take longer to complete than complainants have predicted in their quest to avoid consolidation. That delay, too,

⁸ See Email from Michael Rosenthal to Jason Tutrone (Aug. 22, 2017) (Attached as Exhibit D).

⁹ Reply of Arkema Inc. to Union Pacific's Motion for Consolidation at 1.

¹⁰ See Complainants' Eighth Bi-Weekly Status Report, NOR 42144 *et al.* (June 22, 2017).

¹¹ See Complainants' Twelfth Bi-Weekly Status Report, NOR 42144 *et al.* (Aug. 17, 2017).

¹² Reply to Union Pacific's Second Motion for Consolidation at 6.

¹³ Despite claims of "significant harm" from delay (*id.* at 8), none of the individual complainants has been in a rush to complete discovery—as evidenced by the time Cargill and the Poet entities have taken to complete discovery and by Tesoro's decision to file new discovery requests nearly eight months after filing its complaint.

would be attributable to complainants in the NAFCA Case, not to Union Pacific. Additionally, any prospect of additional delay in the NAFCA Case is yet another reason for the Board to conclude that granting our motion for consolidation would not unduly delay proceedings or prejudice any party in the NAFCA Case.¹⁴

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

September 8, 2017

¹⁴ Complainants in the NAFCA Case aver “that evidence may begin to go stale.” *Id.* at 10. However, they fail to mention that Union Pacific updated our production of traffic data in this proceeding on March 10, 2017, so the data are available through December 31, 2016. We intend to update our production at least one more time, so the data will be available through at least June 30, 2017. Complainants are, of course, free to update their own data productions.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 2017, I caused a copy of the foregoing document to be served by e-mail or first-class mail, postage prepaid, on all of the parties of record in STB Docket Nos. NOR 42144, 42150, 42152, and 42153.

I also caused a copy of the foregoing document to be served by e-mail and first-class mail, postage prepaid, 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

BEFORE THE
SURFACE TRANSPORTATION BOARD

_____	)	
ARKEMA INC.,	)	
	)	
Complainant,	)	
	)	
vs.	)	NOR 42153
	)	
UNION PACIFIC RAILROAD COMPANY,	)	
	)	
Defendant.	)	
_____	)	

ARKEMA’S FIRST SET OF DISCOVERY REQUESTS

Pursuant to 49 C.F.R. part 1114 subpart B, Complainant Arkema, Inc. requests that Defendant Union Pacific Railroad Company produce documents and information responsive to the following Interrogatories and Document Requests to Jeffrey O. Moreno at Thompson Hine LLP, 1919 M St. NW, Washington, D.C. 20036, not later than August 29, 2017.

DEFINITIONS

1. “Communication” means any transmission or receipt of information by any means, including telephone conversations, letters, telecopies, electronic mail, text messages, written memoranda, and in-person conversations.
2. “Document” means all types of documents that are subject to discovery under the Board’s rules at 49 C.F.R. § 1114.30(a)(1). “Document” includes every copy of a document that is not identical to the original or any other copy.
3. “Item 55-C” means Item 55-C in UP Tariff 6004, as it pertains to the movement of empty tank cars to or from Repair Facilities.
4. “Person” means any natural person or legal entity, including any business, trade, or governmental entity, organization, or association.

5. “Repair Facility” has the same meaning as used in Item 55-C.

6. “Union Pacific,” “You,” and “Your” means Defendant Union Pacific Railroad Company, its predecessor railroads, employees, agents, officers, directors, advisors, independent contractors, expert consultants, and all other Persons acting or who have acted on Union Pacific’s behalf.

INSTRUCTIONS

1. Unless a different time period is specified, these requests cover the period from January 1, 2013 to the time responsive information and documents are served on Arkema (“Discovery Period”). Arkema believes that discovery beyond this period will place an undue burden upon the parties. However, if Union Pacific does not agree to limit the scope of its discovery of Arkema to the same period, Arkema reserves its rights to increase the Discovery Period to the same period for which Union Pacific has requested discovery of Arkema and make all assertions in support of such increased discovery period. Also, by limiting these requests to the Discovery Period, Arkema does not waive any defense it may have against any opposition by Union Pacific to Arkema expanding the Discovery Period to match the same period as Union Pacific’s discovery of Arkema.

2. For each and every document request, You are required to produce any Documents in Your possession, custody, or control, without regard to the physical location of such Documents.

3. All Documents are to be produced as they are kept in the usual course of business including any labels, file markings, or similar identifying features, or shall be organized and labeled to correspond to the categories requested herein. If there are no Documents in response to a particular request, You should so state in writing.

4. Each request contemplates production of all Documents in their entirety. If only a portion of a Document is responsive to one or more requests, the Document shall be produced in its entirety.

5. If You for any reason withhold Documents or information responsive to any of these requests, You should state the specific factual and legal basis for doing so and produce Documents or information for any part of the request or interrogatory that is not alleged to be objectionable or to call for production of protected information. If You withhold Documents on the basis of a claimed privilege or attorney work product, then for each such Document, You should provide the following information: the Document's date, type (e.g., letter, memo, notes), author(s), addressee(s), other recipient(s), general subject matter, and the basis for withholding the Document or information.

6. Identify all Persons who provided information for each response, and state which response(s) the Person provided information for.

7. These requests are continuing in character so as to require You to supplement in accordance with 49 C.F.R. § 1114.29.

INTERROGATORIES

Interrogatory No. 1

For each tank car movement to or from a Repair Facility for which Union Pacific has assessed Arkema a charge under Item 55-C, identify:

- a. The origin, interchange location(s) and carrier(s) (if any), and destination, including the Repair Facility to or from which the car moved.
- b. The amount billed to Arkema.
- c. The amount paid by Arkema.

Interrogatory No. 2

For each linehaul rate for transportation of commodities in tank cars that Union Pacific has assessed Arkema since 2013, state the profitability of that rate by any and all measures used by Union Pacific during that time period to determine the profitability of such transportation and explain how UP calculated each such measure of profitability.

Interrogatory No. 3

For each year from 2013 to the present, state the total amount of revenue UP has received from Arkema for line-haul transportation service in loaded tank cars.

DOCUMENT REQUESTS

Document Request No. 1

Produce all documents that contain the information provided in Your answers to the Interrogatories.

Document Request No. 2

Produce all of Your responses to discovery requests served upon Union Pacific in NOR 42144, 42150 and 42152.

Dated: August 14, 2017

Respectfully submitted,

/s/ Jason Tutrone

Jeffrey O. Moreno

Jason D. Tutrone

Thompson Hine LLP

1919 M St, N.W., Suite 700

Washington, DC 20036

(202) 331-8800

Counsel for Arkema Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 2017, I caused a copy of the foregoing document to be served by first-class mail or more expeditious means on the parties of record for NOR 42153.

/s/ Jason Tutrone

Jason D. Tutrone

BEFORE THE
SURFACE TRANSPORTATION BOARD

<u>NORTH AMERICA FREIGHT CAR</u>	)	
<u>ASSOCIATION; AMERICAN FUEL &</u>	)	
<u>PETROCHEMICAL MANUFACTURERS;</u>	)	
<u>THE CHLORINE INSTITUTE; THE</u>	)	
<u>FERTILIZER INSTITUTE; AMERICAN</u>	)	
<u>CHEMISTRY COUNCIL; ETHANOL</u>	)	
<u>PRODUCTS, LLC D/B/A POET ETHANOL</u>	)	NOR 42144, 42150, 42152
<u>PRODUCTS; POET NUTRITION, INC.; and</u>	)	
<u>CARGILL INCORPORATED</u>	)	
	)	
vs.	)	
	)	
<u>UNION PACIFIC RAILROAD</u>	)	
<u>COMPANY</u>	)	

TESORO'S SECOND SET OF DISCOVERY REQUESTS TO
UNION PACIFIC RAILROAD COMPANY

Complainants Tesoro Refining & Marketing Company LLC, Tesoro Great Plains Gathering & Marketing LLC, and Dakota Prairie Refining, LLC (collectively, "Tesoro") hereby serve their First Discovery Requests upon Defendant Union Pacific Railroad under 49 C.F.R. §§ 1114.26 and 1114.30. Responses and responsive documents, as well as any objections, must be delivered by August 31, 2017, or another date or dates mutually agreed to by the parties, to Justin Savage at Hogan Lovells US LLP, Columbia Square, 555 13th St NW, Washington, DC 20004.

INSTRUCTIONS

1. These discovery requests ("Requests") requests are governed by the definitions and instructions set forth in the applicable regulations of the Surface Transportation Board, 49 C.F.R. Part 1114, which are incorporated by reference and supplemented as permitted by the specific definitions and instructions above and below.

2. In responding to these Requests, You are required to furnish all information, documents, and items in Your possession, custody, and control, including, but not limited to, information, documents, or items in the possession of Your attorneys, investigators, employees, agents, representatives, or any other person acting on Your behalf or at Your request, and not merely such information or documents as is held or known by the entity answering.

3. Where a Request has a number of separate subdivisions, or related parts or portions, a complete response is required to each part or portion. Any objection to a Request should clearly indicate the subdivision, part, or portion of the Request to which it is directed.

4. Each Request shall operate and be construed independently, and, unless otherwise indicated, no Request limits the scope of any other Request.

5. Words used in the singular shall include the plural and words used in the plural shall include the singular, whenever the context permits. Terms such as “and,” “or,” or “including” shall be construed in the broadest and most inclusive manner, in the disjunctive or conjunctive as necessary, in order to call for all responsive information without limitation.

6. References to the present tense shall be construed to include the past tense, and references to the past tense shall be construed to include the present tense, as necessary to bring within the scope of each Request all documents that might otherwise be construed to be outside the scope of the Request.

7. If You believe that any request or definition or instruction applicable thereto is ambiguous, it should set forth the language that it believes is ambiguous and the interpretation that it is using in responding to the Request.

8. If any document covered by a Request is withheld for whatever reason, including any privilege, You shall furnish a written privilege log identifying all withheld documents in the following manner:

- a. the specific Request to which the document is responsive;
- b. the date of the document;
- c. the name of each author or preparer;
- d. the name of each person who received the document and the name of such person's employer at the time the person received the document;
- e. a brief description of the subject matter of the document and any withheld attachments or appendices;
- f. the specific factual and legal basis for withholding; and
- g. the number of pages withheld.

9. Each document produced shall be an authentic original document or a true duplicate of an authentic original document.

10. These Requests cover the period from January 1, 2015 to the date you serve your response, unless otherwise indicated.

11. All Requests are continuing and amended or supplemental responses shall be provided if and when responsive new information and documents are discovered by Defendant, its consultants, outside experts and/or counsel.

12. Identify all persons who provided information for each response, and state which response(s) the person provided information for.

DEFINITIONS

Unless the terms of a particular request specifically indicate otherwise, the following definitions are applicable throughout these requests and are incorporated into each specific request.

“Communication” and “communications” mean the verbal, nonverbal, written, manual, and/or electronic transmittal of information of any kind (in the form of facts, ideas, opinions, inquiries, requests for information, or otherwise).

“Document” is defined to be synonymous in meaning and equal in scope to the usage of this term in 49 C.F.R. § 1114.30, and includes, without limitation, all writings of any kind, source, or authorship, both originals and non-identical copies. The term further includes, without limitation, handwritten, typewritten, printed, photocopied, photographic, and electronic or computerized data compilations and electronically stored information. A draft or non-identical copy is a separate document within the meaning of this term.

“Identity” or “Identify” means:

- a. when used with respect to a natural person, to state the person’s full name, present or last known business address, the person’s present or last known business telephone number, the person’s present or last known place of employment, position or business affiliation, and the person’s present and former relationship to Union Pacific.
- b. when used with respect to a person other than a natural person, to state the entity’s full business or organizational name, the address of entity’s principal place of business, the entity’s State of incorporation or formation, and the identity of person(s) who acted on behalf of the entity with respect to the subject matter of the requested document, information or thing.
- c. when used with respect to a document, either to produce the document itself or to state the name or title of the document, the type of document (e.g., letter, memorandum, telegram, computer input or output, chart, etc., or other means of identifying it), the date of the document, the person(s) who authored and/or signed the document, the person(s) to whom the document was addressed, sent, and/or received, the general subject matter of the document, and the present location and present custodian of the docu-

ment (if any such document was but is no longer in the possession, custody or control of UP, state what disposition was made of it and explain the circumstances surrounding, and the authorization for, such disposition, and state the date or approximate date of such disposition).

- d. when used with respect to a non-written communication, to state the identity of every natural person making or receiving the communication, such person's respective principal(s) or employer(s) at the time of the communication, the date, manner and place of the communication, and the topic or subject matter of the communication.

"Item 55-C" means UP's Tariff UP 6004, Item 55-C, effective January 1, 2015.

"Possession, custody or control" means any document or other information that is within the possession or control of a defendant or any of its employees, agents, or affiliates or subsidiaries and their employees.

"Refer or relate" means to have any direct or implied reference or relationship to any subject matters to which such phrase is applied.

"Repair Facility" has the meaning given to it in Item 55-C, which is any facility that cleans, lines, relines, maintains, modifies, repairs, or retrofits tank cars.

"Union Pacific," "Defendant," "You," or "Your" shall mean Defendant Union Pacific Railroad Company and any of its predecessor railroads, as well as any of its outside consultants, experts and counsel. The terms "you," "your," and any other nouns or pronouns shall be gender-inclusive.

INTERROGATORIES

7. Identify all communications relating to requests for refunds for or reductions in freight charges under Item 55-C.

8. Identify communications relating to service issue claims by, disputes with, or inquiries by Union Pacific's customers or shippers relating to the movement of a tank car in need

of repair to a Repair Facility not controlled by Union Pacific in lieu of Union Pacific performing repairs on-site or at a Union Pacific-controlled facility.

9. Identify the factors Union Pacific uses in deciding whether a tank car can be repaired by Union Pacific or an Association of American Railroads (AAR)-certified Mobile Repair Unit on-site or whether the repairs require movement to a Repair Facility.

10. Identify the Persons responsible for deciding whether a tank car can be repaired by Union Pacific or an AAR-certified Mobile Repair Unit on-site or whether the repairs require movement to a Repair Facility.

11. Identify the factors Union Pacific uses in deciding whether to provide a refund to, or reduce freight charges to, Union Pacific customers disputing charges under Item 55-C.

12. Identify the Persons responsible for deciding whether to provide a refund to, or reduce freight charges to, Union Pacific customers disputing charges under Item 55-C.

DOCUMENT REQUESTS

5. Produce all documents that were referred to or relied upon to respond to Interrogatories 7 through 12 above.

6. Produce all documents relating to, discussing, referring to, mentioning or commenting on service issue claims by, disputes with, or inquiries by Union Pacific's customers or shippers relating to the movement of a tank car in need of repair to a Repair Facility in lieu of Union Pacific or an AAR-certified Mobile Repair Unit performing repairs on-site.

7. Produce all documents relating to, discussing, referring to, mentioning or commenting on movement of a tank car to a Repair Facility to address mechanical defects with one or more of the following:

- a. Brake shoes

- b. Wheels
- c. Trucks
- d. Springs
- e. Side bearings
- f. Couplers
- g. Air brakes
- h. Safety appliances.
- i. Light Repairs
- j. Superlight Repairs

8. Produce all documents relating to, discussing, referring to, mentioning or commenting on a tank car deemed unrepairable by Union Pacific.

9. Produce all documents relating to, discussing, referring to, mentioning or commenting on a refund to, or reduction of freight charges to, Union Pacific customers disputing charges under Item 55-C.

Respectfully submitted,

/s/ Justin A. Savage

Justin A. Savage, Esq.
Peter Whitfield, Esq.
Houston Shaner, Esq.
Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600

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

Dated: August 16, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of August, 2017, I caused a copy of the foregoing to be served on counsel for the parties or record in NOR 42144, NOR 42150, and NOR 42152.

/s/ Houston Shaner _____
Houston Shaner

Rosenthal, Michael

From: Rosenthal, Michael
Sent: Friday, August 18, 2017 4:38 PM
To: Tutrone, Jason
Cc: Moreno, Jeff; Pillai, Kavita
Subject: RE: NOR 42153: Arkema Responses to UP's First Discovery Requests

Categories: Red Category

Jason,

Thanks. I'll review your responses, and we can try to set up a call -- perhaps towards the middle or end of next week.

Regards,

Mike

From: Tutrone, Jason [mailto:Jason.Tutrone@thompsonhine.com]
Sent: Friday, August 18, 2017 4:30 PM
To: Rosenthal, Michael <mrosenthal@cov.com>
Cc: Moreno, Jeff <Jeff.Moreno@thompsonhine.com>
Subject: NOR 42153: Arkema Responses to UP's First Discovery Requests

Mike,

I have attached Word and pdf versions of Arkema's responses to UP's first set of discovery requests.

At your earliest convenience after you have had an opportunity to review Arkema's responses, we would like to set up a discovery conference to discuss the scope of discovery and agree on limiting the scope of discovery consistent with the limitations agreed upon in NOR 42144, NOR 42160, and NOR 42152 and Union Pacific's representations in the Motion to Consolidate it filed in this proceeding.

Best regards,

Jason

Jason D. Tutrone | Associate | **Thompson Hine LLP**
1919 M Street, N.W., Suite 700 | Washington, D.C. 20036
Office: 202.263.4143 | **Mobile:** 202.603.3109
Fax: 202.331.8330 | **Email:** Jason.Tutrone@ThompsonHine.com
Web: <http://www.ThompsonHine.com>



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Atlanta | Cincinnati | Cleveland | Columbus | Dayton | New York | Washington, D.C.



Rosenthal, Michael

From: Rosenthal, Michael
Sent: Tuesday, August 22, 2017 11:43 AM
To: Tutrone, Jason (Jason.Tutrone@thompsonhine.com); Jeff.Moreno@ThompsonHine.com
Cc: Pillai, Kavita
Subject: NOR 42153 - discovery
Attachments: Cargill and Poet Discovery Summary provided to Valero_Tesoro 1 27 17.xlsx

Categories: Red Category

Jason,

To keep the ball rolling on the discovery front, I'm providing a list of Union Pacific discovery requests for which we believe a date range from January 1, 2013 - July 31, 2017 would suffice. (We provided a similar list to Valero and Tesoro.) Those requests are:

- Interrogatory No. 3
- Interrogatory No. 4
- Interrogatory No. 7
- Interrogatory No. 8
- Interrogatory No. 14
- Interrogatory No. 16
- Interrogatory No. 17
- Interrogatory No. 18
- Interrogatory No. 19
- Interrogatory No. 20
- Interrogatory No. 28
- Interrogatory No. 33
- Interrogatory No. 37
- Document Request No. 15
- Document Request No. 18
- Document Request No. 19
- Document Request No. 24
- Document Request No. 25
- Document Request No. 26
- Document Request No. 27
- Document Request No. 33
- Document Request No. 34

Please note that our willingness to narrow the time period with respect to interrogatories to which you have responded that you will produce leases does not indicate our agreement to narrow the time frame with respect to Document Request No. 14, which calls for the production of leases.

Also, note that several requests involve communications about Item 55-C, or movements for which charges have been assessed under Item 55-C. In those situations, we would not expect there to be any documents from before Item 55-C was announced, in December 2014.

With regard to Union Pacific's other requests, we understand that Arkema may not retain information going back to 2001, or that obtaining access may be unreasonably burdensome. However, we would appreciate if you would give us a better sense what information does and does not exist, and for which time periods, and the burdens associated with performing a reasonable search, so we can promptly resolve these basic questions about the scope of discovery.

I've also attached a spreadsheet that we provided Valero and Tesoro that reflects the discovery requests to which Cargill and the Poet entities ultimately agreed to respond, or ultimately were ordered to respond, in NOR 42144. (The spreadsheet does not address UP's third set of discovery requests, which was a follow-up set of discovery after we received responses to the first two sets.)

Regards,

Mike

Request	Subject of MTC?	Cargill to Produce	Poet Nutrition to Produce	Poet Ethanol to Produce
Interrogatories				
1		Will produce information to identify tank cars it owns and leases	Will produce information to identify tank cars it leases	Will produce information to identify tank cars it leases
2		Objected.	Responded narratively.	Responded narratively.
3		Will produce tank car lease agreements.	Responded narratively.	Responded narratively.
4		Will produce tank car lease agreements.	Responded narratively.	Responded narratively.
5		Will produce tank car lease agreements.	Will produce tank car lease agreements.	Will produce tank car lease agreements.
6		Will produce tank car lease agreements.	Will produce tank car lease agreements.	Will produce tank car lease agreements.
7		Will produce tank car lease agreements.	Responded narratively.	Responded narratively.
8		Will produce tank car lease agreements.	Responded narratively.	Responded narratively.
9		Will produce tank car lease agreements.	Will produce tank car lease agreements.	Will produce tank car lease agreements.
10		Will produce tank car lease agreements.	Will produce tank car lease agreements.	Will produce tank car lease agreements.
11		Objected.	Objected.	Objected.
12		Objected.	Objected.	Objected.
13		Objected.	Objected.	Objected.
14	Yes as to Cargill	From 9/29 hearing: Time period is 2013 to 2015. Cargill will produce dates sent, received and released from repair facilities and location of facility. Outside consultant may have waybill data which they would provide if so. Otherwise, the information may be contained in the CLM data which they were providing.	Searched; no responsive information.	Searched; does not possess all information but will produce responsive documents.
15	Yes as to Cargill	From 9/29 hearing: If they are planning to claim damages, they will have to provide underlying info so will do so.	Will produce responsive documents.	Will produce responsive documents.
16	Yes	From 9/29 hearing: Must produce this information	From 9/29 hearing: Must produce this information	From 9/29 hearing: Must produce this information
17		Will produce responsive documents.	Responded narratively.	Responded narratively that complainant has not been assigned any reporting marks.
18	Yes	After 9/26 m&c, agreed to provide loaded and empty miles. Empty miles on UP to repair facilities and empty miles on other railroads to repair facilities will be addressed by response to Rog. No. 14. Per 9/29 hearing, they will provide what they have going back to 2007.	Objected. After meet and confer, Wilcox confirmed that Poet has some but not complete information responsive to this Interrogatory going back to 2007 (data on loaded and empty miles for their leased tank cars provided by car owners). Per 9/29 hearing, they will provide what they have going back to 2007.	Objected. After meet and confer, Wilcox confirmed that Poet has some but not complete information responsive to this Interrogatory going back to 2007 (data on loaded and empty miles for their leased tank cars provided by car owners). Per 9/29 hearing, they will provide what they have going back to 2007.
19	Yes as to Cargill	After 9/26 m&c, agreed to provide this for 2007 to present.	Responded narratively that complainant has not been assigned any reporting marks.	Responded narratively that complainant has not been assigned any reporting marks.
20		Responded narratively.	Responded narratively that complainant has not been assigned any reporting marks.	Responded narratively that complainant has not been assigned any reporting marks.
21		Will produce responsive documents.	Will produce responsive documents.	Will produce responsive documents.
22		Will produce responsive documents.	Will produce responsive documents.	Will produce responsive documents.
23		Responded narratively.	Responded narratively.	Responded narratively.
24		Will produce responsive documents.	Searched; no communications identified.	Searched; no communications identified.
25		Will produce responsive documents.	Searched; no communications identified.	Searched; no communications identified.
26		Will produce responsive documents.	Searched; no communications identified.	Searched; no communications identified.
27		Will produce responsive documents.	Searched; no communications identified.	Searched; no communications identified.
28	Yes as to Cargill	After 9/26 m&c, agreed to produce documents for reparations period. Confirmed at hearing.	Will produce responsive documents.	Will produce responsive documents.
29		Objected.	Objected.	Objected.
30	Yes	Agreed to provide reasonably accessible information responsive to subparts a., b., c., f., g., n., o., and s. for the period 2007 to present for movements on UP. Objected to rest. Cargill will produce existing management and accounting reports and analyses regarding Cargill's tank car ownership and maintenance costs, as well as the more detailed tank car cost information it can extract from its fleet management database. Cargill will produce such tank car cost information to the extent it is available for the time period 2007 to 2015. Cargill will not be required to produce car-by-car invoices or other similar transactional documents or information regarding tank car ownership costs, except to the extent such documents or information are readily available from computerized databases.	Responded narratively that complainant does not own tank cars.	Responded narratively that complainant does not own tank cars.
31	Yes	Agreed to provide reasonably accessible information responsive to subparts a., b., c., i., j., and n. for period 2007 to present. Objected to rest. Cargill will produce existing management and accounting reports and analyses regarding Cargill's tank car ownership and maintenance costs, as well as the more detailed tank car cost information it can extract from its fleet management database. Cargill will produce such tank car cost information to the extent it is available for the time period 2007 to 2015. Cargill will not be required to produce car-by-car invoices or other similar transactional documents or information regarding tank car ownership costs, except to the extent such documents or information are readily available from computerized databases.	Poet will produce all documents and information in its possession, custody, or control regarding tank car ownership and maintenance costs, except that POET Nutrition will not be required to produce car-by-car invoices, or other similar transactional documents or information regarding tank car ownership costs, except to the extent the car-by-car materials are readily available from computerized databases. POET Nutrition will produce this information for the time period 2014 to 2015.	Poet will produce summaries of POET Ethanol's tank car ownership and maintenance costs prepared in the normal course of business. POET Ethanol will produce this information for the time period 2008 to 2015. POET Ethanol will not be required to produce car-by-car invoices or other similar transactional documents or information regarding tank car ownership costs
32	Yes	Cargill will produce existing management and accounting reports and analyses regarding Cargill's tank car ownership and maintenance costs, as well as the more detailed tank car cost information it can extract from its fleet management database. Cargill will produce such tank car cost information to the extent it is available for the time period 2007 to 2015. Cargill will not be required to produce car-by-car invoices or other similar transactional documents or information regarding tank car ownership costs, except to the extent such documents or information are readily available from computerized databases.	Poet will produce all documents and information in its possession, custody, or control regarding tank car ownership and maintenance costs, except that POET Nutrition will not be required to produce car-by-car invoices, or other similar transactional documents or information regarding tank car ownership costs, except to the extent the car-by-car materials are readily available from computerized databases. POET Nutrition will produce this information for the time period 2014 to 2015.	Poet will produce summaries of POET Ethanol's tank car ownership and maintenance costs prepared in the normal course of business. POET Ethanol will produce this information for the time period 2008 to 2015. POET Ethanol will not be required to produce car-by-car invoices or other similar transactional documents or information regarding tank car ownership costs
33	Yes	Agreed to provide information in part a, and to the extent applicable, part b for 2007 to present.	Objected. After meet and confer, Wilcox confirmed that neither Poet entity has responsive information for 33(b).	Objected. After meet and confer, Wilcox confirmed that neither Poet entity has responsive information for 33(b).
34		Responded narratively to subpart a and b(i). Objected to b(ii).	Responded narratively to subpart a and b(i). Objected to b(ii). After meet and confer, Wilcox confirmed that neither Poet entity has been or is being paid mileage allowances by any other railroad.	Responded narratively to subpart a and b(i). Objected to b(ii). After meet and confer, Wilcox confirmed that neither Poet entity has been or is being paid mileage allowances by any other railroad.

35	Yes	Cargill will produce existing management and accounting reports and analyses regarding Cargill's tank car ownership and maintenance costs, as well as the more detailed tank car cost information it can extract from its fleet management database. Cargill will produce such tank car cost information to the extent it is available for the time period 2007 to 2015. Cargill will not be required to produce car-by-car invoices or other similar transactional documents or information regarding tank car ownership costs, except to the extent such documents or information are readily available from computerized databases. eted.	Poet will produce all documents and information in its possession, custody, or control regarding tank car ownership and maintenance costs, except that POET Nutrition will not be required to produce car-by-car invoices, or other similar transactional documents or information regarding tank car ownership costs, except to the extent the car-by-car materials are readily available from computerized databases. POET Nutrition will produce this information for the time period 2014 to 2015.	Poet will produce summaries of POET Ethanol's tank car ownership and maintenance costs prepared in the normal course of business. POET Ethanol will produce this information for the time period 2008 to 2015. POET Ethanol will not be required to produce car-by-car invoices or other similar transactional documents or information regarding tank car ownership costs
36		Responded narratively.	Objected.	Responded narratively.
37		Responded narratively.	Responded narratively.	Responded narratively.
38		Responded narratively.	Responded narratively as to UP.	Responded narratively as to UP.
39		Objected.	Objected.	Objected.
Document Requests				
1		Will produce documents as discussed in interrogatory responses.	Will produce documents as discussed in interrogatory responses.	Will produce documents as discussed in interrogatory responses.
2		Will produce responsive documents.	Will produce responsive documents.	Will produce responsive documents.
3		Will produce responsive documents.	Will produce responsive documents.	Will produce responsive documents.
4		Will produce responsive documents.	Will produce responsive documents.	Will produce responsive documents.
5		Will produce responsive documents.	Will produce responsive documents.	Will produce responsive documents.
6		Will produce responsive documents.	Will produce responsive documents.	Will produce responsive documents.
7		Will produce responsive documents.	Will produce responsive documents.	Will produce responsive documents.
8		Will produce responsive documents.	Will produce responsive documents.	Will produce responsive documents.
9		Will produce responsive documents.	Will produce responsive documents.	Will produce responsive documents.
10		Searched; no responsive documents.	Searched; no responsive documents.	Searched; no responsive documents.
11		Searched; no responsive documents.	Searched; no responsive documents.	Searched; no responsive documents.
12		Will produce responsive documents.	Will produce responsive documents.	Will produce responsive documents.
13		Will produce responsive documents.	Will produce responsive documents.	Will produce responsive documents.
14		Will produce responsive documents.	Will produce responsive documents.	Will produce responsive documents.
15		Will produce responsive documents.	Will produce responsive documents.	Will produce responsive documents.
16		Will produce responsive documents, which will most likely consist of lease and sublease riders.	Will produce responsive documents.	Will produce responsive documents, which will most likely consist of lease and sublease riders.
17		Will produce responsive documents.	Will produce responsive documents.	Will produce responsive documents.
18	Yes	Cargill will produce existing management and accounting reports and analyses regarding Cargill's tank car ownership and maintenance costs, as well as the more detailed tank car cost information it can extract from its fleet management database. Cargill will produce such tank car cost information to the extent it is available for the time period 2007 to 2015. Cargill will not be required to produce car-by-car invoices or other similar transactional documents or information regarding tank car ownership costs, except to the extent such documents or information are readily available from computerized databases. eted.	Responded narratively that complainant does not own tank cars.	Responded narratively that complainant does not own tank cars.
19	Yes	Cargill will produce existing management and accounting reports and analyses regarding Cargill's tank car ownership and maintenance costs, as well as the more detailed tank car cost information it can extract from its fleet management database. Cargill will produce such tank car cost information to the extent it is available for the time period 2007 to 2015. Cargill will not be required to produce car-by-car invoices or other similar transactional documents or information regarding tank car ownership costs, except to the extent such documents or information are readily available from computerized databases. eted.	Poet will produce all documents and information in its possession, custody, or control regarding tank car ownership and maintenance costs, except that POET Nutrition will not be required to produce car-by-car invoices, or other similar transactional documents or information regarding tank car ownership costs, except to the extent the car-by-car materials are readily available from computerized databases. POET Nutrition will produce this information for the time period 2014 to 2015.	Poet will produce summaries of POET Ethanol's tank car ownership and maintenance costs prepared in the normal course of business. POET Ethanol will produce this information for the time period 2008 to 2015. POET Ethanol will not be required to produce car-by-car invoices or other similar transactional documents or information regarding tank car ownership costs
20	Yes	Cargill will produce existing management and accounting reports and analyses regarding Cargill's tank car ownership and maintenance costs, as well as the more detailed tank car cost information it can extract from its fleet management database. Cargill will produce such tank car cost information to the extent it is available for the time period 2007 to 2015. Cargill will not be required to produce car-by-car invoices or other similar transactional documents or information regarding tank car ownership costs, except to the extent such documents or information are readily available from computerized databases. eted.	Poet will produce all documents and information in its possession, custody, or control regarding tank car ownership and maintenance costs, except that POET Nutrition will not be required to produce car-by-car invoices, or other similar transactional documents or information regarding tank car ownership costs, except to the extent the car-by-car materials are readily available from computerized databases. POET Nutrition will produce this information for the time period 2014 to 2015.	Poet will produce summaries of POET Ethanol's tank car ownership and maintenance costs prepared in the normal course of business. POET Ethanol will produce this information for the time period 2008 to 2015. POET Ethanol will not be required to produce car-by-car invoices or other similar transactional documents or information regarding tank car ownership costs
21		Will produce responsive documents.	Will produce responsive documents.	Will produce responsive documents.
22		Will produce responsive documents.	Will produce responsive documents.	Will produce responsive documents.
23		Will produce responsive documents.	Will produce responsive documents.	Will produce responsive documents.
24		Will produce responsive documents from January 1, 2013 to present.	Will produce responsive documents.	Will produce responsive documents.
25	Yes as to Cargill	After 9/26 m&c, agreed to produce plans, analyses but not to search emails. At 9/29 hearing, Cargill stated it had no plans.	Searched; no responsive documents.	Searched; no responsive documents.
26	Yes as to Poet entities	Will produce responsive documents from January 1, 2013 to present.	Per 9/29 hearing: Will produce responsive documents related to UP movements and movements by other railroads (BNSF is the only one) from January 2013 to present. Will select a limited number of people likely to make the communications. Will work together to come up with search terms.	Per 9/29 hearing: Will produce responsive documents related to UP movements and movements by other railroads (BNSF is the only one) from January 2013 to present. Will select a limited number of people likely to make the communications. Will work together to come up with search terms.
27		Objected.	Searched; no responsive documents.	Searched; no responsive documents.
28		Will produce responsive documents from January 1, 2013 to present.	Searched; no responsive documents.	Searched; no responsive documents.
29	Yes	Produced leases and subleases from January 1, 2013 to present. After 9/26 m&c, agreed to determine relevant people and check emails and paper documents. Confirmed in hearing.	Will produce responsive documents.	Will produce responsive documents.
30		Searched; no responsive documents.	Searched; no responsive documents.	Searched; no responsive documents.
31	Yes as to Cargill	Will produce responsive documents from January 1, 2013 to present. After 9/26 m&c, agreed to determine relevant people and check emails and paper documents. Confirmed in hearing. No time frame. They will search whatever has been retained.	Searched; no responsive documents.	Searched; no responsive documents.
32		Searched; no responsive documents.	Searched; no responsive documents.	Searched; no responsive documents.
33		Will produce leases and subleases from January 1, 2013 to present.	Will produce responsive documents.	Will produce responsive documents.
34	Yes	Per 9/29 hearing: Agreed to run search terms for emails relating to items 55-c and other similar charges with agreed upon search terms. Cargill to pick an appropriate group of custodians likely to have these documents. Time frame is 2013 to present.	Per 9/29 hearing: Will produce responsive documents from January 1, 2013 to present for movements transported by UP and other railroads.	Per 9/29 hearing: Will produce responsive documents from January 1, 2013 to present for movements transported by UP.

35	Yes	Objected.	No responsive documents as to temporary storage, inspections, testing, repairs, replacements or retrofits. Will produce responsive documents as to car cleaning and tank car movements by UP from Jan. 1, 2013 to present.	No responsive documents as to temporary storage, inspections, testing, repairs, replacements or retrofits. Will produce responsive documents as to car cleaning and tank car movements by UP from Jan. 1, 2013 to present.
36		Will produce responsive documents.	Searched; no responsive documents.	Searched; no responsive documents.