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NORTH AMERICA FREIGHT CAR ASSOCIATION; AMERICAN FUEL & PETROCHEMICALS MANUFACTURERS; THE CHLORINE INSTITUTE; THE FERTILIZER INSTITUTE; AMERICAN CHEMISTRY COUNCIL; ETHANOL PRODUCTS, LLC D/B/A POET ETHANOL PRODUCTS; POET NUTRITION, INC.; and CARGILL INCORPORATED, Complainants, v. UNION PACIFIC RAILROAD COMPANY, Defendant.	STB Docket No. NOR 42144 Consolidated with: Docket No. NOR 42150 Docket No. NOR 42152 Docket No. NOR 42153

UNION PACIFIC'S REPLY EVIDENCE AND ARGUMENT

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I. Introduction and Summary of Argument

Union Pacific charges shippers of all private cars other than tank cars for empty moves, including empty repair moves, unless the empty move directly follows a loaded move on Union Pacific.[1] By adopting Item 55-C, Union Pacific took a significant step toward equal treatment of all private cars.[2] Union Pacific reevaluated our treatment of tank cars after recognizing we faced the prospect of providing a significant number of free empty repair moves for cars likely to make disproportionately few loaded moves on Union Pacific. As we explored the issue, we recognized that the Ex Parte 328 Agreement[3] prevented us from treating empty tank cars exactly like other private cars, but *IHB-II*[4] allowed us to begin moving toward equal treatment by establishing charges for empty repair moves.[5]

Complainants desperately want to preserve the free service they regard as an entitlement. They say Union Pacific's adoption of Item 55-C was "manifestly unreasonable." Joint Evidence

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[1] Union Pacific also does not charge for moving empty cars to and from repair facilities when cars are damaged by Union Pacific or waybilled to a shop by Union Pacific personnel after being taken out of service following a Union Pacific inspection. When we use the term "empty repair moves," we are excluding empty repair moves resulting from Union Pacific-caused damage or Union Pacific-conducted inspections.

[2] *See* Ex. 1 (UP Tariff 6004-C, Item 55-C). Item 55-C is the first version of Item 55 in Tariff UP 6004-C to include Subpart D, which established the challenged empty repair move charges.

[3] We adopt Complainants' use of the term "Ex Parte 328 Agreement" to identify the National Tank Car Allowance Agreement, adopted by the Interstate Commerce Commission ("ICC") in *Investigation of Tank Car Allowance System* ("*System - 1986*"), 3 I.C.C.2d 196 (1986).

[4] "*IHB-I*" is *General American Transportation Corp. v. Indiana Harbor Belt R.R.*, 357 I.C.C. 102 (1977); "*IHB-II*" is *General American Transportation Corp. v. Indiana Harbor Belt R.R.*, 3 I.C.C.2d 599 (1987); "*IHB-III*" is *General American Transportation Corp. v. Indiana Harbor Belt R.R.*, ICC Docket No. 35404 (ICC served Feb. 29, 1988); "*GATC*" is *General American Transportation Corp. v. ICC*, 872 F.2d 1048 (D.C. Cir. 1989).

[5] Union Pacific is committed to pursuing consistent treatment of car owners and users across all private equipment types. Yesterday, we filed a petition to terminate our obligation to participate in the prescribed mileage equalization provisions of the Ex Parte 328 Agreement. That would allow us to treat empty movements of private tank cars just like empty movements of all other private cars.

at 2.[6] However, the only manifestly unreasonable conduct in this case is Complainants' insistence that they should get something for nothing.

Complainants raise three main challenges to Union Pacific's adoption of Item 55-C. None has any merit. Each collides with the indisputable fact that we established a charge the ICC authorized and encouraged railroads to adopt in *IHB-II*.

We briefly address Complainants' main arguments in this summary. But Complainants' case is flawed for more reasons than we can possibly address here. We provide more detail in the remainder of our reply evidence and argument.

1. *IHB-II* allows all railroads to charge shippers for empty repair moves, regardless of whether the railroads pay mileage allowances.

Complainants claim *IHB-II* does not apply to railroads receiving substantial revenue from movements of loaded tank cars, and they say railroads cannot charge shippers for empty repair moves unless the railroads pay mileage allowances. Complainants are wrong.

***IHB-II* applies to all railroads.** *IHB-II* recognized the ICC's prior policy of precluding railroads from establishing separate charges for empty repair moves was "in direct conflict with Congressional direction in the statutory provisions of the 4R Act and the Staggers Act." *IHB-II*, 3 I.C.C.2d at 611. The ICC condemned the prior "free repair move" rule because it "requires carriers to establish rates or free movements which do not contribute to going concern value, prohibits individual pricing for distinct services, encourages cross-subsidization, and promotes inefficiency by giving private car owners little or no incentive to consider transportation costs in

[6] We refer to Complainants' Joint Opening Evidence and Argument as "Joint Evidence." We adopt Complainants' conventions for identifying the various Complainants. *See* Joint Evidence at 1 n.1. We refer to Individual Complainants' supplemental opening submissions using "Op.," and we refer to their verified statements using the witness name and "VS."

selecting repair facilities." *Id.* (internal citations omitted). *IHB-II* does not require railroads to meet any special conditions in order to establish separate charges for empty repair moves. The ICC subsequently removed any possible doubt, stating: "If the *IHB-II* decision is to have its intended remedial effect, *all carriers with potential for repair moves* must be free to impose charges." *Charges for Movement of Empty Cars, Buffalo & Pittsburgh R.R.* ("*Buffalo & Pittsburgh*"), 7 I.C.C.2d 18, 28 (1990) (emphasis added).

***IHB-II* does not require railroads to pay mileage allowances in order to charge for empty repair moves.** The Board has expressly said "[t]he ICC's decision" allowing railroads to establish empty repair move charges "did not turn on whether a portion of the empty repair move charges might be recovered through allowances." *N. Am. Freight Car Ass'n – Protest & Petition for Investigation – Tariff Publications of the Burlington N. & Santa Fe Ry.* ("*NAFCA-I*"), STB Docket No. 42060 (Sub-No. 1) (STB served Aug. 13, 2004) at 6. There was never any doubt. When the ICC decided *IHB-II*, everyone understood railroads could apply empty repair move charges to shippers with "zero-mileage rates" – that is, rates under which a railroad is not obligated to provide cars and thus does not pay mileage allowances when shippers provide cars. When shippers paying zero-mileage rates sought reconsideration, the ICC rejected their arguments, explaining: "repair move costs should be treated just like other repair expenses the private car owners initially pay" – that is, shippers and car owners could be required to pay empty repair move costs even where they used zero-mileage rates. *IHB-III* at 5. Shippers repeated their argument on appeal, and the D.C. Circuit found the ICC had adequately considered *IHB-II*'s impact on shippers with zero-mileage rates. *See GATC*, 872 F.2d at 1058. The Court also agreed with the ICC: "[W]hat is appropriate for ownership costs generally is perfectly appropriate for the discrete ownership costs at issue in this case." *Id.* at 1057.

2. <u>Union Pacific truthfully explained Item 55-C and the reasons for adopting Item 55-C, and Item 55-C does not subvert the Ex Parte 328 Agreement.</u>

Complainants claim Item 55-C is an unreasonable practice because Union Pacific's adoption of Item 55-C was "misleading" in the same way as railroads' use of rate-based fuel surcharges, a practice condemned in *Rail Fuel Surcharges*, STB Ex Parte No. 661 (STB served Jan. 26, 2007). They also claim Union Pacific's adoption of Item 55-C subverts the mileage equalization provisions of the Ex Parte 328 Agreement. Complainants are wrong.

Union Pacific did not mislead shippers in adopting Item 55-C. In *Rail Fuel Surcharges*, the Board said "computing rail fuel surcharges as a percentage of a base rate is an unreasonable practice" because it was misleading to label a charge with no "reasonable nexus to fuel consumption" as a "fuel surcharge." *Rail Fuel Surcharges* at 1, 9.[7] Charging shippers for empty repair moves is not an unreasonable practice – the ICC expressly authorized the practice in *IHB-II*. Moreover, Union Pacific accurately labeled Item 55-C. Item 55-C is precisely what it purports to be and does exactly what it purports to do: Item 55-C makes empty repair moves of tank cars subject to line-haul charges. Union Pacific has consistently used nearly identical tariff language to make empty repair movements of all other types of private cars subject to line-haul charges. Item 55-C simply treats tank cars like all other types of private cars.

Union Pacific also did not mislead shippers when describing why we adopted Item 55-C. We expected the new charges to do exactly what we told shippers they would do:

[7] For those unfamiliar with the history, in the mid-1970s, the ICC specifically declined to prohibit rate-based fuel surcharges, so the Board recognized railroads could not be faulted for relying on that precedent in formulating their fuel surcharge programs, but it prohibited future use of rate-based surcharges. *See id.* at 10.

- Align tank cars more closely with the treatment of empties for all other car types.
- Provide more timely feedback to customers about efficient management of their fleet.
- Reduce empty miles on our busy network which will help protect the fluidity of the network.
- Allow direct and prompt recovery of the costs for moving empty cars to and from shops.

See Rocker VS at 7. Item 55-C has advanced each objective. Complainants claim they were surprised to learn Union Pacific expected the new charges to generate additional revenue. But everyone understood that imposing empty repair move charges would generate additional revenue for railroads. The ICC rejected the free repair move rule in part because "it require[d] carriers to establish rates or free movements which do not contribute to going concern value." *IHB-II*, 3 I.C.C.2d at 611. The ICC recognized "[s]ubstantial use of the *IHB-II* ruling is economically inevitable, since any railroad with a potential for repair move traffic will have everything to gain and nothing to lose by publishing such tariffs." *Buffalo & Pittsburgh*, 7 I.C.C.2d at 23. And Union Pacific expressly told customers we established the new charges to "[a]llow direct and prompt recovery of the costs for moving empty cars to and from shops." Rocker VS at 8 & Ex. 3 (Announcement of Item 55-C).

Item 55-C does not subvert the Ex Parte 328 Agreement. In *Buffalo & Pittsburgh*, the ICC rejected the same claim Complainants make here: "Also unconvincing is the car providers' claim that the [Ex Parte 328 Agreement] was somehow inconsistent with any repeal of the free repair move rule, and would have to be renegotiated before any decision reversing that rule could be implemented." 7 I.C.C.2d at 27. As the ICC recognized, *IHB-II* authorized and encouraged

railroads to establish empty repair move charges, regardless of the impact on the Ex Parte 328 Agreement.[8]

3. <u>Board precedent and decades of practice support the nearly universal use of zero-mileage rates for movements in private tank cars.</u>

Complainants claim Union Pacific cannot charge zero-mileage rates in lieu of paying mileage allowances, unless we also offer rates for movements in railroad-provided tank cars. Complainants are wrong.

Board precedent has long permitted railroads and shippers to use zero-mileage rates. "Where a carrier publishes a rate specifically applicable only to movements in private cars, the carrier is not obligated to provide a car and has no obligation to publish an allowance." *LO Shippers Action Comm. v. Aberdeen & Rockfish Ry.* ("*LO Shippers*"), 4 I.C.C.2d 1, 17 (1987), *aff'd sub nom. LO Shippers Action Comm. v. ICC*, 857 F.2d 802 (D.C. Cir. 1988). Lawful use of zero-mile rates is not limited to car types provided by railroads. Railroads almost never provide tank cars, yet railroads and shippers have used zero-mileage rates for movements in tank cars since deregulation, as confirmed by *IHB-III* and *GATC*. The nearly universal use of zero-mileage rates for tank car traffic reflects economic reality: there is no sense in requiring railroads to set rates as though they provide cars, and then pay refunds to the shipper actually providing the cars. Moreover, Complainants have no right to complain. Every Individual Complainant voluntarily shipped its traffic under contracts or tariffs expressly providing for zero-mileage rates. None ever asked Union Pacific to establish rates providing for mileage allowance payments – not even after four years of litigating this case.

[8] As noted above, Union Pacific has filed a separate petition to terminate our obligation to participate in the mileage equalization system. *See supra* n.5.

* * *

Complainants' case ultimately collapses for an even simpler reason. Complainants are not really arguing about *whether* Union Pacific may charge for empty repair moves; instead, they are arguing about *how* we should charge. In their Joint Evidence, in discussing a hypothetical world in which railroads owned all tank cars, Complainants concede Union Pacific's right to obtain appropriate compensation for empty repair moves:

> UP would not pay itself to move tank cars to and from repair facilities. Rather, UP would recover its repair move costs through its line-haul rates on loaded tank car movements . . . . *Indeed, this is how UP recovered its repair move costs for private tank cars prior to Item 55-C.*

Joint Evidence at 28 (emphasis added). Complainants' concession that empty repair moves were never meant to be free should end this case. Complainants are upset because they believe Union Pacific will be more successful in obtaining appropriate compensation through separate charges than through our rates for loaded movements, but they concede we are entitled to compensation.

* * *

The remainder of this Reply is organized as follows. *Part II* demonstrates Union Pacific lawfully established separate charges for empty repair moves. Specifically, Part II (i) describes Union Pacific's reasons for adopting Item 55-C, (ii) shows the Interstate Commerce Commission Termination Act ("ICCTA") and *IHB-II* authorize and encourage railroads to adopt empty repair move charges, and (iii) shows the reasons for authorizing and encouraging empty repair move charges remain relevant and are reflected in the record of this case. *Part III* demonstrates Union Pacific is lawfully charging zero-mileage rates. Specifically, Part III (i) shows Union Pacific and our customers benefit from using zero-mileage rates, (ii) demonstrates the ICCTA and Board precedent permit use of zero-mileage rates, and (iii) makes clear that prohibiting use of zero-mileage rates would be bad policy. *Part IV* explains why the Board should not award damages

in this case even if it concludes Union Pacific's use of empty repair move charges or zero-mileage rates is unlawful. *Part V* is a short conclusion.

Union Pacific's reply is supported by testimony from five witnesses who bring their knowledge, training, and experience to bear on the issues raised by this proceeding.

- **Kenny Rocker**, Union Pacific's Executive Vice President, Marketing and Sales, shows Union Pacific adopted Item 55-C to address the same types of concerns the ICC identified in authorizing railroads to establish separate charges for empty repair moves in *IHB-II*.

- **Douglas Craven**, Union Pacific's Assistant Vice President, Industrial, in the Marketing and Sales Department, shows Individual Complainants knowingly used zero-mileage rates both before and after Union Pacific adopted Item 55-C.

- **Robert Hirst**, a Marketing Manager for Union Pacific, explains Union Pacific sets full-mileage rates simply by adding expected allowance payments to market-based zero-mileage rates.

- **Kevin Murphy**, the George J. Stigler Distinguished Service Professor of Economics in the Booth School of Business and the Department of Economics at The University of Chicago, applies economic analysis to conclude use of separate charges for empty repair moves and zero-mileage rates are economically reasonable practices.

- **Michael Baranowski**, a Senior Managing Director of FTI Consulting's Economic Consulting Practice analyzes empty repair move data and shows Union Pacific handles a disproportionate share of empty repair moves.

Union Pacific's reply is also supported by documents, data, and deposition testimony from Union Pacific, Complainants, and other sources. Supporting materials are provided as exhibits and are referenced as "Ex. _."[9]

[9] In Union Pacific's reply, including accompanying verified statements, information designated "Highly Confidential" pursuant to the Protective Order in this case is contained within double brackets and has been redacted from the public version of the Reply. Information designated "Confidential" is contained within single brackets and has also been redacted from the public version of this Reply.

II. Union Pacific Lawfully Established Charges for Empty Repair Moves of Tank Cars.

The ICCTA and Board precedent not only authorize railroads to establish empty repair move charges, they *encourage* railroads to adopt such charges. Pricing rail services based on supply and demand conditions is an essential feature of a properly functioning market. Empty repair move charges eliminate cross-subsidies among railroads, shippers, and repair facilities. They also promote efficiency by giving shippers an incentive to consider transportation costs when planning repairs and repair moves, which also encourages development of an efficient repair network. The benefits of empty repair move charges are just as important today as they were when the ICC authorized railroads to establish empty repair move charges in *IHB-II*.

Even before *IHB-II*, the ICC never actually required railroads to provide empty repair moves for free. Rather, the ICC expected railroads to seek compensation for their empty repair moves through their rates on loaded moves. In addition, railroads with large imbalances between empty and loaded moves had the prospect of obtaining additional compensation for empty repair moves through the mileage equalization system. But because railroads could not charge shippers directly for empty tank car moves, they rarely recovered appropriate compensation, and shippers treated empty repair moves as free, acting without regard to the costs they imposed on railroads. In *IHB-II*, the ICC acknowledged what had become a foregone conclusion: railroads should be allowed and encouraged to establish separate charges for empty repair moves.

Union Pacific's empty repair move charge in Item 55-C is precisely the type of separate charge the ICC authorized in *IHB-II*. Even apart from the precedent established in *IHB-II*, Item 55-C is plainly lawful under the ICCTA, which allows railroads to establish separate prices for separate transportation services. Item 55-C is also unquestionably reasonable, because Union Pacific and other railroads have long imposed charges for empty repair moves of all other types

of private cars. Item 55-C also advances many of the specific policy objectives set out in the Federal rail transportation policy, 49 U.S.C. § 10101.

Neither the ICCTA nor *IHB-II* requires railroads adopting separate charges for empty repair moves to justify their decisions. The statutory language is clear, and the policy benefits are self-evident. However, the evidence shows Union Pacific was motivated by the same type of concerns that produced *IHB-II*: Union Pacific faced the prospect of handling many empty repair moves for cars likely to make few loaded moves on Union Pacific. Others in the rail industry recognized the issue as well. In considering possible solutions, Union Pacific recognized the many benefits of establishing separate charges for empty repair moves – the same types of benefits the ICC identified in *IHB-II.*

The evidence also shows Union Pacific's new charges are already having their intended effect. Shippers are factoring Union Pacific's charges into their decision-making process when they control empty repair moves. When shippers do not control empty repair moves, they are successfully pressuring those controlling the moves to select shops so as to reduce inefficient empty movements on Union Pacific. Shippers are also expanding their own shop networks to reduce empty miles, and they are pursuing opportunities to use mobile repair facilities to eliminate empty moves.

Finally, Board precedent, basic economics, and Complainants' own actions confirm the use of zero-mileage rates, rather than rates providing for payment of mileage allowances, has no bearing on the lawfulness of Item 55-C. In *IHB-III*, the ICC specifically rejected efforts to forbid railroads from imposing empty repair move charges when shippers had zero-mileage rates. The D.C. Circuit affirmed the ICC's decision in *GATC*. As the ICC concluded, and the Court agreed, no justification exists for treating charges for empty repair moves differently than other costs of

car ownership. Thus, if railroads and shippers can use zero-mileage rates when shippers directly pay all car ownership costs *except* empty repair move charges, they can use zero-mileage rates when shippers directly pay this one additional ownership cost. The ICC's decision was plainly correct. All the Individual Complainants used zero-mileage rates in contracts and tariffs before Union Pacific adopted Item 55-C, and in the four years since Union Pacific adopted Item 55-C, not *one* has asked Union Pacific for contract or tariff rates providing for payment of mileage allowances.

In sum, Complainants utterly fail to meet their burden of proof. *See N. Am. Freight Car Ass'n – Protest & Petition for Investigation – Tariff Publications of the Burlington N. & Santa Fe Ry.* ("*NAFCA-II*"), STB Docket No. 42060 (Sub-No. 1) (STB served Jan. 26, 2007) at 4 (complainants bear the burden of proving violations of the ICCTA), *pet. for review denied sub nom. N. Am. Freight Car Ass'n v. STB*, 529 F.3d 1166 (D.C. Cir. 2008); *Nat'l Grain & Feed Ass'n v. Burlington N. R.R.*, ICC Docket No. 40169 (ICC served June 1, 1990) at 4 (recognizing complainants bear the burden of proving statutory violations).

The remainder of this Part proceeds as follows: *Part II.A* describes Union Pacific's adoption of Item 55-C and describes why empty repair moves are a separate service. *Part II.B* shows the ICCTA authorizes and encourages railroads to adopt empty repair move charges. *Part II.C* shows *IHB-II* and other precedent authorize and encourage railroads to adopt empty repair move charges. *Part II.D* shows Union Pacific's adoption of Item 55-C is reasonable not only in light of the ICCTA and *IHB-II*, but also in light of the record in this case.

A. Union Pacific adopted Item 55-C to charge separately for the separate service of providing empty repair moves.

Union Pacific charges shippers of all private cars other than tank cars for empty moves, including empty repair moves, unless the empty move directly follows a loaded move on Union

Pacific. *See* Rocker VS at 1 & Ex. 2 (Tariff UP 6004-C, Item 50-F).[10] Before adopting Item 55-C, Union Pacific only charged for moving empty tank cars when new cars left shops to enter into commercial service, when cars left shops after being restenciled to reflect a change in ownership, and when cars moved to shops for dismantling, sale, or scrap. After adopting Item 55-C, Union Pacific now treats movements of empty tank cars more like movements of other empty private cars. *See id.* at 8 & Ex. 1 (Tariff UP 6004-C, Item 55-C).

1. Union Pacific recognized the many benefits of establishing separate charges for empty repair moves.

In 2014, Union Pacific reexamined our charges for moving empty tank cars. We took this step after recognizing we faced the prospect of providing a significant number of free empty repair moves for cars likely to make disproportionately few loaded moves on Union Pacific. *See* Rocker VS at 1-2. Specifically, the Pipeline and Hazardous Materials Safety Administration ("PHMSA") proposed a rule requiring tank cars used to transport crude oil and other highly flammable commodities to be phased out or retrofitted to meet new, stricter safety requirements. *See id.* at 2. Union Pacific does not participate in crude oil transportation markets to the same extent as some of our railroad competitors, but we serve a large number of the repair facilities where retrofits would occur. *See id*. Union Pacific had empty move charges that would apply if shippers moved new, safer cars into service to replace their older cars. However, if shippers decided to retrofit their older cars, Union Pacific faced the prospect of providing free empty repair moves for cars used primarily on other railroads – first to repair facilities for cleaning, then to different repair facilities for retrofitting, then back to our competitors so they could

[10] As noted above, Union Pacific does not charge for moving empty cars to and from repair facilities when cars are damaged by Union Pacific or waybilled to a shop by Union Pacific personnel after being taken out of service following a Union Pacific inspection.

resume handling loaded moves. *See id*. Also, because the empty moves would be free to shippers, shippers would have no incentive to consider the costs they would be imposing on Union Pacific, including the capacity and other resources they would be consuming, when selecting cleaning and retrofitting facilities. *See id.*

As Union Pacific considered the retrofit issue, we also began considering empty tank car moves more generally. Union Pacific questioned why tank cars were treated differently than all other private cars, whether we were compensated appropriately for providing empty moves, and whether shippers had appropriate incentives to consider the impacts on railroad resources when planning and directing empty repair moves. *See id.* at 2-3. Union Pacific recognized the mileage equalization system was supposed to address at least some of these issues, but we questioned whether it provided the best possible solution. *See id.* at 3.

Union Pacific found no good reason for treating empty tank car moves differently from empty moves of other private cars. *See id*. Union Pacific did not believe we were obtaining or could obtain appropriate compensation for moving empty cars through our charges for loaded cars. Union Pacific's rates for loaded movements are determined by the markets for those loaded moves. *See id*. Empty repair moves have little or no connection to specific loaded moves, or even loaded moves in a specific lane. *See id.* In the case of retrofits, our concern was about cars not even moving loaded on Union Pacific at all. Union Pacific also could not simply raise rates for all loaded moves by enough to provide compensation for empty repair moves. If Union Pacific tried to set rates above markets rates, we would lose business. *See id*.

Union Pacific also concluded the mileage equalization system, which applies only to tank cars, was not an effective substitute for compensation or incentives created by separate charges. *See id*. Under mileage equalization, loaded and empty miles, with some exceptions, are

aggregated annually across all railroads by car owner, and a car owner pays nothing unless its ratio of empty-to-loaded mileage exceeds 106%. *See* Ex. 5 (Freight Tariff RIC 6007-O, Item 187). Thus, for retrofits, Union Pacific would not obtain any compensation for providing the empty moves if other railroads moved the cars being retrofitted (and others tank cars owned by the same company) enough loaded miles to offset the empty retrofit moves. *See* Rocker VS at 3-4. More generally, the combination of the 106% ratio, industry-wide scope, car ownership-based aggregation of miles, and annualized nature of any charges dilutes the link between any shipper's fleet management decisions and any empty mileage charges the shipper might eventually pay, and thus dilutes shippers' incentives to operate efficiently. *See id.* at 4.

In adopting Item 55-C, Union Pacific ultimately did not treat empty tank car moves exactly like empty moves of other private cars. Union Pacific concluded we could not cease participating in all of mileage equalization without the Board's permission. *See id.* The ICC had prescribed the general concept of mileage equalization, as well as the 106% ratio, the excess mileage charge, and certain accounting rules in *System - 1986*. However, the ICC left railroads free to make other changes to the rules. As particularly relevant here, railroads could adopt separate charges for empty repair moves, as the ICC made clear in *IHB-II* and *Buffalo & Pittsburgh*. Union Pacific believed this more limited step would still significantly advance our objectives: treat empty tank cars more like other empty private cars, provide shippers timely feedback to improve efficiency and reduce excess empty miles, and provide Union Pacific appropriate compensation for performing empty repair moves. *See* Rocker VS at 4.

2. Empty repair moves are a separate service.

Union Pacific's decision to adopt separate charges for empty repair moves recognized that empty repair moves are a separate service with separate demand characteristics: a shipper's empty repair moves have no necessary connection to its loaded moves. Cars moving in loaded

service on one railroad often move empty to repair facilities on other railroads. *See* Baranowski VS at 7-9. When shippers select repair facilities, they are not required to use repair facilities on the railroad handling their loaded moves.[11] Instead, they balance a variety of factors, including the cost of repairs, the time the car will be out of service, and the capabilities of individual repair facilities.[12] In addition, many shippers lease some or all of their cars from leasing companies,[13] and for certain types of repairs, the lease entitles the lessor to select the facility.[14] Some lessors also own repair facilities and require shippers to direct leased cars to those facilities, without regard to whether the railroad serving their facility also handled the loaded moves.[15]

Most empty repair moves also have no necessary connection to loaded moves because empty repair moves are typically infrequent for any single car and not in any fixed proportion to loaded moves. *See* Baranowski VS at 5. Cars moving to repair facilities for mandatory ten-year qualification inspections (often called "requalification") account for a substantial number of total empty repair moves. However, over a ten-year period, tank cars move loaded in different lanes, on different railroads, and even for different shippers. *See id*. Cars moving to repair facilities for cleaning also account for a substantial number of empty repair moves. Cleaning often occurs at

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[11] *See, e.g.*, Ex. 7 (Grow Tr. 141:16-23); Ex. 14 (Zimski Tr. 189:18-190:19); Ex. 23 (Fox Tr. 52:10-18; 53:3-9); { }

[12] *See, e.g.*, Arkema Op. at 6; Cargill Op., Zimski VS ¶ 21; POET Ethanol Op., Spieckermann VS at 7; { } {{ }} { } {{ }}

[13] *See, e.g.*, Arkema Op., Grow/Trombetta VS ¶ 13; Cargill Op., Zimski VS ¶ 8; POET Ethanol Op., Spieckermann VS at 4; POET Nutrition Op., Siebrecht VS at 3-4; {{ }}

[14] *See, e.g.*, Arkema Op., Grow/Trombetta VS ¶ 16; Cargill Op., Zimski VS ¶ 23; POET Ethanol Op., Spieckermann VS at 7; POET Nutrition Op., Siebrecht VS at 4; { }

[15] *See, e.g.*, Cargill Op., Zimski VS ¶ 23; Ex. 7 (Grow Tr. 151:19-152:7); {{ }} { }

one facility, before the car moves empty to a different facility for requalification or significant repair work.[16] Such cleaning moves have no necessary connection to any loaded moves. Car cleaning moves also occur when shippers return cars at the end of a lease, and those cleaning moves are often followed by a separate empty move to a different repair facility where the cars are returned to the lessor.[17] These cleaning and return moves also have no necessary connection to loaded moves, because lease terms can vary from a few months to many years,[18] and because cars can be used in many lanes and on many railroads while under lease to a single shipper. *See* Baranowski VS at 5. Cars also move to shops to address manufacturing defects or errors in earlier repairs – again, circumstances with no necessary connection to loaded moves.[19]

Empty repair moves are also a separate service in that different shippers have different levels of demand for empty repair moves. Shippers with their own cars will never need cleaning and repairs at the end of a lease.[20] Shippers with shorter-term leases will need more cleaning and repair moves than shippers with longer-term leases because they return cars more often. Some shippers handle products that are hazardous and can only be cleaned at a few qualified shops.[21] Some shippers handle products that are not hazardous, so cars can be cleaned without moving

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[16] *See, e.g.*, Arkema Op., Grow/Trombetta VS ¶ 17; Cargill Op., Zimski VS ¶ 22; POET Ethanol Op., Spieckermann VS at 5; Ex. 7 (Grow Tr. 155:11-22; 176:2-12); Ex. 19 (Spieckermann Tr. 80:20-24); { }

[17] *See, e.g.*, POET Ethanol Op., Spieckermann VS at 5; {{ }} Ex. 19 (Spieckermann Tr. 80:20-81:6); { } {{ }}

[18] *See, e.g.*, {{ }} { }

[19] *See, e.g.*, { }}

[20] *See, e.g.*, { }

[21] *See, e.g.*, Arkema Op., Grow/Trombetta VS ¶ 17; Cargill Op., Zimski VS ¶ 22; { } Ex. 7 (Grow Tr. 155:11-22); { }

them to a shop.[22] Some shippers handle corrosive commodities, so they need relatively more empty repair moves.[23] Some shippers handle commodities that require them to clean their cars before every loaded move, so they need relatively more empty repair moves.[24] Some shippers handle commodities moving in cars that have a five-year requalification interval rather than the standard ten-year period.[25] Some shippers have relatively more empty repair moves because they choose to clean and modify their cars to handle different commodities in the various markets in which they participate.[26]

Item 55-C appropriately treats Union Pacific's movement of empty tank cars to and from repair facilities as a distinct and separate service from our movements of loaded tank cars.

B. The ICCTA authorizes and encourages railroads to establish separate charges for empty repair moves.

Union Pacific's decision to establish separate charges for empty repair moves in Item 55-C is plainly lawful under the ICCTA. Under the ICCTA, a railroad "may establish any rate for transportation or other service provided by the rail carrier," unless the rate is unreasonably high or prohibited by a different statutory provision. 49 U.S.C. § 10701(c).

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[22] *See, e.g.*, {{ }} Ex. 24 (Siebrecht Tr. 44:18-45:4).

[23] Ex. 14 (Zimski Tr. 149:25-151:5); *see also*

[24] *See, e.g.*, Arkema Op., Grow/Trombetta VS ¶ 18; *see also* {{

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[25] *See, e.g.*, Ex. 7 (Grow Tr. 141:2-15).

[26] *See, e.g.*, {{ }}
see also {
{
}

The ICCTA does not merely allow railroads to set separate rates for separate services. The ICCTA encourages railroads to recover their costs from the shippers that generate them:

> Under our statute, railroads are encouraged to independently price their services so as to eliminate cross-subsidies and improve track and equipment utilization.

NAFCA-II at 6; *see also* 49 U.S.C. §§ 10101(1), (2), (3), (5), (9) & (10). The ICCTA's emphasis on pricing freedom and flexibility carries forward the deregulatory policies of the Staggers Act. *See, e.g., Mr. Sprout, Inc. v. United States*, 8 F.3d 118, 127 (2d Cir. 1993) ("[T]he Staggers Act, with its emphasis on allowing rail carriers flexibility to price their services based on their costs and competitive considerations, discourages cross-subsidization among shippers.").[27]

Complainants do not contend § 10701(c)'s pricing freedom and flexibility does not apply to Item 55-C because the rates are unreasonably high in violation of § 10701(d).

Complainants also fail to *explain* how Item 55-C is prohibited by any other statutory provision. Complainants say Item 55-C violates § 11121, but they never explain how the rates violate Union Pacific's duties to "furnish safe and adequate car service and establish, observe, and enforce reasonable rules and practices on car service." 49 U.S.C. § 11121(a)(1). Section 11121 says nothing about the rates railroads may charge shippers.[28]

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[27] *See also ACF Indus., Inc. – Pet. for Exemption*, ICC Docket No. 40194 (ICC served May 10, 1989) at 5 ("Commission policy . . . is clearly contrary to the free transportation of cars. . . . . The [Rail Transportation Policy] and Congressional mandates expressed in the [4R Act] and the Staggers Act encourage the application of separate rates for distinct rail services, demand-based rates and revenue adequacy and discourage cross-subsidization and misallocations of costs.").

[28] To the extent § 11121 plays any role in this case, it precludes the Board from awarding any relief. Under § 11121(a)(1), the Board may act only after making "an affirmative finding" that "the amount spent for the facilities or equipment, including a return equal to the rail carrier's current cost of capital, will be recovered." 49 U.S.C. § 11121(a)(1)(B). Complainants do not and cannot show that providing empty repair moves for *free* would allow Union Pacific to recover the amount spent for the facilities and equipment required to provide those moves.

Complainants also say Item 55-C violates § 11122, but they never explain how the rates violate the "regulations of the Board on car service." *Id.* § 11122(a). Section 11122(b) describes how the Board must determine the "rate of compensation to be paid for each type of freight car" when it regulates such compensation. *Id.* § 11122(b). But § 11122(b) never says railroads must pay compensation for freight cars as a precondition to establishing separate rates for empty repair moves – and the ICC certainly never said so in *IHB-II*. In other words, § 11122 contemplates the Board might regulate certain compensation railroads may *pay* shippers, but it says nothing about rates railroads may *charge* shippers.[29]

Finally, Complainants say Item 55-C violates § 10702, but they never say the tariff itself is not reasonable. Instead, they attack what they claim are Union Pacific's *motives* for adopting the tariff and our communications with shippers about those motives. We refute their attacks in Part II.D.4. More important, § 10702 addresses *practices*, not justifications railroads may offer for adopting practices. *See NAFCA-II* at 10 ("Complainants wrongly assume that BNSF must justify the new practice of charging for empty private cars before imposing these charges."). *IHB-II* expressly authorized the practice of charging separately for empty repair moves.

[29] If Complainants are contending the Ex Parte 328 Agreement constitutes a regulation of compensation pursuant to § 11122, the ICC either considered separate charges for empty repair moves to be consistent with the Ex Parte 328 Agreement, or the ICC overrode the Ex Parte 328 Agreement to the extent the Agreement was inconsistent with *IHB-II* – the ICC decided *IHB-II* five months *after* approving the Ex Parte 328 Agreement in *System - 1986*. *See Buffalo & Pittsburgh*, 7 I.C.C.2d at 27 ("B & P is simply taking advantage of the freedom to impose repair move charges granted by the Commission in *IHB-II*, *supra*. It was the Commission that changed the rule, not B & P."); *see also infra* Part II.D.5.

If Complainants are contending § 11122(b) precludes railroads from charging for empty repair moves unless they pay mileage allowances, the ICC concluded otherwise in *IHB-II*, *IHB-III*, and *NAFCA-II*, as discussed in Part II.C.3. Moreover, even where the Board regulates compensation to be paid for freight cars, § 11122(b) does not preclude railroads and shippers from using contracts and tariffs requiring no such compensation, as discussed in Part III.B.

In sum, Complainants fail to identify *any* statutory provision prohibiting Union Pacific from adopting Item 55-C pursuant to the pricing freedom and flexibility the ICCTA provides in § 10701(c). As we discuss next, charges for empty repair moves have a complicated history. Railroad regulators struggled for many years to rationalize practices that made no economic sense. Congress wisely modernized economic regulation of railroads in the 4R Act[30] and the Staggers Act,[31] and it reinforced reliance on market principles in the ICCTA. The ICCTA plainly permits and encourages railroads to adopt separate charges for empty repair moves.

C. *IHB-II* and other Board precedent authorize and encourage all railroads to establish separate charges for empty repair moves.

Before *IHB-II*, railroads were expected to obtain compensation for empty repair moves through their rates for loaded moves and the mileage equalization system – individual empty repair moves were "free." Regulators were largely indifferent to the difficulties of obtaining compensation for empty repair moves in this manner because they saw moving empty cars as part of the railroads' "collective responsibility." *IHB-II* marked an important turning point in regulatory thinking. *IHB-II* recognized the free repair move rule was bad law and bad policy, and thus authorized all railroads to establish separate charges for empty repair moves. When shippers asked the ICC to reconsider whether railroads could adopt such charges even where shippers negotiated zero-mileage rates assuming their empty repair moves would be free, the ICC said the new policy applied in those circumstances as well.

[30] Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976).

[31] Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980).

The remainder of this section proceeds as follows: *Part II.C.1* discusses the *IHB-II* decision's rejection of the free repair move rule. *Part II.C.2* addresses *IHB-II*'s application to all railroads. *Part II.C.3* addresses *IHB-II*'s application to shippers with zero-mileage rates.

1. *IHB-II* rejects the free repair rule move as bad law and bad policy.

IHB-II reversed the ICC's decision in *IHB-I*, which had prohibited railroads from adopting separate charges for moving empty cars to repair facilities for ordinary repairs if they earned more than *de minimus* revenue from loaded movements of such cars. *IHB-II* recognized *IHB-I*'s free repair move rule was not efficient or equitable and conflicted with the provisions and objectives of the 4R Act and the Staggers Act.

The free repair move rule arose in a pervasively regulated environment. It was based on the premise that private cars, when put into service, become "instrumentalities of transportation," and their movement for repairs becomes the collective responsibility of the rail industry. *IHB-II* rejected that premise. The ICC concluded the instrumentalities of transportation principle was not required by the statutory scheme, *see IHB-II*, 3 I.C.C.2d at 606-08, and the policy against individual carriers charging for empty repair moves encouraged cross-subsidization, promoted inefficiency in selecting repair facilities, and conflicted with congressional mandates granting railroads greater flexibility in setting rates, *see id.* at 610-11. As the ICC explained:

> The rationale of [*IHB-I*] is in direct conflict with Congressional direction in the statutory provisions of the 4R Act and the Staggers Act. Specifically, the [*IHB-I*] decision's method of compensation for cars moving empty in repair moves is directly contrary to current statutory provisions that require the Commission to encourage efficient pricing and provide all carriers with a realistic opportunity to earn adequate revenues.
>
> Furthermore, the [*IHB-I*] approach is also inconsistent with current statutory requirements because it requires carriers to establish rates or free movements which do not contribute to going concern value, prohibits individual pricing for distinct services, encourages cross-subsidization, and promotes inefficiency by giving private car

> owners little or no incentive to consider transportation costs in selecting repair facilities.

Id. at 611 (internal citations omitted).

The *IHB-II* decision recognized "major changes in regulatory policy had taken place that emphasized individual carrier freedom and disapproved of collective approaches which result in [rate] averaging or cross subsidization." *Id.* at 618. The ICC acknowledged the decision might create transitional issues relating to mileage allowances and mileage equalization, but found no injustice in making new charges effective immediately. *See id.* at 618-19. The ICC also made clear its decision was not driven by any factors unique to tank cars: "This decision . . . applies equally to all types of private car moves and the problems and changes discussed in respect to tank cars also have general application to other car types." *Id.* at 619.

When shippers sought reconsideration, the ICC reiterated its sweeping criticisms of the free repair move rule, describing the rule as "outmoded," "impractical," and "irrational," and it encouraged railroads to adopt empty move charges:

> [The free repair move rule was] an outmoded, impractical, and irrational prohibition against tariff charges for repair movements based upon the theory that private cars were instrumentalities of transportation. Instead, we recognized that, in moving cars for repairs, the railroad is performing a distinct service for which a tariff charge should be made . . . .

IHB-III at 2.

Complainants seek a return to the long-discarded free repair move rule. However, as the ICC explained in *IHB-II*, the free repair move rule never had any sound justification. The rule was based on an entirely artificial distinction: railroads could charge separately when they moved empty cars as "property," but not when they moved empty cars as "instrumentalities of transportation." *IHB-II*, 3 I.C.C.2d at 606. But "instrumentalities of transportation" was simply a label used to justify a policy determination that railroads should bear the costs of providing

certain services through "collective responsibility" and thus "charging was improper." *Id*. at 607. As the ICC observed in *IHB-II*, the free repair move rule was established in a very different era, one in which "rate averaging and cross-subsidy were commonplace, often encouraged and clearly deemed acceptable." *Id.*

The free repair move rule's collapse was inevitable. The rule was riddled with inconsistencies and contradictions. When the ICC decided *IHB-I*, railroads were already allowed to charge for many types of empty movements to and from repair facilities, including empty movements of:

- railroad-owned cars, *see IHB-I*, 357 I.C.C. at 114;
- new and rebuilt cars prior to their first loaded movement, *see id.* at 124;
- cars to be sold or scrapped, *see id*.;
- cars to be cleaned, *see id.* at 110, 129.

Most railroads also participated in an industry-wide tariff providing for "mileage equalization," under which tank car owners paid a per-mile charge for their non-revenue empty miles, including miles relating to empty repair moves, to the extent their empty miles exceeded loaded miles by more than five percent. *Id*. at 137.

In *IHB-I*, the ICC struggled to explain why railroads could not establish separate charges for empty cars moving for "ordinary repairs." *Id.* at 122. It developed a complex, fact-based test under which the same car could be one carrier's "property," and another's "instrumentality of transportation," depending on whether the railroad "derives some economic benefit, direct or indirect," from the car's movements or use, or from use of other cars of the same type, "to fulfill its common carrier obligations." *Id.* at 126-27. Under *IHB-I*'s economic benefit test, a car was an "instrumentality of transportation," subject to the free repair move rule, to any railroad that "derives more than a *de minimus* amount of revenue of any sort from the use of any privately

owned cars of the type in question." *Id.* at 127. *IHB-I*'s approach meant few carriers could establish separate charges for empty cars moving for ordinary repairs.

The *IHB-I* decision was plainly flawed from the start. The ICC never explained why the economic benefit test prohibited railroads from charging in the case of ordinary repairs, but not for other empty moves to and from repair facilities (*e.g.*, moves of railroad-owned cars, new and rebuilt cars, cars for sale or scrap, and cars for cleaning). Nor did it explain why the economic benefit test allowed railroads to charge for empty repair moves through mileage equalization.[32] The ICC subsequently developed even more exceptions, further undermining *IHB-I*'s strained logic, as the decision proved to be "increasingly out of step with the prevailing regulatory and industry environments." *IHB-III* at 3. For example, just months after deciding *IHB-I*, the ICC approved charges for moving tank empty cars from Mexico for routine repairs in the United States. The ICC said the cars were not in the national fleet during the year they spent in Mexico, and thus could be treated as "newly acquired" cars. *See Union Tank Car Co. – Declaratory Order – Empty Tank Cars*, 358 I.C.C. 688, 692-93 (1977). The ICC also approved empty repair move charges where the loaded cars previously moved in a unit train dedicated to a particular service, and thus were "not available to [the carrier] to fulfil its common carrier obligation." *Inland Steel Co. v. Ill. Cent. Gulf R.R.*, ICC Docket No. 38646 (ICC served May 24, 1982) at 5. As the exceptions grew, Commissioners decried *IHB-I* as "bad law and bad policy." *Switching Charges for Privately-Owned Cars Billed to Repair Facilities*, ICC Docket No. 38792 (ICC

[32] The D.C. Circuit also noted this inconsistency. *See GATC*, 872 F.2d at 1054 n.12 ("We note that petitioners' theory – under which all costs of empty-repair moves are presumptively the collective responsibility of carriers – is somewhat inconsistent even with the equalization rule, under which at least a portion of these costs may be borne by car providers if their cars accrue excess non-revenue mileage.").

served Oct. 18, 1982) at 10 (Commissioner Andre, concurring). *IHB-I* was recognized as a regulatory failure long before *IHB-II*.

Moreover, in seeking a return to the free repair move rule, Complainants yearn for something that never existed. Empty repair moves were never supposed to be free to shippers. "Free" was shorthand for prohibiting separate charges. The rule thus addressed only the *method* railroads could use to obtain compensation for providing empty repair moves. It was about form, not substance. Even in *IHB-I*, the ICC recognized empty repair moves were not supposed to be free to shippers: "Failure to provide a separate charge for repair movements does not result in free transportation service; rather, such movements are part of the total service obligations comprehended by charges for loaded movements." 357 I.C.C. at 115. Stated differently, the ICC always believed "the cost of car repair movements already is or could be included in published freight rates." *Id.*; *see also Union Tank Car – Declaratory Order*, 358 I.C.C. at 691 ("Line-haul revenue is supposed to cover all the costs involved [in maintaining the car fleet], including the costs of moving empty cars to cleaning and repair stations.").

Complainants fail to acknowledge that *IHB-I* and *IHB-II* do not address *whether* railroads could seek compensation for empty repair moves, but rather *how* they should seek compensation. In *IHB-I*, the ICC said railroads should rely primarily on rates for loaded moves, then turn to the mileage equalization system. The ICC even *ordered* all "railroads which derive direct or indirect benefits from the use of privately owned tank cars [to] participate in [mileage equalization] so [they] will be *justly and reasonably compensated* for [their] share of the costs of maintaining a privately owned car fleet." *IHB-I*, 357 I.C.C. at 137 (emphasis added).

In *IHB-II*, the ICC concluded *IHB-I*'s method of compensating railroads for empty repair moves was flawed for many reasons. At the most basic level, *IHB-I* was not providing railroads

appropriate compensation for empty repair moves. It did not encourage "efficient pricing" and resulted in "free movements." *IHB-II*, 3 I.C.C.2d at 611. As the ICC recognized, railroads were not assured of obtaining appropriate compensation through their rates for loaded moves because no relationship necessarily exists between a railroad's participation in a shipper's loaded moves and empty repair moves. *See id.* at 606. And even if the shipper used the same railroad for loaded and empty repair moves, a railroad still could rarely price loaded moves high enough to obtain appropriate compensation for empty repair moves without losing the business to other railroads, modes, or sources. *See id*. at 614 ("Line-haul rates frequently are set at levels determined by competitive factors without necessarily tracking all costs closely."). Stated differently, "rate averaging" was not the solution. *Id.* at 607.[33] To the contrary, *IHB-I*'s method of compensating railroads encouraged inappropriate cross-subsidization among railroads and shippers. *Id.* at 611 (*IHB-I* "encourage[d] cross-subsidization").

As the ICC also recognized, *IHB-I*'s method was also flawed because it gave shippers "little or no incentive to consider transportation costs in selecting repair facilities." *Id.* As a result, shippers would be more inclined to select facilities offering them lower costs, or faster

[33] A critical aspect of the problem is that empty repair moves are not attributable to specific loaded moves. The ICC addressed a similar issue in *Coal Rate Guidelines, Nationwide*, and explained why railroads could not simply allocate "unattributable costs" on a formulaic basis:

> Any means of allocating these costs among shippers other than actual market demand is arbitrary and may not permit a carrier to cover all of its costs. . . . If a carrier sought to apply the formula price to all of its traffic, it would lose that traffic for which the demand could not support the price assigned. In that event, the remaining shippers might be required to pay a larger portion of the carrier's unattributable costs . . . .

1 I.C.C.2d 520, 526 (1985), *aff'd sub nom. Consolidated Rail Corp v. United States*, 812 F.2d 1444 (3d Cir. 1987).

repairs, or shippers would require railroads to move cars from shop to shop, resulting in inefficient use of transportation resources. *See id.* (*IHB-I* "promotes inefficiency").

The ICC also acknowledged the mileage equalization system did not provide an answer to the compensation problem. Mileage equalization was not designed to compensate railroads appropriately for empty repair moves, and the compensation it provided "was not nearly enough." *Id.* at 605. "Some other solution [was] therefore needed." *Id.* at 606.

The ICC's solution was to allow railroads to establish separate charges for moving empty tank cars to and from repair facilities, just like they are allowed to establish separate charges for other transportation services. In other words, the solution was to advance the deregulatory, market-based policies Congress mandated in the 4R Act and the Staggers Act. *See id.* at 611.

2. *IHB-II* authorizes all railroads to establish separate charges for empty repair moves.

Complainants are plainly incorrect when they say *IHB-II* does not apply to Union Pacific. Complainants say Union Pacific's size and degree of "participation in loaded tank car revenue moves" distinguish us from the railroad defendants in *IHB-II*. Joint Evidence at 27. However, *IHB-II* applies to all railroads, not just railroads similar to the named defendants in *IHB-II*.

In the *IHB-II* proceeding, all railroads, large and small, urged the ICC to reverse *IHB-I*. Terminal and switching railroads were certainly at the forefront of the challenge to the free repair move rule. However, the ICC recognized the issues concerned the entire rail industry. The ICC thus opened the proceeding broadly to the public and received comments from many railroad, shipper, and car owner interests, including Union Pacific and the Association of American Railroads. *See IHB-II*, 3 I.C.C.2d at 602-03 & nn.10-12.

IHB-II's holding and justifications embraced all railroads. *IHB-I* applied to all railroads, not just terminal and switching railroads. And *IHB-II* made clear it was "reversing the decision

in [*IHB-I*]" and "allowing carriers to file tariffs containing charges for hauling empty, privately owned cars to and from repair facilities." *IHB-II*, 3 I.C.C.2d at 599. Moreover, as discussed in Part II.C.1, the ICC acted to address general legal and policy concerns with the free repair move rule, not specific problems with the rule's application to terminal and switching railroads. The ICC correctly recognized *IHB-I* stood "in direct conflict with Congressional direction in the statutory provisions of the 4R Act and the Staggers Act." *Id.* at 611.

If *IHB-II* left any question whether a railroad's authority to adopt separate charges for empty repair moves turned on the carriers' degree of participation in loaded tank car revenue moves, the ICC answered with a clear, direct "no" when describing *IHB-II*'s holding in *IHB-III*:

> The decision announced a change in policy to permit railroads, *regardless of the carrier's degree of participation in related revenue movements*, to charge for the movements of privately owned cars to and from private facilities for ordinary maintenance and repair.

IHB-III at 1 (emphasis added).

Just a few years later, the ICC once again emphasized that *IHB-II* allowed all railroads to impose empty repair move charges. In rejecting arguments the Ex Parte 328 Agreement required railroads to show "special circumstances" to depart from the mileage equalization system, the ICC said "all carriers" must be free to impose empty repair move charges:

> If the *IHB-II* decision is to have its intended remedial effect, *all carriers with potential for repair moves* must be free to impose charges.

Buffalo & Pittsburgh, 7 I.C.C.2d at 28 (emphasis added).

Complainants ignore the plain language of *IHB-II*, *IHB-III*, and *Buffalo & Pittsburgh*. Moreover, they never *explain* how a railroad's degree of participation in loaded tank car revenue moves has any bearing on the ICC's concerns about the free repair rule's impact on "individual pricing for distinct services," "cross-subsidization," and "inefficiency." *IHB-II*, 3 I.C.C.2d at

611. Railroads are encouraged to engage in individual pricing regardless of their participation in loaded revenue moves. Cross-subsidization occurs whenever a railroad must seek compensation for one service from charges for other services, regardless of its participation in loaded revenue moves. Similarly, inefficiency is a concern whenever a railroad must provide free repair moves because free moves "giv[e] private car owners little or no incentive to consider transportation costs in selecting repair facilities." *Id.* *IHB-II*'s rationale applies to all railroads.

3. *IHB-II* does not require railroads to pay mileage allowances in order to establish separate charges for empty repair moves.

Contrary to Complainants' claim, *IHB-II* does not say railroads can charge separately for empty repair moves only if they refund the charges through mileage allowances. When *IHB-II* was decided, shippers with zero-mileage rates – that is, rates under which a railroad is not obligated to provide cars and thus does not pay mileage allowances when shippers provide cars – understood the decision applied to them. Those shippers appealed. The ICC and D.C. Circuit rejected their appeals. We discuss this history in Part II.C.3(a).

The ICC and D.C. Circuit correctly recognized railroads should be allowed to charge separately for empty repair moves regardless of whether they pay mileage allowances or use zero-mileage rates. Railroads' obligations to provide transportation services, including their obligations to provide cars, have always been accompanied by their right to obtain compensation for providing those services, usually through their rates for loaded movements (but sometimes through special charges). If railroads establish and charge rates obligating them to provide all the transportation services, but shippers provide some of the services (*e.g.*, provide cars), shippers are entitled to "compensation" for the services they provide (*e.g.*, mileage allowances). However, if railroads establish and charge rates under which they are *not* obligated to provide certain services (*e.g.*, zero-mileage rates, under which they are not obligated provide cars),

shippers are not entitled to "compensation" for providing those services, and they are plainly not entitled to "compensation" for services railroads continue to provide (*e.g.*, empty repair moves). Thus, railroads are always entitled to compensation when they provide empty repair moves; the only issue is how they may obtain compensation – through their rates on loaded moves or through separate rates on empty repair moves. *IHB-II* authorized railroads to charge separate rates on empty repair moves. We discuss these points in Part II.C.3(b).

Finally, Complainants argue that, if Union Pacific's zero-mileage rates appropriately credited shippers with providing cars, we should have reduced our rates after adopting separate charges for empty repair moves, because we are now obtaining compensation for those moves directly rather than through rates for loaded movements. *See* Joint Evidence at 28, 35. They say Union Pacific improperly "created a new revenue stream." *Id.* at 28. However, Union Pacific's *right* to obtain compensation for empty repair moves through rates for loaded movements does not mean we were successful in doing so. And, even if Union Pacific had been successful, *IHB-II* authorized us to change how we obtain compensation. If shippers are unhappy with the level of their rates on loaded moves after that change, their recourse is to challenge their rates directly. We discuss these points in Part II.C.3(c).

a) *IHB-II* does not require payment of mileage allowances.

The ICC's holding in *IHB-II* was straightforward and simple: "We are reversing the decision in [*IHB-I*] and are allowing carriers to file tariffs containing charges for hauling empty, privately owned cars to and from repair facilities." 3 I.C.C.2d at 599. The ICC's ruling was not conditioned on the payment of mileage allowances. The ICC discussed mileage allowances, but only to emphasize a basic point: no reason existed to treat empty repair move charges differently than all other car ownership costs that shippers pay. The ICC did seem to assume most railroads would pay mileage allowances, and it believed allowances would tend to increase to offset new

empty repair move charges,[34] so shippers would not be subject to any "double payment" if their line-haul rates already compensated railroads for empty repair moves. *Id*. at 614.[35] However, at the same time, the ICC recognized railroads would not necessarily pay mileage allowances. In comments submitted in the *IHB-II* proceeding, Complainant ACC's predecessor, the Chemical Manufacturers Association, described the practice of using of zero-mileage rates, which it called "shipper-car" rates, for moving commodities in tank cars:

> The freight rates collected for moving commodities in tank cars or covered hoppers are generally published on a car-inclusive basis. 4/
>
> 4/ Where 'shipper-car' rates are negotiated and published, they are lower than standard rates, by virtue of the carrier's lesser obligation, and the movement is exempted from the allowance provisions carried in the currently applicable [industry-wide mileage allowance] tariff.

Ex. 33 (pp. 9-10 & n.4). In addition, the ICC specifically discussed its decision in *LO Shippers*, in which it declined to prescribe uniform allowances for private covered hopper cars and upheld use of zero-mileage rates. *See IHB-II*, 3 I.C.C.2d at 615.[36] The ICC was therefore careful to say that empty repair move charges should be treated "just like other repair expenses *recoverable* through the mileage allowance system." *Id.* at 616 (emphasis added). The ICC never assumed all shippers would necessarily *recover* empty repair move expenses through mileage allowance payments.

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[34] The ICC recognized the use of market-based allowances and mileage caps meant even the payment of allowances would not necessarily offset new, separate charges for empty repair moves. *See id.* at 614-15.

[35] More recent cases reject similar "double payment" concerns for a more straightforward reason: "under the law, [a railroad] may raise the prices for its services, as long as the total amount paid is reasonable." *NAFCA-II* at 7. *See infra* Part II.C.3(c).

[36] As discussed above, *IHB-II*, like *IHB-I*, applied to all types of private cars, not just tank cars. *See id.* at 619 ("The vast majority of privately owned cars are tank cars and covered hoppers. This decision, however, applies to all types of private car repair moves . . . ."). The ICC's reference to *LO Shippers* therefore spoke to the mileage allowance issues raised by *IHB-II*.

Shippers understood *IHB-II* did not condition railroads' adoption of empty repair move charges on payment of mileage allowances. They sought reconsideration, asserting the ICC "did not consider the effect of [*IHB-II*] upon contract rates [*i.e.*, zero-mileage rates], and of lessor/ lessee agreements made in reliance on [*IHB-I*]." *IHB-III* at 2.[37] In other words, shippers said the ICC failed to acknowledge that increases in mileage allowance payments to offset empty repair move charges would not help shippers with zero-mileage rates. The ICC denied the request for reconsideration. It said "no party raised the issue" in *IHB-II*, and even if someone had, the result would have been no different: *IHB-I* was "bad law and policy," and if shippers entered into contracts in reliance on *IHB-I*, their recourse was to renegotiate or wait until the contracts expired. *Id.* at 2-3. The ICC said it discussed mileage allowances in *IHB-II* to make the point that "repair move costs should be treated just like other repair expenses the private car owners initially pay" – recovery was *not* guaranteed. *Id.* at 5.[38] The ICC made clear its discussion of allowances was not intended in any way to limit *IHB-II*'s holding that railroads could adopt separate charges for empty repair moves:

> The issue in this proceeding was whether separate charges may be assessed for movements to repair facilities. We found that, because of regulatory policy changes toward greater carrier ratemaking freedom and away from collective approaches that result in cross subsidization, the [*IHB-I*] prohibition against charging for repair moves should be overruled.

Id.

[37] When *IHB-II* was decided, at least some tank car leases apparently placed responsibility for empty repair move charges on the lessor, not the lessee – unlike leases commonly used today – so lessors were also concerned they would incur unexpected costs because of the new charges.

[38] *See id*. ("In summary, petitioners' overall contention that complete recovery of repair move costs is required is incorrect.").

The D.C. Circuit also understood *IHB-II* did not condition railroads' adoption of empty repair move charges on payment of mileage allowances. It rejected claims the ICC "neglected to consider" that "shippers who have negotiated long-term contract rates with carriers, which rates presumably incorporate an offset amount reflecting the shippers' cost of providing railcars [*i.e.*, zero-mileage rates] but do not currently account for the possibility of shipper-borne empty repair charges, will be harmed by [*IHB-II*]." *GATC*, 872 F.2d at 1058 (internal citations omitted). It said the practice of using zero-mileage rates rather than rates providing for payment of mileage allowances did not preclude the ICC from implementing its well-explained departure from *IHB-I*. *See id.* at 1058-1059. And the Court strongly agreed with the ICC's conclusion that "what is appropriate for ownership costs generally is perfectly appropriate for the discrete ownership costs at issue in this case." *Id.* at 1057.[39]

Finally, the Board re-confirmed the ICC's decision in *IHB-II* was not related to payment of mileage allowances in *NAFCA-I*. *NAFCA-I* involved a challenge to new tank car storage and diversion charges adopted by BNSF Railway. North America Freight Car Association, also a Complainant in this case, argued the BNSF charges were distinguishable from the empty repair move charges at issue in *IHB-II* and *Buffalo & Pittsburgh* because, unlike BNSF's charges, empty repair move charges "were factored into the allowance formula as maintenance costs and thus increased the allowance paid by the railroads." *NAFCA-I* at 6. The Board rejected that distinction, reminding NAFCA "the ICC's decision" to allow charges for empty repair moves

[39] The Court answered petitioners' argument that empty repair move charges should be treated differently from other car ownership costs by noting § 11122 contemplates all ownership costs *could be* addressed through allowances. *See id.* However, the Court plainly understood railroads and shippers were also using zero-mileage rates rather than paying mileage allowances. *See id.* at 1050 (referring to use of "direct 'mileage allowances' and offsets on line-haul freight tariffs"); *see id.* at 1056 (referring to use of "mileage allowance charges, contract offsets").

"*did not turn on whether a portion of the empty repair move charges might be recovered through allowances*." *Id.* (emphasis added). Instead, "the rationale in [*IHB-II*, *GATC*, and *Buffalo & Pittsburgh*] for reversing the rule that had made repair moves free . . . to the car owners related to the misallocation of economic burdens among carriers . . . and the conflict with the statutory policies of rate flexibility, revenue adequacy, and demand-based carrier pricing." *Id.*

In sum, Complainants' claim that payment of mileage allowances "was a critical predicate to the *IHB-II* decision," Joint Evidence at 4, is a complete fabrication.[40]

b) Complainants' mileage allowance arguments merely reprise their misguided claim of a right to free empty repair moves.

Complainants' effort to link empty repair move charges to mileage allowances is merely a variation on the same misguided claim that empty repair moves must be free to shippers. But just like the ICC's pre *IHB-I* prohibition against separate charges never meant railroads were to provide empty repair moves for free,[41] the historical practice of paying mileage allowances never meant railroads were to provide tank cars for free. The practices of paying mileage allowances *assumes railroad line-haul rates for moving commodities in loaded cars include compensation for providing cars and bearing the responsibilities of car ownership*. *See, e.g.*, *LO Shippers*, 4

[40] Complainants' argument that *IHB-II* requires railroads establishing empty repair move charges to pay mileage allowances also suffers from a logical flaw. For shippers to recover empty repair move charges through mileage allowances, *all railroads* must pay allowances, not just railroads charging for empty repair moves. Shippers paying charges on Railroad *A* will not necessarily have enough loaded moves on Railroad *A* to recover the charges through allowances. *IHB-II* presented exactly this scenario: the railroad defendants had very few loaded movements, so requiring them to pay allowances would not have allowed the shippers to recover.

A similar scenario is presented here: If Union Pacific handles only retrofit moves for a shipper, then requiring us to pay mileage allowances will not allow the shipper to recover empty repair move charges from us.

Complainants are trying to reframe the ICC's holding in *IHB-II*, but their efforts collapse under the slightest scrutiny.

[41] *See supra* Part II.C.1.

I.C.C.2d at 17 ("[T]he carrier is obligated to publish an allowance for a service rendered by the shipper *only if* the carrier is obligated to perform the service under its line-haul rate." (emphasis added)).[42] Thus, railroads are often said to have a common carrier duty to provide cars, which they can satisfy by providing cars themselves or by compensating shippers for providing cars.[43] But such statements assume railroads are initially compensated for providing cars through their line-haul rates. In other words, when railroads have a duty to provide cars, *railroads* are entitled to *compensation* for providing cars, whether they provide cars themselves or satisfy their duty by

[42] Complainant ACC's predecessor, the Chemical Manufacturers Association, made the same point in comments submitted in the *IHB-II* proceeding. *See* Ex. 33 (p. 9) ("The freight rates collected for moving commodities in tank cars or covered hoppers are generally published on a car-inclusive basis."). Similarly, {{

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[43] We say "often said" for two reasons. First, ICC decisions recognize railroads have no obligation to provide cars (or pay mileage allowances) when shippers use zero-mileage rates, as the *LO Shippers* case cited in the text explains. We discuss the issue in greater detail in Part III. Second, although many decisions involving tank cars include general assertions about common carriers' obligations to provide cars, railroads actually do not have a common carrier obligation to provide tank cars. *See United States v. Pa. R.R.*, 242 U.S. 208 (1916); *Chi., Rock Island & Pac. Ry. v. Lawton Ref. Co.*, 253 F. 705 (8th Cir. 1918); *Rylander v. Chi. Short Line Ry.*, 153 N.E.2d 225, 229-30 (Ill. App. Ct. 1958) ("There is no doubt . . . that the obligation of a carrier to receive and carry by suitable means goods which they assume to transport, does not require the carrier to provide facilities for carrying special types of goods, such as liquids in tank cars.").

paying mileage allowances.[44] As the ICC explained long ago, when railroads have a duty to provide cars, they have a corresponding entitlement to compensation for performing that duty:

> Restating the principle involved: The duty is upon carriers to furnish cars suitable to transport in safety the traffic which they hold themselves out to carry. . . . But for all the expenses incurred in providing and preparing a suitable car[,] carriers are entitled to remuneration, either in the line-haul rate, or by a special charge.

Sioux City Term. Ry. Switching, 241 I.C.C. 53, 67 (1940); *cf. id.* at 69 ("Complainants correctly contend that this switching is an obligation of carriers; but it is a service for which the carriers are entitled to compensation."); *ICC v. Diffenbaugh*, 222 U.S. 42, 47 (1911) ("As the carrier is required to furnish this part of the transportation upon request, he could not be required to do it at his own expense . . . ."). In short, no matter how railroads satisfy their duty to provide cars, they are not obligated to provide cars or related services (including empty repair moves) for free.

If railroads are not obligated to provide cars for free, why do cases discuss compensation to shippers and mileage allowances? Why go through the trouble of charging shippers higher line-haul rates and paying allowances when shippers provide cars? The answer lies in the long history of railroad regulation. The use of mileage allowances was part of a pervasively regulated environment in which competitive pricing was regarded as giving favored shippers an "undue preference." To guard against such preferences, regulators required railroads to set rates as though they provided all cars and performed all transportation services. If shippers actually provided cars or performed services, then railroads could pay an allowance as "compensation."

[44] As discussed below, the circular practice of obtaining compensation from a shipper through rates on loaded movements for the costs of compensating the same shipper for providing cars grew out of a highly regulated environment.

Switching at St. Louis & East St. Louis, 120 I.C.C. 216, 222 (1926). And the ICC separately regulated allowances to prevent railroads from using them to provide prohibited "advantages."[45]

After deregulation, in circumstances in which railroads would not actually provide cars, especially in the case of tank cars, railroads and shippers shifted from the artificial, burdensome practice of using rates that assumed railroads would provide cars and pay mileage allowances, to the more efficient practice of using zero-mileage rates – that is, rates under which railroads are not obligated to provide cars. When railroads use zero-mileage rates, they no longer need to set rates to obtain compensation for providing cars, only to later pay allowances to shippers for actually providing the cars. And when shippers use zero-mileage rates, they are not losing any right to "compensation" – they are simplifying the accounting process.[46]

Complainants' argument that Union Pacific must compensate shippers for the costs of empty repair moves through mileage allowance payments thus fails for the same reason as their claim that empty repair moves must be free to shippers: *railroads* are entitled to compensation for car-related costs they actually incur, and shippers are not entitled to allowance payments (or any other "compensation") unless they provide services the railroad was obligated to perform.

[45] For example, in *El Dorado Oil Works*, the Supreme Court upheld an ICC ruling that allowance payments in excess of a shipper's actual tank car rental costs were unjust and unreasonable and constituted a prohibited rebate and discrimination. As the Court explained: "Payment by the railroad of more than the just value of the services inevitably resulted in its carrying Oil Work's [sic] product at less than the regular freight rate," which "justified the Commission's finding that Oil Works got a concession and an advantage over other shippers who made no such profits on tank cars." *El Dorado Oil Works v. United States*, 328 U.S. 12, 22 (1946).

[46] Again, Complainant ACC's predecessor made essentially this point in its comments in *IHB-II*. *See* Ex. 33. We further discuss the relationship between full-mileage and zero-mileage rates in Part III.A.

c) Complainants' "new revenue stream" argument is a failed attempt at reviving discredited "double recovery" claims.

Complainants belatedly acknowledge Union Pacific's entitlement to compensation for empty repair moves – at least through our "line-haul rates on loaded tank car movements." Joint Evidence at 28. Their final line of attack on Union Pacific's use of zero-mileage rates therefore boils down to a claim that Union Pacific is using zero-mileage rates to charge shippers twice for empty repair moves. Their argument goes something like this: Union Pacific's use of zero-mileage rates while charging separately for empty repair moves must be improper, because if Union Pacific's zero-mileage rates appropriately credited shippers for providing cars, Union Pacific should have reduced rates for loaded movements once we began charging directly for empty repair moves. *See id.* at 28, 35. Complainants' tortured argument essentially restates the failed claims shippers made in *NAFCA-II*. They fail here for the same reasons.

NAFCA-II involved shippers' unsuccessful challenge to BNSF's adoption of separate charges for holding empty private cars. Among their many claims, shippers said the new charges "require[d] shippers to pay BNSF twice for holding their empty cars – once through the line-haul rate and a second time through the [new charges]." *NAFCA-II* at 6. Specifically, they argued:

> [T]raditionally it was understood that shippers would furnish private cars and railroads, including BNSF, would supply the tracks on which to hold those cars so long as they were empty awaiting loading, all as part of BNSF's freight rate, [so] now charging separately for empty private car storage should require the railroad to lower its line-haul rates, which BNSF did not do when it introduced the [new charges].

Id. at 7 (internal quotations and citations omitted). The Board identified three fatal flaws in the shippers' argument. First, the shippers did not claim BNSF agreed or represented it would not establish separate charges. *See id.* Second, the shippers did not "provide any evidence that the line-haul rates paid by private car shippers before the [new charges] included the cost of storing

empty private cars . . . or that they included all such costs." *Id.* Third, "under the law, BNSF may raise the price for its services, as long as the total amount paid is reasonable," and the shippers "do not here challenge the reasonableness of any line-haul rates." *Id.*

All three fatal flaws are present here.

First, Complainants do not claim Union Pacific agreed or represented we would never establish separate charges for empty repair moves. Moreover, shippers knew such charges were always possible: *IHB-II* is well-established precedent, Individual Complainants' tank car leases {{

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Second, Complainants provide no evidence Union Pacific's line-haul rates included compensation for empty repair moves – nor could they. As discussed above, Union Pacific's rates for loaded movements are determined by the markets for those loaded moves. *See* Rocker VS at 3. If Union Pacific tried to set those rates above markets rates to obtain compensation for empty repair moves, we would lose business. *See id*.[48] The recognition that railroads must price in response to market conditions, and not to cover some allocation of unattributable costs, is fundamental to rail regulation in the post-Staggers era.[49] Indeed, Individual Complainants acknowledged the difficulty of passing along empty repair move charges through rates for loaded

[47] *See* {{
} Ex. 19 (Spieckermann Tr. 83:17-22); {
} {{ }}

[48] Thus, as noted by Complainants, Union Pacific's witnesses testified that Union Pacific {{
}} Joint Evidence at 35 (citing Rocker Tr. 60:18-25).

[49] *See supra* n.33; *see also IHB-II*, 3 I.C.C.2d at 614 ("Line-haul rates frequently are set at levels determined by competitive factors without necessarily tracking all costs closely.").

movements when asked why *they* could not pass along the charges to *their own* customers. {{ }} witness testified that such charges cannot simply be spread among all of a company's customers through a general rate increase:

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}} {{ }} witness similarly testified that charges for empty moves could not simply be assigned to loaded moves:

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In addition, Individual Complainants appear to recognize Union Pacific was not recovering for empty repair moves through charges for loaded movements. As part of an internal discussion of Item 55-C, {{

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[50] To the extent Union Pacific might be able to obtain some amount of compensation for empty repair moves through the mileage equalization system, we addressed any potential overlap by excluding the empty miles from mileage equalization when we charge separately for empty repair moves. *See* Rocker VS at 8 n.10; *see also* Ex. 5 (Freight Tariff RIC 6007-O, Item 170).

Other shippers also appear to assume Union Pacific was not recovering for empty repair moves through our charges for loaded movements. Shortly after Union Pacific announced Item 55-C, a member of Complainant AFPM e-mailed a member of Complainant NAFCA and observed that one clear benefit to Union Pacific was the ability to obtain compensation for empty repair moves:

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Third, Complainants' argument is a rate challenge masquerading as an unfair practice claim. It thus violates the prohibition against using an unreasonable practice claim to challenge a "practice" manifested exclusively in the level of rates charged. *See Union Pac. R.R. v. ICC*, 867 F.2d 646 (D.C. Cir. 1989). Complainants say Union Pacific's practice of charging separately for empty repair moves produces excessive rates for loaded movements because rates for loaded moves already include a measure of compensation for empty repair moves. But the Board rejected a similar challenge in similar circumstances because "the challenged 'practice' – allegedly recovering [empty repair move] costs in both base rates and [separate charges] – is manifested exclusively in the level of rates that [shippers are] charged, and thus may only be challenged as an unreasonable rate after a finding of market dominance." *Cargill, Inc. v. BNSF Ry.*, STB Docket No. NOR 42120 (STB served Jan. 4, 2011) at 6 (emphasis omitted).

The Board's *Cargill* decision also rejected the shipper's claim for another reason with strong parallels to this case: the impossibility of deconstructing rates for loaded movements to determine whether a "double recovery" exists. As the Board explained:

> Costs . . . can be among the factors that carriers consider in setting their base rates. But there are many other factors as well – such as general market conditions, carrier-specific financial condition, product demand and the competitive options available to particular shippers . . . . The Board does not attempt to attribute values to each component of rail pricing actions or rule on a carrier's rate on a component-by-component basis.

Id.

In sum, even if Union Pacific's overall charges to particular shippers increased because we adopted separate charges for empty repair moves, that would not provide a valid reason for rejecting Item 55-C as an unreasonable practice. "[U]nder the law," Union Pacific "may raise the price for its services, as long as the total amount paid is reasonable." *NAFCA-II* at 7.[51]

* * *

Outside the litigation context, Complainants' actions demonstrate they understand Union Pacific's use of zero-mileage rates, rather than rates that include payment of mileage allowances, would not address their unhappiness with paying for a service they previously regarded as free. If payment of mileage allowances would have addressed Complainants' objections to Item 55-C, Individual Complainants would have asked Union Pacific to establish contract or tariff rates that provide for payment of mileage allowances after we announced Item 55-C. However, *not one of*

[51] Although Individual Complainants predictably complain about rate increases, the evidence in the record shows that, since adopting Item 55-C, Union Pacific has continued to negotiate rates based on market conditions (and often agreed to rates lower than our original proposals). Thus, to the extent rates prior to our adoption of Item 55-C reflected an expectation we would provide free empty repair moves, current rates have been negotiated in an environment in which shippers know they are paying for empty repair moves. This is what the ICC understood would happen – any possible rate issue would be transitory. *See IHB-III* at 3. We discuss this point in more detail in Part IV.A.3.

the Individual Complainants has asked Union Pacific to establish rates that provide for payment of mileage allowances since Union Pacific announced Item 55-C in 2014. *See* Craven VS at 2.[52]

D. Union Pacific's practice of charging separately for moving empty tank cars to and from repair facilities is a reasonable practice.

Union Pacific's adoption of Item 55-C is lawful under the ICCTA, as shown in Part II.B, and is specifically authorized by *IHB-II*, as shown in Part II.C. Complainants have not given the Board any good reason to revisit *IHB-II*. They do not contend the free repair move rule is more consistent with the ICCTA or Federal rail transportation policy than a rule allowing railroads to charge separately for empty repair moves. They do not contend the free repair move rule is intrinsically more efficient or more fair than a rule allowing railroads to charge separately for empty repair moves. Instead, Complainants simply say Union Pacific is being greedy. They say we earn substantial revenue from moving loaded tank cars, so we should be required to provide empty repair moves for free. *See* Joint Evidence at 27. Union Pacific thinks demanding free service is greedy, not charging for services performed.

In addition, in assessing Complainants' effort to avoid paying for their empty repair moves, some perspective is warranted. Complainants refer to Union Pacific's approximately {{ }} in annual revenue from loaded tank car traffic. *See id*. But in 2017, Cargill

[52] Ironically, mileage allowance payments would not actually account for empty repair move charges. Under the Ex Parte 328 Agreement, "[a]ny charges assessed for moving . . . cars en route to or from car repair facilities" were to be included in "maintenance costs." *System - 1986*, 3 I.C.C.2d at 206 (Agreement § 3(a)). "Maintenance costs" are developed annually based on the experience of three (formerly four) large tank car leasing companies. *See id.* At the time, tank car leases apparently made empty repair move costs a responsibility of the leasing companies. Now, however, lessees bear the costs. *See* {{ }} Ex. 19 (Spieckermann Tr. 83:17-22); { } {{ }} Moreover, lessees do not report their empty repair move costs to leasing companies. *See* Ex. 7 (Grow Tr. 103:25-104:3); { } {{ }} { } Thus, the costs of empty repair move charges are not included in the development of mileage allowances under the formula adopted in the Ex Parte 328 Agreement.

generated revenues of $109.7 billion;[53] Valero generated revenues of $93.980 billion;[54] Tesoro generated revenues of $34.975 billion;[55] Arkema reported sales of €8.326 billion;[56] and POET reportedly earned $4 billion.[57] The Board should not provide Individual Complainants corporate welfare in the form of free empty repair moves.

Even if the Board were to revisit *IHB-II* or reconsider whether *IHB-II* should continue applying to all railroads, the Board would find the policy justifications for allowing railroads to establish separate charges for empty repair moves remain as strong as ever. Union Pacific's adoption of Item 55-C advances important policies identified in *IHB-II* and the Federal rail transportation policy in 49 U.S.C. § 10101.

In addition, as Professor Murphy explains in his Verified Statement, allowing railroads to establish separate charges for empty repair moves is reasonable as a matter of basic economic policy. "Pricing empty repair moves separately creates price signals that motivate buyers to consider whether purchasing an incremental empty repair move provides sufficient value to be worth the price and whether there might be an alternative that would be preferable given the cost of a movement." Murphy VS at 4. "Thus, it creates incentives for shippers to make more efficient use of a railroad's infrastructure because they will take into account explicitly how their decisions about empty repair moves impose costs on railroads." *Id.* In addition, "absent separate pricing of empty repair moves, UP and other railroads would have diminished incentives to invest in resources to service such moves, including in railroad infrastructure. The resulting

[53] *See* Cargill Op., Zimski VS ¶ 4.

[54] *See* Ex. 47.

[55] *See* Ex. 48.

[56] *See* Ex. 49.

[57] *See* Ex. 50.

reduction in capacity would raise costs to UP and prices to shippers (including those that do not generate uncompensated empty moves)." *Id.*

Complainants thus fail to carry their burden of proving Union Pacific's adoption of Item 55-C amounts to an unreasonable practice. *See NAFCA-II* at 5 ("[T]he burden is clearly on Complainants to prove their claims . . . .").

The remainder of this section proceeds as follows: *Part II.D.1* shows Item 55-C advances important Federal rail transportation policies and is consistent with well-accepted rail industry practice. *Part II.D.2* shows reducing cross-subsidization and inefficient empty repair moves remains a concern for Union Pacific and the railroad industry. *Part II.D.3* shows Item 55-C provides shippers incentives to consider transportation costs in selecting repair facilities. *Part II.D.4* shows Union Pacific did not mislead customers in adopting Item 55-C. *Part II.D.5* shows Item 55-C does not undermine mileage equalization. *Part II.D.6* addresses Cargill's improper and erroneous claim that Union Pacific is misapplying Item 55-C.

1. Item 55-C advances many objectives of the Federal rail transportation policy.

One important test of whether a practice is reasonable is its consistency with the Federal rail transportation policy in 49 U.S.C. § 10101. *See, e.g.*, *NAFCA-II* at 6-7; *Schaffer Transp. Co. v. United States*, 355 U.S. 83, 88 (1957) (the statutory transportation policy is "the yardstick by which the correctness of the Commission's actions will be measured"). Item 55-C advances many of the ICCTA's specific policy objectives by establishing separate charges for the service of moving empty cars to repair facilities. Item 55-C's charges "recover costs from those that generate them," which "is exactly what the Board, the ICC before [the Board], and Congress have encouraged railroads to do." *NAFCA-II* at 6-7.

Under the ICCTA, the Federal rail transportation policy continues to encourage railroads to charge separately for separate services for the same reasons identified in *IHB-II*. In general terms, separate charges for separate services remain consistent with current policy objectives to "eliminate cross-subsidies" and "give individual shippers incentives to manage their operations, including private car fleets, as efficiently as possible." *NAFCA-II* at 6, 7. In terms of specific rail policies under the ICCTA, empty repair move charges, including Item 55-C's charges:

- "allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." 49 U.S.C. § 10101(1). They create actual rates for empty repair moves, rather than leaving railroads to obtain compensation through rates on loaded moves and prescribed rates for mileage equalization, or leaving them uncompensated for their services.

- "minimize the need for Federal regulatory control over the rail transportation system." *Id*. § 10101(2). They reduce the need to rely on the prescribed mileage equalization system in favor of greater use of market forces to promote efficiency and compensate railroads for empty repair costs.

- promote "a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues." *Id.* § 10101(3). They eliminate free movements that do not contribute to going concern value.

- "foster sound economic conditions in transportation." *Id.* § 10101(5). They eliminate cross-subsidies and provide compensation for services provided in moving empty cars to repair facilities.

- "encourage honest and efficient management of railroads." *Id.* § 10101(9). They encourage shippers to utilize their private cars more efficiently by encouraging them to take transportation costs into account in their fleet management decisions.

- advance individualized pricing principles. *Id.* § 10101(10). They seek compensation from individual shippers for the costs associated with shippers' decisions to direct empty cars to repair facilities.

In fact, in a strikingly similar case involving BNSF's adoption of separate charges for holding empty private freight cars on a railroad's tracks, the Board found BNSF's adoption of separate charges was consistent with the policies identified above:

> Recovering the cost of empty private car storage from the suppliers of those cars advances several aspects of the rail transportation

> policy, including allowing the demand for services to establish rates (49 U.S.C. 10101(1)), fostering sound economic conditions in transportation (49 U.S.C. 10101(5)), encouraging efficient management of railroads (49 U.S.C. 10101(9)), and encouraging individualized ratemaking (49 U.S.C. 10101(10)).

NAFCA-II at 7; *see also N. Am. Freight Car*, 529 F.3d at 1171-72 (affirming the Board's analysis of the rail transportation policy in *NAFCA-II*).

Consistency with industry practice is an additional consideration in evaluating whether a practice is reasonable. *See, e.g.*, *Railroad Salvage & Restoration, Inc. – Petition for Declaratory Order – Reasonableness of Demurrage Charges*, STB Docket No. NOR 42102 (STB served July 20, 2010) at 13; *Capitol Materials Inc. – Petition for Declaratory Order*, 7 S.T.B. 576, 582, 583-84 (2004). Item 55-C is consistent with how Union Pacific treats all other types of empty private cars moving to and from repair facilities. Under Item 50-F, Union Pacific charges line-haul rates for moving empty cars, other than tank cars, unless the empty move directly follows a loaded move. *See* Ex. 2. Thus, Union Pacific charges for moving other empty cars to and from repair facilities under the same circumstances as we charge for moving empty tank cars under Item 55-C. *See* Rocker VS at 1, 8. Other railroads appear to follow similar practices when handling empty private cars other than tank cars.[58]

Complainants say tank cars should be treated differently than other types of private cars because railroads do not offer transportation in railroad-provided tank cars. *See* Joint Evidence at 48. However, they do not explain why the distinction makes any difference here. Moreover, the ICC knew railroads did not provide tank cars when it decided *IHB-II*, and that fact did not

[58] *See, e.g.*, Ex. 51 (BNSF Rules Book 6100-B, Item 6080); Ex. 52 (CN Guidelines, Item 200); Ex. 53 (CP Private Equipment Tariff 6, Item 25); Ex. 54 (CSX Transportation Public Price List CSXT 6051); Ex. 55 (Tariff KCS 37 B, Item 100); Ex. 56 (NS 8002-A, Item 3000); *see also* {

}} Ex. 24 (Siebrecht Tr. 68:3-6); {

}

alter the outcome. To the contrary, the ICC said *IHB-II* "applies equally to all types of private car repair moves and the problems and changes discussed in respect to tank cars also have general application to other car types." *IHB-II*, 3 I.C.C.2d at 619.[59]

In addition, Item 55-C is consistent with industry practice because Union Pacific was not the first railroad to adopt separate charges for empty repair moves of tank cars. The rail industry tariff governing mileage equalization shows many railroads excepted themselves from the free empty repair move rule, in whole or in part, *before* Union Pacific adopted Item 55-C, including Class I railroads Canadian Pacific and Kansas City Southern.[60] Other Class I railroads, namely BNSF and Canadian National, excepted themselves from the free empty repair move rule after Union Pacific adopted Item 55-C.[61]

Item 55-C is also consistent with industry practice because the charges apply to categories of empty repair moves for which railroads could have adopted separate charges even before *IHB-II*. For example, Complainants focus on Item 55-C charges for retrofitting moves, but railroads could have imposed separate charges for such empty repair moves even before *IHB-II*. Cars moving *to* repair facilities for retrofitting are just like cars moving for dismantling, sale, or scrap. The cars are leaving revenue service and will not be used again until they are rebuilt to meet regulatory standards. Cars moving *from* repair facilities after retrofitting are just like new or rebuilt cars moving prior to their first revenue move in commercial service. In fact, when cars

[59] Complainants also say Union Pacific would not charge itself for empty repair moves if Union Pacific provided tank cars. *See* Joint Evidence at 28. But Union Pacific does provide other types of cars, and we charge when we move private cars of the same types to repair facilities, so our provision of certain cars is not a meaningful distinction. *See* Rocker VS at 1. Moreover, when Union Pacific provides cars, we are less concerned with inefficiencies and cross-subsidization because we determine where and when to send the cars for repairs.

[60] *See* Ex. 6 (Freight Tariff RIC 6007-N, Items 55, 64, 75, 80, 99, 102, 112, 120, 124 & 150).

[61] *See* Ex. 5 (Freight Tariff RIC 6007-O, Items 71 & 90).

specified as DOT-111 cars are retrofitted, they leave the repair facility with a new specification – DOT-117R.[62] Even before *IHB-II*, ICC precedent authorized empty repair move charges under similar circumstances. *See Union Tank Car*, 358 I.C.C. at 692 ("The fact that a car has once made a commercial domestic movement, however, does not mean that the car automatically maintains a permanent status as an instrumentality of transportation entitled to free repair movements. For example, empty cars move as property to facilities for modification or from facilities for transfer between shippers for sale or scrap. These movements are solely for the benefit of the car owner and not for revenue purposes." (internal citations omitted)); *IHB-I*, 357 I.C.C. at 124 ("Movements of 'new acquired' or 'newly constructed' or 'rebuilt' cars prior to their first loaded movement, and empty movements of cars to facilities for transfer between shippers for sale or scrap were considered to be commercial movements for which a charge would be permissible.").

As another example, Complainants take issue with Item 55-C charges for cars moving to and from cleaning facilities. However, prior to *IHB-I*, the ICC permitted separate charges for cars moving to cleaning facilities. *See IHB-I*, 357 I.C.C. at 129. In addition, certain Individual Complainants use tank cars in unit train service. However, after deciding *IHB-I*, but before deciding *IHB-II*, the ICC approved empty repair move charges for cars in unit train service because such cars were "not available to [the carrier] to fulfill its common carrier obligation." *Inland Steel* at 5.

In sum, Item 55-C is reasonable from the perspective of rail transportation policy and actual practice.

[62] *See* Ex. 57 (Bureau of Transportation Statistics, Tank Car Specifications & Terms).

2. Union Pacific has continued interest in reducing cross-subsidization and inefficiencies from empty repair moves.

Complainants are wrong when they claim Union Pacific's motivation for adopting Item 55-C was not consistent with the ICC's rationale for authorizing empty repair move charges in *IHB-II*. *See* Joint Evidence at 24-29. They say Union Pacific is not like the railroad defendants in *IHB-II* because we earn substantial revenue from tank car traffic. *See id*. at 27. But the ICC's rationale in *IHB-II* was not focused on, or dependent on, revenue. The ICC recognized that requiring railroads to provide "free movements . . . encourages cross-subsidization . . . and promotes inefficiency." *IHB-II*, 3 I.C.C.2d at 611.

Complainants are really saying Union Pacific earns enough on loaded movements that we should not care about cross-subsidization and inefficiencies associated with providing free empty repair moves. However, Complainants never explain what entitles them to free empty repair moves, especially when the consequences are cross-subsidization and inefficiency. And the record in this case shows separate pricing of empty repair moves would help address cross-subsidization and inefficiency issues affecting Union Pacific and the railroad industry.

As Professor Murphy confirms, "[e]fficient pricing of a product or service is unrelated to whether the firm is profitable and makes money on other products and services." Murphy VS at 16. "[T]hose taking advantage of empty repair moves when they do not have to pay directly for those transportation services will use them inefficiently." *Id.* And "inefficiency is not the only concern." *Id*. "UP and other users of its transportation services, including but not limited to other shippers that have loaded tank car moves on UP, will suffer harm in the long run if UP cannot collect from the parties that use UP's transportation services." *Id.* at 16-17.

a) Cross-subsidization involving empty repair moves affects Union Pacific, shippers, and others in the railroad industry.

As Complainants recognize, Union Pacific was prompted to consider charging for empty repair moves by the prospect of moving a significant number of tank cars to repair facilities for retrofitting. *See* Joint Evidence at 12. But Complainants apparently fail to recognize this is the same type of cross-subsidization concern raised by the defendant railroads in *IHB-II*: Union Pacific faced the prospect of providing free repair moves for cars likely to make few loaded moves on Union Pacific. *See* Rocker VS at 1-2.[63]

Outside the litigation context, Complainants recognized the legitimacy of Union Pacific's concern that we would not be compensated for empty repair moves relating to retrofitting. In asking Union Pacific to discount our empty repair move charges for cars moving to repair facilities for retrofitting, {{

}}[64]

We discuss Union Pacific's concern for handling a disproportionate quantity of empty repair moves in Part II.D.2(a)(1). However, separate charges for empty repair moves also help mitigate other cross-subsidization in the rail industry that arises regardless of the relationship between any one railroad's loaded and empty repair miles, as discussed in Part II.D.2(a)(2).

[63] Professor Murphy observes that the retrofit situation clearly illustrates the benefits of charging separately for empty repair moves. *See* Murphy VS at 17.

[64]

}

(1) Union Pacific handles a disproportionate share of empty repair moves generally.

Contrary to Complainants' claims, Union Pacific handles a disproportionate share of empty repair moves for tank cars generally.[65] Union Pacific does not automatically handle equal shares of loaded moves and empty repair moves because no necessary connection exists between the railroad handling loaded moves and the railroad handling empty moves when cars move to repair facilities. *See supra* Part II.A.2. As Individual Complainants acknowledged, tank cars without a prior or subsequent loaded move on Union Pacific can be and are sent to repair facilities on Union Pacific.[66]

Union Pacific's disproportionate responsibility for empty repair moves is clear from data in the record. The data show Union Pacific handled {{ }} more empty repair miles than any other Class I railroad in 2016. *See* Baranowski VS at 6-7 & Table 5. During the same period, Union Pacific handled {{ }} of empty repair move miles, but only {{ }} of loaded miles. *See id.* at 7-8 & Table 6. In addition, when Union Pacific handles empty cars moving to repair facilities, the shop move is often our only opportunity to earn revenue. For example, from 2015 through 2017, at least {{ }} of the cars subject to charges under Item 55-C did not make a loaded move on Union Pacific during the year we imposed the charge. *See id*. at 9 & Table 7. The data also show cars commonly move in loaded service on other railroads,

[65] As discussed throughout this Reply, Union Pacific believes we were not being compensated appropriately for providing empty repair moves before adopting Item 55-C because we generally cannot obtain such compensation through rates for loaded movements. *See* Rocker VS at 3; *see also* Murphy VS at 4; *id.* at 13 & n.25. That is, compensation, cross-subsidy, and efficiency issues would exist even if Union Pacific did not handle more than our share of loaded line-haul moves. However, we address disproportionality here to show why compensation and cross-subsidization would be special problems for Union Pacific if our only option were to try to obtain compensation through our rates for loaded moves.

[66] *See*, *e.g.*, Ex. 7 (Grow Tr. 141:16-23); Ex. 14 (Zimski Tr. 190:14-19); Ex. 23 (Fox Tr. 53:3-9); { }

use Union Pacific's system only to visit a shop, then immediately return to loaded service on other railroads. In 2015 and 2016, Union Pacific experienced this pattern approximately {{ }} of the time. *See id.* at 8.

Union Pacific's disproportionate responsibility for empty repair moves is not surprising. Union Pacific serves more repair facilities than other railroads. *See id.* at 6 & Table 4. As one of the Individual Complainants explained: {

}[67]

Outside the litigation context, Complainants recognize the cross-subsidy issue and the legitimacy of Union Pacific's concerns. Shortly after Union Pacific announced Item 55-C, an AFPM member emailed a NAFCA member about Item 55-C and the disparities between empty repair moves and loaded moves on Union Pacific:

{{

}}

As discussed next, Item 55-C would play a legitimate role in preventing cross-subsidies even if there were no issue of disproportionate empty repair moves on Union Pacific. However, the disproportionate use of Union Pacific's network for empty repair moves aggravates cross-subsidy problems for Union Pacific.

[67] *See also*

(2) Empty repair move charges address many forms of cross-subsidization in addition to disproportionate burdens of handling empty repair moves.

In *IHB-II*, the ICC focused on a particular cross-subsidization issue presented by the facts in that case – cross-subsidization of other railroads by railroads with a disproportionate share of empty repair moves. However, requiring railroads to provide free empty repair moves creates a variety of market distortions. Separate charges for empty repair moves, including Item 55-C, help eliminate cross-subsidization in even more ways than the ICC identified in *IHB-II*.[68]

The record in this case helps illuminate the many types of cross-subsidization arising from free empty repair moves. Perhaps most significant are cross-subsidization effects among shippers. In the absence of separate charges, shippers with relatively more empty repair moves impose costs on shippers with relatively fewer empty repair moves. As discussed in Part II.A.2, shippers do not all consume empty repair moves in the same proportion to their loaded moves. Differences in consumption of empty repair moves arise from differences among shippers in commodities shipped (*i.e.*, some require more cleaning and repairs); mix of owned and leased cars (*i.e.*, leased cars must be cleaned upon return); conversions of cars to different services (*i.e.*,

[68] Notably, if *IHB-II* had required railroads to pay mileage allowances as a condition to charging separately for empty repair moves, as Complainants claim, *see* Joint Evidence at 3-4, it would have replaced one cross-subsidy with another. As the ICC observed in *IHB-II*, a critical flaw in *IHB-I*'s approach was the lack of a necessary relationship between a railroad's loaded moves and empty repair moves. *See IHB-II*, 3 I.C.C.2d at 606. That is, Shipper *X* could make empty repair moves on Railroad *A*, but loaded moves on Railroad *B*, leaving Railroad *A* without a chance to obtain compensation for its empty repair moves. (As discussed elsewhere, not just the number of loaded moves, but also market conditions might preclude a railroad from recovering for empty moves through rates on loaded moves.) What would happen if all railroads charged for empty repair moves *and* paid mileage allowances? Railroad *A* would be compensated for providing empty shop moves, but Railroad *B* would bear the costs through mileage allowance payments. In other words, railroads would remain collectively responsible for repair costs, but Railroad *B* would be subsidizing Railroad *A*. Such an outcome would be inconsistent with the ICC's intent to change prior policies that encouraged reliance on cross-subsidies and collective responsibility. *See id.* at 607.

conversions involve cleaning and modifications); and fleet management and leasing practices (*i.e.*, priorities in selecting repair facilities; length of leases). Shippers with relatively more empty repair moves are imposing the costs of those moves on shippers with relatively fewer empty repair moves.

Free empty repair moves also distort markets for repair facilities. When empty repair moves are free, repair facilities in lower-cost, more remote locations have a relative advantage over repair facilities located in higher-cost, more central locations. All other things being equal, the absence of charges for empty repair moves allows more remote facilities to exploit their cost advantages over other facilities. Railroads would be subsidizing decisions by owners of repair facilities to locate their facilities in remote locations, contrary to the railroads' interests in minimizing free empty repair moves.

Free empty repair moves also distort markets for new tank cars, including new DOT-117 cars. When empty repair moves are free, retrofitted cars are relatively more attractive than new cars. All other things being equal, the absence of charges for empty repair moves encourages shippers to retrofit tank cars, rather than acquire new cars – especially because railroads are allowed to charge for movements of new tank cars from shops into service. For very similar reasons, free empty repair moves make leasing existing cars relatively more attractive than acquiring brand new cars.

When market distortions caused by free empty repair moves relate to the commodity being shipped, impacts beyond the rail industry can be particularly significant. In other words, when a commodity's nature (*e.g.*, more corrosive, more cleaning required) requires relatively more empty repair moves, too much of the commodity will be produced, because production decisions do not reflect the full costs to society. Retrofitting moves provide an example:

PHMSA rules require shippers of certain hazardous commodities to use retrofitted cars or new cars. However, if shippers do not bear the full costs of using retrofitted cars, which include empty repair move costs, they will oversupply the commodities they ship.

In sum, empty repair move charges in general, and Item 55-C in particular, eliminate a wide range of potential market distortions and cross-subsidization by assigning the costs of empty repair moves to those empty repair moves.

b) Inefficient empty repair moves remain a concern for Union Pacific and the railroad industry.

Complainants fail almost entirely to address inefficiencies created by a system of free empty repair moves. As Professor Murphy observes, "when shippers view empty shop moves as 'free' because they incur no explicit cost, they will lack incentives to make efficient choices about when and where to make such moves, will overconsume railroad resources, and will create other market distortions." Murphy VS at 11. Item 55-C gives shippers stronger incentives than they would otherwise have to reduce their excess empty moves and miles. For example, Item 55-C gives shippers stronger incentives to engage in more and earlier planning, so they will more often be able to send cars to repair facilities immediately following loaded movements, rather than have the cars returned to the origin first, which results in extra moves and extra miles. *See* Rocker VS at 4-5. It also gives shippers stronger incentives to choose facilities capable of performing all required work, such as cleaning and repairs, at one location, rather than have railroads move cars empty from shop to shop for different services. *See id.* at 5. It also gives shippers stronger incentives to seek out additional, conveniently located shops and to increase use of mobile repair facilities. *See id*. Shippers will have stronger incentives to develop other creative ways to reduce excess empty repair moves and miles.

Complainants correctly observe Union Pacific did not try to quantify the efficiency benefits of adopting Item 55-C. Union Pacific understood we could not predict or model the specific consequences of adopting new charges for empty repair moves. *See id.* Union Pacific understood individual shippers would decide whether and how to change their behavior after weighing all the economic consequences. *See id.* Union Pacific also did not expect shipper practices, or the car repair network, to change overnight. *See id.* However, Union Pacific knew shippers would have more appropriate incentives to make more efficient decisions in managing their empty repair moves if they were considering transportation costs, rather than treating empty repair moves as free. *See id.*

(1) The record highlights inefficiencies associated with free empty repair rules.

The evidence in the record highlights the inefficiencies associated with free empty repair moves. Before Union Pacific adopted Item 55-C, when shippers decided where to send cars for repairs, they were not concerned about transportation costs. Instead, they balanced a variety of factors – the shop's location; the price charged by the shop as compared with prices charged by alternative shops; the shop's capacity to perform the work quickly; the shop's reputation – *all from the perspective of their own interests*. As {{ }} witness explained, {{

}}[69]

Individual Complainants suggest their interest in fast turn-around times for cars in shops serves as an effective proxy for transportation efficiencies. However, they also acknowledge the

[69] *See also* Arkema Op. at 6; Cargill Op., Zimski VS ¶ 12; {{ }} *id*. (Grow Tr. 169:21-170:5 ("Q: You just look at the balance and try to decide what's best for Arkema? A: Right.")); { } {{ }} { }

closest shop will not necessarily have the fastest turn-around time. In fact, in a presentation to Union Pacific regarding Item 55-C's expected impact, {{

}}[70]

In addition, shippers are sometimes indifferent to turn-around times. For example, when shippers already have enough cars in their fleet, or when demand slows, other factors become relatively more important, such as the costs of repairs (including cleaning), as { } witness confirmed:

{

[70] *See also, e.g.*, {

}

} {{

}

In fact, some shipper frustration with Item 55-C appears to stem from capacity shortages at repair facilities, which forced shippers to choose between longer wait times and paying to move cars to more distant shops. *See, e.g.*, Ex. 7 (Grow Tr. 164:2-165:13); {{ }} Shop capacity shortages also can result in cars moving empty back to shipper facilities, then requiring a chargeable empty move to repair facilities. *See, e.g.*, Ex. 7 (Grow Tr. 166:19-167:10); {{ }}

}[71] The record contains actual examples of situations in which shippers considered savings in repair costs to outweigh the costs of extra empty repair moves.[72]

Shippers also balance their interest in minimizing the time cars spend out of service with other car management issues and broader business issues. For example, {{ }} witness explained he might be willing in certain circumstances {{

}} { } witness also emphasized the company's overriding concern was the need to move loaded freight: {

}

The record also reveals other situations in which shippers decided not to pursue on-site repair or cleaning options because of (non-transportation-related) costs. For example, Arkema chose not to pursue on-site qualification of cars for its hydrogen peroxide business, even though

[71] In his Verified Statement, Cargill's witness claims Cargill's repair decisions are designed to "minimize the distance that empty tank cars will have to travel." Cargill Op., Zimski VS ¶ 17. However, he later concedes Cargill actually considers a variety of other factors. *See id.* ¶ 21.

[72] *See, e.g.*, {

} *see also* {

}}

other companies were apparently doing on-site qualification at their own facilities, because the project involved {{

}} Along the same lines, {{

}}

That shippers' own interests can outweigh a railroad's interests in efficient empty repair moves is no surprise. As Professor Murphy explains, "absent explicit charges for transportation services to shops, a shipper will not take into account the full costs it imposes on the railroad that provides the service when deciding where and when to move cars for repairs." Murphy VS at 13. Item 55-C does not require any shipper to prioritize empty repair move costs over other business considerations; however, Item 55-C ensures transportation costs also play a role in the decision-making process.

(2) The record shows the mileage equalization system does not provide strong incentives to consider transportation costs in selecting repair facilities.

The evidence in the record also shows the ICC was correct in *IHB-II* when it recognized empty repair move charges would give shippers stronger incentives to consider transportation costs in selecting repair facilities than the mileage equalization system. *See* 3 I.C.C.2d at 611. The abstract possibility of paying mileage equalization charges gives shippers no real incentive to consider transportation costs in their decisions regarding any particular empty repair moves. As Professor Murphy explains, "the mileage equalization system neither provides clear pricing signals nor assures that the railroad incurring the costs of empty repair moves is compensated for those moves." Murphy VS at 18. "This is because the incremental cost to a shipper of an empty repair move, if any, is unrelated to the cost that move imposes on a railroad . . . . " *Id.* Mileage equalization has barely any connection to empty repair moves. Shippers with their own cars will

pay nothing unless their *total* empty miles exceed their *total* loaded miles by more than 6% over a year-long period. Thus, empty repair moves are indistinguishable from other sources of empty miles, and they are entirely free if the shipper does not exceed the 6% threshold. Even if the shipper exceeds the 6% threshold, the shipper will not receive feedback about its decision-making until the end of the year, and it will not receive specific feedback about its empty repair move practices. Any possible incentives grow even weaker in the case of shippers with leased cars. Shippers with leased cars can have their excess empty miles offset by the loaded miles of other shippers leasing cars from the same owner, so they may pay nothing even if their own empty miles exceed loaded miles by more than 6%.[73]

Not surprisingly, when asked about mileage equalization, Arkema's witness testified the company {{

}}

…

Q: Do you monitor loaded versus empty miles in cars Arkema owns?

A: I do not.

Q: Do you know whether [your colleague] does?

A: It's possible, but it's not anything significant, as far as I know. It's not been brought to my attention.

Q: There's no process in place as far as you know?

[73] Some lease arrangements, but not all, appear to require shippers to pay mileage equalization to leasing companies even when a leasing company would not actually pay mileage equalization for its fleet as a whole. Whether leasing companies routinely enforce such provisions is unclear. *See, e.g.*, { }

A: As far as I know, no.

Ex. 13 (Trombetta Tr. 53:13-54:14). Cargill's witness did not even know whether the company does anything to manage movements of leased cars to avoid paying mileage equalization, {

}

Q: . . . But do you know, is there anything Cargill does as far as directing movements of tank cars to avoid having to pay equalization?

A: I don't know.

Ex. 14 (Zimski Tr. 143:11-145:4). POET Ethanol's witness, when asked whether the company monitors mileage equalization data to ensure it will not exceed the 6% threshold, said: "We look at it. But like I said earlier, a lot of the data is not realtime. So it's more of a retroactive look."

Ex. 19 (Spieckermann Tr. 106:8-14). POET Nutrition's witness said he receives quarterly summaries of mileage equalization data and tosses them in the trash:

Q: Do you do anything with these quarterly summaries?

A: I do not.

. . . .

Q. And when you get them in the mail you toss them in the trash?

A: Yes.

Ex. 24 (Siebrecht Tr. 39:9-25). { } witness testified {

} {{

}}

Union Pacific's adoption of Item 55-C will not eliminate all empty repair moves that may be inefficient from the perspective of operating our rail network. However, Item 55-C requires shippers to factor transportation costs into their empty repair move decisions, along with their other interests, to improve overall efficiency. As Arkema's witness recognized, Item 55-C's empty shop move charges are "a new variable to add to the capacity/turnaround/distance equation in the shop selection process for everyone involved." Ex. 7 (Grow Tr. 44:13-25).[74] For example, in discussing an actual situation in which {{

[74] Cargill claims that considering transportation costs for empty repair moves "significantly interferes with efficient management of Cargill's tank car fleet." Cargill Op. 15. However, Cargill did not provide a shred of evidence – not a single example of any impact on any empty repair move that left society (or even just Cargill) worse off than if the move had been free. And, as discussed in the text, Union Pacific's charges do not dictate any particular outcome. Our charges merely ensure Cargill and others consider transportation costs in their decision-making. Cargill's claims are also inconsistent with other Individual Complainants' claims that they were already doing what Item 55-C incentivizes them to do. *See*, *e.g.*, Arkema Op., Grow/Trombetta VS ¶ 18 ("Because these practices enable Arkema to maximize the use of its tank cars, Arkema has been managing its fleet in accordance with these practices since before UP announced Item 55-C."); POET Ethanol Op. 22 ("Since POET already engages in this practice, the substantial new charges imposed by UP . . . are largely just significant additional cost . . . ."); Ex. 19 (Spieckermann Tr. 140:8-17 (confirming no impacts on POET Ethanol's business other than costs being charged under Item 55-C)); {

}

}} This example vividly illustrates the important pro-efficiency potential of Item 55-C. And the record shows shippers are in fact responding positively to Item 55-C by accounting for transportation costs in their decision-making and in a variety of other ways, as shown in Part II.D.3.

Empty shop move charges may also help reduce inefficiencies by prompting a broader examination of repair issues. For example, inefficient empty repair moves are a special problem for leased tank cars. Under lease terms commonly in use, when shippers lease cars, the leasing company, not the shipper, selects the facility for most inspections, maintenance, and repairs, including tank car requalification.[75] Thus, even if a shipper would prefer a nearby shop, the decision is not theirs.[76] In addition, certain leasing companies own repair facilities.[77] Their incentive is not to minimize empty repair moves, but to {{

}}[78] In fact, leasing companies have an additional

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[75] *See, e.g.*, Arkema Op., Grow/Trombetta VS ¶ 16; Cargill Op., Zimski VS ¶ 23; POET Ethanol Op., Spieckermann VS at 7; POET Nutrition Op., Siebrecht VS at 4; {
}

[76] *See, e.g.*, Arkema Op., Grow/Trombetta VS ¶ 16 ("[T]he lessor has the final say on which facility will be used."); Cargill Op., Zimski VS ¶ 23 ("[T]he lessor [has] the right unilaterally to select where the tank car will be repaired or inspected pursuant to the terms of the lease."); } *see also, e.g.*, {
}

[77] *See, e.g.*, Cargill Op., Zimski VS ¶ 23; Ex. 7 (Grow Tr. 151:19-152:7); {{
}} { }

[78] *See also*
Ex. 7 (Grow

(continued…)

incentive to prefer longer moves to less busy shops, because {{

}} *See, e.g.*, {{

}}[79] {

} Shippers apparently have been willing to give leasing companies decision-making authority when empty repair moves were free. However, adoption of empty repair move charges should encourage shippers to reevaluate. Indeed, the record shows shippers are responding to Item 55-C by pressing leasing companies to be more responsive to their concerns relating to efficient handling of empty repair moves, as shown in Part II.D.3.

Cargill's witness provided an excellent example of the incentives created by separate charges for empty repair moves, and the lack of incentives that exists in the absence of such charges. Prior to Union Pacific's adoption of Item 55-C, {

Tr. 152:3-7); {{ }} {

[79] *See also* Arkema Op., Grow/Trombetta VS ¶ 19 ("[R]ent accrues on Arkema's cars while moving to and from repair facilities, but not while they are at those facilities . . . .").

} Cargill identified another case where it was {

} {{

}} {

} When asked whether Cargill had also looked for similar opportunities to reduce empty movements of tank cars, Cargill's answer was "No":

> Q: What if the movement was included under mileage equalization? Would it have shown up in your study?
>
> A: No.
>
> Q: Because Cargill wasn't paying for those moves?
>
> A: That's right.
>
> Q: So it didn't care in the same way that it cared about these covered hopper moves?
>
> A: That's correct.

Ex. 18 (Hildebrand Tr. 57:21-58:5).

Union Pacific does not want to dictate the choices our customers make. Union Pacific simply wants them to have the same incentives to improve their management of empty repair moves for tank cars that currently exist for other types of private cars. *See* Rocker VS at 5.

3. Union Pacific's adoption of Item 55-C is motivating shippers to consider transportation costs in managing empty repair moves.

Union Pacific did not expect our adoption of Item 55-C to produce massive changes in shipper behaviors immediately. Union Pacific understood shippers had grown accustomed to free empty repair moves and might resist change. However, the record shows Union Pacific's adoption of Item 55-C is producing efficiency benefits. The record also shows that, over time,

Union Pacific's empty repair move charges will likely spur shippers and others to make additional changes that improve the efficiency of the repair network.

The record shows Union Pacific's adoption of Item 55-C has in fact given shippers "incentives to consider transportation costs in selecting repair facilities." *IHB-II*, 3 I.C.C.2d at 611. Union Pacific's adoption of Item 55-C immediately prompted Individual Complainants to place greater focus on shop selection:

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  }

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- POET Ethanol {

  }} and empty repair moves now "get more focus with the cost attached to it." Ex. 19 (Spieckermann Tr. 113:17-24; 129:4-130:2); *see also* Ex. 22 (Spieckermann Dep. Ex. 12 (PEP10067) ("We are going to have to be strategic about cars going to shop and distances and freight to get them there.")).

- {

  }

Individual Complainants also are now placing more focus on sending cars to repair facilities directly after unloading rather than returning them to the origin first:

- Arkema has added "additional communications to try to make sure that we're diverting cars when we have the opportunities as opposed to letting them come back to the plant." Ex. 7 (Grow Tr. 180:17-181:3).

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Individual Complainants are also focused on identifying additional repair facilities in locations that help minimize empty transit distance for empty repair moves:

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Individual Complainants also say they now have greater incentives to use mobile repair facilities rather than move empty cars to shops for repairs:

- Arkema recognizes the existence of Union Pacific's empty repair move charges affects the choice between using a mobile facility and a fixed facility because it can use mobile facilities to avoid the charges. Ex. 7 (Grow Tr. 151:5-14).

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  }

- POET Ethanol has looked into the possibility of increasing its use of mobile repair facilities. *See* Ex. 19 (Spieckermann Tr. 138:1-8); *see also* Ex. 22 (Spieckermann Dep. Ex. 12 (PEP10067) ("If there was a chance they could build a qualification site on a mobile basis at one of our plants, that would be ideal as we could avoid fees from the railroads.")).

-

  } *see also*

- { } and

Leasing companies also produced documents in discovery reflecting increased interest from shippers in using mobile facilities in response to empty shop move charges.[80]

Individual Complainants are also pushing back when leasing companies propose inefficient empty repair moves for leased cars. For example:

- Arkema says it will on occasion "push back on the shop selection with the lessors and, based on a number of different criteria, to see if they would consider an alternate shop." Ex. 7 (Grow Tr. 153:20-25).
- {

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- {

}

Leasing companies also produced documents in discovery reflecting pushback from shippers seeking to avoid long empty repair moves because of the associated charges.[81]

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[80] *See*, *e.g.*, {

}}

[81] *See, e.g.*, {

(continued…)

Individual Complainants are also placing increased emphasis on leasing companies' repair capabilities and shop locations when evaluating lease options. {{

}} {{

}} Leasing company documents also show shippers are trying to use competitive pressures to encourage leasing companies to direct cars to closer shops,[82] and leasing companies are responding.[83] {

}

In addition, Individual Complainants are including empty repair move costs in their analyses when deciding whether to renew leases or return their leased cars in exchange for new

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[82] *See, e.g.*, {

}

[83] *See, e.g.*, {

}

cars,[84] where to send cars for retrofitting,[85] and whether to modify their existing cars or acquire new cars as shifting markets make shipping different commodities more or less attractive.[86]

As Professor Murphy observes, these types of adjustments to separate pricing of empty repair moves are predictable under economic theory, and additional efficiency enhancements are likely: "Incentives to make longer-run adjustments to enhance efficiency are created by price signals that UP and other railroads have created to reflect the costs that shipper/owners impose and to guide their decision making. Such adjustments may not yet be evident, but economics teaches that they will occur." Murphy VS at 16.

{ } say many of their efforts to mitigate Item 55-C's impacts are constrained by contracts with leasing companies, state regulations, safety considerations, limited capabilities of mobile units, limited space at its facilities, and other "business needs." { } None of those reasons justifies requiring Union Pacific to subsidize { } operations, or the operations of any other shipper, by providing free empty repair moves. Item 55-C does not require shippers to make any particular decisions about how they use rail transportation or about their overall level of business activity. Item 55-C only ensures shippers consider rail transportation costs when making those decisions. That is exactly what should be occurring to produce outcomes that are efficient for society as a whole.

4. Union Pacific adopted Item 55-C for reasonable business purposes.

Rather than focus on Item 55-C's impact on rail transportation, Complainants devote most of their attention to attacking Union Pacific's motives for adopting Item 55-C. Specifically,

[84] *See, e.g.*, { } {{ }}

[85] *See, e.g.*, { }

[86] *See, e.g.*, {{ }}

they claim Union Pacific had no "reasonable business or policy purpose" and "misrepresented [our] true objectives," which were to "generate revenue from empty tank car repair movements [we] expected to occur as a result of PHMSA's proposed rules" requiring retrofitting of DOT-111 tank cars. Joint Evidence at 40. Complainants' attacks miss their mark, both factually and legally. Union Pacific adopted Item 55-C for reasonable business purposes. Union Pacific's objectives included obtaining compensation for providing empty repair moves – empty repair moves related to PHMSA's rulemaking and more generally. Union Pacific's objectives also included reducing cross-subsidization and promoting efficiency, as discussed above. These objectives were plainly reasonable. And Union Pacific never misled our customers. Union Pacific's internal communications were consistent with our external communications, and both sets of communications were consistent with the actual consequences of adopting Item 55-C.

In evaluating Complainants' arguments that Union Pacific misled customers regarding our revenue objectives, it is worth remembering how much revenue Union Pacific expected to gain from Item 55-C. As Complainants recognize, Union Pacific {{

}} *See* Joint Evidence at 9. Union Pacific internally estimated the new charges would generate an additional {{ }} *See id.*; *see also* Rocker VS at 6 & Ex. 4 (Operating Committee Presentation). In other words, Union Pacific estimated an increase of just {{ }} over our {{ }} in revenue from tank car traffic in 2014. *See* Joint Evidence at 27. Thus, when Union Pacific announced Item 55-C and explained the charges to our customers, {{

}}[87]

[87] Union Pacific's underestimate illustrates one important negative consequence of the historical practice of providing service for free – the lack of incentive to track shippers' use of the service. Shippers may or may not have known how much empty repair move service they consumed, but (continued…)

a) Union Pacific adopted Item 55-C for reasonable business purposes.

As Complainants recognize, one of Union Pacific's goals in adopting Item 55-C was to obtain compensation for providing empty repair moves. Obtaining compensation for providing services is plainly a valid business purpose, and it is certainly consistent with the Federal rail transportation policy. *See also* Murphy VS at 20-21.[88] As discussed in Part II.D.1, charging market-based rates for service:

- allows "competition and the demand for services to establish reasonable rates for transportation by rail," 49 U.S.C. § 10101(1);
- "minimize[s] the need for Federal regulatory control over the rail transportation system," *id*. § 10101(2);
- promotes "a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues," *id.* § 10101(3);
- fosters "sound economic conditions in transportation," *id*. § 10101(5);
- encourages "honest and efficient management of railroads," *id.* § 10101(9); and
- relies "on individual rate increases [rather than] the use of increases of general applicability," *id.* § 10101(10).

In short, even if Union Pacific's only objective were to increase revenues by charging for empty repair moves, we would have had a reasonable business and policy purpose.[89] However, as the

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Union Pacific was surprised to learn how much service we had been providing for free. *See* Rocker VS at 6-7.

[88] Obviously, Complainants' objective in urging a return to the free empty repair move rule is to maximize their own revenues. We say this not to engage in more finger-pointing, but rather to highlight the point that railroads and shippers all seek to maximize their profits consistent with the law, and to pretend otherwise would be a farce.

[89] Complainants' evidence blends two issues related to the PHMSA rulemaking. In addition to considering empty shop move charges, Union Pacific was evaluating existing rates for moving new tank cars from repair facilities into service. Union Pacific expected to see increased demand for new tank cars meeting the improved safety standards. *See* Rocker VS at 2 n.3. Complainants are not arguing Union Pacific may not charge for those empty moves. Rather, Complainants appear to be gratuitously criticizing Union Pacific for increasing rates in response to increased (continued…)

ICC recognized in *IHB-II*, establishing separate charges for empty repair moves also promotes other important policies. Specifically, it reduces cross-subsidization and promotes efficiency by increasing shipper incentives to consider transportation costs in selecting repair facilities. *See* 3 I.C.C.2d at 611. Thus, *IHB-II* establishes that adopting empty repair move charges advances reasonable business and policy objectives.[90]

b) Union Pacific did not mislead customers in describing why we adopted Item 55-C.

Complainants say Union Pacific misrepresented our objective of increasing revenues by telling customers we hoped to accomplish goals in addition to obtaining compensation for empty repair moves. But Union Pacific had those additional goals in mind as well, as reflected in our internal communications.

When Union Pacific announced Item 55-C, we sent customers a series of slides to explain the new charges. *See* Rocker VS at 7 & Ex. 3 (Announcement of Item 55-C). The first slide

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demand, because the demand stemmed from new safety regulations. But Complainants do not explain why Union Pacific should bear the costs of new safety standards, rather than shippers who make the decisions to ship hazardous commodities by rail. Union Pacific and shippers of commodities not affected by the new safety regulations should not be subsidizing shippers of hazardous commodities. Rather, shippers affected by the new safety rules should be making production and transportation decisions based on the full economic consequences of their decisions to transport their hazardous commodities by rail.

[90] Individual Complainants insist their decisions regarding empty repair moves were perfectly efficient before Union Pacific adopted Item 55-C, so Union Pacific had no legitimate business justification to apply Item 55-C to them. But all Individual Complainants were receiving free empty repair moves, so we were justified in seeking compensation for those services. Also, as shown in Part II.D.3, Union Pacific's adoption of Item 55-C has in fact incentivized efficient behavior by Individual Complainants. Regardless, railroads need not prove all shippers are acting inefficiently before adopting rules incentivizing efficient behavior. *See, e.g.*, *NAFCA-II* at 9-10 ("[Complainants] contend that BNSF has not shown that private empty cars are any part of the case of inefficiencies or congestion on its system. Complainants wrongly assume that BNSF must justify the new practice of charging for empty private cars before imposing these charges."); *cf. N. Am. Freight Car Ass'n v. Union Pac. R.R.*, STB Docket No. NOR 42119 (STB served Mar. 12, 2015) at 10 (tariff "reasonably encourage[s] shippers to help address safety hazards caused by lading residue on railcars").

said: "Effective January 1, 2015, UP will apply mileage-based charges to certain movements of empty private tank cars to and from repair facilities located on Union Pacific." *Id.* The second slide contained the question "Why Change?" and answered with four bullet points:

- "Align tank cars more closely with treatment of empties for all other car types"
- "Provide more timely feedback to customers about efficient management of their fleet"
- "Reduce empty miles on our busy network which will help protect the fluidity of our network"
- "Allow direct and prompt recovery of the costs for moving empty cars to and from shops"

Id. Thus, if any customer initially thought Union Pacific was adopting the new charges without regard to our financial interests, the fourth bullet point noted our concern for obtaining revenue for providing empty repair moves. Union Pacific provided the same explanation of our motives inside and outside Union Pacific. Union Pacific's internal communications to our Marketing & Sales personnel contained the same basic explanation. *See* Rocker VS at 7 & Ex. 3.[91]

Union Pacific's adoption of Item 55-C advanced each of the objectives we identified to shippers:

- Item 55-C treats empty repair moves of tank cars just like empty repair moves of all other types of private cars. *See* Rocker VS at 8.
- Customers receive more timely feedback on their empty repair moves because they are billed as the moves occur, whereas before they were billed annually through the mileage equalization system (if they were even billed at all). *See id.*; *see also supra* Part II.D.2.

[91] Complainants say "UP's efficiency justification rings hollow because the mileage equalization program in *Ex Parte 328* already encourages tank car providers to be efficient." Joint Evidence at 43. However, the ICC recognized in *IHB-II* that the mileage equalization system did not provide sufficient incentives to shippers. One of the ICC's reasons for rejecting the free repair move/mileage equalization regime in favor of separate charges for empty repair moves was that the free repair move regime "promotes inefficiency by giving private car owners little or no incentive to consider transportation costs in selecting repair facilities." 3 I.C.C.2d at 611.

- The record in this case shows Individual Complainants and other shippers are responding to Item 55-C by considering transportation costs in selecting repair facilities, which should reduce both the distance and frequency of empty repair moves. *See supra* Part II.D.3.

- Union Pacific is directly obtaining compensation from shippers for empty repair moves, and the associated empty miles are excluded from mileage equalization accounting. *See* Rocker VS at 8.

Complainants nonetheless say some of Union Pacific's internal documents focused on revenues and did not expressly discuss other benefits. *See* Joint Evidence at 41. But whenever anyone proposes to charge for something that was once free, eliminating cross-subsidization is implicitly the issue and more appropriate incentives are the likely result, even if business people do not spell out their thoughts in economic terms. Moreover, the documents Complainants cite simply reflect the evolution in Union Pacific's thinking, from an initial focus on retrofit moves[92] to the broader recognition that the mileage equalization system was not giving shippers using tank cars the same incentives to make efficient empty repair moves as the rules governing all other private equipment. *See* Rocker VS at 2-3. As Union Pacific moved to a consideration of broader issues, our internal documents consistently reflected our dissatisfaction with mileage equalization and our desire to adopt rules more like those already governing all other private cars.[93] Indeed, when Union Pacific personnel presented the developing plan to the railroad's Operating Committee, the presentation focused not only on capturing additional revenue from retrofits, but also on applying consistent, modern rules to empty movements of all types of private equipment. *See* Rocker VS at 7-8 & Ex. 4.

[92] For example, Complainants' Exhibit 16 contains a discussion focused solely on retrofit issues, before Union Pacific focused on broader issues with the mileage equalization system.

[93] For example, Complainants' Exhibit 17 was created three months after Exhibit 16, and it discusses both revenue interests and a broader desire to apply the same rules to empty movements of all types of private cars.

Complainants say the multiple objectives described to the Operating Committee were really just different ways to say "capture significant additional revenue." Joint Evidence at 41. But it is equally accurate to say "capturing additional revenue" is just the same as eliminating cross-subsidization and increasing incentives to be efficient. In *IHB-II*, for example, the ICC did not care whether the railroad defendants and other railroads participating in the proceeding were motivated to increase revenues or had other objectives in mind. The ICC recognized charging separately for empty repair moves inevitably helps to reduce cross-subsidization and promote efficiency by giving shippers an incentive to consider transportation costs in planning repair moves. *See* 3 I.C.C.2d at 611. *IHB-II* and the ICCTA encourage railroads to adopt separate charges for empty repair moves because such charges produce important, extrinsic benefits, regardless of railroads' internal motivations.

Finally, even if Union Pacific intentionally downplayed our revenue expectations, which we did not, such conduct would not make adoption of Item 55-C an unreasonable practice under 49 U.S.C. § 10702. Under § 10702, the Board evaluates the reasonableness of practices; it does not try to determine a railroad's internal motives for adopting practices.[94] Complainants cite only one case to support their argument, *Rail Fuel Surcharges*. However, *Rail Fuel Surcharges* did not involve parsing a railroad's internal and external explanations for adopting a practice. The Board condemned a specific practice: "computing rail fuel surcharges as a percentage of a base rate is an unreasonable practice." *Rail Fuel Surcharges* at 1. The Board said the practice

[94] If the Board focused on internal motivations, the same practice might be unlawful as to one railroad but lawful as to all others. Here, Union Pacific could be required to provide free empty repair moves, but not other railroads that have adopted empty repair move charges for tank cars, including BNSF, Canadian National, Canadian Pacific, and Kansas City Southern. Such an outcome would allow shippers to demand even more free empty repair moves from Union Pacific in order to avoid incurring charges from other railroads.

was unreasonable because it involved *inherently misleading labeling* – labeling a charge with no "reasonable nexus" to fuel consumption as a "fuel surcharge." *Id.* at 9 ("But if a carrier chooses to use a fuel surcharge program, it must be based upon attributes of a movement that directly affect the amount of fuel consumed. In other words, there must be a reasonable nexus to fuel consumption.").[95]

Here, the ICC specifically authorized the practice in question – adopting separate charges for empty repair moves – in *IHB-II*. Complainants do not claim Union Pacific mislabeled Item 55-C. Complainants do not claim shippers were misled by the label about how the charges were constructed. Complainants do not dispute that Item 55-C is precisely what it purports to be, and it does exactly what it purports to do. Item 55-C subjects empty repair movements of private tank cars to line-haul charges – just like all other types of private cars.

5. Union Pacific's adoption of Item 55-C is consistent with the Ex Parte 328 Agreement.

Complainants' claim that Union Pacific's adoption of Item 55-C unreasonably subverts the Ex Parte 328 Agreement, *see* Joint Evidence at 44-50, is truly perplexing. The ICC has squarely addressed this issue and rejected such claims. Contrary to Complainants' claim, Item 55-C is not a "back-door attempt to 'exit' mileage equalization," *id.* at 49; rather Union Pacific walked through the front door, which the ICC threw open in *IHB-II*.

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[95] *See also id.* at 7 (rejecting argument "that Congress could not have intended for us to regulate an individual component of a rate based solely upon the label given to it by the railroad as a fuel surcharge.").

In *Rail Fuel Surcharges*, the Board also expressed concern the railroads were using increased fuel costs to disguise rate increases on loaded moves. *See id.* ("We believe that imposing rate increases in this manner [*i.e.*, through something labeled a fuel surcharge], when there is no real correlation between the rate increase and the increase in fuel costs for that particular movement to which the surcharge is applied, is a misleading and ultimately unreasonable practice").

Here, Union Pacific did not use Item 55-C to increase rates on loaded moves. We openly established separate charges for a separate service.

In *IHB-II*, the ICC removed any prohibition against empty repair move charges that may have been incorporated in the Ex Parte 328 Agreement. The Ex Parte 328 Agreement pre-dated *IHB-II*. In *IHB-II*, the ICC recognized railroads' adoption of empty repair move charges would affect the mileage equalization rules in the Ex Parte 328 Agreement. *See* 3 I.C.C.2d at 619. However, the ICC left any changes to mileage equalization to the parties in interest:

> We recognize that, for the changeover we are approving to be fully effective, there will have to be a change in the mileage equalization rule. . . . It is inappropriate for us to change the equalization rule in this case. Accordingly, at this point we will leave the matter to the parties in interest.

Id. Several years later, in *Buffalo & Pittsburgh*, shippers claimed the *IHB-II* decision actually meant railroads could not implement empty repair move charges until and unless the parties renegotiated the Ex Parte 328 Agreement. The ICC flatly rejected the shippers' arguments, observing that if anyone was harmed by *IHB-II*'s effect on mileage equalization, it was the railroads, not shippers:

> Also unconvincing is the car providers' claim that the [Ex Parte 328 Agreement] was somehow inconsistent with any repeal of the free repair moves rule, and would have to be renegotiated before any decision reversing that rule could be implemented. It is true that in *IHB-II*, we stated that the equalization rule might require refinement for the changeover to be fully effective. *IHB-II*, *supra*, at 619. We did not require renegotiations, however. Moreover, the effect of *IHB-II* on equalization accounting is essentially adverse to the railroads, since charging for repair moves eliminates mileage that would have applied to the 106% threshold.

7 I.C.C.2d at 27-28 (footnote omitted).[96]

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[96] The ICC also noted: "Also, to the extent that the 6% excess of empty miles over loaded miles was intended to represent repair moves, that threshold may no longer be justified. Thus, if anyone would seek modification of the equalization rule it would be the railroads." *Id.* at 28 n.14.

Although irrelevant to the outcome here, to avoid possible confusion, we note Complainants are wrong when they say the 6% excess of empty miles was intended to represent *only* repair moves. (continued…)

In short, regardless of whether the Ex Parte 328 Agreement would have prohibited railroads from adopting separate charges for empty repair moves, the ICC overrode any such prohibition in *IHB-II*, as it later confirmed in *Buffalo & Pittsburgh. Cf. Buffalo & Pittsburgh*, 7 I.C.C.2d at 26-27 ("B & P's tariff does not repeal the 'free repair moves' rule; B & P is simply taking advantage of the freedom to impose repair move charges granted by the Commission in *IHB-II, supra*. It was the Commission that changed the rule, not B & P.").[97]

Complainants' argument is also perplexing because Union Pacific has not "exited" the mileage equalization system. Union Pacific wanted to stop participating in mileage equalization entirely, so we could treat all empty movements of tank cars the same as all empty movements of other private equipment. *See* Rocker VS at 4. However, Union Pacific concluded we could not unilaterally withdraw from the equalization provisions of the Ex Parte 328 Agreement that were prescribed by the ICC in *System - 1986*, except as authorized by *IHB-II*. *See id.* Union Pacific thus carefully conformed our conduct to the law.

Complainants' claim reflects the D.C. Circuit's over-simplification of an issue that was irrelevant to its decision in *GATC*. *See* Joint Evidence at 46 & n.130. As the ICC recognized in *IHB-II*, the 6% figure was primarily intended to account for other sources of nonrevenue empty mileage, including empty repositioning moves between shipper facilities and "mileage caused by railroad error, railroad damage, railroad convenience, detours, and service orders." 3 I.C.C.2d at 601 n.5; *see also id.* at 605 (explaining the 106% figure "was mainly designed to represent shipper-responsibility . . . transfers").

[97] Complainants are also wrong when they say the mileage equalization and mileage allowance provisions of the Ex Parte 328 Agreement "reflected a carefully negotiated balancing." Joint Evidence at 45. The mileage allowance provisions were "the product of three years of intense Commission-directed and supervised negotiations between the railroads and virtually all tank car owners and users," *System - 1986*, 3 I.C.C.2d at 200, and were "a marked improvement over the 1979 agreement" *id.* at 201. However, by contrast, "no consensus was reached with respect to the equalization rule matters set forth in Section 1 of the agreement, which therefore remain[ed] unchanged." *Id.* at 199. Instead, the parties said they would "continue to study [equalization] matters and, when and if consensus is reached, will present the agreed resolution to the Commission." *Id.* Complainants fabricate a connection that never existed.

Union Pacific *does* want to withdraw from mileage equalization. To that end, we have separately submitted a petition to institute an appropriate proceeding. However, the petition is required only because we want to go further towards treating empty movements of tank cars like empty movements of other private cars than the ICC expressly authorized in *IHB-II*.

6. Union Pacific's charges for empty moves to shipper loading facilities after charging for empty moves between repair facilities are required by the terms of Item 55-C.

Cargill, joined in a footnote by POET Ethanol, says Union Pacific is misapplying Item 55-C because we charge to move cars from a cleaning facility to a repair facility, and then charge again when we move the cars from the repair facility to a shipper facility for loading. *See* Cargill Op. 23; POET Ethanol at 22 n.16. Cargill says the move from the cleaning facility to the repair shop "should be considered a loaded line-haul revenue move," so the "empty move from the repair facility back to Cargill's facility should not be assessed Item 55-C charges." Cargill Op. 23. The Board must disregard this claim because it was not raised in the Complaint.

Cargill's claim is not only waived and forfeited, it is also misguided. Item 55-C says empty tank cars moving to and from repair facilities are subject to line-haul charges, *except* "empty movements that are immediately preceded by a *loaded* line-haul revenue movement on Union Pacific will move free of charge *to Repair Facilities*." Ex. 1 (emphasis added). An empty move from a cleaning facility to a repair facility is not a "*loaded* line-haul revenue movement on Union Pacific." To the contrary, Union Pacific is applying a charge that specifically applies *because* the car is *empty – i.e.*, not loaded. Also, the empty move Cargill wants for free is the empty move *from* a repair facility *to Cargill's facility*. However, such moves do not qualify for the exception to empty repair move charges, which applies only to cars moving "*to Repair Facilities*." Union Pacific is applying Item 55-C faithfully according to the tariff's terms.

III. Union Pacific Is Lawfully Charging Zero-Mileage Rates.

Complainants' claim that Board precedent precludes Union Pacific's use of zero-mileage rates for movements in tank cars is frivolous, as are related claims for reparations by Cargill, POET Ethanol, and POET Nutrition. Union Pacific and shippers can contract for zero-mileage rates, and Board precedent permits use of zero-mileage rates in tariffs. But the Board need not wade into any debate about use of mileage allowances and zero-mileage rates here because, as Complainants stipulated: "There is no evidence that [Union Pacific] has refused a request to establish rates for movements in cars that provide for payment of a mileage allowance." Ex. 59 (Stipulation #4).

The remainder of this Part proceeds as follows: *Part III.A* shows Union Pacific and shippers have benefited from the long-standing, nearly universal practice of using zero-mileage rates for movements in tank cars. *Part III.B* shows the ICCTA and Board precedent permit use of zero-mileage rates in contracts and tariffs. *Part III.C* shows the Board should permit use of zero-mileage rates as a matter of sound regulatory policy.

A. Union Pacific and shippers have long benefited from zero-mileage rates.

1. Use of zero-mileage rates for movements in tank cars is a long-standing, nearly universal practice.

Cargill, POET Ethanol, POET Nutrition, and nearly every other Union Pacific customer shipping commodities in tank cars uses zero-mileage rates – that is, rates under which Union Pacific is not obligated to provide rail cars and thus does not pay mileage allowances when customers provide cars. *See* Craven VS at 2. Neither Cargill, POET Ethanol, POET Nutrition, nor nearly any other customer shipping commodities in tank cars has requested rates providing for payment of mileage allowances in current memory. *See id.* Union Pacific's nearly universal use of zero-mileage rates for movements in tank cars is consistent with the practices of all other

railroads. According to Complainants, from 2014 through 2017, only {{ }} of all Union Pacific tank car movements received mileage allowance payments. *See* Joint Evidence, Crowley VS at 3. Also, according to the five Association Complainants, whose members include nearly all shippers using tank cars, "there is essentially no difference between [Union Pacific] and other railroads regarding the proportion of movements for which [their] members receive mileage allowances." Ex. 59 (Stipulation #9).[98]

If Complainants' legal claims are correct, Union Pacific and other railroads moving tank cars have been violating the law since the 1980s. As tank car leasing company GATX states on its web site: "Zero-mileage rates have been offered since railroads were deregulated." Ex. 36.[99] But Complainants' claims are not correct. To the contrary, Complainants have long recognized that use of zero-mileage rates for shipments in tank cars is lawful. Complainant ACC's predecessor discussed zero-mileage rates in *IHB-II*, when mileage allowances were still widely used. ACC's predecessor explained in comments submitted to the ICC that railroads generally published rates on a car-inclusive basis and then paid allowances to "reimburse a shipper who assumes the car-furnishing responsibility," but it added a footnote recognizing that railroads were *not* required to pay allowances when charging zero-mileage rates (which it called "shipper-car" rates), because railroads were *not* publishing such rates "on a car-inclusive basis":

> The freight rates collected for moving commodities in tank cars or covered hoppers are generally published on a car-inclusive basis. 4/

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[98] Cargill, POET Ethanol, and POET Nutrition admit they have never shipped traffic in a tank car under a contract, tariff, or other rate document with any railroad that provided for payment of a mileage allowance to the best of their knowledge. *See* Exs. 61 & 62 (Request for Admission No. 5).

[99] { } *see also* {{ }}

> 4/ Where "shipper-car" rates are negotiated and published, they are lower than standard rates, by virtue of the carrier's lesser obligation, and the movement is exempted from the allowance provisions carried in the currently applicable [industry-wide mileage allowance] tariff.

Ex. 33 (pp. 9-10 & n.4). Union Pacific discusses the legal principles in more detail in Part III.B, but ACC's predecessor correctly understood that use of zero-mileage rates is lawful.

2. Use of zero-mileage rates provides substantial benefits to shippers, as shippers themselves recognize.

Zero-mileage rates provide significant benefits to shippers, as shippers and tank car leasing companies have long acknowledged. Mileage allowances are an artifact of a highly regulated environment in which railroads were required to develop and publish rates with the assumption they would provide cars, and if the shipper provided the cars, railroads would pay refunds in the form of an allowance (which were also regulated). *See supra* Part II.C.3(b).

After deregulation, railroads and shippers increasingly favored use of zero-mileage rates. Shippers in particular preferred the lower initial rate levels (*i.e.*, railroads did not have to set rates high enough to accommodate refunds), improved cash-flow (*i.e.*, shippers immediately received the benefit of lower rates rather than later collecting refunds), and elimination of the need to audit mileage payments (*i.e.*, ensuring railroads included every loaded mile for every car and paid the correct mileage rate for each car). Tank car leasing company {{ }} a member of Complainant NAFCA, identified all these benefits to shippers of converting to zero-mileage rates in internal documents:

{

}} Individual Complainants also recognized the same benefits and more from converting to zero-mileage rates. {{ }} witness explained in an internal company e-mail why {{

}} As Complainants admit, Union Pacific did in fact reduce shippers' rates when converting their rates from full-mileage to zero-mileage (because we no longer needed to pay mileage allowances). *See* Joint Evidence at 34.[100] Indeed, Arkema's witness testified that he worked for a different shipper when it converted from full-mileage rates

[100] Complainants reveal their fundamental misunderstanding of the rate/allowance relationship when they say shippers' reduced rates from converting to zero-mileage rates must have been "illusory" because a Union Pacific document says our "car costs" decreased as a result of the conversions. Joint Evidence at 34 n.92. When Union Pacific charges rates that obligate us to provide cars (*i.e.*, full-mileage rates) and thus pays allowances when shippers provide cars, the allowance payments constitute our car costs – they are payments to shippers for providing cars we were obligated to provide. *See supra* Part II.C.3(b). Thus, when shippers convert to zero-mileage rates, our revenues decrease (because we reduce our rates from higher full-mileage rates to lower zero-mileage rates), and our car costs also decrease (because we stop paying mileage allowances). The combination of receiving lower rates *and* paying lower car costs means the conversions are revenue-neutral for Union Pacific, just like the combination of paying lower rates but not receiving allowances means they are revenue-neutral to shippers.

to zero-mileage rates, and that the shipper obtained lower rates as a result. *See* Ex. 7 (Grow Tr. 191:21-193:4). As Union Pacific's documents also show, *shippers* often drove the conversion process – they wanted the benefits of zero-mileage rates.[101]

Union Pacific also favors use of zero-mileage rates. Calculating full-mileage rates is administratively burdensome, complex, and potentially confusing. The process requires starting with a market rate for rail transportation, then estimating likely mileage allowance payments, and then adding the expected payment amounts to the market rate. *See* Hirst VS at 1-2. Determining likely allowance payments is difficult, because mileage payments differ for each car, depending on the car's original cost and age, and shippers control which cars in their fleet they will use for each movement. *See id.* at 2. Thus, when Union Pacific adds expected allowance payments to the market rate for transportation, then later pays allowances, we might ultimately over-shoot or under-shoot the market rate for transportation – especially if shippers make changes to their fleets. *See id.* at 3. The need to account for mileage allowance payments also complicates rate negotiations: Union Pacific and customers might disagree about appropriate rates not because we disagree about transportation markets, but because we have different assumptions about fleet composition. Union Pacific strongly prefers to focus negotiations with shippers on market rates for transportation, allowing shippers to focus separately on their car-supply arrangements. *See id*. Union Pacific has established full-mileage rates when customers expressed a genuine desire

[101] *See, e.g.*, Joint Evidence, Ex. 27 {{

} *see also* Ex. 65 (UPRR0021471) ({

}}); Ex. 66 (UPRR0025480) ({{

}}).

to use them, but in our experience, customers only rarely want full-mileage rates. *See* Craven VS at 2.

None of this should be a surprise. As Professor Murphy explains, using zero-mileage rates is more efficient than using full-mileage rates and has no impact on the net rate shippers will pay:

> [I]f shippers must compensate railroads for transportation services, while railroads must compensate shippers who provide cars used for transportation services, it is more efficient to set a price for transportation services that nets out the concurrent price to use the car. This saves on the required transactions costs – there is no need to make two sets of payments (one of which would essentially refund a portion of the transportation rate) rather than one (by the shipper for the cost of transportation net of compensation for use of its car). Moreover, economics informs us that the net price paid by the buyer and received by the seller will be the same whether there are two payments going in opposite directions or simply one net price.

Murphy VS at 5.

B. The ICCTA and Board precedent permit use of zero-mileage rates.

1. Railroads and shippers can use zero-mileage rates in contracts.

The Board cannot preclude Union Pacific and shippers from entering into contracts providing for use of zero-mileage rates. The ICCTA allows railroads to "enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions." 49 U.S.C. § 10709(a). If a contract does not require the railroad to pay mileage allowances, there can be no other source of any such duty: "A party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract." *Id.* § 10709(b). Indeed, even if Complainants identified a statutory provision prohibiting use of zero-mileage rates, it would not preclude the parties to a transportation contract from using zero-mileage rates: "A contract that

is authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part." *Id.* § 10709(c)(1); *see also N. Am. Freight Car Ass'n. v. Union Pac. R.R.*, STB Docket No. NOR 42144 (STB served Dec. 21, 2015) at 4 ("It is well settled that the Board's authority does not extend to those movements conducted pursuant to transportation contracts."); *id.* ("[C]omplainants may not challenge before the Board the application of a practice to movements governed by contract, even if the same practice also appears in a tariff.").

2. Railroads and shippers can use zero-mileage rates in tariffs.

Railroads and shippers can also use zero-mileage rates in tariffs. Complainants fail to identify any statute requiring payment of mileage allowances. They repeatedly reference 49 U.S.C. § 11122, but § 11122 does not require railroads to pay mileage allowances. Instead, § 11122(a) *authorizes*, but does not *require*, the Board to establish regulations on "car service," including "the compensation to be paid for the use of a . . . freight car." 49 U.S.C. § 11122(a)(1). Section 11122(b) describes how the Board should determine the "rate of compensation to be paid for each type of freight car," but those provisions are relevant only when the Board decides to regulate car compensation. *Id.* § 11122(b). Section 11122 does not give shippers any independent right to mileage allowance payments.

The only plausible source of a railroad obligation to pay shippers mileage allowances on movements in tank cars is the Ex Parte 328 Agreement, but the Agreement does not preclude use of zero-mileage rates. Complainants refer to the Ex Parte 328 Agreement, but they mistakenly call it a "safe harbor." Joint Evidence at 37. The Agreement is not a mere safe harbor: it *is* the Board's prescribed method of regulating compensation to be paid for the use of tank cars under § 11122. The ICC prescribed the Agreement's mileage allowance procedures in *System - 1986*,

3 I.C.C.2d 196. However, Complainants run away from the Ex Parte 328 Agreement for good reason: *the Ex Parte 328 Agreement does not require railroads to pay mileage allowances when parties use zero-mileage rates.* As Complainant ACC's predecessor explained in *IHB-II*, even when the agency prescribes allowances under § 11122, "shipper-car" (zero-mileage) rates are "exempted" from allowance payments, because such rates do not obligate the carrier to provide a car. Ex. 33 (pp. 9-10 & n.4). When a rate does not obligate a carrier to provide a car – *i.e.*, the carrier has a "lesser obligation" – no obligation exists to pay an allowance. *Id.* (n.4).

In addition, even if the Ex Parte 328 Agreement applied to tariffs with zero-mileage rates, Union Pacific tariffs with zero-mileage rates would qualify as lawful "departure tariffs" under the Agreement. The Agreement expressly includes procedures to "allow the railroads to make agreed-upon departures effective quickly" and "confine the need for [Board] intervention to cases where affected parties protest departure tariffs." *System - 1986*, 3 I.C.C.2d at 198. Thus, even if zero-mileage rates were not implicitly exempted from any system of allowances, the Agreement allows "departures" from full-mileage rates, including zero-mileage rates.

In this case, any debate about whether zero-mileage rates are properly considered "exempted" and thus outside of the Agreement or "departures" under the Agreement would be purely academic. Neither Cargill, POET Ethanol, POET Nutrition, nor any other shipper tried to protest a zero-mileage tariff under the Agreement's rules for protesting departure tariffs. *See System - 1986*, 3 I.C.C.2d at 209-10. Thus, Union Pacific's existing tariffs containing zero-mileage rates are lawful under either approach.

If the Board wades into the debate, it should affirm that neither § 11122 nor the Ex Parte 328 Agreement prevents railroads and shippers from using tariffs with zero-mileage rates or requires treating such tariffs as "departure tariffs." As discussed above, allowance issues arise

when a railroad establishes a rate applicable to movements in cars it is obligated to provide. But "[w]here a carrier publishes a rate specifically applicable only to movements in private cars [*i.e.*, a zero-mileage rate], the carrier is not obligated to provide a car and has no obligation to publish an allowance." *LO Shippers*, 4 I.C.C.2d at 17; *see also Natural Gas Pipeline Co. of America v. New York Central R.R.*, 323 I.C.C. 75, 79 (1964) ("[S]ince the defendant does not hold itself out to supply the cars, the unit train tariffs need not contain allowance provisions . . . ."); *Eastern Central Motor Carriers Ass'n v. Baltimore & O. R.R.*, 314 I.C.C. 5, 45 (1961) ("[I]t cannot be said that carriers are barred from publishing rates for less than a so-called complete service."); *id.* at 46 ("With respect to 'allowances,' obviously none can be made to the shipper for performing a service the avoidance of which is the consideration for the lower rate."); *Cooper-Jarrett, Inc. v. United States*, 226 F. Supp. 318, 324 (W.D. Mo. 1964) ("If the carrier wishes to initiate a lesser service for a lesser price, it may do so.").

Complainants say *LO Shippers* and earlier cases approving use of zero-mileage rates do not apply to tank cars – they apply only when railroads also establish rates for service in railroad-provided equipment. *See* Joint Evidence at 29-32. But Complainants do not and cannot identify any statutory basis for the distinction they propose. And Complainants do not and cannot cite a single case containing such a holding. Instead, Complainants highlight a passage from an older decision quoted in *LO Shippers*:

> "When a carrier offers a lesser service for a lower rate than the rate for a complete service, and the offer at the lower rate is accepted by the shipper, the carrier is not obligated to do more than it has offered to do for the lower rate, and no allowance can be made to a shipper for performing a service the avoidance of which is the consideration for the lower rate."

Joint Evidence at 30 (*quoting LO Shippers*, 4. I.C.C.2d at 17 (internal quotation omitted)). But why Complainants think the passage advances their argument is not clear. A zero-mileage rate is

precisely an offer of "a lesser service for a lower rate." Complainants appear to assume "lesser service" implies a comparison to service in railroad-provided cars. However, zero-mileage rates are also a "lesser service" compared with service under which railroads assume the obligation to provide cars and publish rates on a car-inclusive basis, but fulfill their obligation by paying a mileage allowance.[102] As discussed above, the latter approach is precisely how railroads were traditionally expected to provide common carrier service for shipments in tank cars. *See supra* Part II.C.3(b); *see also* Ex. 33 (p. 10 n.4) (explaining "shipper-car" rates are "lower than standard rates, by virtue of the carrier's *lesser obligation*" (emphasis added)).

Complainants also point to some language in *LO Shippers* discussing "dual rate scales," and one sentence of *dicta* about testing the "adequacy of the differential" between zero-mileage rates and published rates for service in railroad-provided cars. *See* Joint Evidence at 30-31. *LO Shippers* happened to involve dual rate scales, but the ICC's approval of the use of zero-mileage rates was not limited to situations in which railroads also published rates for service in railroad-provided cars. To the contrary, the ICC stated without qualification: "[T]he carrier is obligated to publish an allowance for a service rendered by the shipper *only if* the carrier is obligated to perform the service under its line-haul rate." 4 I.C.C.2d at 17 (emphasis added). The ICC mentioned "dual rate scales" to show the general rule also applied in cases involving dual rate scales. *See id.* at 17-18.[103] As for the sentence of *dicta* regarding "adequacy of the differential," *id.* at 18, we cannot know what the ICC had in mind. The ICC might have been thinking about

[102] In fact, Complainants highlight Union Pacific's treatment of full-mileage rates as rates for a service for which we are obligated to provide cars by pointing to a document that shows we treated mileage allowance payments as car costs. *See supra* note 100.

[103] The ICC observed that it "has long accepted dual rate scales with zero-allowance rates," *id.* at 17, and that a railroad "escapes no legal obligation concerning car compensation by publishing zero allowance rates in dual rate scales" – because a railroad has no such obligation when it publishes zero-mileage rates, *id.* at 18.

challenges to rates for service in *railroad-provided cars* where railroads offered zero-mileage rates, but not rates providing for payment of mileage allowances. In any event, the ICC would not have suggested a test of adequate "compensation" to shippers for providing cars under zero-mileage rates – just one page earlier, the ICC expressly recognized railroads were *not* obligated to provide such "compensation" when they were *not* obligated to provide cars under their line-haul rates. *See id.* at 17.[104]

Complainants also argue at length that, even if railroads could charge zero-mileage rates when they do not have comparable rates for movements in railroad-provided cars, Union Pacific still could not charge zero-mileage rates unless we *prove* we "compensate" shippers who provide cars by "discounting" rates we would charge if we were paying mileage allowances. *See* Joint Evidence at 32-39. Again, Complainants cite no statute or agency decision supporting any such rule. And Complainants once again proceed from the erroneous premise that shippers are always entitled to compensation for providing cars, when in fact, shippers are entitled to compensation *only if* railroads set rates obligating them to provide cars, and then the shipper provides cars. *See supra* Part II.C.3(b). Thus, the short answer to Complainants' "proof" argument is provided by the passage they highlight from *LO Shippers* and our discussion in Part II.C.3(b): when a railroad offers zero-mileage rates and a shipper accepts, the carrier does not owe the shipper *any* "compensation," whether in the form of "discounting" or "allowances," for "'performing a service [*i.e.*, providing cars] the avoidance of which is the consideration for the lower [*i.e.* zero-mileage] rate.'" *LO Shippers*, 4 I.C.C.2d at 17 (quoting *Natural Gas Pipeline*, 323 I.C.C. at 99).

[104] Indeed, if shippers believe their zero-mileage rates are too high, their recourse is not to complain about phantom "allowance payments" and "differentials" but to request rates providing for payment of allowances or file a rate case, as discussed in Parts IV.A.1 and IV.A.3.

Complainants say they cannot tell whether Union Pacific really charges less for zero-mileage rates than we would charge if rates provided for payment of mileage allowances. *See* Joint Evidence at 34-36. Their claim is irrelevant, but it is also nonsense. In depositions and documents, Complainants acknowledged the obvious – their rates would certainly be higher if they provided for payment of mileage allowances, because they would have to account for the railroad's obligation to pay mileage allowances (in lieu of providing cars). { } witness specifically testified he would expect rates providing for payment of mileage allowances to be higher than zero-mileage rates, to offset the costs of paying allowances:

} Witnesses for other Individual Complainants provided similar testimony.[105] Complainant ACC's predecessor made the same point to the ICC in *IHB-II* – zero-

[105] *See e.g.*,

} *see also*

}

mileage rates would be lower than full-mileage rates because the railroad takes on a lesser obligation:

> Where "shipper-car" rates are negotiated and published, they are lower than standard rates, by virtue of the carrier's lesser obligation . . . .

Ex. 33 (p. 10 n.4). Tank car leasing company {{ }} a member of Complainant NAFCA, explained zero-mileage rates would be lower than rates providing for payment of mileage allowances in a document used to educate company personnel:

> {{
>
> }} Similarly, tank car leasing company GATX explains on its website:
>
> A zero-mileage rate means no mileage compensation is received from the railroad. Instead, the railroad charges a lower freight rate because it will not pass on credits to the owner or lessor for the loaded mileage traveled.

Ex. 36. {{

}}

Basic logic and economics also provide the answer. As a simple illustration, if a shipper paying $\$X$ per car under zero-mileage rates demanded mileage allowances amounting to $\$Y$ per car, Union Pacific would set the full-mileage rate at $\$X+\$Y$. Union Pacific would have no reason to charge any less: we know that, from the shipper's perspective, the net rate would remain $\$X$ (because we would be refunding $\$Y$), so the shipper would ship as much traffic as when our rate

was $*X*.[106] As Professor Murphy explains: "If a shipper decided it preferred to receive a mileage allowance rather than pay zero-mileage rates, the railroad would require a higher transportation rate to offset the mileage allowance, and the shipper would have demonstrated its willingness to pay a higher gross mileage rate that resulted in the same net rate. The only difference is that both the railroad and the shipper would incur additional transaction costs to account for the refund." Murphy VS at 22.

In fact, the illustration provided above describes how Union Pacific actually establishes full-mileage rates when we provide them. These days, Union Pacific rarely uses full-mileage rates for commodities moving in any type of private equipment. One exception is {{ }} moving in private covered hopper cars. But even when Union Pacific provides full-mileage rates, we first develop a market rate for the transportation portion of the service (*i.e.*, a zero-mileage rate), and then we add the amount we expect to pay the shipper in mileage allowances, based on the expected fleet composition. *See* Hirst VS at 1-2.[107]

Even more to the point: if Complainants had any real doubt about how Union Pacific's zero-mileage rates would compare to full-mileage rates, they would have asked for full-mileage

[106] In fact, Union Pacific might increase rates by little more than $*Y*, and the shipper might ship a little less, because administration of mileage allowance payments would increase the costs of both parties. But Union Pacific would have no incentive to *decrease* our net rate, because that would merely encourage additional inefficient use of mileage allowances.

[107] Union Pacific strongly prefers not to establish full-mileage rates because it increases our administrative costs, so we try not to create any differential that would encourage use of full-mileage rates. However, we recognize our customers might have a particular reason to request full-mileage rates, and we have been willing to accommodate reasonable requests. *See* Craven VS at 2.

rates. Complainants' silence during the decades in which they used and benefited from zero-mileage rates, including the four years they have been litigating this case, speaks volumes.[108]

* * *

As decades of practice show, railroads and shippers correctly understood *LO Shippers* and earlier cases addressing zero-mileage rates to stand for a basic point: railroads have no obligation to pay allowances when railroads and shippers use zero-mileage rates.

C. Precluding use of zero-mileage rates would be bad policy.

Complainants' legal position is not only contrary to the law, it would produce bad rail transportation policy by prohibiting use of zero-mileage rates for movements in tank cars. Use of zero-mileage rates is a pro-competitive, efficient practice railroads and shippers have long embraced. Under Complainants' approach, railroads and shippers could not use zero-mileage rates unless railroads also provided cars and established dual rate scales. *See* Joint Evidence at 30-32. However, railroads almost never provide tank cars – and for good reason. As the ICC recognized, "tank-car owners prefer to furnish their own cars, and they assert it would be impractical for carriers to do so." *In the Matter of Private Cars*, 50 I.C.C. 652, 681 (1918). The ICC also recognized private ownership of tank cars "has been of incalculable benefit to shippers." *Id.* at 683. "[B]usiness could not be done in the most effective manner were carriers

[108] Complainants also suggest Union Pacific somehow bears some burden of proof because we control "critical information." *See* Joint Evidence at 36-38. Again, Complainants' argument wrongly assumes shippers are entitled to "discounts" when they use zero-mileage rates. *Id.* at 37. In any event, as *LO Shippers* establishes, shippers bear the burden of proof when claiming railroads are not paying appropriate allowances. 4 I.C.C.2d at 20-21. Shippers have access to all the "critical information" – our zero-mileage rates, the prescribed mileage allowances, and their car-ownership costs – and could request full-mileage rates. In addition, Complainants never explain why anyone would ever want to debate the differential between zero-mileage rates and full-mileage rates and engage in complex arguments about appropriate levels of market-based compensation for car ownership costs. If shippers are unhappy with zero-mileage rates, they should file a rate case or request full-mileage rates.

to own or control [tank] cars." *Id.* Thus, "[a]s a rule carriers have never furnished these cars, and it has come to be mutually understood that they should not do so." *Id.* According to Complainants' legal position, however, unless railroads and shippers reversed more than a century of practice, they could not use zero-mileage rates for movements in tank cars.

A Board decision prohibiting use of zero-mileage rates for movements in tank cars would be bad policy. Shippers have embraced use of zero-mileage rates, and they have done so for very good reasons, as discussed above. *See supra* Part III.A.2. Prohibiting use of zero-mileage rates would thus be inconsistent with Federal policy "to allow . . . the demand for services to establish reasonable rates for transportation," 49 U.S.C. § 10101(1), and "to minimize the need for Federal regulatory control over the rail transportation system," *id.* § 10101(2). Prohibiting use of zero-mileage rates would be inconsistent with these policies not only because it would block market-driven behavior, but also because it would require use of collectively negotiated, regulated mileage allowances in developing tariff rates for movements in tank cars – the polar opposite of the ICCTA's demand-based, deregulatory policies. Condemning railroads and shippers to the administrative burdens of tracking and auditing mileage allowance payments would also be the polar opposite of encouraging efficient management of railroads. *See id.* § 10101(9). No policy-maker unencumbered by the regulatory mindset of the early 1900s would *require* railroads to establish rates as though they will provide cars, then pay shippers prescribed refunds when shippers provide the cars, rather than simply allow railroads to establish lower initial rates.

In fact a witness for { } one of the Individual Complainants seeking reparations for non-payment of mileage allowances, testified that even { } does not actually want Union Pacific to pay mileage allowances:

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In sum, the Board can avoid detailed consideration of mileage allowance issues because Complainants have not presented any evidence that Union Pacific has refused a request to establish rates providing for payment of mileage allowances. If the Board addresses mileage allowances, it should consider voiding the mileage allowance provisions of the Ex Parte 328 Agreement. As discussed above, tank car mileage allowances are a regulatory relic. And even if some railroads and shippers still wanted to use full-mileage rates and allowance payments, allowances could be negotiated bi-laterally. However, Union Pacific sees no pressing need for Board action. The operation of market forces has largely eliminated use of prescribed mileage allowances.

IV. Individual Complainants Are Not Entitled to Damages.

Individual Complainants are not entitled to any damages because Union Pacific lawfully adopted Item 55-C and lawfully charged zero-mileage rates. Even if the Board were to disagree, Individual Complainants would not be entitled to damages because they continued to use zero-mileage rates and benefit from such rates since January 1, 2015. Individual Complainants thus failed to mitigate damages, are equitably estopped from seeking damages, and cannot show any specific harm. We discuss these points in Part IV.A. In addition, if the Board were to reverse *IHB-II* or preclude use of zero-mileage rates in this case, awarding damages would be improper because such an award would create a "manifest injustice," as shown Part IV.B.

A. Complainants cannot use zero-mileage rates and still claim damages allegedly arising from non-payment of full-mileage rates.

"It is well-established that reparations are not automatically required upon the finding of an unlawful practice . . . . Specific injury must therefore be shown." *Mobile Tank Car Servs. v. Southern Ry.*, ICC Docket No. 40134 (ICC served July 1, 1988) at 5. In addition, the Board "exercises discretion in determining whether the equities of restitution warrant reparations, based on the circumstances of each case." *Id.*; *see also Increases in Freight Rates and Charges - 1973*, 365 I.C.C. 426, 428 (1981) ("However, it is not always appropriate to award refunds or damages to shippers, even though the carrier may have published and/or charged a rate ultimately found unlawful, and we have considerable discretion in this area."); *Insulating Materials, Bet. Points in Official Terr.*, 364 I.C.C. 599, 601 (1981) (rejecting damages for unreasonable practice "in the absence of a showing of specific harm or rate unreasonableness"), *aff'd sub nom. Nat'l Insulation Transp. Comm. v. ICC*, 683 F.2d 533 (D.C. Cir. 1982); *see generally Genstar Chem. Ltd. v. ICC*, 665 F.2d 1304, 1308-09 (D.C. Cir. 1981) (the Interstate Commerce Act "does not compel a refund of all charges collected under [an unlawful] tariff" because the Act "provides not for penalties but for compensation for actual harm").

Individual Complainants incorrectly assume proof of an unreasonable practice would automatically entitle them to reparations. However, they are not automatically entitled to relief, and they are not entitled to relief here because they failed to mitigate damages, they benefitted from shipping under zero-mileage rates, and they have not shown actual harm from paying separate charges for empty repair moves or paying zero-mileage rates.

1. Individual Complainants failed to mitigate alleged damages by requesting rates providing for payment of mileage allowances.

"A party suffering loss from a breach of duty must do what a reasonable man would do to mitigate his loss." *Louisiana Railcar, Inc. v. Mo. Pac. R.R.*, 7 I.C.C.2d 30, 34 (1990). Here, by

Complainants' own account, Individual Complainants could have mitigated any alleged damages by requesting and shipping under full-mileage rates. Instead, they knowingly and voluntarily continued using zero-mileage rates, and thus they are not entitled to any relief.

Complainants' main objection to Item 55-C is that "Item 55-C violates the compensation requirement of 49 U.S.C. §§ 11121 and 11122 because UP does not pay mileage allowances." Joint Evidence at 20. However, Individual Complainants knew they were using zero-mileage rates, yet they never tried to mitigate their alleged damages by requesting full-mileage rates. When Union Pacific adopted Item 55-C, Individual Complainants were all using contracts and tariffs expressly providing that Union Pacific would not pay mileage allowances. *See* Craven VS at 2. POET Ethanol admits to shipping under a tariff providing: "Mileage allowance payments on private equipment shall not apply." *See* POET Ethanol Op. 16. {

} {{ }} also understood it was not entitled to mileage allowances when shipping under rates containing such a provision:

{

}} {{ }} also understood it was not entitled to mileage allowances:

{

}} In fact, each Individual Complainant was shipping under zero-mileage contracts or tariffs with similar or identical provisions. *See* Craven VS at 2.[109] When Union Pacific adopted Item 55-C, Individual Complainants could have mitigated their alleged losses by asking for contract rates or tariff rates providing for payment of mileage allowances. However, Individual Complainants never asked. *See* Craven VS at 2.[110]

For Individual Complainants with contracts, renegotiation should have been an obvious option. In fact, in *IHB-III*, the ICC suggested shippers with zero-mileage contract rates explore renegotiation. *See IHB-III* at 3 ("Moreover, it is possible that outstanding long-term contracts . . . that were, in fact, negotiated in reliance on [IHB-I] can be renegotiated."). Individual Complainants thus have no excuse for neglecting this mitigation option.[111]

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[109] Individual Complainants also admitted in discovery that the contracts, tariffs, and other price documents governing the rates Union Pacific charged them for movements in tank cars provide Union Pacific would not pay mileage allowances. *See* Exs. 60-64 (Request for Admission No. 6).

[110] With regard to the failure to request new contract rates, see { } {{ }}

With regard to the failure to request new tariff rates, see

}

Individual Complainants also admitted in discovery that they never asked Union Pacific to establish rates for movements in tank cars providing for payment of mileage allowances. *See* Exs. 60-64 (Request for Admission No. 1).

[111] {

} *compare* {{

(continued…)

Individual Complainants using zero-mileage tariffs have even less of an excuse: they plainly could have asked Union Pacific to establish tariff rates providing for payment of mileage allowances. Instead, Individual Complainants try to excuse their failure by saying Union Pacific never *offered* them rates with mileage allowances.[112] But Union Pacific is not required to maintain a menu of tariff rates on offer. Rather, Union Pacific is required to establish tariff rates only in response to reasonable requests. *See* 49 U.S.C. § 11101; 49 C.F.R. § 1300.3; *see also Capitol Materials, Inc.*, 7 S.T.B. at 581 ("[S]ince 1996 there has been no requirement that railroads file tariffs with the Board or even have tariffs."). Not one Individual Complainant has ever asked Union Pacific to establish tariff rates providing for payment of mileage allowances. *See* Craven VS at 2.

Cargill, POET Ethanol, and POET Nutrition not only seek refunds of charges paid under Item 55-C, they seek reparations expressly for non-payment of mileage allowances. The same failure to mitigate precludes their claims for reparations. Cargill, POET Ethanol, and POET Nutrition also failed to prove they would be entitled to mileage allowances on the cars they lease. As Cargill, POET Ethanol, and POET Nutrition recognize, when railroads pay mileage allowances, they pay the car's owner/lessor, not the shipper/lessee,[113] and the lessee is not always entitled to allowances paid in connection with the cars they lease – a lessee's entitlement to allowances depends on its arrangement with the lessor. *See* Cargill Op. 8; POET Ethanol Op.

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[112] No Individual Complainant claimed to be unaware of the concept of mileage allowances. *See, e.g.*, Ex. 7 (Grow Tr. 103:5-8); Ex. 18 (Hildebrand Tr. 67:17-19); Ex. 19 (Spieckermann Tr. 21:24-22:2); Ex. 24 (Siebrecht Tr. 46:20-47:1); {

}

[113] *See* Ex. 5 (Freight Tariff RIC 6007-O, Item 180).

8-9; POET Nutrition Op. 8.[114] In this case, documents produced in discovery show {{

}} Cargill, POET Ethanol, and POET Nutrition thus failed to prove they would be entitled to mileage allowance payments for the cars they lease, even if Union Pacific were required to pay mileage allowances when shippers use zero-mileage rates (which we are not).

2. Individual Complainants are estopped from seeking damages because they benefited from zero-mileage rates.

Equitable estoppel prevents Individual Complainants from trying to have their cake and eat it too – in this case, benefitting from the terms of their zero-mileage rates and then seeking to repudiate those terms when they work to Complainants' disadvantage. *See, e.g.*, *Birmingham*

[114] That leasing companies may retain some portion of mileage allowance payments is likely another reason why shippers prefer zero-mileage arrangements.

Assocs., Ltd. v. Abbott Labs., 547 F. Supp. 2d 295, 301 (S.D.N.Y. 2008); *Denney v. Jenkens & Gilchrist*, 412 F. Supp. 2d 293, 298 (S.D.N.Y. 2005).

As discussed above, not one Individual Complainant asked Union Pacific to establish contract rates or tariff rates providing for payment of mileage allowances since Union Pacific announced Item 55-C in 2014. To the contrary, Individual Complainants continued negotiating new contract rates and tariff rates with Union Pacific, knowing the rates did not provide for payment of mileage allowances.[115] Why? Individual Complainants understood and enjoyed the price efficiency and other benefits of zero-mileage rates. As discussed above, Union Pacific plainly would have charged more under full-mileage rates than zero-mileage rates – as confirmed by Complainants themselves in documents and testimony, by basic logic and economics, and by Union Pacific's past and current practices.[116]

In seeking damages, Individual Complainants want to have it both ways: they want the benefit of lower, zero-mileage rates (which they received in consideration for providing cars), but they do not want to pay for empty repair moves (claiming Union Pacific was obligated to

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[115] *See*, *e.g.*, {

} {

{{

} *see also* {

}}

[116] *See supra* Parts III.A.2 & III.B.2.

provide cars). As one Individual Complainant's witness confirmed, shippers are happy with zero-mileage rates. They are simply unhappy with empty repair move charges:

} But Individual Complainants cannot have it both ways. They cannot seek damages by arguing that Union Pacific is obligated to provide cars (or pay mileage allowances), while knowingly accepting the benefits of lower, zero-mileage rates.

Equitable principles precluding an award of damages are especially strong with regard to the separate reparations claims by Cargill, POET Ethanol, and POET Nutrition. As discussed above, when Union Pacific establishes zero-mileage rates, the rates are lower than full-mileage rates in consideration of the shipper's agreement to provide cars. Thus, Cargill, POET Ethanol, and POET Nutrition already obtained exactly what they seek here – consideration for providing cars – by using zero-mileage rates. A damages award would thus give them double credit for providing cars – first through lower, zero-mileage rates, then again through mileage allowance payments. Cargill, POET Ethanol, and POET Nutrition's reparations claims are also barred by the related concept of waiver: even assuming they had a right to rates providing for payment of mileage allowances, they relinquished or abandoned the right to mileage allowance payments by intentionally shipping under zero-mileage rates. As discussed above, Cargill, POET Ethanol,

and POET Nutrition knew that they were shipping under zero-mileage rates and that such rates did not entitle them to mileage allowance payments. They thus waived any right to mileage allowance payments. *See Pyco Indus. Inc. – Alternative Rail Service – South Plains Switching Ltd.*, STB Finance Docket No. 34889 (STB served Jan. 11, 2008) at 4 ("A waiver is the intentional relinquishment or abandonment of a known right.").[117]

3. Individual Complainants do not and cannot prove specific injury.

Individual Complainants also are not entitled to damages because they have not proven specific injury. In other words, they have not proven they are paying more than Union Pacific could have charged them had we never adopted Item 55-C or never used zero-mileage rates. In such circumstances, Board precedent precludes an award of damages. For example, in *Insulating Materials*, the ICC found Conrail engaged in an unreasonable practice by raising minimum shipment weights above the weights certain shippers could load, resulting in payments of higher shipping charges for shipping the same amount of material. However, the ICC refused to award any damages, explaining, "we did not find that the resulting *rates* were unjustified." *Insulating Materials*, 364 I.C.C. at 601. As the ICC further explained, even when the method of raising rates is proven illegal, damages are not appropriate *unless* the rates themselves exceed a maximum reasonable level:

> [Shippers] are entitled to just and reasonable rates from the railroads. If the contested charges are actually above a maximum reasonable rate then damage has been done to these shippers; but if the only proven illegality is the method of raising them, what injury may have been done and what amounts should be refunded are far less certain.

[117] Cargill, POET Ethanol, and POET Nutrition also {{ }} *See supra* Part IV.A.1.

Id. at 603. In this case, even if Complainants were to convince the Board that use of Item 55-C or zero-mileage rates was an unreasonable practice, Individual Complainants have not proven they are paying unreasonably high rates as a result, so they are not entitled to damages.

Approaching damages from the context of the overall reasonableness of the rate is particularly appropriate in this case. The reparation claims filed by Cargill, POET Ethanol, and POET Nutrition are essentially challenges to the level of their zero-mileage rates. But if those rates are not unreasonably high, they suffered no actual damage. *See Insulating Materials*, 364 I.C.C. at 601-02. Cargill, POET Ethanol, and POET Nutrition have not tried to show that Union Pacific has market dominance or that their rates are unreasonable. In *Insulating Materials*, the ICC recognized the agency should not use its "rules and practices jurisdiction in a fashion that create[s] incentives [for complainants] to attempt to evade rate flexibility and market dominance requirements." *Id.* at 602; *see also Union Pacific*, 867 F.2d at 649. Awarding Cargill, POET Ethanol, and POET Nutrition reparations for non-payment of mileage allowances would allow them to evade the requirements that would have applied in a straightforward challenge to the reasonableness of their zero-mileage rates.

Individual Complainants' damage claims regarding Item 55-C have the same defect. As discussed above, Complainants concede Union Pacific was allowed to obtain compensation for our empty repair moves through our line-haul rates. *See* Joint Evidence at 28. Thus, Individual Complainants cannot show any actual harm from Item 55-C charges unless they also show their overall rates, including Item 55-C charges, are unreasonable. Individual Complainants have not made such a showing here, and "in the absence of evidence of specific injury," the Board should "decline to exercise [its] discretion to provide refunds." *Insulating Materials*, 364 I.C.C. at 603.

Individual Complainants also cannot show actual harm from Union Pacific's adoption of Item 55-C for another reason: they factored Item 55-C's costs into their rate negotiations since Union Pacific adopted Item 55-C, and they benefitted from the rates they negotiated. In other words, just like zero-mileage rates have long reflected a market environment in which shippers understood they would provide rail cars and negotiated rates accordingly, Union Pacific's zero-mileage rates after we adopted Item 55-C reflect an environment in which shippers understood they would pay for empty repair moves and thus have negotiated line-haul rates knowing they would pay empty repair move charges under Item 55-C. For example, {{ }} witness testified {{ }} factored such market conditions into the zero-mileage rates it considered acceptable after Union Pacific adopted Item 55-C:

{

}}[118] Arkema's witnesses testified that as rates in contracts have expired, Union Pacific and Arkema negotiated new rates "based on overall market conditions." Arkema Op., Grow/Trombetta VS ¶ 10. In fact, on at least one occasion, {

[118] *See also* {{

}

} Thus, again, Individual Complainants would be having it both ways if they could benefit from lower, zero-mileage rates they negotiated with Union Pacific based on the understanding they would pay empty repair move charges, only to then collect damages in these proceedings for having paid empty repair move charges. Accordingly, Individual Complainants are not entitled to any damages.[119]

B. A damages award would create a manifest injustice.

Even if the Board were to reverse *IHB-II* and revert to the free empty repair rule, or if the Board were to preclude use of zero-mileage rates, it should not award any damages here. A damages award would be improper because the Board's reversal of *IHB-II* or repudiation of the long-accepted, industry-wide practice of using zero-mileage rates would be "'an abrupt departure from well established practice.'" *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (quoting *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972)). Union Pacific relied on *IHB-II*, *IHB-III*, *Buffalo & Pittsburgh*, and *NAFCA-II*, among other decisions, when adopting Item 55-C.[120] Union Pacific's reliance on

[119] In addition, pursuant to 49 U.S.C. § 10709(c), {{

}} Similarly, {

}}

[120] The ICC also upheld the use of empty repair move charges in *Mobile Tank Car Services v. Southern Railway*, ICC Docket No. 40134 (ICC served July 1, 1988), and *Switching Charges for Privately Owned Cars Moving to and from Repair Facilities, NW & SOU, April 20, 1990*, ICC Docket No. 40433 (ICC served Mar. 18, 1991).

those long-established, well-reasoned decisions was plainly reasonable. In addition, Canadian Pacific, KCS, and other railroads adopted empty repair move charges before Union Pacific. *See supra* Part II.B. BNSF and Canadian National adopted empty repair move charges after Union Pacific adopted Item 55-C. *See id.*[121] And Union Pacific (and other railroads with empty repair move charges) would be subject to substantial burdens if reversal of *IHB-II* led to an award of damages. Similarly, Union Pacific relied on *LO Shippers* and earlier ICC cases in establishing zero-mileage rates. Union Pacific's reliance was plainly reasonable: as the record shows, use of zero-mileage rates is nearly a universal practice. *See supra* Part III.A.1.

Under these circumstances, the Board's retroactive application of the free empty repair rule, or a rule prohibiting use of zero-mileage rates, to award damages would work a "manifest injustice." *Clark-Cowlitz*, 826 F.2d at 1081 (internal quotation omitted); *see also Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001) ("In a case in which there is a substitution of new law for old law that was reasonably clear, a decision to deny retroactive effect is uncontroversial." (internal quotation omitted.)); *Garvey v. Nat'l Transp. Safety Bd.*, 190 F.3d 571, 584 (D.C. Cir. 1999) ("An agency is also barred from applying a new rule in the adjudication in which it is announced if doing so would work a 'manifest injustice.'") (citation omitted) ; *Pub. Serv. Co. of Colo. v. FERC*, 91 F.3d 1478, 1488 (D.C. Cir. 1996) ("The governing principle is that where there is a 'substitution of new law for old law that was reasonably clear,' the new rule may justifiably be given prospective-only effect in order to 'protect the settled expectations of those who had relied on the preexisting rule.'" (quoting

[121] As discussed in Part III, the record in this case shows these other railroads, like Union Pacific, pay mileage allowances only rarely, if ever, so Union Pacific's use of zero-mileage rates would not distinguish Union Pacific's use of empty repair move charges from other railroads' use of empty repair move charges. *See supra* Part III.A.1.

Williams Nat. Gas Co. v. FERC, 3 F.3d 1544, 1554 (D.C. Cir. 1993)). In *Rail Fuel Surcharges*, the Board signaled it would not entertain damages claims where railroads relied on a prior rule, stating: "we do not believe that railroads can be faulted for assuming [the challenged practice] w[as] permissible." *Rail Fuel Surcharges* at 10. Thus, if the Board were to reverse course here regarding empty repair move charges or use of zero-mileage rates, it should not award damages against Union Pacific.

V. Conclusion

Union Pacific adopted Item 55-C so we could impose separate charges for the separate service we provide in moving empty private tank cars to and from repair facilities. The ICC authorized and encouraged railroads to adopt such charges in *IHB-II*. In fact, Union Pacific applies such charges to all private cars other than tank cars.

Complainants have come to expect free empty repair moves. They are unhappy with the new charges. However, they concede Union Pacific is entitled to compensation for providing empty repair moves. And they never explain why we should not be allowed to obtain such compensation directly through separate charges.

The ICCTA, Federal rail transportation policy, Board precedent, economic principles, and the record in this case highlight the many reasons railroads should be allowed to establish separate charges for separate services, and for empty repair moves in particular.

The ICCTA, Federal rail transportation policy, Board precedent, economic principles, and the record in this case also show use of zero-mileage rates is reasonable and lawful.

Accordingly, the Board should dismiss the Complaint.

Respectfully submitted,

/s/ Michael L. Rosenthal

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April 26, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April, 2019, I caused a copy of the foregoing document to be served by first class mail, postage prepaid, or a more expeditious method of service on all parties of record in NOR 42144, NOR 42150, NOR 42152, and NOR 42153.

/s/ Michael L. Rosenthal
Michael L. Rosenthal

VERIFIED STATEMENT

OF

KENNY ROCKER

My name is Kenny Rocker. I am Executive Vice President, Marketing and Sales, for Union Pacific Railroad Company. I joined Union Pacific in 1994 and have held my current position since 2018. Since joining Union Pacific, I have held various Marketing and Sales positions, including assignments in Automotive, Chemicals, and the Market Development & Sales Center. I hold a bachelor's degree in Finance from Tuskegee University.

In this Statement, I discuss why Union Pacific developed and adopted separate charges for empty repair moves of private tank cars in Tariff UP 6004-C, Item 55-C.[1]

In 2014, when Union Pacific developed and adopted Item 55-C, I was Assistant Vice President, Chemicals, in the Marketing and Sales Department. Before Union Pacific adopted Item 55-C, we charged shippers of all private cars other than tank cars for empty moves, including empty repair moves, unless the empty move directly followed a loaded move on Union Pacific, in accordance with Tariff UP 6004, Item 50-F.[2] Additionally, Union Pacific charged for moving empty tank cars when new cars moved prior to their first loaded move in commercial service, when cars that were restenciled to reflect a change in ownership moved prior to their first loaded move in commercial service, and when cars moved for dismantling, sale, or scrap.

Union Pacific began reexamining our approach to charging for movements of empty tank cars in the summer or fall of 2014. We began the process after realizing we faced the prospect of providing a significant number of free empty moves for tank cars we expected to make relatively

[1] *See* Ex. 1.

[2] *See* Ex. 2.

few loaded moves on Union Pacific. Specifically, we recognized the Pipeline and Hazardous Materials Safety Administration ("PHMSA") proposed regulations requiring tank cars used to transport crude oil and other highly flammable commodities to be phased out or retrofitted to meet new, stricter safety requirements. Given our network, Union Pacific does not transport as much crude oil as some of our railroad competitors, but we serve a large number of the repair facilities where retrofits would likely occur. We recognized Union Pacific had empty tank car charges that would apply if shippers and car owners built new, safer cars and moved them into service to replace their older cars.[3] However, if shippers and car owners decided to retrofit older cars, we faced the possibility of providing free empty repair moves for cars used mostly on other railroads. As I understood the retrofit process, we could potentially be required to provide three empty repair moves for a single car – first to a repair facility for cleaning, then to another repair facility for retrofitting, then back to one of our competitors to resume loaded moves. I was also concerned that free moves meant shippers and car owners would have little regard for the costs they were imposing on us, including the capacity and other resources they were consuming, in planning their retrofits and empty repair moves.

With these considerations in mind, I asked a team to consider not only the question of compensation for retrofit moves, but also the broader question of aligning our treatment of empty tank cars with our treatment of other empty private cars. At the time, I did not know why Union Pacific had been treating tank cars differently than other private cars, but I did not think we were being compensated appropriately for moving empty tank cars. I did not think we were providing shippers appropriate incentives to consider the impacts of their empty repair moves on Union

[3] In fact, at the same time we were considering adopting new charges for empty moves, we were also considering adjustments to our existing rates for moving new tank cars into service, recognizing the PHMSA rules would potentially increase the market demand for new tank cars.

Pacific, since they did not bear any of the costs. I understood the mileage equalization system was supposed to address some of these issues, but the system struck me as complex, convoluted, and outdated, especially as compared to the simple process of charging directly for certain types of empty moves.

After studying the issues, the team found no good reason to treat empty tank car moves differently from empty moves of other private cars. They recommended Union Pacific exit the mileage equalization system and adopt the same system of charges we were already applying to cars other than tank cars. Compensation for empty tank car moves was one of our goals. We were concerned about compensation for potential retrofit moves, but we were also concerned about compensation for other empty moves that did not directly follow loaded moves. At some point, I learned the idea behind "free" empty moves for tank cars was that we could recover the costs through our rates on loaded moves. That made no sense to me where the empty move does not directly follow a loaded move. I have spent my career at Union Pacific in Marketing and Sales. I know from experience that our rates for loaded movements are based on the market for those loaded movements. The empty move charges we were considering had no connection to specific loaded movements, or even loaded moves in a specific traffic lane. We cannot set rates for loaded movements above market levels to recover compensation for unrelated movements. We would lose the business to the competition.

The team studying empty move charges also concluded the mileage equalization system was not adequately compensating Union Pacific or providing appropriate incentives to shippers and car owners to be efficient in planning their empty moves. Under mileage equalization, a car owner pays nothing unless its fleet-wide ratio of empty-to-loaded mileage exceeds 106% on an annual basis. As a result, if a car owner used Union Pacific only for empty retrofit moves, we

would obtain no compensation if the owner's cars moved enough miles in loaded service on other railroads to offset the empty retrofit moves. The team concluded the mileage equalization system creates little connection between a shipper or car owner's fleet management decisions and equalization charges, since miles are aggregated across all railroads over a whole year, and car owners incur no charges, regardless of inefficiencies, if their empty miles do not exceed loaded miles by 6%.

Ultimately, Union Pacific did not immediately exit the mileage equalization system. We recognized the Interstate Commerce Commission had prescribed the terms of the National Tank Car Allowance Agreement, which addressed mileage equalization, in a 1986 proceeding.[4] We concluded we could not safely exit mileage equalization without permission from the Surface Transportation Board. We also recognized the Interstate Commerce Commission expressly authorized railroads to adopt separate charges for a more limited set of empty movements of private tank cars – empty repair moves – in a different proceeding, *IHB-II*.[5] We decided the more limited step of adopting separate charges for empty repair moves would still advance our objectives: treat empty tank cars more like other empty private cars, provide shippers timely feedback to improve efficiency and reduce excess empty miles, and provide Union Pacific appropriate compensation for performing empty moves.

Union Pacific believes Item 55-C gives shippers much stronger incentives than they previously had to consider transportation costs in planning empty repair moves. For example, Item 55-C gives shippers stronger incentives to plan their empty repair moves so they more often

[4] *See Investigation of Tank Car Allowance System*, 3 I.C.C.2d 196 (1986).

[5] *General American Transp. Corp. v. Indiana Harbor Belt R.R.*, 3 I.C.C.2d 599 (1987), *pet. for reconsideration denied*, *General American Transp. Corp. v. Indiana Harbor Belt R.R.*, ICC Docket No. 35404 (ICC served Feb. 29, 1988), *aff'd sub nom. General American Transp. Corp. v. ICC*, 872 F.2d 1048 (D.C. Cir. 1989).

send cars to shops immediately following loaded movements, rather than have the cars returned to the shipper's facility first, which results in extra moves and extra miles. It also gives shippers stronger incentives to reduce unnecessary empty moves and miles by choosing shops capable of performing all required work, such as cleaning and repairs, at one location, rather than have cars move empty from shop to shop for different services. It also gives shippers stronger incentives to look for additional, nearby shops, and to make greater use of mobile shops, to reduce excess empty miles or even eliminate the need for empty repair moves. Item 55-C also provides much faster, more direct feedback to shippers about their fleet management decisions than mileage equalization. Charges are directly connected to specific moves, not an annual, industry-wide, aggregated charge.

I understand Complainants in this case question whether Union Pacific was sincerely interested in improving efficiency because we did not try to quantify how much Item 55-C would reduce empty moves or miles. We were extremely interested in increasing efficiency: reducing unnecessary car movements, especially unnecessary free moves, is an ongoing objective. But the team working on this project recognized our expertise was not in tank car repairs. We knew we could not predict the specific consequences of adopting Item 55-C. We were not trying to dictate the choices our customers make. We understood individual shippers would decide whether and how to change their behavior after weighing all the economic consequences. We understood that repair practices were not going to change overnight. But we were confident shippers would have more appropriate incentives to make more efficient decisions in managing their empty repair moves if they were considering transportation costs than if they were treating empty repair moves as free.

I also understand Complainants argue Union Pacific was only interested in increasing our revenues. Union Pacific is certainly interested in making sure we are appropriately compensated for providing empty moves, including empty repair moves. Our reexamination of the empty move issue was certainly prompted by questions about compensation for retrofit moves. But compensation and incentives are two sides of the same coin – if people see something as free, they will not have the appropriate incentives to use it efficiently – which we recognized very early in the process.

When Complainants claim that Item 55-C was just about revenue, they forget Union Pacific greatly underestimated the revenue impact of Item 55-C. Because we never previously charged for most empty moves of tank cars, we did not have a readily available source of data we could use to estimate fully the impact of new charges. In fact, in my presentation to Union Pacific's Operating Committee, which I made when we were still considering exiting mileage equalization entirely, we estimated the new charges would generate an additional {{ }}[6] That is not an insignificant amount, but it is a very small fraction of our overall tank car revenues. Our expectations were reduced even further when we decided not to exit mileage equalization entirely and, instead, opted to focus exclusively on empty repair moves. As a result, when Union Pacific announced Item 55-C and explained the charges internally and externally to our customers, {{ }} That revenue generated by Item 55-C so greatly exceeded our expectations shows the dangers of not charging for a service. We had no ready source of data we could use to distinguish excess empty repair moves and miles from all other empty miles used in mileage equalization calculations. As a result, we did not understand just how much

[6] *See* Ex. 4.

service we had been providing for free. In other words, we underestimated the costs empty repair moves had been imposing on us.

I also understand Complainants say Union Pacific misled customers when we explained why we adopted Item 55-C because we did not emphasize our interest obtaining compensation for empty repair moves. Union Pacific in no way misled our customers. When Union Pacific announced Item 55-C, we sent customers a series of slides to explain the charges.[7] The first slide said: "Effective January 1, 2015 UP will apply mileage-based charges to certain movements of empty private tank cars to and from repair facilities located on Union Pacific." The second slide contained the question "Why Change?" and answered with four bullet points:

- "Align tank cars more closely with treatment of empties for all other car types"
- "Provide more timely feedback to customers about efficient management of their fleet"
- "Reduce empty miles on our busy network which will help protect the fluidity of our network"
- "Allow direct and prompt recovery of the costs for moving empty cars to and from shops"

Each of the four bullet points accurately described our motivations. The fourth bullet point in particular noted our interest in obtaining appropriate revenue for providing empty repair moves. The explanation we gave our customers was the same as the explanation we shared all across the company, and particularly in material distributed to employees in our Marketing and Sales Department.[8] These explanations were also consistent with my presentation to Union Pacific's Operating Committee, which focused not only on ensuring we were compensated for

[7] *See* Ex. 3.

[8] *See id*.

retrofitting moves, but also on applying consistent, modern rules to empty movements of all types of private equipment.[9]

Union Pacific's explanation to our customers is also consistent with the objectives we actually achieved. By adopting Item 55-C, we are aligning treatment of empty repair moves for tank cars with our treatment of empty repair moves for other types of private cars. We are also providing more timely feedback regarding fleet management by charging as empty repair moves occur, rather than relying on the indirect and delayed mileage equalization system. I understand the record developed in this case confirms shippers are responding to Item 55-C by considering transportation costs when they select repair facilities and plan repair moves. Finally, we are directly obtaining compensation from shippers for empty repair moves.[10]

In sum, Item 55-C treats empty movements of private tank cars more like empty movements of other private cars by ensuring we are compensated for the service we provide and giving shippers appropriate incentives to consider transportation costs in managing empty repair movements.

[9] *See* Ex. 4.

[10] When Union Pacific adopted Item 55-C, we also ensured the empty miles for which we charged directly would not be included in the calculation of empty miles under the mileage equalization system, to avoid any possible double-count.

VERIFICATION

I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge, belief, and information. Further, I certify that I am qualified and authorized to file this statement.

Executed on April 25, 2019.

/s/ Kenny Rocker

VERIFIED STATEMENT

OF

DOUGLAS CRAVEN

My name is Douglas Craven. I am Assistant Vice President, Industrial, in the Marketing and Sales Department of Union Pacific Railroad Company. I joined Union Pacific in 1995 and have held my current position since 2017. Since joining Union Pacific, I have held various Marketing and Sales positions involving Chemicals and Industrial Products. I hold a bachelor's degree from the University of Nebraska.

In this Statement, I discuss Union Pacific's and our customers' use of "zero-mileage rates" – rates under which Union Pacific is not obligated to provide rail cars and thus does not pay mileage allowances when customers provide cars – both before and after Union Pacific adopted empty repair move charges in Tariff UP 6004-C, Item 55-C.

Union Pacific and our customers rarely use rates for movements in tank cars providing for mileage allowance payments. Since at least the early 2000s, more than 85% of all Union Pacific's loaded tank car movements involved zero-mileage rates. In 2014, the year before we instituted empty repair move charges, approximately 0.28% of loaded tank car movements involved mileage allowance payments. In 2017, approximately 0.13% of loaded tank car movements involved mileage allowance payments.

When Union Pacific establishes zero-mileage rates in tariffs and contracts for shipments in tank cars, the rate item contains rules specifying the shipper will provide cars (*i.e.*, "Applies in Customer/Shipper-owned or leased equipment bearing private (non-railcarrier) reporting marks") and the railroad will not pay mileage allowances (*i.e.*, "Mileage allowance payment on private equipment will not apply.").

Before Union Pacific adopted Item 55-C, none of the Individual Complainants, nor nearly any other customer shipping commodities in tank cars, had asked to establish rates providing for payment of mileage allowances in current memory.

Before Union Pacific adopted Item 55-C, all the Individual Complainants, and nearly all other customers shipping commodities in tank cars, were shipping all their tank car traffic under zero-mileage rates, in tariffs or contracts or both, expressly providing Union Pacific would not pay mileage allowances.

After Union Pacific adopted Item 55-C, none of the Individual Complainants asked to establish rates providing for payment of mileage allowances. All the Individual Complainants continue to ship all their tank car traffic under zero-mileage rates, in tariffs or contracts or both, expressly providing Union Pacific would not pay mileage allowances.

I am not aware of any customer that has requested rates providing for mileage allowance payments for movements in tank cars because Union Pacific adopted Item 55-C. Union Pacific has established full-mileage rates when customers express a genuine desire to use them, but in my experience, customers only rarely want full-mileage rates.

VERIFICATION

I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge, belief, and information. Further, I certify that I am qualified and authorized to file this statement.

Executed on April 25, 2019.

/s/ Douglas Craven

VERIFIED STATEMENT

OF

ROBERT C. HIRST

My name is Robert C. Hirst. I am a Marketing Manager in the Marketing and Sales Department of Union Pacific Railroad Company. I joined Union Pacific in 1991 and have held my current position since 2017. In my current position, I am responsible for pricing movements of {{

}} All these movements occur in private covered hopper cars, {{

}} I also have substantial experience with pricing movements under full-mileage and zero-mileage rates outside the {{ }} Over the course of my career at Union Pacific, I have held a variety of other positions in the Marketing and Sales Department, including positions in which I was responsible for pricing commodities moving in private tank cars when the railroad and our customers were actively transitioning tariff rates from full-mileage rates to zero-mileage rates in the early 2000s.

In this Statement, I explain how Union Pacific calculates rates providing for payments of mileage allowances and why Union Pacific and our customers generally prefer zero-mileage rates rather than full-mileage rates.

Calculating full-mileage rates is administratively burdensome, unnecessarily complex, and potentially confusing as compared with calculating zero-mileage rates. When a customer requests a zero-mileage rate, Union Pacific assesses the market rate for rail transportation of the customer's commodity, given the specific origins and destinations, then we seek feedback from

the customer and fine-tune our understanding of the market as appropriate. When a customer requests a full-mileage rate, the process becomes more complicated. In both cases, we start the same way – by assessing the market rate for the requested rail transportation – but developing full-mileage rates requires us to undertake an additional analysis: we must estimate our likely mileage allowance payments, so we can build them into the rate and try to ensure we are not ultimately charging (or receiving) more (or less) than the market rate for transportation.

Estimating mileage allowance payments is not a simple process. Mileage allowances are paid based on loaded miles, but the amount of the mileage allowance payment varies by car, depending on the particular car's original cost or fair market value and its age. Also, we do not know which cars the customer will actually load for any particular shipment or series of shipments when we are establishing rates. As a result, we have to make assumptions. We base our assumptions on historical information about the customer's car usage, as well as any information we may have about how the customer's fleet has changed, or may change during the period covered by the rate. Once we are satisfied with our estimate, we add that amount – and perhaps a little more – to the zero-mileage rate to create a full-mileage rate.

For example, if we conclude the market rate for a particular move is $1,000 per car, and we estimate the average mileage allowance payment per car used for that move would be $200, we would set a zero-mileage rate at $1,000 per car, and a full-mileage rate as at least $1,200 per car. If we accurately estimate the mileage allowance payments, then when a loaded car moves under the full-mileage rate, the net outcome for both the railroad and our customer would be the same as if it had moved under zero-mileage rate:

Customer payment to UP under full-mileage rate:	$1,200
Less UP mileage allowance payment to Customer:	($ 200)
Customer net payment to UP:	$1,000

Union Pacific prefers using zero-mileage rates from a marketing perspective, at least for markets in which shippers traditionally supply the rail cars. When we use zero-mileage rates, we avoid the administrative burdens associated with estimating mileage allowance payments, as well as administrative costs associated with resolving any billing disputes over allowance payments. Using zero-mileage rates also allows us to focus on our expertise – assessing market rates for rail transportation – rather than requiring us to delve into fleet composition issues. In addition, using zero-mileage rates simplifies rate negotiations. With a zero-mileage rate, if a customer questions a quoted rate, we know the issue arises from our assessment of transportation market conditions. With a full-mileage rate, it can take time to sort out whether we and our customer have different perspectives about transportation markets, or different assumptions about fleet composition, or both.

Union Pacific also prefers using zero-mileage rates from a marketing perspective because they allow us to avoid unintended market consequences that might otherwise arise from faulty assumptions about a customer's fleet composition. For example, if we overestimate the mileage allowance payments we will be required to make (perhaps because our customer ends up using lower-cost cars), we will end up setting an overall price that is too high, and thus we might not move as much traffic as we could at the actual market price for transportation. On the other hand, if we underestimate the mileage allowance payments (perhaps because our customer acquires higher-costs cars), we will end up with an overall price that is too low, and thus we might end up subsidizing inefficient moves. In other words, quoting full-mileage rates increases the risk that the railroad and our customer over-shoot or under-shoot the market. Moreover, we may end up distorting our customers' decisions about their car supply arrangements.

To the best of my recollection, Union Pacific and our customers have used zero-mileage rates for movements in tank cars since at least the 1990s – at least for movements under contract rates. In the early 2000s, railroads and shippers began using zero-mileage rates more frequently for movements under tariff rates. I recall our customers were generally in favor of transitioning to zero-mileage rates. They typically appreciated paying lower rates up front, rather than paying higher rates initially and receiving refunds through mileage allowance payments. They also appreciated the reduction in administrative burdens, including burdens associated with monitoring mileage and mileage allowance payments. In some cases, our customers were the first to raise the issue, because they had been paying zero-mileage rates on other railroads. At worst, I recall some of our tank car customers being indifferent to the transition – they understood mileage allowance payments were not some sort of special benefit the railroads owed them – they understood we were building the mileage allowances into the rates they were paying.

VERIFICATION

I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge, belief, and information. Further, I certify that I am qualified and authorized to file this statement.

Executed on April 25, 2019.

/s/ Robert C. Hirst

Verified Statement of Professor Kevin M. Murphy
on Behalf of Union Pacific Railroad Company
in NAFCA vs. Union Pacific Railroad Company

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I. INTRODUCTION

My name is Kevin M. Murphy. I am the George J. Stigler Distinguished Service Professor of Economics in the Booth School of Business and the Department of Economics at The University of Chicago, where I have taught since 1983.

I earned a doctorate degree in economics from The University of Chicago in 1986. I received my bachelor's degree, also in economics, from the University of California, Los Angeles, in 1981.

At The University of Chicago, I teach economics in both the Booth School of Business and the Department of Economics. I teach graduate level courses in microeconomics, price theory, empirical labor economics, and sports analytics. In these courses, I cover a wide range of topics, including the incentives that motivate firms and individuals, the operation of markets, the determinants of market prices, and the impacts of regulation and the legal system. Most of my teaching focuses on two things: how to use the tools of economics to understand the behavior of individuals, firms and markets; and, how to apply economic analysis to data. My focus in both research and teaching has been on integrating economic principles and empirical analysis.

I have authored or co-authored more than 65 articles in a variety of areas in economics. Those articles have been published in leading scholarly and professional journals, including the *American Economic Review*, the *Journal of Law and Economics*, and the *Journal of Political Economy*.

I am a Fellow of the Econometric Society and a member of the American Academy of Arts and Sciences. In 1997, I was awarded the John Bates Clark Medal, which the American Economic Association awarded once every two years to an outstanding American economist under the age of forty.[1] In 2005, I was named a MacArthur Fellow, an award that provides a five-year fellowship to individuals who show exceptional merit and promise for continued and enhanced creative work. Also in 2005, I was elected a Fellow of the Society of Labor Economists.

[1] The John Bates Clark Medal was awarded biennially until 2009, but it now is awarded annually. *See* http://www.aeaweb.org/honors_awards/clark_medal.php (accessed December 19, 2012).

In addition to my positions at The University of Chicago, I am also a Senior Consultant to Charles River Associates ("CRA"), a consulting firm that specializes in the application of economics to law and regulatory matters. I have consulted on a variety of antitrust, intellectual property, fraud, and other matters involving economic and legal issues, such as damages, class certification, mergers, labor practices, joint ventures, and allegations of anticompetitive exclusionary access, tying, price fixing, and price discrimination.

I have submitted testimony in Federal Court, the U.S. Senate, and to state and federal regulatory bodies, and I have submitted expert reports in numerous cases. I have submitted testimony in proceedings before the Surface Transportation Board ("Board" or "STB"). I have testified on behalf of the U.S. Federal Trade Commission, and I have consulted for the U.S. Department of Justice. My CV is attached to this Verified Statement.

II. ASSIGNMENT AND SUMMARY OF OPINIONS

I have been asked by Union Pacific Railroad Company ("UP") to analyze the economic consequences of allowing railroads to establish separate charges for empty movements of private tank cars to and from repair facilities ("empty repair moves"). UP began applying separate charges for empty repair moves on January 1, 2015, after adopting Item 55-C, Subpart D, in UP Tariff 6004-C ("Item 55-C"). Under Item 55-C, empty repair moves not immediately preceded by a loaded line-haul revenue movement ("loaded move") are subject to line-haul charges.[2] UP's line-haul charges for empty repair moves are established in UP Tariff 4703, which provides for per-car charges for moves of 0-250 miles and 251-500 miles, and a per-mile charge for moves that exceed 500 miles.[3]

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[2] I understand that Item 55-C is included in the set of exhibits being submitted by UP in this proceeding as Exhibit 1. Under Item 55-C, UP does not charge for moving empty cars to and from repair facilities when cars are damaged by UP or waybilled to a shop by UP personnel after being taken out of service following a UP inspection.

Throughout this Statement, I use the terms "empty repair moves" and "empty shop moves" interchangeably to refer to empty moves to and from repair facilities that are not preceded by a loaded move and that are not any other type of empty moves for which UP already had been charging explicitly (e.g., moving cars into or out of service) or has explicitly exempted from charges (e.g., moving cars damaged by UP).

[3] I understand that Complainants provided several versions of UP Tariff 4703 in *Complainants' Joint Opening Evidence and Argument*, February 22, 2019 ("Complainants' Opening Argument").

Certain shippers that own and lease tank cars, along with trade associations representing shippers and tank car owners, have challenged UP's adoption of charges for empty repair moves as "an unreasonable practice" and a "violation of UP's statutory obligations to compensate private car owners for the use of their tank cars[.]"[4] These Complainants assert that "UP's recent adoption of Tariff UP 6004, Item 55-C […] shifts the cost of transporting empty tank cars to and from repair facilities from UP to the providers of private tank cars[.]"[5] Complainants also challenge a long-standing practice of UP, other railroads, and shippers of using zero-mileage transportation rates – i.e., rates under which railroads do not provide cars or pay compensation to providers of private tank cars for shipments in private equipment.

In this Verified Statement, I offer no opinion on whether Item 55-C or the use of zero-mileage rates violates UP's statutory obligations. I understand those are legal questions that will be addressed by others. Rather, I use my expertise as an economist to understand and explain the underlying economics that I believe should be applied in evaluating Complainants' claims and requests for relief.

As I explain in detail below, markets function best to benefit both consumers and suppliers when suppliers have flexibility to price their services in response to supply and demand conditions. One way in which suppliers exercise that flexibility is determining when to charge separate prices for separate services, and when to charge for multiple services as a "bundle." Bundle pricing is the market-driven outcome in some situations. For example, sellers of shoes could offer right and left shoes separately, allowing consumers with different-sized feet to buy a single pair of shoes with better overall fit. However, there is so little demand to purchase only a left or right shoe, and so much additional cost for suppliers to determine how many of each size to manufacture and retailers to decide how much inventory to hold, that shoes are almost always sold in pairs. The market outcome demonstrates that selling pairs of shoes is efficient overall – it provides the greatest benefits to both buyers and sellers by reducing costs and providing consumers the product that they want.

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4 See, e.g., North America Freight Car Association, et al. v. Union Pacific Railroad Company, *First Amended Complaint*, ¶ 29, filed June 2, 2015 ("First Amended Complaint").

5 First Amended Complaint ¶18. As defined in UP's tariff "'Repair Facilities' means any facility that cleans, lines, relines, maintains, modifies, repairs, or retrofits tank cars."

When two services have different demand factors, and different competitive alternatives from which buyers can select, then sellers generally find it efficient to price the services separately. Separate pricing creates marketplace signals for buyers to use the type and quantity of each service efficiently, which in turn guides suppliers in their decisions about what products to supply and where to invest. For example, socks and shoes are not sold as a bundle at a single price, even though consumers wear socks with most types of shoes. This is because there is no necessary connection between particular socks and particular shoes. Consumers purchasing the same shoes may want to buy socks from other suppliers, and they will purchase different quantities and styles of socks. Some people want a greater amount or variety of socks than others, and demand for any particular pair of socks (color, material, thickness etc.) will differ from person to person.

As I discuss below, loaded moves and empty repair moves are more like shoes and socks than pairs of shoes. Offering and pricing empty repair moves separately from loaded moves is likely more efficient than bundle pricing, or essentially providing empty repair moves at no explicit price. Pricing empty repair moves separately creates price signals that motivate buyers to consider whether purchasing an incremental empty repair move provides sufficient value to be worth the price and whether there might be an alternative that would be preferable given the cost of a movement. Thus, it creates incentives for shippers to make more efficient use of a railroad's infrastructure because they will take into account explicitly how their decisions about empty repair moves impose costs on railroads.

In addition, railroads will not be able to recover costs of empty repair moves by raising line-haul charges on loaded movements. If they tried, prices for some loaded moves would exceed the competitive price for the loaded move alone, and business would be lost to competitors who do not face the same costs or who seek to recover them in different ways. Raising line-haul charges to cover the cost of empty repair moves would create distortions in the marketplace and reduce demand for loaded moves. And, absent separate pricing of empty repair moves, UP and other railroads would have diminished incentives to invest in resources to service such moves, including in railroad infrastructure. The resulting reduction in capacity would raise costs to UP and prices to shippers (including those that do not generate uncompensated empty moves). By contrast, charging separately for empty repair moves prevents such harms to UP and other shippers.

Complainants' claims regarding use of zero-mileage rates also are inconsistent with economics. Again, an analogy to pricing of shoes illustrates the basic economic concept. If shoes always are sold as pairs, it is irrelevant whether a $70 pair bears a $70 price sticker, or instead the price for one shoe is $65 and the other is $5. Similarly, a consumer's willingness to buy the pair will be the same if the sticker price is $90, but she knows she will be handed a $20 refund immediately after purchasing the shoes at the sticker price. The net price remains $70, and it is that net price that will guide the actions of both consumers and suppliers. Either consumers will find $70 to be a competitive price and will purchase the shoes, or they will decide there is a better option.

Here, if shippers must compensate railroads for transportation services, while railroads must compensate shippers who provide cars used for transportation services, it is more efficient to set a price for transportation services that nets out the concurrent price to use the car. This saves on the required transactions costs – there is no need to make two sets of payments (one of which would essentially refund a portion of the transportation rate) rather than one (by the shipper for the cost of transportation net of compensation for use of its car). Moreover, economics informs us that the net price paid by the buyer and received by the seller will be the same whether there are two payments going in opposite directions or simply one net price.

The remainder of my Verified Statement is organized as follows. In Part III, I present some industry background that informs my analysis. In Part IV, I explain the role of price in allocating resources efficiently in market-based economies. In Part V, I apply those economics to the allegations in this case, and explain the potential gain in economic efficiency from railroads' adoption of separate charges for empty repair moves. I also explain why railroads cannot simply recover costs of empty repair moves by raising line-haul charges on loaded movements, and why the "mileage equalization" system does not create incentives for efficient decisions about empty repair moves and does not provide railroads with market-based compensation for transporting empty tank cars. Finally, in Part VI, I explain why providers of private tank cars should not expect to benefit if zero-mileage rates are prohibited and railroads are required to pay mileage allowances, and why shippers have not been harmed if they have not received mileage allowance payments in the past.

In preparing my Statement, I have been informed by prior Board decisions, statements submitted by economists in prior Board proceedings, submissions in this proceeding, a variety of data and documents on the railroad industry, data and information received from UP, and literature on the railroad industry. My analysis also relies on generally accepted economic principles of incentives and economic efficiency. My opinions are based on information available to me as of the date of this report. My work is on-going, and I will continue to collect data and other information relevant to the issues and opinions that I discuss in this report.

III. INDUSTRY BACKGROUND ON WHICH I RELY

I have reviewed the Verified Statement of Mr. Kenny Rocker, Executive Vice President, Marketing and Sales, for Union Pacific Railroad Company, that I understand UP is submitting, in which he explains how UP has priced its transportation-related services in the past, how it prices those services today and why UP adopted Item 55-C.[6] Below, I summarize briefly the factual background (based in part on the Rocker Verified Statement) that informs the rest of my analysis.

From the time a tank car enters service, it uses a variety of services provided by UP and other railroads. UP's tariffs governing empty movements of tank cars have long provided for separate charges for empty movements of new and re-stenciled cars prior to their first loaded moves, as well as empty movements of cars for dismantling, sale or scrap.[7] This practice continues today. In addition, I understand that the rates in UP's tariffs and contracts for transportation of shippers' goods are understood to cover one "free" empty movement for every loaded movement of a tank car, whether that empty move is to the point of origin of the prior loaded move, to another destination for reloading, or to a shop for repairs, cleaning or other services.

These UP practices are common to tank cars and other types of private cars for which UP provides transportation services. What has differed historically is that UP long has charged separately for empty moves of private cars other than tank cars to and from shops that were not preceded by a loaded move on UP, while there has been no explicit charge for such movements

[6] Verified Statement of Kenny Rocker, April 25, 2019 ("Rocker Verified Statement").

[7] Rocker Verified Statement at 1.

of tank cars.[8] Thus, for other types of private cars, tariffs similar to those implemented in UP's Item 55-C tariff have applied.

For tank cars, explicit compensation (if any) for empty repair moves, including those unrelated to and in excess of loaded moves, has been made through the tank car mileage equalization system. This is:

> a system of accounting that entails the aggregate reporting of loaded and empty private tank car miles. Mileage is collected and reported by rail carriers, processed by Railinc for the AAR, and then distributed to the railroads and private tank car owners on a monthly basis […] Should the empty mileage accumulated by any tank car owner exceed the loaded mileage during the same calendar year by more than six percent, such excess empty mileage must be paid by the tank car owner to the AAR at a rate to be determined yearly. This money (minus the administration fee) is then distributed to those railroads whose handling of empty tank cars exceeded their loaded handling by more than six percent.[9]

In the United States, virtually all tank cars are privately owned by lessors and shippers.[10] According to The Railway Supply Institute, "[a]s a result of the unique North American regulatory and maintenance requirements associated with the use of tank cars, railroads do not own tank cars resulting in shipper reliance on privately owned tank cars."[11] Tank cars typically are leased under full-service leasing where "the lessor is responsible (both operationally and financially) for completing periodic safety tests on the tank and its attachments, as well as ongoing maintenance of wheels, truck components, and brake systems[,]" and lessors manage completion of modifications required by government regulations.[12] Lessors control where cars are repaired, inspected and retrofitted. Lessors generally establish a network of authorized repair

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[8] *Ibid.*

[9] Railinc *Guide for Railroads* (https://www.railinc.com/rportal/documents/18/260641/GuideforRailroads.pdf) at 21.

[10] ALLTRANSTEK, L.L.C., *Railblazers*, 6/2018, Vol IV, Iss. II (http://www.alltranstek.com/uploads/4/5/1/7/45171167/alltranstek_newsletter_q2_2018.pdf): "99.4% of all tank cars are owned by leasing companies and shippers. Recent trends have shown an increase in lessor ownership of tank cars at the expense of shipper owned cars."

[11] https://tankcarresourcecenter.com/wp-content/uploads/2017/12/Tank-Car-Leasing.pdf. The Railway Supply Institute Committee on Tank Cars (RSICTC) "is composed of representatives from major manufacturers and owner-lessors of rail tank cars." (https://tankcarresourcecenter.com/about-us/)

[12] https://tankcarresourcecenter.com/wp-content/uploads/2017/12/Tank-Car-Leasing.pdf. According to RSICTC, "[s]hippers often lack maintenance, operational or regulatory expertise" so these responsibilities are handled by the lessor. (*Id.*)

facilities. However, shippers (as lessees) generally choose where to have cars cleaned, which may occur after every move or less frequently depending on the commodity.

Unlike some other types of rail cars, tank cars almost always return empty after a load is delivered. They are specialized to a particular product (until cleaned) and thus are not reloaded at destination,[13] and they are not regularly exchanged ("pooled") between shippers. Because tank cars are highly specialized, they often remain in a shipper's possession at its facilities for months.[14]

I understand that, historically, railroads were expected to set line-haul rates for loaded moves as though they were providing tank cars, and then compensate shippers for actually providing cars through "mileage allowance payments." According to GATX, a global rail car lessor,[15] "[z]ero-mileage rates have been offered since railroads were deregulated. A zero-mileage rate means no mileage compensation is received from the railroad. Instead, *the railroad charges a lower freight rate because it will not pass on credits to the owner or lessor for the loaded mileage traveled*."[16] I understand that, since the early 2000s, more than 85% of UP's tank car shipments were made under zero-mileage rates and that almost all UP's contracts and tariffs had zero-mileage rates in 2014 and 2017.[17]

IV. THE ROLE OF PRICE IN ALLOCATING RESOURCES EFFICIENTLY

Since the Staggers Act of 1980 (or even earlier), regulatory oversight of the railroad industry has aimed to allow competition and the demand for services to replace to the greatest extent possible the heavy hand of government regulation that had resulted in the virtual collapse

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[13] ALLTRANSTEK, L.L.C., *Railblazers*, 12/2016, Vol II, Iss. III (http://www.alltranstek.com/uploads/4/5/1/7/45171167/alltranstek_newsletter_q3_2016_-_final.pdf): "Because tank cars are used for shipping liquid or gas products and are one-way cars that lack pooling opportunities, shippers are responsible for supplying their own tank car equipment. As a result, 99.7% of all tank cars are owned by leasing companies and shippers. Recent trends have shown an increase in lessor ownership of tank cars at the expense of shipper owned cars."

[14] "Tanks cars are highly specialized, and often sit in a factory or chemical plant for months, so railroads have never supplied tank cars." (https://www.trainorders.com/discussion/read.php?18,4010348).

[15] http://www.gatx.com/wps/wcm/connect/GATX/GATX_SITE/Home/About/.

[16] http://www.gatx.com/wps/wcm/connect/GATX/GATX_SITE/Home/Rail+North+America/Customer+Care/Mileage/ (emphasis added).

[17] Verified Statement of Douglas Craven ("Craven Verified Statement") at 1.

of the railroad industry by the 1970s. An important part of deregulation was giving railroads flexibility to set rates and confining rate oversight to the limited situations where shippers could demonstrate an absence of effective competition.

Even where regulation occurs, the STB has followed a policy that recognizes that the public interest is best served by replicating outcomes that would be expected in competitive markets.[18] An important component of any policy that aims to replicate market outcomes in the presence of regulatory oversight is to ask whether railroads' conduct, including their pricing practices, is similar to that observed in other industries not subject to regulation. If similar conduct to that challenged in the railroad industry is common – indeed the norm – in other industries when competition is effective, then it reflects how competition works best to allocate resources efficiently, and regulators should not interfere when railroads adopt the same principles and practices. Thus, economic principles and understanding of pricing practices in other industries, and even in other parts of the railroad industry, provide an appropriate economic framework for evaluating Complainants' claims.

Markets efficiently allocate resources based on cost and demand and the prices that result. Producers' willingness to supply a product or service will depend on the costs of doing so. No producer will freely agree to supply a product or service if it does not expect to receive a price equal to or greater than its incremental costs to supply that product or service.[19] Similarly, consumers' willingness to purchase a product or service depends on the value they obtain from use of that product or service compared with its price. No consumer will freely agree to purchase a product or service if it does not expect to obtain value greater than or equal to the price it must pay for its use. In deciding whether to purchase a product or service, the consumer will compare the value it obtains from use of various alternatives in the marketplace. If it obtains greater value (net of price paid) from one product than from another, then it will purchase the

[18] The stand-alone cost ("SAC") test that the STB uses to evaluate the reasonableness of challenged rates under certain conditions is evidence of this.

[19] There are two types of "costs" that are relevant to a producer's willingness to supply a product or service to a customer that are not as obvious as costs such as labor and fuel. The first is opportunity cost, or the earnings foregone when the producer's capacity-constrained resources are used for one customer and not another. The second is a competitive return on capital, or the rate of return necessary to induce the producer to build and maintain the physical and intellectual plant, equipment and other assets needed in order to provide the product or service. Both types of costs are relevant here.

first product. The resulting market outcome is that resources tend to be allocated to their highest valued use so society's resources are used efficiently.

As a general matter, under competition, two products for which demand and supply factors are distinct will be priced separately, rather than solely at a single bundled price.[20] Separate prices enable suppliers to reflect the separate costs and demands for each service in the price of that service, and buyers to decide how much of each to purchase based on their demand for each service given its price. This is especially true when a buyer that wants to purchase both products can obtain them from different suppliers. A supplier cannot collect the cost of the second product in the price of the first product, because the buyer then would purchase the first product from a different seller that does not also provide the second product. Thus, efficiency is typically best achieved when pricing reflects the separate demand and cost factors that apply to each service offered.

Consider, for example, a landlord deciding whether or not to provide heat to his apartment tenants without charging each tenant separately for the heat that tenant consumes each month. In a building with more than a couple of tenants and where the rent includes an allocation to each tenant of the building's heating costs (based, say, on apartment square footage), no tenant will perceive her own use as affecting what she pays. This is because no individual apartment will contribute meaningfully to the total cost of heat for the building, and the rent will be unaffected by any variation in costs to heat one individual's apartment. In this scenario, no individual tenant's economization by turning down the thermostat will be rewarded. For this reason, analysts have found that tenants in buildings where rent includes heat tend to set their thermostats a few degrees higher in the winter than those in apartments where heat is not included.[21] While there are other reasons it might be in a landlord's interest to offer only leases with heat included, even though doing so may encourage inefficient consumption, landlords can choose not to do so if they find the additional costs when passed through to tenants in higher

[20] Separate pricing is not always efficient, even when there is independent demand for the two products. However, it generally is efficient to give sellers the *flexibility* to price separately if they so choose. They will choose to do so when they can reduce problems of overuse and underinvestment by choosing to price separately and the gains from doing so exceed the additional monitoring and transactions costs required to set two separate prices and collect revenue accordingly. As I show in this statement, it is not surprising that UP has chosen to exercise its flexibility to price empty repair moves separately given incentives to do so.

[21] *See, e.g.,* Arik Levinson and Scott Niemann, "Energy use by apartment tenants when landlords pay for utilities," Resource and Energy Economics 26 (2004) 51–75.

rents to be unprofitable. In some cases, for example, renters may strongly prefer to control their own heating costs, and may have many rental options where heat is excluded. A landlord choosing only to offer leases that include heat, and to charge rents that include the average per-apartment heating costs, may find that there is little or no demand for his apartments because most or even all renters prefer to pay their individual heating costs and so choose other apartments.

As I explain in Part V, the same principles apply when considering efficient pricing of empty repair moves when these movements are not directly related to a particular loaded movement.

V. ECONOMIC EFFICIENCY IS ENHANCED IF RAILROADS CAN CHARGE SEPARATELY FOR EMPTY REPAIR MOVES

The economic principles discussed above are useful in evaluating Complainants' argument that Item 55-C is unreasonable.[22] Application of those principles establishes that giving railroads flexibility to charge separately for empty repair moves best creates incentives for railroads and shippers to operate efficiently and assures that the railroad industry makes ongoing investments needed to serve shippers and their evolving needs. When buyers are not faced with proper price signals, the result is inefficiencies, such as over-consumption of certain services, and distortions, including reduced incentives for investment. In sum, when shippers view empty shop moves as "free" because they incur no explicit cost, they will lack incentives to make efficient choices about when and where to make such moves, will overconsume railroad resources, and will create other market distortions.[23]

A. Empty Tank Car Shop Moves May be Inefficient If Those Moves Are Not Priced Separately from Loaded Moves

I understand that UP's filings in this matter will provide evidence of several specific ways in which shippers appear to fail to make efficient choices when selecting where to send

[22] *See* Complainants' Opening Argument at 39.

[23] Permitting railroads to price empty shop moves independently of freight charges generally makes economic sense. However, in some cases, railroads may find it in their interest not to charge separately for these empty moves. For example, in competing for loaded business, a railroad may want to provide incentives by waiving or discounting charges for these empty shop moves. These individual negotiations for "bundled" pricing when preferred by the buyer and profitable for the railroad are expected in competitive markets, and may occur here as well. However, the existence of such arrangements is not evidence that they are always efficient and competitive.

tank cars for repairs or cleaning. These fall into several categories: (1) tank cars returned to the origin before being moved to a shop; (2) tank cars moved to a distant shop rather than a shop that is closer to the origin of the next loaded move; (3) tank cars being moved empty twice – once for cleaning and a second time for repair and/or inspection – without an effort to combine the moves into a single move; and (4) using fixed rather than mobile repair facilities. As I now explain, the incentives created when users of tank cars incur a separate cost for empty shop moves will tend to reduce such inefficiencies.

1. There Is Separate Demand for Loaded and Empty Shop Moves

The underlying economic principle of efficient decision making is that parties should be confronted with the costs of the alternatives that they face, and they must be able to adjust their conduct in response. In the language of economics, users will have the incentive to make efficient decisions when they are faced with the true marginal cost (price) and marginal benefit (incremental value) associated with marketplace alternatives. As explained above, when customers buy two distinct products, such as a right and a left shoe, but obtain no value from one without the other, then it is efficient to set a single price for both. The two shoes are sold in fixed proportions (one right shoe always sold with a matching left shoe) and demand for the pair will not be affected by how the price is split across the two individual shoes. However, when customers use two distinct products, each one is independently valuable, and there is no fixed ratio of use between the two – say, an iPhone and headphones – inefficiencies will arise from charging for one product but treating the other as free (all buyers of an iPhone may want headphones, but some will replace headphones more than others before purchasing a new phone). If the user will face no marginal cost from consuming the second product, she will tend to overconsume that product (for example, she would be less inclined to care for her headphones if she always could get free replacements). The ability to price separately allows the parties a mechanism to reduce or eliminate such distortions.

Unlike the case of right and left shoes, a shipper's demand for loaded moves will have only a weak link to its demand for empty shop moves or for empty shop moves on a particular railroad. (In contrast, an empty move directly following a loaded move, for which UP does not charge, has similar economic characteristics to a left (empty) and right (loaded) shoe because, as explained above, tank cars are almost never reloaded at the point of delivery and thus every loaded move is followed by at least one empty move.) Indeed, there are instances when both

services are not even provided by the same railroad – the loaded move and following empty "free" move may be on one railroad, while a subsequent empty repair move may occur on a different railroad. This was the concern about the retrofit movements that Complainants allege motivated UP's decision to issue item 55-C;[24] there was no guarantee that a shipper would choose to use a shop on a railroad that handled its loaded moves.

Shipper demand for loaded moves derives from demand for the product that is being shipped. While more use of a tank car for loaded moves likely is related loosely to the need for repair services, that relationship will not be in any fixed ratio overall and especially not a fixed ratio for a particular railroad. I understand that UP is presenting evidence that individual tank cars move empty to shops relatively infrequently and for a variety of reasons that have no relationship to their loaded moves. In such circumstances, prices charged for loaded moves cannot ensure shippers will make efficient decisions regarding their empty repair moves. And, when shippers have options for their loaded moves, a railroad cannot price loaded moves to compensate for the expected empty repair moves it provides that shipper.[25]

2. Absent Separate Pricing, Providers Have Incentives to Overconsume Railroad Resources for Empty Shop Moves

I understand that, before UP adopted Item 55-C, car owners and shippers considered a variety of factors when selecting shops and timing shop visits to minimize their own costs. Some but not all of those factors might also tend to minimize transportation costs incurred by UP, because car owners and shippers would want to minimize their total costs incurred and maximize the value they obtained when selecting where and when to repair a tank car, including time out of service, quality, shop prices, dependability, etc. However, absent explicit charges for transportation services to shops, a shipper will not take into account the full costs it imposes on the railroad that provides the service when deciding where and when to move cars for repairs. All other things equal, even owners focused on the amount of time out of service that they might incur by using one shop rather than another will tend to overconsume the transportation services needed to reach more distant, alternative shops if there is no explicit cost for transportation. This

[24] Complainants' Opening Argument at 2-3.

[25] For this reason, Complainants wrongly expected offsetting declines in Union Pacific's rates for loaded tank car moves once UP began imposing Item 55-C charges for empty repair moves. Complainants' Opening Argument at 35 ("some adjustment clearly would be warranted if UP was discounting its zero-mileage rates to compensate tank car providers for car ownership costs, which include the cost of transportation to and from repair facilities pursuant to Item 55-C").

is inefficient, because it requires greater resources to move an empty tank car to a more distant shop. The longer move should be chosen only when the cost savings from using a distant shop in place of one that is closer outweigh the transportation costs arising from greater distance.

Again, a simple example illustrates how resources can be wasted if a consumer does not recognize the full cost of its choices. Milk may be cheaper at a distant Wal-Mart than at a nearby grocery store, but I will buy milk at Wal-Mart only when the savings are sufficient to compensate for the additional time and transportation costs that a trip to Wal-Mart entails. Paying more at the local grocery store will appear irrational unless transportation costs are taken into account. UP's Item 55-C makes explicit costs that are relevant in determining whether additional mileage or mileage on a railroad other than the one that obtained the loaded move is really less expensive.

If tank car owners obtain empty repair moves from a railroad that did not provide loaded moves, then there is no opportunity for the railroad providing the empty repair move to be compensated for its services or indirectly incentivize shippers to reduce costs by adjusting the price of loaded moves based on a shipper's anticipated use of unloaded moves to repair shops. (Even where both loaded moves and empty repair moves occur on the same railroad, recovery of costs through rates for loaded moves likely is not possible.) Consider a shipper that makes a loaded move on Railroad A. Railroad A will earn revenue for that move, and will move the empty car to the original loading point, or a new loading point, or to a repair facility on Railroad A for no additional charge. But if the shipper wants or needs to move the empty tank car to a shop on Railroad B, then Railroad A earns revenue, but Railroad B incurs costs and earns no revenues, even though that move imposes real costs on Railroad B (perhaps displacing or slowing down loaded moves in addition to using Railroad B's equipment and operational resources). Railroad B would not be compensated for that move if it did not charge separately for empty shop moves – it could not recover from the previous loaded move made by the shipper (which did not occur on Railroad B) and it may not handle any of the shipper's other loaded moves. Even if Railroad B could compete for loaded moves from that shipper, competition from other railroads would in general prevent the railroad from recovering the cost of the empty move that other railroads did not have to bear.

Tank car owners may choose to use a shop not located on the same railroad that made the immediately previous loaded move, or that handles the bulk of the shipper's loaded moves, for

several reasons. First, for leased cars, the owner's authorized shops may not be conveniently located in relation to where the shipper's loaded moves are made, and I understand that the lessor generally specifies which shops it authorizes shippers to use for major repairs, inspections and retrofits. Second, there may not be availability at shops located on the loaded-move railroad's line, and owners and shippers have an incentive to minimize time out of service and time in shops. Third, shops on the loaded-move railroad's line may charge higher prices than those on another railroad. Finally, optimizing the timing and location of shop moves may require the shipper to incur additional costs for tracking and economizing on such moves. Absent any incentive to do so, the shipper will choose not to incur such costs.[26]

Price signals that reflect resource costs and customer demand induce efficient choices, and economics predicts that the rail industry will adjust over time to be more efficient in response to explicit pricing of empty repair moves. A shipper may find that, once it takes into account what it must pay UP for empty shop moves, along with other costs such as time out of service that it already takes into account, it is more costly to use a more distant shop than a closer shop with a longer backlog. For leased cars, if the lessor has not authorized shops at convenient locations or has not arranged for enough shop space to provide repairs in a timely manner, then the lessor and shipper will have an incentive to negotiate an arrangement where the lessor adds shops to its shop network, or expands existing shops, thereby reducing the shipper's costs of empty repair moves. If the lessor does not want to expand its shop network, the shipper may be able to negotiate a reduced lease rate to compensate for the additional costs to use the lessor's

[26] As a matter of economics, incurring costs to monitor and quantify the use of other resources is precisely the type of efficient actions that competitive markets induce. Individuals and firms often incur costs to become more efficient. For example, a consumer deciding where to purchase a large-screen television will compare prices across retailers – either on the internet or by visiting several retailers – which takes time but that provides him with value (e.g., lower price, better television) that justifies the additional time. In economic terms, a consumer will invest resources in search until a dollar (or utility equivalent) of additional search no longer yields a dollar of cost savings. Firms develop systems and practices to reduce search costs, and tank car owners and shippers likely would develop them here so they and shippers make optimal choice among repair locations and about timing of empty shop moves when they face prices that reflect the costs of supplying those moves. (For example, Arkema's witness said "we did put together a short formal procedure which essentially just emphasized prior procedure to consistently execute ways to avoid the tariff charge" (Grow Dep. 8/30/2018 at 41:17-42:5)). The existence of such costs is not a reason why services should be provided for free or at rates that are not competitive.

preferred shop.[27] Absent explicit charges by UP for the service it provides in moving an empty car to a repair facility, there would be no incentive for the shipper and lessor to take into account the costs that UP incurs compared with the costs to the lessor and shipper of avoiding that empty repair move.

Incentives to make longer-run adjustments to enhance efficiency are created by price signals that UP and other railroads have created to reflect the costs that shipper/owners impose and to guide their decision making. Such adjustments may not yet be evident, but economics teaches that they will occur.

3. Before Item 55-C, the Cost of Empty Repair Moves Would Fall on All UP's Customers, Not Just Shippers Using Tank Cars

Complainants appear to argue that UP's charges for empty repair moves are not justified because UP earns so much revenue from loaded tank car traffic that it does not need to recover costs for empty repair moves.[28] As a matter of economics, this argument fails. It is equivalent to saying that Apple should not charge customers for headphones because it makes so much money from sales of the iPhone that it does not need to also obtain revenue from sales of headphones. Companies are not expected to give away some of their products and services if they earn profits on others, especially when the product (headphones) if free could go to customers who never purchased an iPhone. Efficient pricing of a product or service is unrelated to whether the firm is profitable and makes money on other products and services. And, as I discuss next, a firm's inability to make some customers pay for the products or services they obtain likely will harm both the firm and the firm's other paying customers in the long run.

My previous discussion showed that efficient choices are induced by the *marginal* or incremental cost of use, which a shipper incurs only if each empty repair move is priced separately. Those taking advantage of empty repair moves when they do not have to pay directly for those transportation services will use them inefficiently. However, inefficiency is not the only concern if UP is not compensated for empty repair moves. UP and other users of its transportation services, including but not limited to other shippers that have loaded tank car

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[27] The shipper also may be able to use the higher cost it will incur if it uses a more distant shop to negotiate a lower freight rate with UP.

[28] *See* Complainants' Opening Argument at 4 ("substantial consolidation of the rail industry…has virtually eliminated that problem [of "misallocation or cross-subsidization" or repair move responsibility between railroads] as to any Class I railroad because they all receive significant revenue from loaded tank car movements.").

moves on UP, will suffer harm in the long run if UP cannot collect from the parties that use UP's transportation services. System-wide harm will result because UP's overall profitability and rate of return on investment will be depressed, which will reduce UP's incentives to invest in the infrastructure that serves both customers that pay for transport of loaded moves and those who effectively obtain free empty repair moves.

UP's investments to expand and upgrade tracks, switching facilities, and other improvements benefit both loaded (paid) and empty repair (free) moves. Every dollar spent to improve those facilities could result in more paying business, but also in additional free repair moves. For example, double tracking a stretch of UP's network on which repair shops are located will attract more loaded moves, perhaps making rail transport more attractive relative to truck, but also could attract additional unpaid empty repair moves for which UP would not be compensated. The expected rate of return on such an investment will be the net return after deducting from the expected increased paying traffic the costs of providing additional unpaid free shop moves. The consequences of reduced incentives to invest fall not only on shippers using tank cars, but on shippers using other types of rail cars as well, because the vast majority of UP's infrastructure is shared by all types of rail cars used by shippers of all products.

Indeed, if Complainants are correct and UP was motivated, at least in part, to adopt Item 55-C by the prospect of a dramatic increase in empty repair moves in response to demand for retrofitting tank cars that transport flammable commodities required by the Pipeline and Hazardous Materials Safety Administration ("PHMSA"),[29] then the implementation of separate charges for empty shop moves that UP expected to disproportionately occur on UP's lines was critical in the face of a substantial increase in costs of empty shop moves and the impact that such uncompensated costs could have on its rail system overall. Increasing rates for loaded movements to compensate for increased expenses of empty moves, even if that could be done, would be inefficient and would lead to reduced volume of loaded moves and increased empty mileage, an inefficient substitution of types of traffic that would reduce the railroad's profitability and be inconsistent with market pricing. In contrast, by imposing costs of empty mileage associated with retrofits on the tank car owners that determine where such retrofits occur, UP encourages those moves to be made efficiently. With rates for loaded movements

[29] Complainants' Opening Argument at 2-3.

separately priced based on costs and demand to transport those loads, UP has efficient incentives and clear signals to make investments that benefit all its customers.

B. Mileage Equalization Payments to Compensate for "Excess" Empty Tank Car Moves Do Not Create Incentives for Efficient Decision Making about Empty Shop Moves or Properly Compensate Railroads that Provide Those Moves

Prior to January 1, 2015, all empty miles associated with empty shop moves on UP were credited as part of the tank car mileage equalization program. Under that program, participating railroads as a whole receive compensation when a tank car owner's aggregate empty (non-revenue) mileage (across all shippers) exceeds 106 percent of its loaded (revenue) mileage in a year.[30] Tank car owners that exceed the 106 percent threshold calculated across their entire fleet of cars compensate railroads collectively at a rate of $0.95 per excess empty mile.[31] Total mileage equalization payments are then distributed to the railroads according to a formula under which revenue for "excess empty mileage will be distributed to the participating carriers by the AAR in direct proportion to such carriers' portion of excess empty mileage to the total accumulated excess empty mileage."[32] I understand that, when UP began charging shippers directly through Item 55-C for the mileage associated with empty shop moves, the mileage subject to those charges no longer was credited to the mileage equalization system and included in the calculations of revenue potentially owed to railroads for "excess" empty moves.[33]

Unlike the charges UP imposes pursuant to Item 55-C, the mileage equalization system neither provides clear pricing signals nor assures that the railroad incurring the costs of empty repair moves is compensated for those moves. This is because the incremental cost to a shipper of an empty repair move, if any, is unrelated to the cost that move imposes on a railroad or to the

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[30] http://www.gatx.com/wps/wcm/connect/GATX/GATX_SITE/Home/Rail+North+America/Customer+Care/Mileage/ ("If the combined empty miles traveled in a year by a customer's leased tank rail cars are more than 106% of combined loaded miles, a penalty will be assessed against the difference in the third quarter of every year.")

[31] Railinc, *Freight Tariff RIC 6007-0* Item 187 (https://www railinc.com/rportal/documents/18/1125211/RIC_6007_O_03-01-19.pdf).

[32] *Ibid.*

[33] *See* Rocker Verified Statement at fn. 10. I understand UP still participates in the mileage equalization program, and still accumulates empty miles for empty returns, empty moves to shops after a loaded move, empty repositioning (e.g., from one loading point to another), and empty moves to/from storage locations. However, I understand UP has petitioned the STB to allow UP to discontinue participation in the mileage equalization program. Nothing in my testimony depends on UP's continued participation in that program, and my analysis would be unaffected by UP's exit from that program.

revenue the railroad receives (if any) from the move. The annual aggregation of an owner's loaded and empty miles and the fact that an owner makes no payment unless its empty miles exceed loaded miles by six percent over the year mean that any link between the resource costs imposed on a particular railroad for an empty repair move and the decision by the owner when and where to send a tank car for shop repairs or cleaning is highly attenuated.

Efficient choices are made when a decision maker knows or can reasonably predict the costs associated with making one choice rather than another. Even if the current regulated rate of $0.95 paid by a car owner for an additional empty mile movement (if it exceeds the 106 percent threshold) reflected the true market price of that move (which evidence shows it does not), the possibility of incurring a cost through the mileage equalization program if a shipper makes an empty repair move is too remote to incentivize efficient conduct and properly compensate UP for several reasons.

First, a car owner that does not anticipate accruing empty miles greater than 106 percent of loaded miles will face no expected cost for the movement to the UP shop. Thus, if all the tank car owner's loaded and empty miles, except empty repair moves, are made on competing railroads, including empty miles in excess of loaded miles but below the 106 percent threshold, the competing railroads will obtain all the revenue associated with those moves while UP will bear all the costs of the empty shop moves. The mileage equalization program provides no incentive for the car owner to select a shop located on the railroad earning revenue from that owner rather than a shop on UP – the transportation costs to the car owner (zero) are the same either way.

Second, even car owners that expect to exceed the 106 percent threshold will not face appropriate pricing signals when considering when and where to move a car for repairs or cleaning. The regulated rate for excess empty moves imposed through the mileage equalization program likely does not approximate the market price for such moves. Under Item 55-C, the mileage rate for empty shop moves is substantially greater than $0.95. Given that (as I understand) the Item 55-C rate is approximately the same as UP charges for empty shop moves of other types of rail cars for which, I understand, the practice of charging for such moves has existed for decades, there is a presumption that the Item 55-C rate better approximates a true market rate for such moves than does a regulated rate indexed to a rate set decades ago without

taking into account the true cost (including the opportunity cost) of shop moves and the market demand for such services.

Third, even if the regulated rate were a market rate, mileage equalization payments are determined based on the aggregated "excess" miles incurred by an owner (a lessor or shipper that owns the private cars) for all railroads collectively, not based on the excess miles attributable to a particular car owner for a particular shipment and choice of route. This means that equalization payments (if any) made because the aggregate empty mileage attributable to an owner exceeds 106% of its loaded miles likely will not be received proportionately – or at all – by the railroads that incurred the actual cost of empty repair moves, or will not be recognized by the shipper/owner responsible for decisions that result in excess empty moves.

Thus, the mileage equalization system does not provide direct and transparent price signals that incentivize decision makers to economize on empty repair moves and empty miles.

C. UP's Policy of Charging for Empty Repair Moves of Tank Cars Is the Same as It and Other Railroads Impose for Empty Repair Moves of Other Types of Rail Cars

One way that economists evaluate whether a business practice is a competitive outcome is whether that practice tends to be adopted in other, similar situations. Here, the evidence is that separate pricing of empty rail car shop moves not following a loaded move is the general rule, not the exception.[34] For other types of rail cars, railroads charge separately for empty shop moves, rather than through an industry-wide, collective, equalization-like "truing up" across all owners and all railroads annually.[35] From this, I infer that the competitive practice for tank cars, like for other types of rail cars, is for owners to pay for the freight services they consume and then purchase and pay separately for the empty shop moves that they choose to make.

D. Complainants Wrongly Criticize UP's Motivation

Complainants' claim that {{ }} is ironic because Complainants are certainly focused on their own profits in seeking to retain the old system. Complainants imply that it is unreasonable for UP to profit from providing pricing incentives for shippers and lessors to take into account how their use of UP's services for empty

[34] Rocker Verified Statement at 1.

[35] *Ibid.*

[36] Complainants' Opening Argument at 5.

repair moves affects the railroad's revenues, efficiency and investments. Yet, competition drives firms in competitive industries to charge separate prices for the various services they provide when cost and demand considerations make it efficient to do so. The goal of railroad deregulation was to allow and encourage railroads to respond competitively to market conditions. Criticizing UP for acting like any other competitive business would be contrary to that basic policy goal.

VI. REQUIRING RAILROADS TO PAY MILEAGE ALLOWANCES RATHER THAN ZERO-MILEAGE RATES MAKES NO ECONOMIC SENSE

Complainants also argue that railroads should be required to pay rates that provide for payment of mileage allowances (per-mile payments on loaded moves designed to account for the costs of owning and maintaining rail cars) according to a prescribed formula, rather than zero-mileage rates. Complainants argue that railroads are required to compensate shippers when shippers provide cars, but neither the Board nor shippers themselves can determine whether railroads are compensating owners appropriately for providing private tank cars unless railroads have rates in place that provide for payment of mileage allowances. Alternatively, they suggest railroads supply some tank cars themselves, and so provide a benchmark against which to measure the "discount" embedded in zero-mileage rates.[37]

I offer no opinion on what is required under the law. As a matter of economics, however, shippers should not expect lower net rates if UP must pay mileage allowances, and so they have not been harmed by zero-mileage rates. I understand that both shippers and railroads have preferred zero-mileage rates, which have predominated since at least the early 2000s.[38]

The example of shoes sold in pairs illustrates the applicable economic principle that the allocation of price between components sold in fixed proportions is economically meaningless. Shippers have a demand for transportation services. The shipper's willingness to pay for transportation services is unaffected by how its total payment is allocated between the cost of transportation net of a mileage allowance and the mileage allowance (essentially, a negative price). Thus, a shipper willing to pay the equivalent of a $10 per mile zero-mileage rate will be

[37] Complainants' Opening Argument at § III.A.

[38] *See* Craven Verified Statement at 1. According to Complainants' expert, Thomas D. Crowley, UP paid mileage allowances on {{ }} of its loaded moves between 2014 and 2017. Crowley Verified Statement at 10.

willing to pay the railroad $12 if the railroad pays the shipper a $2 mileage allowance (in effect, a $2 refund of the $12 the shipper paid the railroad), with two transactions substituting for one under zero-mileage rates. Neither the shipper's willingness to pay nor the railroad's willingness to supply transportation service will be affected by how the net price is broken down.[39]

The same logic that zero-mileage rate will incorporate the implicit mileage allowance that Complainants claim should be paid separately to providers of tank cars applies whether the implicit mileage allowance is the same for all cars or differs across cars based on car cost and age. Requiring explicit payment of mileage allowances would simply add transaction costs and require additional monitoring, invoicing and accounting of payments between the parties compared with a zero-mileage system (which likely explains why railroads and shippers rarely negotiate full-mileage rates).[40] If a shipper decided it preferred to receive a mileage allowance rather than pay zero-mileage rates, the railroad would require a higher transportation rate to offset the mileage allowance, and the shipper would have demonstrated its willingness to pay a higher gross mileage rate that resulted in the same net rate. The only difference is that both the railroad and the shipper would incur additional transaction costs to account for the refund. Therefore, I am not surprised that very few shippers who provide tank cars have requested mileage allowances in the recent past.[41]

Complainants argue that {{

}}, which they claim makes Item 55-C unlawful. I interpret their argument to be that (a) UP is responsible for paying for empty repair moves because this is part of the railroad's obligation, so (b) when UP began charging explicitly for empty repair moves it had an obligation to make an offsetting

[39] This contrasts with the inefficiency when the empty repair moves are not priced separately, because the cost of empty shop moves cannot be rolled efficiently into transportation rates for two reasons First, there is no fixed ratio of loaded to empty shop moves either overall or for individual railroads. Second, there is a real resource cost to using transportation services for empty shop moves unrelated to loaded moves, so separate prices create incentives to reduce unnecessary empty shop mileage.

[40] The administrative burden associated with payment of mileage allowances is described in the Verified Statement of Robert C. Hirst.

[41] Craven Verified Statement at 1-2.

mileage allowance payment to tank car providers to ensure they are not charged for costs that railroads must bear.[42]

Again, I do not address the question of what costs railroads and shippers are supposed to bear under the applicable law. However, I note that Complainants' argument seems inconsistent with the nature of the Item 55-C charges. Item 55-C charges are transportation charges that apply only to empty repair moves not preceded by a loaded move. In other words, they apply to a small fraction of all the costs of owning and maintaining tank cars supposedly covered by mileage allowance payments. If UP began paying mileage allowances (*i.e.*, compensation for all costs of owning an maintaining tank cars) when it imposed Item 55-C charges (*i.e.*, charges for one component of car ownership and maintenance cars), it would have been compensating shippers for much more than their costs of empty repair moves, and it would require large adjustments in rate for loaded move to offset those allowances.

If Complainants are saying UP did not expect to change line-haul rates for loaded moves as a result of its adoption of Item 55-C, this would be consistent with my conclusion that rates for loaded rates would not incorporate compensation for empty repair moves because loaded and empty moves are subject to different demand conditions. I would not expect the rates for loaded moves generally to have included compensation for empty repair moves, because demand for loaded moves is not linked to demand for empty repair moves.

Finally, whether or not the costs of empty repair moves were somehow incorporated for some shippers in the rates for loaded moves, those rates will adjust to reflect the new charges as the relevant contracts expire or as shippers request new tariffs.[43] There is no need for regulatory intervention.[44]

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[42] The logic of Complainant's argument is not entirely clear, but they say that UP's implementation of Item 55-C is inconsistent with an ICC holding that "tank car providers ultimately recoup such charges through mileage allowances." (Complainants' Opening Argument at 21.)

[43] To the extent contracts required shippers to bear the risk that railroads would impose new charges during the term of the contract, that was a risk shippers apparently agreed to assume. Otherwise, I would expect shippers to argue that UP breached the contracts by adopting the empty repair move charges.

[44] The ICC recognized that changes in rules that affect the allocation of price between railroads and shippers will cause adjustments in contract terms. *See General American Transp. Corp. v. Indiana Harbor Belt Railroad Co.*, decided February 22, 1988, at 3 ("Thus, car owners will not be forced permanently…to bear a cost they cannot recoup from the railroads."). As a matter of economics, the incidence of (i.e., who ultimate bears) a cost will be worked out in the marketplace irrespective of where that cost initially is imposed.

VERIFICATION

I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge, belief, and information. Further, I certify that I am qualified and authorized to file this statement.

Executed on April 25, 2019.

/s/ Kevin M. Murphy

Curriculum Vitae

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2002-2005: George J. Stigler Professor of Economics, Department of Economics and Booth School of Business, The University of Chicago

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1988 – 1989: Associate Professor of Business Economics and Industrial Relations, The University of Chicago

1986 – 1988: Assistant Professor of Business Economics and Industrial Relations, The University of Chicago

1983 – 1986: Lecturer, Booth School of Business, The University of Chicago

1982 – 1983: Teaching Associate, Department of Economics, The University of Chicago

1979 – 1981: Research Assistant, Unicon Research Corporation, Santa Monica, California

Honors and Awards

2008: John von Neumann Lecture Award, Rajk College, Corvinus University, Budapest

2007: Kenneth J. Arrow Award (with Robert H. Topel)

October 2005: Garfield Research Prize (with Robert H. Topel)

September 2005: MacArthur Foundation Fellow

1998: Elected to the American Academy of Arts & Sciences

1997: John Bates Clark Medalist

1993: Fellow of The Econometric Society

1989 – 1991: Sloan Foundation Fellowship, The University of Chicago

1983 – 1984: Earhart Foundation Fellowship, The University of Chicago

1981 – 1983: Fellowship, Friedman Fund, The University of Chicago

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Publications

Books

Social Economics: Market Behavior in a Social Environment with Gary S. Becker, Cambridge, MA: Harvard University Press (2000).

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Deposition of Kevin M. Murphy, July 22, 2017, in the Matter of Blue Cross Blue Shield Antitrust Litigation (MDL No.: 2406), The United States District Court for the Northern District of Alabama Southern Division. Master File No. 2:13-CV-20000-RDP.

Expert Report of Kevin M. Murphy, August 25, 2017, in the Matter of Gene R. Romero, et al. v. Allstate Insurance, et al., The United States District Court for the Eastern District of Pennsylvania. Case No. 01-3894 (consolidated with other matters) (E.D. Pa.).

Expert Rebuttal Report of Kevin M. Murphy, September 18, 2017, in the Matter of Gene R. Romero, et al. v. Allstate Insurance, et al., The United States District Court for the Eastern District of Pennsylvania. Case No. 01-3894 (consolidated with other matters) (E.D. Pa.).

Expert Report of Kevin M. Murphy, November 3, 2017, in the Matter of Valassis Communications, Inc. v. News Corporation, News America Marketing, a/k/a News America Incorporated, a/k/a News America Marketing Group, a/k/a News America Marketing FSI L.L.C., a/k/a News America Marketing FSI, Inc.; and News America Marketing In-Store Services L.L.C., a/k/a News America Marketing In-Store Services, Inc., The United States District Court for the Southern District of New York. Case No. 1:17-cv-07378-PKC.

Deposition of Kevin M. Murphy, January 17, 2018, in the Matter of Valassis Communications, Inc. v. News Corporation, News America Marketing, a/k/a News America Incorporated, a/k/a News America Marketing Group, a/k/a News America Marketing FSI L.L.C., a/k/a News America Marketing FSI, Inc.; and News America Marketing In-Store Services L.L.C., a/k/a News America Marketing In-Store Services, Inc., The United States District Court for the Southern District of New York. Case No. 1:17-cv-07378-PKC.

Verified Statement of Kevin M. Murphy, January 19, 2018, In Re Biogen '755 Patent Litigation, The United States District Court for the District of New Jersey. Civil Action No. 10-2734 (CCC/JAD).

Trial Testimony of Kevin M. Murphy, February 1, 2018, In Re Biogen '755 Patent Litigation, The United States District Court for the District of New Jersey. Civil Action No. 10-cv-2734 (CCC/JBC).

Expert Report and Testimony of Kevin M. Murphy, February 28, 2018 in the Matter of Washington Metropolitan Area Transit Authority and Amalgamated Transit Union Local 689, Interest Arbitration Under Sections 66(C) Of the WMATA Compact, The United States District Court for the District of Columbia.

Expert Report of Kevin M. Murphy, June 29, 2018, in the Matter of Gene R. Romero, et al. v. Allstate Insurance, et al., The United States District Court for the Eastern District of Pennsylvania. Case No. 01-3894 (consolidated with other matters) (E.D. Pa.).

Expert Report of Kevin M. Murphy, July 30, 2018, in the Matter of Daniel Gordon, et al. v. Amadeus IT Group, S.A. et al. The United States District Court for the Southern District of New York. Civ. A. No. 1:15-cv-05457-KPF.

Declaration of Kevin M. Murphy, August 16, 2018, in the Matter of Genentech, Inc., Biogen, Inc., Hoffmann-La Roche Inc., and City of Hope v. Celltrion, Inc., Celltrion Healthcare Co., Ltd., Teva Pharmaceuticals USA, Inc., and Teva Pharmaceuticals International GmbH, The United States District Court for the District of New Jersey. Civ. A. No. 18-cv-00574 (RMB) (KMW).

Expert Report of Kevin M. Murphy, September 21, 2018, in the Matter of Certain Memory Modules and Components Thereof, International Trade Commission, Washington, DC 20436. No. 337-TA-1089.

Reply Declaration of Kevin M. Murphy, September 26, 2018, in the Matter of Genentech, Inc., Biogen, Inc., Hoffmann-La Roche Inc., and City of Hope v. Celltrion, Inc., Celltrion Healthcare Co., Ltd., Teva Pharmaceuticals USA, Inc., and Teva Pharmaceuticals International GmbH, The United States District Court for the District of New Jersey. Civ. A. No. 18-cv-00574 (RMB) (KMW).

Expert Rebuttal Report of Kevin M. Murphy, October 9, 2018, in the Matter of Certain Memory Modules and Components Thereof, International Trade Commission, Washington, DC 20436. No. 337-TA-1089.

Deposition of Kevin M. Murphy, October 29, 2018, in the Matter of Certain Memory Modules and Components Thereof, International Trade Commission, Washington, DC 20436. No. 337-TA-1089.

Confidential Submission to the U.S. Department of Justice, Economic Considerations for Modification and Termination of the ASCAP Consent Decree, October 30, 2018.

Expert Report of Kevin M. Murphy, March 1, 2019, in the Matter of First Impressions Salon, Inc., Roy Mattson, KPH Healthcare Services, Inc., d/b/a Kinney Drugs, Inc. and Piggly Wiggly Midwest, LLC. v. National Milk Producers Federation, Cooperatives Working Together, Dairy Farmers of America, Inc., Land O'Lakes, Inc., Dairylea Cooperative Inc., Agri-Mark, Inc. d/b/a Cabot Creamery Cooperative, Inc., The United States District Court for the Southern District of Illinois. Case No. 3:13-cv-00454-SCW.

Expert Report of Kevin M. Murphy, March 15, 2019, in the Matter of Robert Binz V, Michael Binz, Leslie Clemenson, William Clynes, Andrew Margolick, Gregory Melita, and Nili Sinai-Nathan v. Amadeus IT Group, S.A., Amadeus North America, Inc., Amadeus Americas, Inc., Sabre Corporation f/k/a Holdings Corporation, Sabre Holdings Corporation, Sabre GLBL Inc., Sabre Travel International Limited, Travelport Worldwide Limited, and Travelport LP d/b/a Travelport, The United States District Court for the Southern District of New York. Civ A. No. 1:15-cv-05457-KPF.

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,	)	STB Docket Nos. NOR 42144
Complainants,	)	Consolidated with: Docket No. NOR 42150 Docket No. NOR 42152
v.	)	Docket No. NOR 42153
UNION PACIFIC RAILROAD COMPANY,	)	
Defendant.	)	

VERIFIED STATEMENT OF MICHAEL R. BARANOWSKI

I. Introduction

I am Michael R. Baranowski, a Senior Managing Director at FTI Consulting and the head of FTI's Network Industries Strategies group within the Economic Consulting division. I have over thirty-five years of experience in analyzing railroad traffic and revenue patterns, evaluating railroad operations, analyzing railroad data, calculating and projecting the costs of providing railroad service, analyzing contribution and profitability, analyzing damage claims, and determining the reasonableness of railroad rates and charges. I have testified numerous times before the Surface Transportation Board, arbitration panels, and other federal and state regulatory agencies regarding economic issues related to transportation. A statement of my qualifications is attached to my verified statement.

I have been asked by Union Pacific Railroad (UP) to analyze tank car movement data produced in discovery in this proceeding, and in particular, to analyze (i) UP's relative share of empty moves to and from repair facilities, and (ii) movements of cars owned and leased by Individual Complainants that were subject to charges under UP's Item 55-C.

My analyses show: (1) UP handles a disproportionate share of empty moves to and from repair shops and often moves empty cars to and from shops even though it has not moved the cars in loaded revenue service in the surrounding periods; and (2) the relative use of Item 55-C moves varies considerably among Individual Complainants. Details of my analysis and findings are discussed in the sections below.

II. Background

In this section, I describe the data I used to conduct my analyses and the manner in which those data were compiled and processed to generate my results.

a. Data Overview

I used two main sources of data produced in discovery in this proceeding.

First, UP produced waybill-related traffic and revenue data that provides information for all tank car movements, loaded and empty, on UP's system between 2010 and 2017. These data include, among other things, the tank car's initial and car mark, origin, interchange, and destination locations, commodity, net tons in the tank car, UP's operating miles and revenues, and the rate authority under which each shipment moved. My analysis focused on the 2015 to 2017 period when Item 55-C movements occurred. I identified Item 55-C moves as empty shipments moving with a standard transportation commodity code ("STCC") of 3742217 and a rate provided by tariff UP 4703, Item 1100 or 1200.[1] The below table summarizes all movement records for revenue shipments between 2015 and 2017 in UP's data.

Table 1
Summary of UP Tank Car 2015 – 2017 Revenue Shipments

	Moves	UP Revenues ($Millions)
55-C Moves	{{ }}	{{ }}
Other Revenue Moves	{{ }}	{{ }}
Total Revenue Moves	{{ }}	{{ }}
Percent 55-C	{{ }}	{{ }}

See Baranowski Workpaper "UP Data Tables.xlsx", tab "Tables".

Second, I was provided certain railroad event data maintained by Railinc, which I understand UP obtained through discovery requests to certain companies that own and lease tank cars. The Railinc data report detailed operational events between 2010 and 2016 by time and by location among all railroads for the tank cars owned by GATX Corporation, Union Tank Car Company, Trinity Industries, and American Railcar Industries. Unlike the UP waybill data that are limited to tank car activity on UP's system, the Railinc data provide complete tank car event

[1] Union Pacific's rates for moves subject to empty repair move charges under Item 55-C were in Item 1100 in 2015, then moved to Item 1200 beginning January 1, 2016.

information for the full route of movement over all participating carriers and include events reporting when and where individual cars were interchanged by railroads for movements to and from shops. My analysis of the Railinc data focused on the 2015 to 2016 period when Item 55-C movements occurred. For those years, the Railinc data include detailed movement information for over {{ }} unique tank cars, representing more than {{ }} of the estimated number of North American tank cars in service, as well as more than {{ }} of tank cars that moved on UP during the 2015-2016 time period.[2] Table 2 summarizes the proportion of the North American tank car fleet for which event information are reported in the Railinc data produced for this proceeding.

Table 2
Proportion of North American Tank Car Fleet Represented in 2015 – 2016 Railinc Data

	Tank Cars	Percent Covered
Approximate Total Tank Cars in Service in North America During 2015-16 Period	414,780	100%
Tank Cars in 2015-2016 Railinc Data Belonging to Four Tank Car Owners	{{ }}	{{ }}
Tank Cars in 2015-2016 UP Data	{{ }}	{{ }}
Tank Cars in Both Railinc and UP Data	{{ }}	{{ }}

See Baranowski Workpaper "Railinc Tables.xlsx", tab "Tables".

In addition to the UP and Railinc data, Arkema, Cargill, Tesoro, Valero, POET Ethanol and POET Nutrition (Individual Complainants) produced limited and varying information related to their respective tank car fleets that I used to identify their shipments for certain of my analyses. Details of how I used the data provided by each of the named complainants are included in my work papers.

[2] During my review of the Railinc data, I determined that approximately 20% of freight cars for which event data were produced were not tank cars, and I excluded those other cars from my analyses.

b. Data Processing

The Railinc data cover all moves on all railroads, while the UP data provide information for only the portion of each tank car movement on UP. As such, I relied on Railinc data for much of my analysis of UP's relative share of empty repair moves.[3] Because the Railinc data include information for every event reported for each tank car on each carrier participating in the shipment, it was necessary to first aggregate the information for each tank car shipment by participating carrier. Table 3 shows a summary of the detail provided in the Railinc data for a UP tank car empty shop move to Hearne, Texas, for which the loaded moves before and after the shop move occur on another railroad.

Table 3
Railinc Detail For UP Interline Shop Move{{

}}See Baranowski Workpaper "Railinc Example.xlsx", tab "Example".

[3] Because my analysis of Railinc data focused on UP's relative share of empty moves to shops compared to other railroads, I did not attempt to distinguish the portion of shop moves on UP that would be subject to charges under the conditions established in Item 55-C from shop moves that would be "free" to shippers even with empty repair move charges in place (e.g., shop moves immediately following loaded line-haul moves on the railroad moving the car to the shop, shop moves resulting from railroad damage).

The movement summarized in Table 3 is an example of a tank car handled by UP only to be shopped. It shows that the tank car moved in loaded revenue service on NS, was moved in interline service from NS to UP via CSX to the repair facility in Hearne, Texas and was then returned to NS via interline movement and returned to loaded service on NS. The structure of the summarized Railinc data allowed me to easily identify the movement characteristics of the shop moves in which UP participated and UP's role in the move, which are summarized below.

III. My Analysis of the Railinc Data Shows that UP Bears a Disproportionate Share of Empty Tank Car Movements to Repair Shops.

The Railinc data I analyzed show that UP handles a disproportionate share of empty tank car moves to and from repair facilities. The data also establish that movements of tank cars across the United States rail network do not adhere, for the most part, to any specific pattern or dedicated cycles. On the contrary, the data show that tank cars are dispatched routinely to myriad origins and destinations across the country. For example, {{

}}[4] The data also show empty shop moves are infrequent for any specific car. In 2016, {{

}}[5] This cycle aligns with the ten year mandatory tank car requalification mandates for tank cars carrying certain commodities.

The Railinc data also show why it is not surprising to find UP handles a disproportionate share of empty repair moves. Using the Railinc data, I identified the tank car shop locations accessible to each of the Class I railroads based on reporting events where Class I railroads

[4] See Baranowski workpaper "Tank Car Characteristics.xlsx", tab "Data".
[5] See Baranowski Workpaper "Railinc Tables.xlsx", tab "Tables".

switch tank cars to and from shops. As the table below shows, UP serves more shop locations than any other Class I railroad.[6] Table 4 shows the number of shop event locations reported in the Railinc data in 2016.

Table 4
Summary of Number of Shop Event Reporting Locations in Railinc Data

Class I Railroad	Locations in Continental United States Where Tank Cars Are Interchanged to Shops by Class I Railroad [1/]
UP	{{ }}
BNSF	{{ }}
CSXT	{{ }}
NS	{{ }}
CPRS	{{ }}
CN	{{ }}
KCS	{{ }}

[1/] Includes 4 locations served by multiple Class I railroads

See Baranowski Workpaper "Shop Locations.xlsx", tab "Tables".

The concentration of shops on UP translates into UP bearing more of the operational burden of empty tank car movements to repair shops than other Class I railroads. Moves of empty tank cars to, from, and between shops impose operational burdens that can be measured in terms of empty miles, car handlings, and switches at the shop. I measured each of these metrics using the 2016 Railinc movement data. As shown below, each of these metrics shows that UP bears more of the operational burden for shop moves than any other Class I railroad.

First, as Table 5 shows, UP incurred by far the most empty miles moving tank cars to, from, and between shops – {{ }} more empty shop miles than any other Class I railroad.

[6] I also considered additional shops accessible to each Class I railroad by delivering the tank car to the shortline railroad that serves the shop. Calculations contained in my workpapers confirm that from this standpoint UP likewise serves the most shops of all Class I railroads.

Table 5
Empty Shop Related Tank Car Miles from Railinc Data

Estimated Empty Car-Miles To, From, and Between Shops For Tank Cars in Railinc Data (Millions)	
UP	{{ }}
CSXT	{{ }}
BNSF	{{ }}
NS	{{ }}
CN	{{ }}
CP	{{ }}
KCS	{{ }}

See Baranowski Workpaper "Railinc Tables.xlsx", tab "Tables".

In addition to incurring the most miles to, from, and between shops, UP overall participates as an originating, terminating, or overhead carrier in {{ }} of all movements to, from or between shops reported in the Railinc data. Also, because of the disproportionate number of shops on its network, UP is the switching carrier at the repair shop location for {{ }} of all shop events nationwide.[7]

The operational burdens of empty shop moves on UP are not only greater than the burdens on other railroads, they are disproportionately greater. To put this into perspective, I compared the relative percentage of loaded miles to empty shop miles among railroads. As Table 6 shows, the relative proportion of empty tank car miles to, from, and between shops on UP is considerably greater than that of the other Class I carriers.

[7] See Baranowski Workpaper "Railinc Tables.xlsx", tab "Tables".

Table 6
Relative Proportion of Empty Shop Miles to Loaded Miles

	Percent of Loaded Miles	Percent of Empty Shop Miles	Relative Share of Shop Miles Over / (Under) Loaded Miles
Union Pacific Railroad	{{ }}	{{ }}	{{ }}
Other Western Class I Railroads	{{ }}	{{ }}	{{ }}
Eastern Class I Railroads	{{ }}	{{ }}	{ }}

See Baranowski Workpaper "Railinc Tables.xlsx", tab "Tables".

In addition, UP often participates in only the move to the shop and not the prior or subsequent loaded move. To further understand the dynamics that result in UP handling empty shop moves but not loaded revenue moves, I examined the movement history of tank cars making shop visits in Railinc data for 2015 and 2016 to determine how often UP participated in moving tank cars to shops but did not participate in the loaded move immediately prior to or subsequent to an empty shop move on UP.[8] Specifically, I identified shop visits for tank cars where data were available to both identify which railroads moved the tank car to, from, and between the shops, as well as to identify the railroads that moved the tank car in loaded service immediately before and after the tank car visited the shop. For the tank cars with sufficient data to analyze, I identified all shop visits where UP participated in either the move to, from, and/or between shop. Then I identified that UP did not participate in the loaded move before or after the shop visit for {{ }} of these shop visits.[9] This demonstrates that tank cars commonly move in loaded service on other railroads, come onto UP's system only to visit a shop, and then immediately return to loaded service on other railroads. (An example is shown in Table 3.) In

[8] I analyzed movements in 2015 as well as 2016 in order to have a larger set of complete move cycles to analyze.
[9] See Baranowski Workpaper "UP Data Tables.xlsx", tab "Tables".

these situations, a tank car is used exclusively by other railroads for loaded service not involving UP, but UP bears the burden of moving the tank car to and/or from shops.

Finally, using the data produced by UP, I considered the issue of disproportionate burdens from UP's perspective. Specifically, I identified all tank cars that made Item 55-C moves during each year from 2015 through 2017, and determined which of these tank cars also made other revenue moves on UP during the same year. As Table 7 shows, Item 55-C charges are UP's only source of revenues during the year for at least {{ }} of all tank cars it moves to and from shops. In other words, for {{ }} the cars UP moves to shops in a given year, UP receives no revenue for loaded line-haul moves in that year. UP's only source of revenue for handling those cars is the Item 55-C charge.

Table 7
Proportion of UP Shipments of Empty Tank Cars to Shops for Which Tariff 55-C Is UP's Only Revenue

	2015	2016	2017
Total 55-C Moves	{{ }}	{{ }}	{{ }}
Portion of 55-C Moves For Tank Cars Not In Other UP Revenue Service During Year	{{ }}	{{ }}	{{ }}
Percent	{{ }}	{{ }}	{{ }}

See Baranowski Workpaper "UP Data Tables.xlsx", tab "Tables".

IV. Empty Tank Car Shopping Practices of Individual Complainants Vary Considerably.

The UP tank car data suggest that shippers have different levels of demand for shop moves, and that their shop moves have different characteristics. As shown below in Table 8, the share of Item 55-C moves in relation to all revenue moves on UP from 2015 through 2017 varies considerably among Individual Complainants. For example, {{

}}

Table 8
Percentage of Shop Moves to Total Revenue Moves on UP for Individual Complainants

	2015-17 UP Revenue Moves		
	55-C Shop Moves	Total Revenue Moves	Percent 55-C
Arkema	{{ }}	{{ }}	{{ }}
Cargill	{{ }}	{{ }}	{{ }}
Poet Ethanol	{{ }}	{{ }}	{{ }}
Poet Nutrition	{{ }}	{{ }}	{{ }}
Tesoro	{{ }}	{{ }}	{{ }}
Valero	{{ }}	{{ }}	{{ }}
Other	{{ }}	{{ }}	{{ }}
Total	{{ }}	{{ }}	{{ }}

See Baranowski Workpaper "UP Data Tables.xlsx", tab "Tables".

Differences among shippers' shop move practices are suggested by different average lengths of haul for Item 55-C moves. Average lengths of haul for 55-C moves from 2015 through 2017 varied considerably for Individual Complainants, as shown below in Table 9. For example,

{{

}}

Table 9
Average Length of Haul For Shop Moves of Individual Complainants

	Average 55-C Miles
Arkema	{{ }}
Cargill	{{ }}
Poet Ethanol	{{ }}
Poet Nutrition	{{ }}
Tesoro	{{ }}
Valero	{{ }}
Other	{{ }}
Total	{{ }}

See Baranowski Workpaper "UP Data Tables.xlsx", tab "Tables".

V. Conclusion

My analysis of tank car movement data reveals considerable variation in empty repair moves among railroads and among shippers. My analysis shows UP faces significant and disproportionate burdens in handling empty repair moves as compared with other Class I railroads. My analysis also shows considerable variation in the relative amount and nature of empty repair moves among shippers in general, and particularly among Individual Complainants.

VERIFICATION

I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge, belief, and information. Further, I certify that I am qualified and authorized to file this statement.

Executed on April 26, 2019

/s/ Michael R. Baranowski

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EDUCATION

B.S. in Accounting, Fairfield University

Supplemental Finance Studies, Kean College

Mike Baranowski heads FTI's Network Industries Strategies practice and provides strategic, financial and economic consulting services to the telecommunications and railroad and pipeline transportation industries. He has special expertise in analyzing and developing complex costing and cash flow models, conducting detailed operations analysis, and transportation engineering. Much of his work involves providing oral and written expert testimony before courts, arbitration panels and regulatory bodies.

He is a recognized expert in railroad regulatory economics and has assisted FTI's railroad clients in a broad range of litigation and regulatory engagements involving pricing of services, contract disputes, damage calculations and analyses of the specific effects of pending or proposed changes in policy or regulation.

Some of Mr. Baranowski's representative experience includes:

- Development of strategic litigation approach for large railroad rate proceedings based on the theory of Constrained Market Pricing and the Stand-Alone cost test. Theory assumes the existence of a hypothetical, efficient competitor and involves detailed analysis of railroad operations, expenses, captial expenditures and revenues.
- Development of a suite of modeling tools to assess the regulatory risk of railroad rates for a mix of commodities based on key cost drivers and forecasts.
- Design and development of modeling tools designed to simulate the cost of competitive entry into local telecommunications markets and directing the efforts of a nationwide team of testifying experts presenting the cost model results in multiple proceedings across the country.
- Detailed analysis, critique and restatement of complex cost models developed for the railroad, telecommunications, pipeline and trucking industries.
- Designing modeling tools for use in calculating the costs of competitive entry into railroad, telecommunications and pipeline markets.
- Conducting detailed analyses of railroad operations and developing the associated capital requirements and operating expenses attributable to specific movements and the incremental capital and operating expense requirements attributable to major changes in anticipated traffic levels.

Mr. Baranowski holds a B.S. in Accounting from Fairfield University in Fairfield, Connecticut and has pursued supplemental finance studies at Kean College in Union, New Jersey.

SELECT RAILROAD TESTIMONY

Surface Transportation Board

August 24, 2009	Docket No. 42114 US Magnesium, L.L.C. v. Union Pacific Railroad Company, Opening Evidence of Union Pacific Railroad Company
October 22, 2009	Docket No. 42114 US Magnesium, L.L.C. v. Union Pacific Railroad Company, Rebuttal Evidence of Union Pacific Railroad Company
January 19, 2010	Docket No. 42110 Seminole Electric Cooperative, Inc. v. CSX Transportation, Inc., Reply Evidence of CSX Transportation, Inc.
May 7, 2010	Docket No. 42113 Arizona Electric Power Cooperative, Inc. v. BNSF Railway Company and Union Pacific Railroad Company, Joint Reply Evidence of BNSF Railway Company and Union Pacific Railroad Company
November 22, 2010	Docket No. 42088 Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company, BNSF Comments on Remand, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
January 6, 2011	Docket No. 42056 Texas Municipal Power Agency v. BNSF Railway Company, BNSF Reply to TMPA Petition for Enforcement of Decision, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
October 28, 2011	Docket No. FD 35506 Western Coal Traffic League - Petition for Declaratory Order, Opening Evidence of BNSF Railway Company, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
November 10, 2011	Docket No. 42127 Intermountain Power Agency v. Union Pacific Railroad Company, Reply Evidence of Union Pacific Railroad Company
November 28, 2011	Docket No. FD 35506 Western Coal Traffic League - Petition for Declaratory Order, Reply Evidence of BNSF Railway Company, Joint Reply Verified Statement of Michael R. Baranowski and Benton V. Fisher
May 10, 2012	Docket No. 42056 Texas Municipal Power Agency v. BNSF Railway Company, BNSF Reply to TMPA Petition to Reopen and Modify Rate Prescription, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
November 30, 2012	Docket No. 42125 E.I. DuPont De Nemours & Company v. Norfolk Southern Railway Company, Reply Evidence of Norfolk Southern Railway Company
December 7, 2012	Docket No. Ex Parte 715, Rate Regulation Reforms, Reply Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski
January 7, 2013	Docket No. 42130 SunBelt Chlor Alkali Partnership v. Norfolk Southern Railway Company, Reply Evidence of Norfolk Southern Railway Company
March 1, 2013	Ex Parte No. 711 Petition for Rulemaking to Adopt Revised Competitive Switching Rules, Opening Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski and Richard W. Brown
April 12, 2013	Docket No. 42136 Intermountain Power Agency v. Union Pacific Railroad Company, Reply Evidence of Union Pacific Railroad Company

April 30, 2013	Ex Parte No. 711 Petition for Rulemaking to Adopt Revised Competitive Switching Rules, Reply Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski and Richard W. Brown
June 20, 2013	Ex Parte No. 431 (Sub-No. 4) Review of the General Purpose Costing System, Comments of the Association of American Railroads, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
September 5, 2013	Ex Parte No. 431 (Sub-No. 4) Review of the General Purpose Costing System, Reply Comments of the Association of American Railroads, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
July 21, 2014	Docket No. 42121 Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc., Reply Evidence of CSX Transportation, Inc.
September 5, 2014	Ex Parte No. 722 Railroad Revenue Adequacy, Opening Comments of Norfolk Southern Railway Company, Verified Statement of Michael R. Baranowski
November 4, 2014	Ex Parte No. 722 Railroad Revenue Adequacy, Reply Comments of Norfolk Southern Railway Company, Verified Statement of Michael R. Baranowski
September 4, 2015	Docket No. FD 35743 Application of the National Railroad Passenger Corporation Under 49 U.S.C. § 24308(a) - Canadian National Railway Company, Opening Evidence of Illinois Central Railroad Company and Grand Trunk Western Railroad, Joint Verified Statement of Michael Baranowski and Benton Fisher
October 7, 2015	Docket No. 42121 Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc., Supplemental and Compliance Evidence of CSX Transportation, Inc.
October 23, 2015	Docket No. FD 33760 (Sub-No. 46) BNSF Railway Company - Terminal Trackage Rights -- Kansas City Southern Railway Company and Union Pacific Railroad Company, BNSF Rebuttal Statement, Verified Statement of Michael R. Baranowski
November 20, 2015	Docket No. 42121 Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc., Reply to Supplemental and Compliance Evidence
March 7, 2016	Docket No. 42142 Consumers Energy Company v. CSX Transportation, Inc., Reply Evidence of CSX Transportation, Inc.
July 18, 2016	Docket No. FD 35842 New England Central Railroad, Inc. -- Trackage Rights Order – Pan Am Southern LLC, Pan Am Southern Reply Evidence, Verified Statement of Michael R. Baranowski
July 26, 2016	Ex Parte No. 704 (Sub-No. 1) Review of Commodity, Boxcar, and TOFC/COFC Exemptions, Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski and Benton V. Fisher
August 26, 2016	Ex Parte No. 704 (Sub-No. 1) Review of Commodity, Boxcar, and TOFC/COFC Exemptions, Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski and Benton V. Fisher
October 11, 2016	Ex Parte No. 431 (Sub-No. 4) Review of the General Purpose Costing System, Comment of the Association of American Railroads, Verified Statement of Michael R. Baranowski and Benton V. Fisher
October 26, 2016	Ex Parte No. 711 (Sub-No. 1) Reciprocal Switching, Opening Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski

November 7, 2016	Ex Parte No. 431 (Sub-No. 4) Review of the General Purpose Costing System, Reply Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski and Benton V. Fisher
March 6, 2017	Docket No. 42142 Consumers Energy Company v. CSX Transportation, Inc., Supplemental Reply Evidence of CSX Transportation, Inc.
January 12, 2018	Docket No. FD 32760 (Sub-No. 46) BNSF Railway Company - Terminal Trackage Rights -- Kansas City Southern Railway Company and Union Pacific Railroad Company, BNSF Petition to Establish Conditions of Use and Compensation, Verified Statement of Michael R. Baranowski
July 16, 2018	Docket No. FD 32760 (Sub-No. 46) BNSF Railway Company - Terminal Trackage Rights -- Kansas City Southern Railway Company and Union Pacific Railroad Company, BNSF Rebuttal, Verified Statement of Michael R. Baranowski

U.S. District Court for the Northern District of Texas, Fort Worth Division

November 7, 2017	Civil Action No. 4:16-cv-1061-O, BNSF Railway Company v. Panhandle Northern Railroad LLC, Expert Report of Michael R. Baranowski
November 22, 2017	Civil Action No. 4:16-cv-1061-O, BNSF Railway Company v. Panhandle Northern Railroad LLC, Reply Expert Report of Michael R. Baranowski
December 21, 2017	Civil Action No. 4:16-cv-1061-O, BNSF Railway Company v. Panhandle Northern Railroad LLC, Rebuttal Expert Report of Michael R. Baranowski

Arbitrations and Mediations

February 12, 2009	In the Matter of the Arbitration between Wisconsin Public Service Corporation and Union Pacific Railroad Company, Rebuttal Expert Report of Michael R. Baranowski on behalf of Union Pacific Railroad Company
October 16, 2009	In the Matter of Arbitration Between Norfolk Southern Railway Company and Drummond Coal Sales, Inc., Expert Report of Michael R. Baranowski on behalf of Norfolk Southern Railway Company
July 25, 2011	American Arbitration Association Case No. 58 147 Y 0031809, BNSF Railway Company and Kansas City Southern Railway Company, Expert Report of Michael R. Baranowski on behalf of BNSF Railway Company
April 25, 2013	JAMS REF #1340009009, Union Pacific Railroad vs. Canadian Pacific and Dakota, Minnesota & Eastern Railroad Arbitration, Expert Report of Michael R. Baranowski on behalf of Union Pacific Railroad Company
September 6, 2013	IN JAMS ARBITRATION, Case No. 1220044715, Union Pacific Railroad Company v. BNSF Railway Company, Expert Report of Michael R. Baranowski
October 25, 2013	IN JAMS ARBITRATION, Case No. 1220044715, Union Pacific Railroad Company v. BNSF Railway Company, Expert Reply Report of Michael R. Baranowski
January 1, 2014	IN JAMS ARBITRATION, Case No. 1220044715, Union Pacific Railroad Company v. BNSF Railway Company, BNSF Post-Argument Submission, Affidavit of Michael R. Baranowski
April 14, 2017	American Arbitration Association Case No. 01-15-0004-4830 and 01-15-0004-4931, Arbitration Between FirstEnergy Generation LLC and CSX Transportation, Inc. & BNSF Railway Company, Expert Report of Michael R. Baranowski

November 22, 2017	American Arbitration Association Case No. No. 01-16-0003-6208, CSXT Transportation, Inc. v. JEA and Florida Power & Light Co., Expert Report of Michael R. Baranowski
January 26, 2018	American Arbitration Association Case No. No. 01-16-0005-5615, BNSF Railway Company & Norfolk Southern Railway Company v. FirstEnergy Generation, LLC, Expert Report of Michael R. Baranowski
February 16, 2018	American Arbitration Association Case No. 01-16-0005-5615, BNSF Railway Company & Norfolk Southern Railway Company v. FirstEnergy Generation, LLC, Rebuttal Expert Report of Michael R. Baranowski
February 23, 2018	American Arbitration Association Case No. 01-17-0000-0130, J.B. Hunt Transport, Inc. and BNSF Railway Company, Expert Report of Michael R. Baranowski
April 17, 2018	American Arbitration Association Case No. 01-17-0000-0130, J.B. Hunt Transport, Inc. and BNSF Railway Company, Reply Expert Report of Michael R. Baranowski
June 22, 2018	JAMS REF #1100088262, BNSF Railway Company v. Union Pacific Railroad Company, Expert Report of Michael R. Baranowski
March 25, 2019	American Arbitration Association Case No. 01-17-0000-0130, J.B. Hunt Transport, Inc. and BNSF Railway Company, Expert Report of Michael R. Baranowski
April 26, 2019	American Arbitration Association Case No. 01-17-0000-0130, J.B. Hunt Transport, Inc. and BNSF Railway Company, Reply Expert Report of Michael R. Baranowski

EXHIBIT 1

TARIFF UP 6004-C

Cancels UP 6004-B

(Revision 1)

Applying On

ACCESSORIAL SERVICES - RULES AND CHARGES

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

Issued By:
B. A. ROMMEL - MANAGER PRICING SERVICES
E. A. HUNTER - MANAGER PRICING SERVICES

Union Pacific Railroad Company
1400 Douglas Street Omaha, NE 68179

MOVEMENT OF EMPTY TANK CARS

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

A. New tank cars moving prior to their first loaded move in commercial service (STCC 3742213);

B. Restenciled tank cars moving prior to their first loaded move in commercial service (STCC 3742213);

C. Tank cars moving for dismantling, sale, or scrap (STCC 3742293); and

D. Empty tank cars moving to and from Repair Facilities (STCC 3742217) except that (i) empty movements that are immediately preceded by a loaded line-haul revenue movement on Union Pacific will move free of charge to Repair Facilities, (ii) empty tank cars taken out of service by Union Pacific inspection and waybilled by Union Pacific's Mechanical Department under Rule 1 of the Association of American Railroads Interchange Rules will move free of charge to and from Repair Facilities, and (iii) empty tank cars damaged by Union Pacific will move free of charge to and from Repair Facilities.

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

EXHIBIT 2

TARIFF UP 6004-C

Cancels UP 6004-B

(Revision 1)

Applying On

ACCESSORIAL SERVICES - RULES AND CHARGES

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

Issued By:
B. A. ROMMEL - MANAGER PRICING SERVICES
E. A. HUNTER - MANAGER PRICING SERVICES

Union Pacific Railroad Company
1400 Douglas Street Omaha, NE 68179

MOVEMENT OF EMPTY CARS, WITH PRIVATE MARKINGS, OTHER THAN TANKS

Empty movements of all non-tank rail cars with private reporting marks, including cars with private reporting marks that are owned or controlled by railroads, are chargeable subject to the provisions of Tariff UP 4703-series; except as follows:

(a) **[c]** Empty cars returned to origin point of the prior load via the reverse route will be transported without charge.

(b) **[c]** In lieu of a free return via the reverse route, allowed in (a) above, and upon receipt of written instructions within 150 calendar days of the UP loaded waybill date, an empty car will be transported to an alternate UP served station, or to a UP offline junction without charge, if UP received loaded line haul revenue on the immediately preceding movement of the car.

(c) **[c]** One diversion or reconsignment of movements described in (a) and (b) will be permitted without charge, providing the diversion or reconsignment order is received, accepted and executed by UP prior to the car's arrival at a UP served destination or a UP offline junction, and provided further that the move does not result in any out-of-route or backhaul mileage.

(d) Cars taken out of service by UP inspection and waybilled by UP Mechanical Department will move free to and from shop under A.A.R. Interchange Rule 1.

NOTE: In no event will UP provide any additional free transportation of an empty railcar to a new loading point after the railcar has been delivered or interchanged offline.

EXHIBIT 3

Redacted

Highly Confidential/Confidential

EXHIBIT 4

Redacted

Highly Confidential/Confidential

EXHIBIT 5



FREIGHT TARIFF RIC 6007-O

(For cancellations, see Item 1, this tariff)

MILEAGE ALLOWANCES AND RULES GOVERNING

THE HANDLING OF AND THE PAYMENT OF MILEAGE

ALSO CHARGES

ON
CARS OF PRIVATE OWNERSHIP
AS DEFINED IN ITEMS 25 AND 400

BY
RAILROADS PARTIES TO THIS TARIFF

For List of Participating Carriers, see Item 2.10

This tariff is also applicable on intrastate traffic, except where expressly provided to the contrary in connection with particular rates and provisions contained herein.

ISSUED: February 8, 2016 **EFFECTIVE: March 1, 2016**

ISSUED BY

RAILINC, AGENT
7001 WESTON PARKWAY, SUITE 200
CARY, NC 27513

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CHECK SHEET FOR PAGE REVISIONS

Except as otherwise provided, Title Page and pages 1 through 57, inclusive, are effective as of the date shown. Original and revised pages as named below contain all the changes. (New or revised Pages containing changes effective as of the Effective date shown below are highlighted in yellow.)

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ISSUED: February 8, 2019

EFFECTIVE: March 1, 2019

ISSUED BY: Railinc, Agent, 7001 Weston Parkway, Suite 200, Cary, NC 27513

For explanation of abbreviations and reference marks not explained herein, see Item 9999, this tariff.

LIST OF PAGE REVISIONS

Below is a list of new or revised pages issued to date. Except as noted, new or revised pages containing changes effective as of the Effective date shown below are highlighted in yellow.

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ISSUED BY: Railinc, Agent, 7001 Weston Parkway, Suite 200, Cary, NC 27513

For explanation of abbreviations and reference marks not explained herein, see Item 9999, this tariff.

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ITEM 1

CANCELLATION NOTICE

Freight Tariff RIC 6007-O cancels Freight Tariff RIC 6007-N and all supplements issued thereto.

Except as otherwise provided, provisions formerly shown in Freight Tariff RIC 6007-N, as supplemented, are hereby brought forward in Freight Tariff RIC 6007-O, in their entirety.

ITEM 2.10

LIST OF PARTICIPATING CARRIERS
ALPHABETIZED BY STANDARD
CARRIER ABBREVIATION
(See Note 1)

AA - Ann Arbor Railroad.....412
AKDN - Acadiana Railway Company [D]
ANR - Angelina & Neches River Railroad Company [D]
APA - Apache Railway Company.....35
ASRY - Ashland Railway, Inc.

BLOL - BloomerLine, The
BNSF - BNSF Railway Company.....50,70,71, 73, 410, 420, 422, 424, 426, 428, 430, 432, 434, 436, 438, 440, 441, 442, 444, 445, 446, 448, 620, 630
BOCT - Baltimore and Ohio Chicago Terminal Railroad Company, The.....412
BPRR - Buffalo & Pittsburgh Railroad, Inc.....75, 449

CAGY - Columbus and Greenville Railway.....102, 453
CBRY - Copper Basin Railway, Inc.
CCKY - Chattanooga & Chickamauga Railway Co.
CIC - Cedar Rapids and Iowa City Railway Company.....80, 450
CM - Central Montana Rail, Inc.
CN - Canadian National Railway.....90, 185, 454, 457.50
CPRS - Canadian Pacific Railway.....99, 458, 459, 460, 462, 464, 466, 468, 470, 472, 474, 476, 478, 480, 482, 630
CSS - Chicago SouthShore & South Bend Railroad.....104, 451, 452
CSXT - CSX Transportation, Inc., comprised of the following carriers:
Carrollton Railroad, The.
CSX Transportation, Inc.
Gainesville Midland Railroad Company.
Richmond, Fredericksburg and Potomac Railway Company.
Three Rivers Railway Company.
Western Railway of Alabama, The...106, 484, 486
CW - Colorado & Wyoming Railway Company, The
CWA - Central Washington Railroad Company

DKS - Doniphan, Kensett & Searcy Railway
DME - Dakota, Minnesota & Eastern Railroad.....487, 622
EJE - Elgin, Joliet and Eastern Railway Company [D]
ELS - Escanaba and Lake Superior Railroad Company.....35
ETRY - East Tennessee Railway, L.P.

(Continued in next column)

ITEM 2.10

LIST OF PARTICIPATING CARRIERS
ALPHABETIZED BY STANDARD
CARRIER ABBREVIATION
(See Note 1)

GLC - Great Lakes Central Railroad
GNBC - Grainbelt Corporation.....620, 630
GNRR - Georgia Northeastern Railroad Company, Inc.
GRR - Georgetown Railroad Company
GWWE - Gateway Eastern Railway Company

HE - Hollis & Eastern Railroad Company
HPTD - High Point, Thomasville & Denton Railroad Company.....492

IAIS - Iowa Interstate Railroad, Ltd.....120 [E-2]
IANR - Iowa Northern Railway.....495

KCS - Kansas City Southern Railway Company.....35, 124, 185, 504, 524, 526, 527, 630

LC - Lancaster and Chester Railway Company
LSI - Lake Superior & Ishpeming Railroad Company
LSRC - Lake State Railway Company

ME - Morristown & Erie Railway, Inc.
MRL - Montana Rail Link, Inc... [D]
MSE - Mississippi Export Railroad Company.....35

NHN - New Hampshire Northcoast Corporation
NS - Norfolk Southern Railway Company, comprised of the following carriers:
Norfolk and Western Railway Company
Norfolk Southern Railway Company.
Alabama Great Southern Railroad Company.
Atlantic and East Carolina Railway Company.
Camp Lejeune Railroad Company.
Central of Georgia Railroad Company.
Chesapeake Western Railway.
Cincinnati, New Orleans and Texas Pacific Railway Company.
Georgia Southern and Florida Railway Company.
Tennessee Railway Company.....131,135, 540,544,545,546,547, 548

NYSW - New York, Susquehanna and Western Railway Corp.

PR - Palmetto Railways
PW - Providence and Worcester Railroad Company.....35

RSR - Rochester & Southern Railroad, Inc.

SAN - Sandersville Railroad Company.....145, 550
SBVR - South Branch Valley Rail Road
SLC - San Luis Central Railroad Company, The [D]
SM - St. Marys Railroad Company [D]
SRN - Sabine River & Northern Railroad Company
ST - ST Rail System.....150, 555, 560, 565
STPP - St. Paul & Pacific Northwest Railroad Company, LLC [A] [E-1]
SUN - Sunset Railway Company

(Continued on next page)

ISSUED: December 17, 2018

[E-1] EFFECTIVE: December 31, 2018
[E-2] EFFECTIVE: January 1, 2019

ISSUED BY: Railinc, Agent, 7001 Weston Parkway, Suite 200, Cary, NC 27513

For explanation of abbreviations and reference marks not explained herein, see Item 9999, this tariff.

ITEM 2.10

LIST OF PARTICIPATING CARRIERS
ALPHABETIZED BY STANDARD
CARRIER ABBREVIATION
(See Note 1)

TR - Tomahawk Railway, Limited Partnership.....35
TRC - Trona Railway Company.....35
TSU - Tulsa-Sapulpa Union Railway Company.....35

UP - Union Pacific Railroad Company…….. 50, 170, 185, 410, 575, 576, 577, 579, 585, 591, 592, 630

VR - Valdosta Railway, L.P
WSS - Winston-Salem Southbound Railway Company…..595

EXPLANATION OF NOTES

1. Items of general application in Sections 1 and 2 affecting the participation of all or large groups or numbers of carriers are not listed in this column.

RULES AND OTHER GOVERNING PROVISIONS
GENERAL RULES AND REGULATIONS

ITEM 5

REFERENCE TO TARIFFS, ITEMS, NOTES, RULES, ETC

1. Where reference is made in this tariff to tariffs, items, notes, rules, etc., such references are continuous and include supplements to and successive issues of such tariffs and reissues of such items, notes, rules, etc.

2. Where reference is made in this tariff to another tariff by number, such reference applies also to such tariff to the extent it may be applicable on intrastate traffic or traffic to or from Canada.

ITEM 10

CONSECUTIVE NUMBERS

1. Where consecutive numbers are represented in this tariff by the first and last numbers connected by the word “to” of a hyphen they will be understood to include both of the numbers shown.

2. If the first number only bears a reference mark such reference mark also applies to the last number shown and to all numbers between the first and last numbers.

ITEM 15

CANCELLATION OF ORIGINAL AND REVISED PAGES

When this tariff is amended by revised pages, the cancellation of prior pages, will be affected by means of this rule. A revised page will not show a cancellation notice except when a cancellation notice is necessary because of suspension, rejection, or other reasons. Revisions of each page will be published and filed in numerical sequence. (Items containing changes will be highlighted in yellow.)

For Example: "1st Revised Page 6" will have the effect of canceling Original Page 6; "3rd Revised Page 72.1" will have the effect of canceling 2nd Revised page 72.1; and, 2nd Revised page 72.1 will have the effect of canceling 1st Revised page 72.1.

SECTION 1
APPLIES ONLY ON TANK CARS

ITEM 25

APPLICATION OF SECTION 1

1. The term “Cars of Private Ownership”, when used in this tariff, is defined as cars bearing other than Railroad Reporting marks that are owned by individuals, firms, corporations, or car companies, including cars owned and/ or operated by railroad controlled car lines.

2. Except as otherwise provided herein, these rules govern the handling of tank cars including the payment of mileage allowances, when used by railroads parties to this tariff individually or jointly, where specifically provided herein, for transportation over their lines as follows:

   A. Between points in the United States (interstate and intrastate) including movements where part of the through route is through Canada.

   B. Internationally, i.e., between points in the United States and points in Canada. (Applicable only on that portion of the haul within the United States).

   C. For that portion of the haul in the United States in connection with movements between points in Canada where part of the through route is through the United States.

SECTION 1
EXCEPTION TO APPLICATION OF RATES
APPLIES ONLY ON TANK CARS

ITEM 30

GENERAL EXCEPTION

The rules and mileage allowances published herein will not apply to:

A. Cars that are not properly registered in the Official Railway Equipment Register, RER 6414-Series, showing capacities and assigned reporting marks.

B. Mileage allowances named in Item 195-Series of this tariff will not apply to cars handled under the provisions of Item 190.

ITEM 35
[C]

APPLIES ONLY FOR CARRIERS NAMED IN THIS ITEM

The provisions of Item 187-Series “Equalization of Mileage on Tank Cars of Private Ownership”, will not apply in connection with carriers named below:

Apache Railway Company, The
Escanaba and Lake Superior Railroad Company
Kansas City Southern Railway Company (Stations 31011 to 31315 only)
Mississippi Export Railroad
Providence and Worcester Railroad Company
Tomahawk Railway, Limited Partnership
Trona Railway Company
Tulsa Sapulpa Union Railway Company

(Carriers formerly shown herein and not brought forward have been removed.)

ITEM 40

(Provisions formerly shown herein and not brought forward are hereby canceled.)

SECTION 1
EXCEPTION TO APPLICATION AND RULES
APPLIES ONLY ON TANK CARS

ITEM 50

APPLIES ONLY FOR CARRIERS NAMED IN THIS ITEM

Empty privately-owned or leased tank cars used or to be used in Intra-Mexican service will be subject to the following provisions:

A. Owner or lessee shall secure an entry permit from the involved Mexican carrier prior to empty movement to the border crossing and permit number must be shown in the writing instructions accompanying such car.

B. Subsequent to Intra-Mexican service, written instructions for each car entering the U.S. must clearly indicate the exact consignee or facility for disposition of the car prior to movement beyond the border gateways.

C. Upon failure to comply with paragraphs A or B, a holding charge of $10.00 per day will be assessed for each 24 hours or fraction thereof beginning at 7:00 AM of the day following arrival of such empty privately owned or leased car at the border crossing, (excluding Saturdays, Sundays and holidays), until provisions of paragraphs A and B as applicable are fulfilled.

BNSF Railway Company
Union Pacific Railroad Company

ITEM 70

BNSF RAILWAY COMPANY (LINES IN CANADA)

This tariff also applies on all traffic moving over the lines of the BNSF in Canada.

ITEM 71

BNSF RAILWAY COMPANY
(EXCEPTION TO ITEM 190)

The provisions of Item 190 Series for the movement of empty tank cars without charge to or from facilities for cleaning, lining, relining, maintenance, modification, retrofit or repair, will not apply to such cars moving via BNSF to/from such facilities unless the empty movement is immediately preceded by a loaded line haul revenue movement via BNSF. In all other circumstances, the published tariff charges in BNSF 90020B, and other applicable BNSF price authorities, for the movement of empty cars on their own wheels shall apply and will be assessed to the car owner.

SECTION 1
EXCEPTION TO APPLICATION AND RULES
APPLIES ONLY ON TANK CARS

ITEM 73

BNSF RAILWAY COMPANY
(EXCEPTION TO ITEM 190)

When a tank car is released from load on BNSF, the empty will be returned via the reverse of the loaded route to the origin station of the last loaded movement. If the owner or lessee of the car desires movement via a different route or to a station other than the origin of the last loaded movement, empty billing instructions must be given to:

BNSF Railway Co.
Carload Billing
920 S.E. Quincy
Topeka, KS 66612
Telephone: (800) 786-2873
FAX: (800) 786-2455

prior to release of the empty car. If the owner or lessee of the car requests movement via a different route, or to a station other than the origin of the last movement, after release of the empty car, diversion provisions and charges, as named in BNSF Diversion Tariff 6200 Series, are applicable.

ITEM 75

BUFFALO & PITTSBURGH RAILROAD, INC. (BPRR)

The provisions of Item 190-Series, or other provisions for the movement of empty tank cars without charge to or from facilities for cleaning, lining, relining, maintenance, modification, repair or storage, will not apply to such cars moving to or from facilities served by the BPRR unless the empty movement is immediately preceded by or followed by a loaded revenue movement via the BPRR. In all other circumstances, the published tariff charges in Tariff BPRR 4004-Series for movement of empty cars on their own wheels to and from repair or storage facilities shall apply.

ITEM 80

CEDAR RAPIDS AND IOWA CITY RAILWAY COMPANY
(CIC)

The provisions of Item 190-Series or other provisions provided in this tariff for the movement of empty tank cars without charge to and from facilities for cleaning, lining, relining, maintenance, modification, repair or storage, etc., will not apply for account of the CIC. For Rules and charges to apply, see Freight Tariff CIC 4006-Series.

ITEM 90

(For provisions formerly shown herein, see Item 90, Page 7.1)

SECTION 1
EXCEPTION TO APPLICATION AND RULES
APPLIES ONLY ON TANK CARS

ITEM 90
[I]

CANADIAN NATIONAL RAILWAY COMPANY

The tariff rules contained herein regarding tank car movements will not apply to the movements described in Item 25.2.C. For those movements, the rules and charges contained in Tariff CN 6544 shall apply.

The provisions of Item 190 Series for the movement of empty tank cars without charge will not apply to such cars moving to, from or via CN unless the empty movement is immediately preceded by a loaded line haul revenue movement via CN. In all other circumstances, the published tariff charges in CN 890000, and other applicable CN price authorities, for the movement of empty cars on their own wheels shall apply and shall be assessed to the responsibility of the car owner. [C]

Note: In the event that the shipper's Bill of Lading fails to identify the car owner as "Payer of Freight", the shipper may be held responsible for all applicable charges.

SECTION 1
EXCEPTION TO APPLICATION AND RULES
APPLIES ONLY ON TANK CARS

ITEM 99

CANADIAN PACIFIC RAILWAY
(EXCEPTION TO ITEM 190)

The provisions of Item 190 Series for the movement of empty tank cars without charge to or from facilities for cleaning, lining, relining, maintenance, modification or repair, will not apply to such cars moving via CPRS from or to said facilities unless the empty movement is immediately preceded by a loaded revenue movement via CPRS. In all other circumstances, the published tariff charges in Tariff CP 4000 Series for movement of empty cars on their own wheels shall apply and will be assessed to the car owner.

On shipments moving within Canada, CP's Mileage Equalization program in Tariff CP 6 applies, except on miles in Canada for "bridge traffic" which only passes through the Canada for routing purposes that are under the terms of this tariff.

ITEM 102

COLUMBUS AND GREENVILLE RAILWAY (CAGY)

The provisions of Item 190-Series, or other provisions for the movement of empty tank cars without charge will not apply to such cars moving, to, from, or via the CAGY unless the empty movement is immediately preceded by or followed by a revenue movement via Columbus and Greenville Railway. In all other circumstances, charges published in the Uniform Freight Classification for movement of empty cars on their own wheels observing the single line minimum charge shall apply.

ITEM 104

CHICAGO SOUTH SHORE AND SOUTH BEND RAILROAD (CSS)

The provisions of Item 190 Series, or other provisions for the movement of empty tank cars without charge to or from facilities for cleaning, lining, relining, maintenance, modification, repair or storage, will not apply to such cars moving via Chicago South Shore and South Bend Railroad from or to said facilities unless the empty movement is immediately preceded by or followed by a loaded revenue movement via Chicago South Shore and South Bend Railroad. In all other circumstances, the applicable CSS publication for the movement of empty cars on their own wheels shall apply.

SECTION 1
EXCEPTION TO APPLICATION AND RULES
APPLIES ONLY ON TANK CARS

ITEM 106

CSX TRANSPORTATION INC.

The participation of this carrier is restricted to movements over its lines, as follows:

A. Between points in the United States, including movements where part of the through route is through the Dominion of Canada.

B. For that portion of the haul in the United States on international movements, i.e., between points in the United States and points in the Dominion of Canada.

ITEM 112

(Provisions formerly shown herein and not brought forward are hereby canceled.)

ITEM 120
[C]

IOWA INTERSTATE RAILROAD, LTD (IAIS)
(EXCEPTION TO ITEM 190)

Provisions of Item 190-series, or any other provision provided in this tariff, regarding the movement of empty tank cars without charge to or from Repair Facilities (any facility that cleans, lines, relines, maintains, modifies, repairs, or retrofits tank cars) will not apply for the account of IAIS. Movements of empty tank cars to or from Repair Facilities will be subject to the rules and charges provided in the applicable IAIS tariff(s).

ITEM 124

KANSAS CITY SOUTHERN RAILWAY COMPANY, THE

Provisions of Item 190 Series, or any other provision allowing for free switching service of an empty freight car (or cars) to or from shop facilities for cleaning, lining, relining, maintenance, modification or repair, will not apply to and from shop facilities served by KCS. Matter of switch charge will be handled by the applicable KCS Tariff.

ITEM 131

NORFOLK SOUTHERN RAILWAY COMPANY

When it is necessary to move a loaded private car to/from shop or repair facilities located on NS, NS will pay mileage payments not to exceed the amount that would have been earned had the car not required additional rail movements to/ from shop or repair facilities, provided that the mileage allowances for the loaded movement are not elsewhere restricted.

SECTION 1
EXCEPTION TO APPLICATION AND RULES
APPLIES ONLY ON TANK CARS

ITEM 135

NORFOLK SOUTHERN RAILWAY COMPANY
(EXCEPTION TO ITEM 190) (See NOTE 1)

When a car is released from load on NS, the empty will be returned via the reverse of the loaded route to the origin station of the last loaded movement. If the owner or lessee of the car desires movement via a different route or to a station other than the origin of the last loaded movement, empty billing instructions must be sent prior to release of the empty car via FAX, or NS internet application. If by fax send to:

FAX: 800-580-6092
Norfolk Southern Railway Company
Agency Operation Center
125 Spring Street South West
Atlanta, GA 30303

If the owner or lessee requests movement via a different route, or to a station other than the origin of the last loaded movement, after release of the empty car, diversion provisions and charges, as named in Norfolk Southern Tariff 8002 Series, are applicable.

EXPLANATION OF NOTE

1. If subject tank car has last contained Hazardous Materials, shipping paper must be furnished at the point of origin of the empty car for all moves whether they are reverse or not.

ITEM 145

SANDERSVILLE RAILROAD COMPANY (SAN)

Inbound tank car mileage will be used as an offset to outbound loaded mileage (or vice versa) and the SAN will pay no mileage based on freight mileage table from or to station on its line.

ITEM 148

(Provisions formerly shown herein and not brought forward are hereby canceled.)

SECTION 1
EXCEPTION TO APPLICATION AND RULES
APPLIES ONLY ON TANK CARS

ITEM 150

ST RAIL SYSTEM

1. The provisions of Item 190 Series or other provisions for the movement of empty tank cars without charge to or from facilities for cleaning, lining, relining, maintenance, modification or repair, will not apply to such cars moving via ST Rail System from or to said facilities unless the empty movement is immediately preceded by or followed by a loaded revenue movement via the ST Rail System. In all other circumstances, the published tariff charges in Tariff ST 4020 Series for movement of empty cars on their own wheels shall apply.

2. The provisions of Item 180 Series concerning the payment of mileage will not apply to cars which are moving via ST Rail System under rates published in tariffs, quotes or contracts that are identified as "zero mileage rates". In the event that the party responsible for the payment of freight charges associated with zero mileage rates is different than the party to whom the reporting marks for said cars are assigned, the car owner must secure mileage payments from the freight paying party.

ITEM 170

UNION PACIFIC RAILROAD COMPANY
(EXCEPTION TO ITEM 190)

Provisions of Item 190-series, or any other provision provided in this tariff, regarding the movement of empty tank cars without charge to or from Repair Facilities will not apply for the account of UP. Movements of empty tank cars to or from Repair Facilities will be subject to the rules and charges provided in the applicable UP tariff(s). For purposes of this Item, the capitalized term "Repair Facilities" means any facility that cleans, lines, relines, maintains, modifies, repairs, or retrofits tank cars.

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 180

PAYMENT OF MILEAGE

1. Upon written application reporting marks will be assigned to car owner or lessee by the Assistant Vice President, Business Services, Association of American Railroads, provided applicants are subscribers to the AAR Mechanical Interchange Agreement. Applications for reporting marks shall state the owner and lessee for cars under lease. Contact information is required in FindUs.Rail (www.Railinc.com).

2. Mileage allowance must be reported to the car owner (person or company at a single address, to whom the reporting marks are assigned) within one (1) month and ten (10) days from the last day of the month in which it is earned including payment for cars on hand at the end of that month.

3. Mileage allowance for the use of tank cars will be paid only to the person or company at a single address, to whom the reporting marks are assigned provided cars are properly equipped and marked with the assigned reporting marks and car number, and providing further that:

   A. A description of each car is furnished to the Assistant Vice President, Business Services, AAR, as required in the Umler Data Specification Manual at www.Railinc.com, Products & Services for the assignment of applicable mileage allowances. Such information received by the Assistant Vice President by the last working day of the month except, data transfers requiring data entry by AAR/Railinc staff must be received by the 25th day of the month, will be effective the first day of the subsequent month. Cars registered with transportation code "S_", "SX", "XA", "XZ" or "YA" are not eligible for mileage allowances and will be assigned a zero rate.

4. Reporting marks assigned to private car owners shall consist of four letters including the final letter "X".

5. Assigned reporting marks must be painted or stenciled on the body of the car. When reporting mileage allowances, the carding, placarding, or boarding of cars will not be recognized.

ITEM 182

DEDUCTIONS AND MILEAGE CLAIM HANDLING PROCEDURES

1. Deductions By Railroads To Private Car Owners

   A. Mileage allowed in error, by a railroad, including, but not limited to mileage allowed at incorrect rates for any reason, may be deducted from the car owner's account within twenty-four (24) months from the last day of the month for which the mileage was reported as earned, but not later. A railroad may tender an invoice for mileage allowed in error at any time within twenty-four (24) months from the last day of the month for which the mileage was reported as earned. Except as provided in paragraph 3, an owner-lessor of a private car must remit within eight (8) months after the invoice is presented the entire amount of any invoice issued to it.

(Continued in next column)

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 182 (Cont'd)

DEDUCTIONS AND MILEAGE CLAIM HANDLING PROCEDURES

   B. Deductions for amounts of $25.00 or less shall not be taken after the expiration of two (2) months and ten (10) days from the last day of the month the mileage was earned.

2. Claims Issued By Private Car Owners To Railroads

   A. A private car owner must, within twenty-four (24) months from the last day of the month the completed cycle was reported, present any claim for mileage allowance discrepancies, including incorrect rates or omissions, to the applicable rail carrier in the prescr bed AAR format, as published in AAR Circular No. OT-3 Series at www.Railinc.com, Reference Files. Claims not presented in the required format will not be processed. The railroad receiving the claim must within the four (4) months from the date on which the claim was presented allow it in whole or in part, or decline it. The private car owner may reissue its claim, if applicable within four (4) months from the last day of the four (4) months' period allowed the railroad which handled the claim prior to reissuance. The railroad receiving the reissue claim must within four (4) months from the date of which the reissued claim was presented allow it in whole or in part or decline it. If the railroad fails to handle the original or reissued claim within the prescribed time limits, it will constitute a valid claim as last presented and must be honored by the railroad to which presented. Claim for amounts of $25.00 per car per cycle or less shall not be issued. The $25.00 limit is not applicable where no miles were reported for the railroad cycle.

3. Claims by Owners-Lessors

   A. If a railroad takes a deduction against or issues an invoice to an owner-lessor for mileage allowed in error, including, but not limited to, mileage allowed at incorrect rates for any reason, but the erroneous allowance payment is not recoverable by the owner-lessor as defined below, the owner-lessor may present a claim for the recovery of the amounts deducted by the railroad or the cancellation of an unpaid invoice within two (2) years of receiving notice of the railroad's deduction or invoice. For application of this tariff provision, an owner-lessor may claim that an erroneous mileage payment is "not recoverable" only when (a) the erroneous mileage payment was actually paid or credited by the owner-lessor to a lessee (except those lessees whose primary business is the leasing of cars to entities other than those within a lessee's corporate family and who ship only incidentally) irrespective of whether the lessee subsequently paid or credited the mileage allowance payment to a sublessee; (b) the erroneous allowance payment cannot be recovered from the lessee because the lessee has declared bankruptcy or sought reorganization or is no longer a lessee of the owner-lessor; (c) the owner-lessor exercised timely efforts to recover the erroneous allowance payment beginning within ninety (90) days of receiving notice of the railroad's deduction or invoice;

(Continued on next page)

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 182 (Cont'd)

DEDUCTIONS AND MILEAGE CLAIM HANDLING PROCEDURES

3. Claims by Owners-Lessors

A. (Cont'd) and (d) the owner-lessor undertook diligent collection efforts to recover the erroneous allowance payments until eight (8) months from the date of such notice or invoice (or until the earlier date of initiation of bankruptcy/reorganization proceedings), including making demands for payment and taking deductions against lessees' accounts. Such a claim must be accompanied by a certificate assigned by an officer or other person specifically authorized to sign the certificate of the owner-lessor stating how the claim satisfied each of the requirements set forth above, together with documents reflecting the owner-lessor's collection efforts. If, using reasonable efforts, the railroad is unable to determine whether the lessee's primary business is the leasing of cars to entities other than those in the lessee's corporate family, it shall consult with the owner-lessor, which shall provide the railroad with any evidence of the lessee's shipping activities which may be available to the owner-lessor using reasonable efforts. The owner-lessor shall provide the railroad with an assignment of the owner-lessor's claims and rights to collect the amount not recovered upon payment of the claim of cancellation of the invoice by the railroad.

B. If the railroad had deducted the amount of an erroneous allowance payment from an owner-lessor, the railroad must remit to the owner-lessor the amount deducted within four (4) months of its receipt of a properly presented, valid claim from the owner-lessor.

ITEM 185

COMPUTATION OF MILEAGE
(See Exceptions 1 through 6)

1. Mileage will be computed on the basis of actual distance based on freight mileage tables of the individual lines parties to this tariff, lawfully on file, via the route of movement from station of origin or station at which received from connecting line to destination station or to stations at which delivered to connecting line without deduction of mileage through switching districts (see Note 1).

2. When the transportation begins and ends, i.e., when a car is both loaded and unloaded, within a switching district, no mileage will be allowed. Mileage between an industry or public track and freight station at station of origin or destination will not be allowed.

(Continued in next column)

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 185 (Cont'd)

COMPUTATION OF MILEAGE
(See Exceptions 1 through 6)

EXPLANATION OF NOTES

1. The intent of the clause "without deduction of mileage through switching districts" is to insure mileage being allowed for the full distance the car moves, via route of movement from freight station of origin to freight station to which destined. When there are two or more freight stations on a road within a switching district, mileage will be paid to or from the station within such district at which the car is actually loaded or unloaded or at which it is received from or delivered to connecting line.

EXCEPTIONS

1. In computing distances between stations on the UP on the one hand and stations on the KCS on the other hand, via the New Orleans Gateway, deduct 11.5 miles from the actual distance to and from New Orleans via the UP and 5.4 miles from the actual distance to and from New Orleans via the KCS.

2. Mileage will be allowed on movements having origin and destinations at stations or districts within the Chicago Switching District, provided the movements originate at or are destined to industries having private sidings.

3. In computing distances between stations on the UP on the one hand and stations on the IC on the other hand via the New Orleans Gateway, deduct 11.5 miles from the actual distance to and from New Orleans, LA via the UP and 5.1 miles from the actual distance to and from New Orleans via the IC.

4. In computing distances from, to or via KCS on traffic routed via New Orleans, LA, interchanged at Shrewsbury, LA, deduct 5.4 miles from the actual distance to and from New Orleans, LA on the KCS.

5. When for account of the KCS, mileages will be computed on basis of the shortest distance over the route of these lines determined by freight mileage tables lawfully on file , in lieu of actual distance as provided in Paragraph 1 of this item.

6. All traffic between West Lake, LA on KCS and interchange with UP will be made at De Quincy, LA, in lieu of Lake Charles, LA for carriers convenience and to facilitate industries located at West Lake, LA. KCS will not pay mileage allowance between West Lake, LA and De Quincy, LA, when cars are moving under provisions of UP reroute orders.

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 187

EQUALIZATION OF MILEAGE ON TANK CARS OF PRIVATE OWNERSHIP

PART A
AGGREGATE EMPTY MILEAGE VERSUS LOADED MILEAGE (SEE NOTE 1)

1. Should the aggregate empty mileage accumulated by tank cars carrying any of the reported marks assigned to any one person or company during a calendar year exceed the aggregate loaded mileage during the same calendar year by more than six (6) percent, such excess mileage must be paid for by the person or company to whom the reporting marks are assigned at the rate of ♦ninety-five (95) cents per mile, without minimum, subject to the procedures outlined in Part D (See Note 2, this item).

2. Mileage on empty cars moving on revenue billing will not be included in the equalization account.

3. Empty mileage accumulated on cars moving to and from repair facilities for modification under DOT mandated retrofit programs or for inspection and/or repair under FRA Emergency Orders will not be included in the equalization account. Empty mileage accumulated on cars moving under AAR Early Warning/ Maintenance Advisory letters to and from repair facilities associated with the removal of certain truck bolsters that were manufactured by the National Castings of Mexico facility in Sahagun, Mexico, will not be included in the equalization account.

4. Except as outlined in Item 190 Series, Paragraph 2 (C), no adjustments to loaded or empty mileage will be made in the equalization account for mileage caused by error in handling of the reporting railroad or of another railroad, or for mileage accumulated on cars moving on their own wheels to and from repair facilities due to railroad damage or for mileage accumulated due to longer routes for railroad convenience, detours and Surface Transportation Board Service Orders. Rail carriers will make equalization adjustments to the owners of excess reported on-line empty mileage on cars, they lease and operate under private marks, or cars of other lessees and/or owners operating on their line for company material, weed killer and similar service.

5. Adjustments to loaded or empty mileage will be made in the equalization account for apparent accounting errors in the total mileage reported for participating rail carriers under the following procedures. In the absence of appropriate adjustments being made by the AAR or a participating carrier for such accounting errors, a private car company or owner may request an appropriate adjustment for mileage summaries reported in error, from the involved rail carrier in the format prescribed by the AAR, provided such request is made within thirty (30) days of the forwarding of the monthly AAR "Year to Date Equalization Register", containing the alleged error, furnishing a duplicate of such request to the Assistant Vice President, Business Services, AAR. The rail carriers will have thirty (30) days from the date of such request in which to decline or make all or a portion of the requested adjustment, advising the Assistant Vice President of the handling accorded.

(Continued in next column)

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 187 (Cont'd)

EQUALIZATION OF MILEAGE ON TANK CARS OF PRIVATE OWNERSHIP

PART A
AGGREGATE EMPTY MILEAGE VERSUS LOADED MILEAGE (SEE NOTE 1)

5. (Cont'd) If the rail carrier fails to act upon a request for adjustments in the AAR summary totals within the specified time frame, the AAR is authorized to make the adjustment to the equalization account of the private car company or owner for the amount of mileage originally requested. Exceptions to the annual national equalization statement will be handled in accordance with the provisions of Part D (2).

   ALL requests for adjustments to the equalization account must be presented by the private car company or owner to the involved rail carrier(s) or presented by the rail carrier(s) to the private car company or owner within three (3) years from the last day of the reporting month in question. However, such request for adjustments will not be accepted by the AAR if the involved rail carrier or car owner is no longer an operating entity, except as provided for in Part C.

6. Aggregate loaded and empty mileage will be computed on the basis of actual distance, as defined in Item 185-Series. Adjustments made subsequent to the deadline specified in Part D will be computed in the subsequent equalization account year.

PART B
REPORTING OF ACTUAL LOADED AND EMPTY MILEAGE

Each participating carrier will submit a monthly mileage report in the format prescribed by the AAR to the assignee of each reporting mark forty (40) days after the close of the movement month reporting by individual car number the actual loaded and empty miles moved as computed in accordance with Item 185-Series. In addition, total actual monthly loaded and empty mileage accumulated by all cars bearing each reporting mark will be reported to the assignee of such mark in the format prescribed by the AAR, furnishing a duplicate of this summary report to the Assistant Vice President, Business Services, AAR. Adjustments for prior months will be indicated on this monthly summary report.

PART C
CHANGE OF OWNERSHIP

When a private tank car company or owner discontinues business or disposes of all tank car equipment, any excess empty mileage balance which has accrued to the date of such action, on the tank cars bearing the reporting marks of such company or owner, shall be subject to bill as of that date, in accordance with the provisions of Parts A and D of Item 187-Series, subject to any applicable adjustments.

(Continued on next page)

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 187 (Cont'd)

EQUALIZATION OF MILEAGE ON TANK CARS OF PRIVATE OWNERSHIP

PART D
ANNUAL NATIONAL EQUALIZATION ACCOUNTING

1. After May 20 of each year, the Assistant Vice President, Business Services, AAR will summarize all empty and loaded mileage by reporting mark assigned to any person or company, reporting for the proceeding calendar year, by all participating carriers to this tariff. Should the aggregate empty mileage exceed the aggregate loaded mileage of all participating carriers by more than (6) percent for any such group of reporting marks, the person or company to whom the reporting marks are assigned will be billed at the rate of ♦ninety-five (95) cents per mile without minimum and must pay the AAR on behalf of each participating carrier for such excess for such empty mileage. The charges collected for this excess empty mileage will be distr buted to the participating carriers by the AAR in direct proportion to such carriers portion of excess empty mileage to the total accumulated excess empty mileage. Only that mileage and any related adjustments reported to the Assistant Vice President prior to May 20 will be considered in determining and excess empty mileage, as outlined herein (See Notes 1, 2 and 3).

2. An annual national equalization statement detailing the excess empty mileage accumulated and any applicable charges will be tendered by the Assistant Vice President to the person or company assigned the reporting mark(s) for such cars for verification no later than July 1 of the year succeeding the equalization accounting year. Exceptions to this statement must be received by the Assistant Vice President within 30 days of the date tendered, and payment for all excess empty mileage is due immediately thereafter. Any adjustments made by the participating carriers up to and including the March account applicable to the prior year(s) will be incorporated in the equalization accounts for the prior equalization accounting year. Any railroad or AAR adjustments made subsequent to the March account will be carried over to the following equalization accounting year (See Note 3).

3. A private car company or owner failing to render complete payment for all excess empty mileage within thirty (30) days of the date its equalization statement is tendered by the AAR will be subject to a penalty of one and a half percent (1.5%) interest per month (i.e., annual rate of 18%) for each calendar month or fraction thereof on any outstanding balance due from the date of the AAR's invoice statement. If any portion of a private car company's or owner's equalization statement remains unpaid in excess of 3 months from the date initially tendered, all mileage allowances accrued by the tank cars registered in the Umler file bearing its reporting marks will be withheld by the carriers participating in this item until such time as complete payment including applicable penalty interest is made. Once complete payment is made, the participating carriers will be notified by the AAR and claims for any applicable mileage allowances withheld will be honored, less a 15% penalty charge for the carriers' administrative expense.

(Continued in next column)

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 187 (Cont'd)

EQUALIZATION OF MILEAGE ON TANK CARS OF PRIVATE OWNERSHIP

PART D
ANNUAL NATIONAL EQUALIZATION ACCOUNTING

EXPLANATION OF NOTES

1. The ♦ninety-five (95) cents per mile charges for excess empty mileage under the provisions of this item is subject to revision September 1 of each year under Ex Parte No. 328 agreed annual update procedures, and will be retroactively applied to cover the entire calendar year involved.

2. Close out dates specified in Part D may be extended by the AAR for a maximum of 60 days for special national accounting problem conditions, affecting substantially all carriers and all owners.

3. Invoices that have been issued which, after investigation, are determined to have been erroneous due to rail carriers or AAR accounting and/or system errors may be cancelled by the Assistant Vice President.

ITEM 190

HANDLING OF EMPTY TANK CARS
(SEE NOTE 2)

1. When a tank car is released from load, the owner or lessee must issue instructions for the disposition of the empty car to the agent at point of unloading either direct or through consignee or via EDI. Empty instructions may also be included with the original loaded shipping instructions if transmitted via EDI. If the owner or lessee fails to have instructions in the hands of the railroad agent having jurisdiction at point of unloading prior to the time the car is released from load to forward the car or written instructions to hold it, the agent is authorized to forward the empty car to the origin point of the last load via reverse of the loaded route. No tank car which last contained hazardous material may be moved without having shipping instructions furnished as per Title 49 Code of Federal Regulations.

2. Empty tank cars will be handled as follows:

   A. Except as otherwise provided in this tariff, cars covered by this section will be moved empty without charge between stations or junction points upon receipt of instructions from the car owner or lessee confirmed in writing. Such instructions must include the specific facility to which such empty car is consigned or the name and address of the person or company which controls the car. No allowance will be made for mileage of such cars during empty movement.

   B. A new car, a car that is restenciled with private reporting marks or a newly acquired car moving prior to its first loaded move in commercial service and a newly acquired car moving prior to its first loaded move in commercial service and a car moving for sale or scrap will be moved upon surrender of a bill of lading and will be subject to applicable rates.(see Note 1).

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SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 190 (Cont'd)

HANDLING OF EMPTY TANK CARS
(SEE NOTE 2)

2. Empty tank cars will be handled as follows: (Cont'd)

   C. If the owner or lessee or party issued instructions to forward the empty tank car to the origin point of the last load by specific routing different than the reverse routing of the loaded movement, the total miles of such return movement will be billed at the excess empty mileage rate specified in Item 187-Series without minimum and such empty mileage so billed will be excluded from the equalization account of the owner. This billing will be made to, and collectable from, the person so requesting such variance in the return routing. If the carriers depart from the destinations, junctions or carriers of the reverse route of the load, any resulting excess empty miles will be excluded from the car owner's equalization account by erring carrier.

EXPLANATION OF NOTES

1. A car loaded with railroad company material moving on non-revenue billing will be considered as having been loaded in commercial service on which the railroads derived line-haul revenue.

2. The provisions of this item apply except as otherwise provided in Item 192-Series of this tariff.

ITEM 192

HANDLING AND HOLDING OF EMPTY TANK CARS BY RAILROADS ON RAILROAD TRACKS
(SEE NOTE 1)

1. The rules and charges in this item apply only to empty private tank cars consigned to non-railroad repair facilities; i.e., facilities for cleaning, lining, relining, maintenance, modification or repair.

2. The rules and charges do not apply to:

   A. Empty private tank cars moving as revenue freight under the provisions of Item 190-Series, Paragraph B 2.

   B. Empty private tank cars handled or held for carrier operating convenience.

   C. Empty private tank cars en route to facilities for cleaning, lining, relining or repair for heavy repairs following railroad damage.

   D. Empty private tank cars en route to repair facilities located on the premises of a shipping facility, provided that the empty car, after repair, is subsequently shipped from the facility in revenue freight service.

3. No allowance will be made by carriers for mileage accrued during supplemental empty movement of tank cars that are assessed charges as provided in Paragraph 5.

(Continued in next column)

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 192 (Cont'd)

HANDLING AND HOLDING OF EMPTY TANK CARS BY RAILROADS ON RAILROAD TRACKS
(SEE NOTE 1)

4. Charges applicable under these provisions will apply to empty private tank cars which the consignee has not ordered to their cleaning, lining, relining, maintenance, modification or repair facility (or their owned or leased tracks in the vicinity thereof) before the expiration of 48 hours free time (not counting Saturdays, Sundays or holidays) after placement. The time calculation will start the first 7 A.M. subsequent to carrier notification to the consignee that the empty private car is ready for placement and the time calculation will stop when the carrier places or forwards the car pursuant to instructions or should have placed or forwarded the car pursuant to instructions.

5. After expiration of free time as provided in Paragraph 4, charges will be as follows: (See Note 2)

   A. Supplementary handling charge of ♦$106.00 per car.

   B. Holding charge of $1 per car per calendar day or fraction thereof including Saturdays, Sundays and holidays while held by carrier on non-leased tracks awaiting disposition.

6. In the event the consignee orders the car to tracks owned or leased by the consignee in the vicinity of the facility for cleaning, lining, relining, maintenance, modification or repair within the forty-eight hour period descr bed under Paragraph 4, this item, there will be no supplementary handling charge for the movement; however, such cars will be subject to the supplementary handling charge of ♦$106.00 per car (See Note 2) at such time that the empty tank car is subsequently ordered and moved onto the facility for cleaning, lining, relining, maintenance, modification or repair or ordered moved from that facility to the tracks or leased by the consignee in the vicinity of the facility.

7. Applicable billing will be monthly to the facility involved.

EXPLANATION OF NOTES

1. The rules and charges in this item do not in any way supersede or duplicate existing, or new written contractual operating, side track, track lease, property lease, etc., agreements or tariffs that contain empty private tank car handling and holding provisions as part of the overall agreement.

2. Per ExParte No. 328, the supplemental handling charge will be revised annually at the same time as the tank car mileage allowance update, utilizing the same method as that prescribed for updating the excess mileage equalization charge.

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

▲♦**ITEM 195**

MILEAGE RATE ALLOWANCE ON TANK "T" CAR (SEE ITEM 196 FOR EXPLANATION OF DESIGNATING SYMBOL) (SEE NOTE 1)

Mileage rate allowance for cars of foregoing mechanical designations shall be in cents per loaded mile (See Notes 2 and 7) as follows:

COLUMN 1 - Original cost or fair market value in dollars (see Notes 3, 4, 5 and 6, this item).
COLUMN 2 - Cars in service years 1 through 30.
COLUMN 3 - Cars in service years 31 and over.

COLUMN 1	COLUMN 2	COLUMN 3
$ 0 – 1000	46.7	46.4
1001 – 2000	47.3	46.4
2001 – 3000	48.0	46.5
3001 – 4000	48.6	46.5
4001 – 5000	49.3	46.6
5001 - 6000	49.9	46.6
6001 - 7000	50.6	46.7
7001 - 8000	51.3	46.7
8001 - 9000	51.9	46.8
9001 - 10000	52.6	46.8
10001 - 11000	53.2	46.9
11001 - 12000	53.9	46.9
12001 - 13000	54.5	46.9
13001 - 14000	55.2	47.0
14001 - 15000	55.8	47.0
15001 - 16000	56.5	47.1
16001 - 17000	57.1	47.1
17001 - 18000	57.8	47.2
18001 - 19000	58.4	47.2
19001 - 20000	59.1	47.3
20001 - 21000	59.7	47.3
21001 - 22000	60.4	47.4
22001 - 23000	61.0	47.4
23001 - 24000	61.7	47.5
24001 - 25000	62.4	47.5
25001 - 26000	63.0	47.6
26001 - 27000	63.7	47.6
27001 - 28000	64.3	47.7
28001 - 29000	65.0	47.7
29001 - 30000	65.6	47.8
30001 - 31000	66.3	47.8
31001 - 32000	66.9	47.8
32001 - 33000	67.6	47.9
33001 - 34000	68.2	47.9
34001 - 35000	68.9	48.0
35001 - 36000	69.5	48.0
36001 - 37000	70.2	48.1
37001 - 38000	70.8	48.1
38001 - 39000	71.5	48.2
39001 - 40000	72.1	48.2

(Continued in next column)

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

♦**ITEM 195** (Cont'd)

MILEAGE RATE ALLOWANCE ON TANK "T" CAR (SEE ITEM 196 FOR EXPLANATION OF DESIGNATING SYMBOL) (SEE NOTE 1)

COLUMN 1	COLUMN 2	COLUMN 3
40001 - 41000	72.8	48.3
41001 - 42000	73.5	48.3
42001 - 43000	74.1	48.4
43001 - 44000	74.8	48.4
44001 - 45000	75.4	48.5
45001 - 46000	76.1	48.5
46001 - 47000	76.7	48.6
47001 - 48000	77.4	48.6
48001 - 49000	78.0	48.7
49001 - 50000	78.7	48.7
50001 - 51000	79.3	48.7
51001 - 52000	80.0	48.8
52001 - 53000	80.6	48.8
53001 - 54000	81.3	48.9
54001 - 55000	81.9	48.9
55001 - 56000	82.6	49.0
56001 - 57000	83.3	49.0
57001 - 58000	83.9	49.1
58001 - 59000	84.6	49.1
59001 - 60000	85.2	49.2
60001 - 61000	85.9	49.2
61001 - 62000	86.5	49.3
62001 - 63000	87.2	49.3
63001 - 64000	87.8	49.4
64001 - 65000	88.5	49.4
65001 - 66000	89.1	49.5
66001 - 67000	89.8	49.5
67001 - 68000	90.4	49.5
68001 - 69000	91.1	49.6
69001 - 70000	91.7	49.6
70001 - 71000	92.4	49.7
71001 - 72000	93.0	49.7
72001 - 73000	93.7	49.8
73001 - 74000	94.4	49.8
74001 - 75000	95.0	49.9
75001 - 76000	95.7	49.9
76001 - 77000	96.3	50.0
77001 - 78000	97.0	50.0
78001 - 79000	97.6	50.1
79001 - 80000	98.3	50.1

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SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

♦ **ITEM 195** (Cont'd)

MILEAGE RATE ALLOWANCE ON TANK "T" CAR (SEE ITEM 196 FOR EXPLANATION OF DESIGNATING SYMBOL) (SEE NOTE 1)

COLUMN 1	COLUMN 2	COLUMN 3
80001 - 81000	98.9	50.2
81001 - 82000	99.6	50.2
82001 - 83000	100.2	50.3
83001 - 84000	100.9	50.3
84001 - 85000	101.5	50.4
85001 - 86000	102.2	50.4
86001 - 87000	102.8	50.4
87001 - 88000	103.5	50.5
88001 - 89000	104.1	50.5
89001 - 90000	104.8	50.6
90001 - 91000	105.5	50.6
91001 - 92000	106.1	50.7
92001 - 93000	106.8	50.7
93001 - 94000	107.4	50.8
94001 - 95000	108.1	50.8
95001 - 96000	108.4	50.7
96001 - 97000	108.7	50.6
97001 - 98000	109.0	50.5
98001 - 99000	109.3	50.4
99001 - 100000	109.6	50.3
100001 - 101000	109.9	50.1
101001 - 102000	110.2	50.0
102001 - 103000	110.5	49.9
103001 - 104000	110.7	49.8
104001 - 105000	111.0	49.7
105001 - 106000	111.3	49.6
106001 - 107000	111.6	49.5
107001 - 108000	111.9	49.4
108001 - 109000	112.2	49.3
109001 - 110000	112.5	49.2
110001 - 111000	112.7	49.1
111001 - 112000	113.0	49.0
112001 - 113000	113.3	48.9
113001 - 114000	113.6	48.8
114001 - 115000	113.8	48.7
115001 - 116000	114.1	48.6
116001 - 117000	114.4	48.5
117001 - 118000	114.6	48.4
118001 - 119000	114.9	48.3
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SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

♦ **ITEM 195** (Cont'd)

MILEAGE RATE ALLOWANCE ON TANK "T" CAR (SEE ITEM 196 FOR EXPLANATION OF DESIGNATING SYMBOL) (SEE NOTE 1)

COLUMN 1	COLUMN 2	COLUMN 3
120001 - 121000	115.4	48.1
121001 - 122000	115.7	48.0
122001 - 123000	116.0	47.9
123001 - 124000	116.2	47.8
124001 - 125000	116.5	47.7
125001 - 126000	116.7	47.6
126001 - 127000	117.0	47.5
127001 - 128000	117.2	47.4
128001 - 129000	117.5	47.3
129001 - 130000	117.7	47.2
130001 - 131000	118.0	47.1
131001 - 132000	118.2	47.0
132001 - 133000	118.5	46.9
133001 - 134000	118.7	46.8
134001 - 135000	119.0	46.7
135001 - 136000	119.2	46.6
136001 - 137000	119.4	46.6
137001 - 138000	119.7	46.5
138001 - 139000	119.9	46.4
139001 - 140000	120.1	46.3
140001 - 141000	120.4	46.2
141001 - 142000	120.6	46.1
142001 - 143000	120.8	46.0
143001 - 144000	121.1	45.9
144001 - 145000	121.3	45.9
145001 - 146000	121.5	45.8
146001 - 147000	121.7	45.7
147001 - 148000	122.0	45.6
148001 - 149000	122.2	45.5
149001 - 150000	122.4	45.4
150001 - 151000	122.6	45.3
151001 - 152000	122.9	45.3
152001 - 153000	123.1	45.2
153001 - 154000	123.3	45.1
154001 - 155000	123.5	45.0
155001 - 156000	123.7	44.9
156001 - 157000	124.0	44.9
157001 - 158000	124.2	44.8
158001 - 159000	124.4	44.7

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SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 195 (Cont'd)

MILEAGE RATE ALLOWANCE ON TANK "T" CAR
(SEE ITEM 196 FOR EXPLANATION OF DESIGNATING SYMBOL) (SEE NOTE 1)
(Cont'd)

EXPLANATION OF NOTES

1. Designating symbols (mechanical designation) will be assigned to car owner or lessee by the Executive Director, Rules and Standards, Technical Services, Association of American Railroads, upon written application.

2. For mileage allowance purposes, the service year of a car is calculated based upon year of construction of underframe. A car's first service year is the year built. Its second service year begins on January 1 of the year following the year built, with succeeding service years starting on January 1 of each following year. If the tank's service year exceeds 30, the car's service year is considered to be in excess of 30 regardless of year of construction of underframe. For those cars constructed without an underframe, the car's service year is calculated based upon year of construction of tank. Service year is determined by subtracting the year of construction (built/rebuilt) from the current calendar year, plus 1, e.g., (2000 - 1970) + 1 = 31, or Service Years 31 and over allowance bracket.

(Continued on next page)

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 195 (Cont'd)

MILEAGE RATE ALLOWANCE ON TANK "T" CAR
(SEE ITEM 196 FOR EXPLANATION OF DESIGNATING SYMBOL) (SEE NOTE 1)

EXPLANATION OF NOTES

3. Applies as follows:

   A. For cars built between January 1, 1968 and July 1, 1991, assignment of owned or leased cars to value groups will be determined by the original cost as represented to the original buyer by the manufacturer's invoice price at the time of original installation into service. In the case of a manufacturer-lessor, the fair market value or the value which was certified, or would have been certified, for investment tax credit purposes shall be substituted therefore.

   B. Assignment to value groups of cars placed into service after July 1, 1991 will be determined by the original cost of the car to the original buyer as stated in the manufacturer's invoice. In only two circumstances, owners may certify as alternative "true value" in lieu of invoice price: (a) manufacturers who retain cars for their own leasing service and (b) purchasers who can demonstrate that they contributed physical assets of significant value that were used by the manufacturer in fabricating a car, resulting in a reduction of the invoice price by more than $1,000 per car below the price that otherwise would have been charged. For manufacturers "true value" is the price for which a car or group of cars manufactured as a group would have been sold in an arm's length transaction. For purchasers who have made a qualifying contribution to fabrication, "true value" is the invoice price plus the depreciated value of the contributed assets distributed over the cars for which the assets were used, subject to the same limitations on "true value" which would apply to a manufacturer. "True value" shall not exceed the average price of similar cars registered in Umler at invoice price within the most recent 12 months for which registration information is available in Umler, adjusted for changes in the market values of new tank cars as reflected in average car prices. If the AAR determines by audit that a certified "true value" exceeds this value limit by an amount that causes a car to be placed in a higher allowance value bracket, the value of the car will be reduced to the appropriate value bracket. In addition, if the AAR determines by audit that a certified, "true value" exceeds this value limit by an amount that causes a car to be placed in allowance value bracket more than one bracket above the otherwise applicable bracket, excess allowances paid as a result of the over valuation shall be reimbursed to the paying railroads.

      Those owners who certify a "true value" in lieu of invoice price during the calendar year must provide to the AAR an officer's certificate at the end of the year stating that, based on all information available to the owner, the owner has complied with the terms of this item. Car owners must supply for entry into Umler all information required for tank cars in the Umler Data Specification Manual. Notwithstanding any other provision of this tariff item, "true value" will be subject to audit directly by the AAR.

(Continued in next column)

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 195 (Cont'd)

MILEAGE RATE ALLOWANCE ON TANK "T" CAR
(SEE ITEM 196 FOR EXPLANATION OF DESIGNATING SYMBOL) (SEE NOTE 1)

EXPLANATION OF NOTES

3. Applies as follows: (Cont'd)

   C. If applicable, initial into service transportation costs, capitalized original lining costs, capitalized additions and capitalized betterments shall be added to car values determined pursuant to Paragraphs 3 (A) and 3 (B), above, if not already included in the value of the car. For cars built after January 1, 1988, capitalized inspection costs shall be added to the value, if applicable and if not already included in the value, if applicable and if not already included in the value of the car. Values other than invoice price shall be identified in accordance with the current AAR Umler Data Specification Manual at the time cars are submitted to the Assistant Vice President, Business Services, AAR, for registration in the Umler file (see Note 6, this item).

   D. The rebuilt year and rebuilt valuation of a private car will be utilized for the purpose of computing applicable mileage allowances subject to the following conditions:

      1. The car must be rebuilt in accordance with the current requirements of Rule 88, Section C of the Office Manual and Sections A & B of the Field Manual, AAR Interchange Rules, Application for official rebuilt status must be filed with the Executive Director, Rules and Standards, AAR Technical Services and written formal approval received prior to registering such car in the Umler file with rebuilt age and valuation data.

      2. Assignment of owned or leased rebuilt cars to value groups will be determined as outlined in Notes 3. (A), 3. (B) and 3. (C) herein, except that the maximum valuation of a rebuilt private car shall not exceed the lesser of:
         a. 75 percent of the original cost of a comparable new car.
         b. 75 percent of the calculated replacement cost of the rebuilt car prior to rebuilding, as computed per AAR Interchange Rule 107.

   E. All car ages and values submitted are subject to verification by the AAR, and audit by the AAR or the owners independent public accountant upon reasonable request by the AAR. If the car owner elects to have the audit performed by its independent public accountant, such audit must be performed in a timely fashion in the manner prescribed by the AAR, will be performed at the car owner's expense and must be duly certified by the car owner's auditor as representing the true value of all cars included in such audit. Failure of the car owner to furnish the required car valuation data to the AAR Umler file, to arrange for the requested audit, or to correct errors determined as a result of such audit, will result in such car(s) being assigned to the lowest applicable mileage allowance rate group.

(Continued on next page)

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 195 (Cont'd)

MILEAGE RATE ALLOWANCE ON TANK "T" CAR (SEE ITEM 196 FOR EXPLANATION OF DESIGNATING SYMBOL) (SEE NOTE 1)

EXPLANATION OF NOTES

3. Applies as follows: (Cont'd)

F. Maximum original cost of fair market value will be as follows:

1.	For cars built in 1981 and prior	$ 64,001
2.	For cars built in 1982	$ 58,001
3.	For cars built in 1983	$ 56,001
4.	For cars built in 1984	$ 51,001
5.	For cars built in 1985	$ 54,001
6.	For cars built in 1986	$ 66,001
7.	For cars built in 1987	$ 62,001
8.	For cars built in 1988	$ 63,001
9.	For cars built in 1989	$ 64,001
10.	For cars built in 1990	$ 67,001
11.	For cars built in 1991	$ 71,001
12.	For cars built in 1992	$ 70,001
13.	For cars built in 1993	$ 76,001
14.	For cars built in 1994	$ 74,001
15.	For cars built in 1995	$ 80,001
16.	For cars built in 1996	$ 83,001
17.	For cars built in 1997	$ 84,001
18.	For cars built in 1998	$ 89,001
19.	For cars built in 1999	$ 94,001
20.	For cars built in 2000	$ 92,001
21.	For cars built in 2001	$ 106,001
22.	For cars built in 2002	$ 109,001
23.	For cars built in 2003	$ 85,001
24.	For cars built in 2004	$ 93,001
25.	For cars built in 2005	$ 101,001
26.	For cars built in 2006	$ 97,001
27.	For cars built in 2007	$ 112,001
28.	For cars built in 2008	$ 112,001
29.	For cars built in 2009	$ 117,001
30.	For cars built in 2010	$ 102,001
31.	For cars built in 2011	$ 107,001
32.	For cars built in 2012	$ 129,001
33.	For cars built in 2013	$ 144,001
34.	For cars built in 2014	$ 136,001
35.	For cars built in 2015	$ 158,001
36.	For cars built in 2016	$ 141,001
37.	For cars built in 2017	$ 138,001
38.	For cars built in 2018 and subsequent	$ 141,001 [A]

NOTE: Age is determined by subtracting the year of construction (built/rebuilt) from the current calendar year plus 1. e.g. (2016-2000) + 1 = 17

4. For cars built or rebuilt subsequent to December 31, 1977, all values reported to the AAR Umler file must be stated in equivalent U.S. dollars based on the applicable exchange rate at the time such cars were built or rebuilt. Subsequent capitalized additions and betterments reported to Umler must also be stated in equivalent U.S. dollars at the time such improvements were made.

(Continued in next column)

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 195 (Cont'd)

MILEAGE RATE ALLOWANCE ON TANK "T" CAR (SEE ITEM 196 FOR EXPLANATION OF DESIGNATING SYMBOL) (SEE NOTE 1)

EXPLANATION OF NOTES

5. Applies as follows:

A. Into service transportation costs are those freight charges associated with the movement of a car that is ready for its first load to the locations of the car's original installation into service. Other transportation charges incurred during construction (e.g., to a facility which installs the original lining, etc) may be included in ledger value provided that the cost is capitalized.

B. A capital expenditure is an expenditure intended to benefit future periods in contrast to revenue expenditure/current expense which benefits a current period. It is an addition to a capital asset and is initially reflected on the balance sheet. A capital expenditure normally is subject to depreciation in future years.

C. Applies as follows:

1. An addition or betterment has the effect of:
   a. Extending the useful life of a car beyond the life projected when the car was entered into service; or
   b. Increasing a car's normal use beyond that which was in effect when the car was entered into service; or
   c. Lowering the operating costs beyond that which was in effect at the time the car was entered into service; or
   d. Otherwise adding to the worth of the benefits a car can yield beyond that in effect when the car was entered into service (e.g., enhance safety, etc).
   e. Any repair that maintains a car in its customary state of operating efficiency is NOT an addition or betterment.
2. An addition is the installation of a new component of a car (not a replacement) which meets the above tests. The value registered in Umler shall be the cost of the component added, including labor.
3. A betterment is the replacement of a component of the car with a superior component. The value registered in Umler for a betterment should not exceed the cost of the superior component, including labor minus (1) the original value of the component that was replaced (i.e., retired) and (2) the cost (i.e., expense) incurred in removing the old component.
4. When a unit of property is removed from a car (i.e., partial retirement), the ledger value registered in Umler shall be reduced by the original value of the unit removed.
5. Any cost recovered under AAR Defect Car Billing, if applicable, must be deducted from the cost of an addition or betterment.

(Continued on next page)

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 195 (Cont'd)

MILEAGE RATE ALLOWANCE ON TANK "T" CAR (SEE ITEM 196 FOR EXPLANATION OF DESIGNATING SYMBOL) (SEE NOTE 1)

EXPLANATION OF NOTES

6. Applies as follows:

   A. When an owner: (1) makes a valuation correction to the Umler file; or (2) changes the mechanical designation of cars registered in the Umler file; and such changes result in an increase or decrease in the mileage allowance rates, the Assistant Vice President, Business Services, AAR, will be so notified and the increase or decrease will be applied retroactively. Once cars have been reported to the Umler file, any of the foregoing corrections or changes that result in a retroactive increase or decrease in the mileage allowance rates will be identified by the Assistant Vice President. The car owner is required to furnish the Assistant Vice President documented proof of the basis of the correction or change and advise as to any applicable mileage allowance adjustments which are required.

   B. Retroactive Mileage Allowance Decrease: Within five (5) months from the date of a change to the Umler file resulting in a retroactive mileage allowance rate decrease, the owner will notify all using carriers of such decrease with either supporting details or a summary of the over-collections, with a copy to the Assistant Vice President. After receiving such notification, the using carrier shall deduct such amount(s), in the next open mileage reports to the car owner, plus fifteen (15) percent to reimburse the handling road for audit and associated administrative expenses. If the owner fails to send notification to the users within five (5) months, the Assistant Vice President shall notify carriers of the car initial (s) and number(s) involved and the user(s) shall make an adjustment, as described above.

   C. Retroactive Mileage Allowance Increase: Within five (5) months from the date of a change to the Umler file resulting in a retroactive mileage allowance rate increase, the owner will notify all using carriers of such increase with either supporting details or a summary of the under-collections, with a copy to the Assistant Vice President. After receiving such notification, the using carriers shall add such amount(s) in their next open mileage reports to the car owner, less fifteen (15) percent to reimburse the handling roads for audit and associated administrative expense. No retroactive mileage allowance rate increase will be applicable if the owner fails to notify the using carriers of such increase within five (5) months from the date of a change to the Umler file.

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 196

EXPLANATION OF SYMBOL USED IN ITEM 195

SYMBOL	EXPLANATION
"T"	Tank Car. Tank car means any car which is used only for the transportation of liquids, liquefied gases, compressed gases, or solids that are liquefied prior to unloading. Car may be without underframe if container serving as superstructure is designed to serve as underframe. If car has underframe, it must be designed only for the carriage of one or more enclosed containers (with or without compartments) that form the superstructure and are integral parts of the car. All such containers must be securely attached to underframe when offered for transportation but may have demountable features.

EXHIBIT 6



FREIGHT TARIFF RIC 6007-N

(For cancellations, see Item 1, this tariff)

MILEAGE ALLOWANCES AND RULES GOVERNING

THE HANDLING OF AND THE PAYMENT OF MILEAGE

ALSO CHARGES

ON
CARS OF PRIVATE OWNERSHIP
AS DEFINED IN ITEMS 25 AND 400

BY
RAILROADS PARTIES TO THIS TARIFF

For List of Participating Carriers, see Item 2.10

This tariff is also applicable on intrastate traffic, except where expressly provided to the contrary in connection with particular rates and provisions contained herein.

ISSUED: February 6, 2009 **EFFECTIVE: March 1, 2009**

ISSUED BY

RAILINC, AGENT
7001 WESTON PARKWAY, SUITE 200
CARY, NC 27513

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For explanation of terms and explanation of abbreviations and reference marks, see Item 99999, this tariff.

ITEM 1

CANCELLATION NOTICE

Freight Tariff RIC 6007-N cancels Freight Tariff RIC 6007-M and Freight Tariff ASLG 6007, and all supplements issued thereto.

Provisions formerly published in Freight Tariff RIC 6007-M and Freight Tariff ASLG 6007, as supplemented, and not brought forward in Freight Tariff RIC 6007-N are hereby canceled.

ITEM 2.10

LIST OF PARTICIPATING CARRIERS
ALPHABETIZED BY STANDARD
CARRIER ABBREVIATION
(See Note 1)

AA - Ann Arbor Railroad.....413
AKDN - Acadiana Railway Company.....40, 412
ANR - Angelina & Neches River Railroad Company.....35
APA - Apache Railway Company.....35
AR - Aberdeen and Rockfish Railroad Company….36, 411
ASRY - Ashland Railway, Inc.

BLOL - BloomerLine, The
BNSF - BNSF Railway Company…….50,70,73, 410, 420, 422, 424, 426, 428, 430, 432, 434, 436, 438, 440, 441, 442, 444, 445, 446, 448, 620, 630
BOCT - Baltimore and Ohio Chicago Terminal Railroad Company, The……..…22
BPRR - Buffalo & Pittsburgh Railroad, Inc.....75, 449
BS - Birmingham Southern Railroad Company…....64, 418
BXN - Bauxite & Northern Railway Company…….....55, 416

CAGY - Columbus and Greenville Railway.....102, 453
CBRY - Copper Basin Railway, Inc.
CCKY - Chattanooga & Chickamauga Railway Co.
CIC - Cedar Rapids and Iowa City Railway Company…...80, 450
CLC - Columbia & Cowlitz Railway Company….....35
CM - Central Montana Rail, Inc.
CN - Canadian National Railway……..….90, 185, 454, 457.50
CPRS - Canadian Pacific Railway.….99, 458, 459, 460, 462, 464, 466, 468, 470, 472, 474, 476, 478, 480, 482, 630
CSS - Chicago SouthShore & South Bend Railroad…....451, 452
CSXT - CSX Transportation, Inc., comprised of the following carriers:
Carrollton Railroad, The.
CSX Transportation, Inc.
Gainesville Midland Railroad Company.
Richmond, Fredericksburg and Potomac Railway Company.
Three Rivers Railway Company.
Western Railway of Alabama, The...106, 484, 486
CW - Colorado & Wyoming Railway Company, The
CWA - Central Washington Railroad Company

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ITEM 2.10

LIST OF PARTICIPATING CARRIERS
ALPHABETIZED BY STANDARD
CARRIER ABBREVIATION
(See Note 1)

DKS - Doniphan, Kensett & Searcy Railway
DME - Dakota, Minnesota & Eastern Railroad…….....487, 622
DQE - DeQueen and Eastern Railroad Company

ECBR - East Cooper & Berkeley Railroad Company
EJE - Elgin, Joliet and Eastern Railway Company…….112, 488, 490
ELS - Escanaba and Lake Superior Railroad Company.....35
EV - Everett Railroad Company
ETRY - East Tennessee Railway, L.P.

FWCR - Florida West Coast Railroad Company

GLC - Great Lakes Central Railroad
GNBC - Grainbelt Corporation.....620, 630
GNRR - Georgia Northeastern Railroad Company, Inc.
GRR - Georgetown Railroad Company
GRW - Gary Railway Company
GTRA - Golden Triangle Railroad
GWWE - Gateway Eastern Railway Company

HE - Hollis & Eastern Railroad Company
HPTD - High Point, Thomasville & Denton Railroad Company……..492

IAIS - Iowa Interstate Railroad, Ltd.....35, 120,121
IANR - Iowa Northern Railway……..……495

ICE - Iowa, Chicago & Eastern Railroad Corporation……499
IORY - Indiana & Ohio Railway Company

KCS - Kansas City Southern Railway Company…...…35, 124, 185, 504, 524, 526, 527, 630

LC - Lancaster and Chester Railway Company
LNW - Louisiana and North West Railroad Company
LSI - Lake Superior & Ishpeming Railroad Company
LSRC - Lake State Railway Company

ME - Morristown & Erie Railway, Inc.
MCR - McCloud Railway Company
MRL - Montana Rail Link, Inc.…….620, 630
MSE - Mississippi Export Railroad Company.....35

(Continued on next page)

For explanation of terms and explanation of abbreviations and reference marks, see Item 99999, this tariff.

ITEM 2.10

LIST OF PARTICIPATING CARRIERS
ALPHABETIZED BY STANDARD
CARRIER ABBREVIATION
(See Note 1)

NHN - New Hampshire Northcoast Corporation
NS - Norfolk Southern Railway Company, comprised of the following carriers:
Norfolk and Western Railway Company
Norfolk Southern Railway Company.
Alabama Great Southern Railroad Company.
Atlantic and East Carolina Railway Company.
Camp Lejeune Railroad Company.
Central of Georgia Railroad Company.
Chesapeake Western Railway.
Cincinnati, New Orleans and Texas Pacific Railway Company.
Georgia Southern and Florida Railway Company.
Tennessee Railway Company……...131,135, 540,544,545,546,547, 548

NYSW - New York, Susquehanna and Western Railway Corp.

PBVR - Port Bienville Railroad
PCN - Point Comfort & Northern Railway Company…....35, 45, 427
PDRR - Pee Dee River Railroad.....140, 552
PNR - Panhandle Northern Railroad Co.
PW - Providence and Worcester Railroad Company…....35

RSR - Rochester & Southern Railroad, Inc.
RSS - Rockdale, Sandow & Southern Railroad Company……..……..55, 416

SAN - Sandersville Railroad Company.....145, 550
SBVR - South Branch Valley Rail Road
SLC - San Luis Central Railroad Company, The
SM - St. Marys Railroad Company.....148, 554
SMA - San Manuel Arizona Railroad Company
SRN - Sabine River & Northern Railroad Company
ST - ST Rail System……...150, 555, 560, 565
SUN - Sunset Railway Company

TR - Tomahawk Railway, Limited Partnership.....35
TRC - Trona Railway Company.....35
TSRR - Tennessee Southern Railroad Company, Inc.
TSU - Tulsa-Sapulpa Union Railway Company.....35

UP - Union Pacific Railroad Company…….. 50, 185, 410, 575, 576, 577, 579, 585, 591, 592, 630

VR - Valdosta Railway, L.P
WSS - Winston-Salem Southbound Railway Company……595
WTNN - West Tennessee Railroad Corp.....35

EXPLANATION OF NOTES

1. Items of general application affecting the participation of all or large groups or numbers of carriers are not listed in this column.

RULES AND OTHER GOVERNING PROVISIONS
GENERAL RULES AND REGULATIONS

ITEM 5

REFERENCE TO TARIFFS, ITEMS, NOTES, RULES, ETC

1. Where reference is made in this tariff to tariffs, items, notes, rules, etc., such references are continuous and include supplements to and successive issues of such tariffs and reissues of such items, notes, rules, etc.

2. Where reference is made in this tariff to another tariff by number, such reference applies also to such tariff to the extent it may be applicable on intrastate traffic or traffic to or from Canada.

ITEM 10

CONSECUTIVE NUMBERS

1. Where consecutive numbers are represented in this tariff by the first and last numbers connected by the word “to” of a hyphen they will be understood to include both of the numbers shown.

2. If the first number only bears a reference mark such reference mark also applies to the last number shown and to all numbers between the first and last numbers.

ITEM 15

METHOD OF CANCELLING ITEMS

As this Tariff is supplemented, numbered items with letter suffixes cancel correspondingly numbered items in the original tariff, or in a prior supplement. Letter suffixes will be used in alphabetical sequence starting with A, Example: Item 100-A cancels Item 100, Item 100-AA cancels Item 100-Z, Item 100-AB cancels Item 100-AA, Item 100-BA cancels Item 100-AZ, or Item 105-B cancels Item 105-A, in a prior supplement which in turn cancelled Item 105

ITEM 20

METHOD OF DENOTING REISSUED MATTER IN SUPPLEMENTS

Matter brought forward without change from one supplement to another will be designated as “Reissued” by a reference mark in the form of a square enclosing a number, the number being that of the supplement in which the reissued matter first appeared in its currently effective form. To determine its original effective date, consult the supplement in which the reissued matter first became effective

ITEM 22

BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY (SEE EXCEPTION 1)

Provisions of this tariff for the movement of empty cars without charge to or from shop facilities for cleaning, lining, relining, maintenance or repair, will not apply to such cars moving from or to shop facilities served by BOCT, to the extent charges are published in Tariff BOCT 8100-Series.

EXCEPTION

1. These provisions do not apply to tank cars.

For explanation of terms and explanation of abbreviations and reference marks, see Item 99999, this tariff.

SECTION 1
APPLIES ONLY ON TANK CARS

ITEM 25

APPLICATION OF SECTION 1

1. The term "Cars of Private Ownership", when used in this tariff, is defined as cars bearing other than Railroad Reporting marks that are owned by individuals, firms, corporations, or car companies, including cars owned and/ or operated by railroad controlled car lines.

2. Except as otherwise provided herein, these rules govern the handling of tank cars including the payment of mileage allowances, when used by railroads parties to this tariff individually or jointly, where specifically provided herein, for transportation over their lines as follows:

   A. Between points in the United States (interstate and intrastate) including movements where part of the through route is through Canada.

   B. Internationally, i.e., between points in the United States and points in Canada. (Applicable only on that portion of the haul within the United States).

   C. For that portion of the haul in the United States in connection with movements between points in Canada where part of the through route is through the United States.

SECTION 1
EXCEPTION TO APPLICATION OF RATES
APPLIES ONLY ON TANK CARS

ITEM 30

GENERAL EXCEPTION

The rules and mileage allowances published herein will not apply to:

A. Cars that are not properly registered in the Official Railway Equipment Register, RER 6414-Series, showing capacities and assigned reporting marks.

B. Mileage allowances named in Item 195-Series of this tariff will not apply to cars handled under the provisions of Item 190.

ITEM 35

APPLIES ONLY FOR CARRIERS NAMED IN THIS ITEM

The provisions of Item 187-Series "Equalization of Mileage on Tank Cars of Private Ownership", will not apply in connection with carriers named below:

Angelina and Neches River Railroad Company
Apache Railway Company, The
Columbia and Cowlitz Railway Company
Escanaba and Lake Superior Railroad Company
Iowa Interstate Railroad, Ltd.
Kansas City Southern Railway Company (Stations 31011 to 31315 only)
Mississippi Export Railroad
Point Comfort and Northern Railway Company
Providence and Worcester Railroad Company
Tomahawk Railway, Limited Partnership
Trona Railway Company
Tulsa Sapulpa Union Railway Company
West Tennessee Railroad Corp.

ITEM 36

ABERDEEN AND ROCKFISH RAILROAD COMPANY (AR)

Mileage allowance will not be paid by the AR on movments of five (5) miles or less.

For explanation of terms and explanation of abbreviations and reference marks, see Item 99999, this tariff.

SECTION 1
EXCEPTION TO APPLICATION AND RULES
APPLIES ONLY ON TANK CARS

ITEM 40

ACADIANA RAILWAY COMPANY (AKDN)

The provisions of Item 190-Series, or other provisions for the movement of empty cars without charge to or from facilities for cleaning, lining, relining, maintenance, modification or repair, will not apply to such cars moving to or from facilities served by AKDN unless the empty movement is immediately preceded by or followed by a loaded revenue movement via the AKDN. In all other circumstances, the published tariff charges for movement of empty cars on their own wheels shall apply.

ITEM 50

APPLIES ONLY FOR CARRIERS NAMED IN THIS ITEM

Empty privately-owned or leased tank cars used or to be used in Intra-Mexican service will be subject to the following provisions:

A. Owner or lessee shall secure an entry permit from the involved Mexican carrier prior to empty movement to the border crossing and permit number must be shown in the writing instructions accompanying such car.

B. Subsequent to Intra-Mexican service, written instructions for each car entering the U.S. must clearly indicate the exact consignee or facility for disposition of the car prior to movement beyond the border gateways.

C. Upon failure to comply with paragraphs A or B, a holding charge of $10.00 per day will be assessed for each 24 hours or fraction thereof beginning at 7:00 AM of the day following arrival of such empty privately owned or leased car at the border crossing, (excluding Saturdays, Sundays and holidays), until provisions of paragraphs A and B as applicable are fulfilled.

BNSF Railway Company
Union Pacific Railroad Company

ITEM 55

BAUXITE & NORTHERN RAILWAY COMPANY (BXN)
POINT COMFORT & NORTHERN RAILWAY COMPANY (PCN)
ROCKDALE, SANDOW & SOUTHERN RAILROAD COMPANY (RSS)

The provisions of Item 190-Series or other provisions for the movement of empty tank cars without charge will not apply to such cars moving on the BXN, PCN or RSS, unless the empty movement is immediately preceded by or followed by a revenue movement on the same road (BXN, PCN, RSS). The published charges in Tariff BXN 4700, PCN 4700 or RSS 4700 will apply.

SECTION 1
EXCEPTION TO APPLICATION AND RULES
APPLIES ONLY ON TANK CARS

ITEM 64

BIRMINGHAM SOUTHERN RAILROAD COMPANY (BS)

The provisions of Item 190-Series, or other provisions for the movement of empty tank cars without charge to or from facilities for cleaning, lining, relining, maintenance, modification, repair or storage, will not apply to such cars moving to or from facilities served by this railroad unless the empty movement is immediately preceded by or followed by a loaded revenue movement via the BS. In all other circumstances, the published tariff charges in Tariffs BS 8020 or BS 3023-Series for movement of empty cars on their own wheels to and from repair or storage facilities shall apply.

ITEM 70

BNSF RAILWAY COMPANY (LINES IN CANADA)

This tariff also applies on all traffic moving over the lines of the BNSF in Canada.

ITEM 73

BNSF RAILWAY COMPANY
(EXCEPTION TO ITEM 190)

When a tank car is released from load on BNSF, the empty will be returned via the reverse of the loaded route to the origin station of the last loaded movement. If the owner or lessee of the car desires movement via a different route or to a station other than the origin of the last loaded movement, empty billing instructions must be given to:

BNSF Railway Co.
Carload Billing
920 S.E. Quincy
Topeka, KS 66612
Telephone: (800) 786-2873
FAX: (800) 786-2455

prior to release of the empty car. If the owner or lessee of the car requests movement via a different route, or to a station other than the origin of the last movement, after release of the empty car, diversion provisions and charges, as named in BNSF Diversion Tariff 6200 Series, are applicable.

For explanation of terms and explanation of abbreviations and reference marks, see Item 99999, this tariff.

SECTION 1
EXCEPTION TO APPLICATION AND RULES
APPLIES ONLY ON TANK CARS

ITEM 75

BUFFALO & PITTSBURGH RAILROAD, INC. (BPRR)

The provisions of Item 190-Series, or other provisions for the movement of empty tank cars without charge to or from facilities for cleaning, lining, relining, maintenance, modification, repair or storage, will not apply to such cars moving to or from facilities served by the BPRR unless the empty movement is immediately preceded by or followed by a loaded revenue movement via the BPRR. In all other circumstances, the published tariff charges in Tariff BPRR 4004-Series for movement of empty cars on their own wheels to and from repair or storage facilities shall apply.

ITEM 80

CEDAR RAPIDS AND IOWA CITY RAILWAY COMPANY (CIC)

The provisions of Item 190-Series or other provisions provided in this tariff for the movement of empty tank cars without charge to and from facilities for cleaning, lining, relining, maintenance, modification, repair or storage, etc., will not apply for account of the CIC. For Rules and charges to apply, see Freight Tariff CIC 4006-Series.

ITEM 90

CANADIAN NATIONAL RAILWAY COMPANY

The tariff rules contained herein regarding tank car movements will not apply to the movements described in Item 25.2.C. For those movements, the rules and charges contained in Tariff CN 6544 shall apply.

ITEM 99

CANADIAN PACIFIC RAILWAY
(EXCEPTION TO ITEM 190)

The provisions of Item 190 Series for the movement of empty tank cars without charge to or from facilities for cleaning, lining, relining, maintenance, modification or repair, will not apply to such cars moving via CPRS from or to said facilities unless the empty movement is immediately preceded by or followed by a loaded revenue movement via CPRS. In all other circumstances, the published tariff charges in Tariff CP 4000 Series for movement of empty cars on their own wheels shall apply

SECTION 1
EXCEPTION TO APPLICATION AND RULES
APPLIES ONLY ON TANK CARS

ITEM 102

COLUMBUS AND GREENVILLE RAILWAY (CAGY)

The provisions of Item 190-Series, or other provisions for the movement of empty tank cars without charge will not apply to such cars moving, to, from, or via the CAGY unless the empty movement is immediately preceded by or followed by a revenue movement via Columbus and Greenville Railway. In all other circumstances, charges published in the Uniform Freight Classification for movement of empty cars on their own wheels observing the single line minimum charge shall apply.

For explanation of terms and explanation of abbreviations and reference marks, see Item 99999, this tariff.

SECTION 1
EXCEPTION TO APPLICATION AND RULES
APPLIES ONLY ON TANK CARS

ITEM 106

CSX TRANSPORTATION INC.

The participation of this carrier is restricted to movements over its lines, as follows:

A. Between points in the United States, including movements where part of the through route is through the Dominion of Canada.

B. For that portion of the haul in the United States on international movements, i.e., between points in the United States and points in the Dominion of Canada.

ITEM 112

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

The provisions of Item 190 Series or other provisions for the movement of empty tank cars without charge to or from facilities for cleaning, lining, relining, maintenance, modification, repair or storage, will not apply to such cars moving to or from facilities acting as agent for the cars' owners and located at stations served by this railroad unless the empty movement is immediately preceded by or followed by a loaded revenue movement via the EJE. In all other circumstances, the published tariff charges in Tariff EJE 4193 or 6024 Series for movement of empty cars on their own wheels to and from repair or storage facilities acting as agent for the car owner shall apply.

ITEM 120

IOWA INTERSTATE RAILROAD, LTD (IAIS)
(Exception to Item 190-Series)

The provisions of Item 190-Series, or other provisions for the movement of empty tank cars without charge to or from facilities for cleaning, lining, relining, maintenance, modification or repair, will not apply to such cars routed via IAIS to and from facilities served by Cedar Rapids and Iowa City Railway unless the empty movement is immediately preceded by or followed by a loaded revenue movement via the IAIS. In all other circumstances, the published tariff charges in Tariff IAIS 3000-D Series for movement of empty cars on their own wheels shall apply.

ITEM 121

IOWA INTERSTATE RAILROAD, LTD. (IAIS)
(Station Nos. 122 to 5006)

The maximum allowance under the provisions of Item 195-Series to be paid by IAIS on shipments of Alcoholic Spirits and/or Alcoholic Liqueurs, when originating at points in Indiana and destined to points in California, shall be seventy-five cents per mile.

SECTION 1
EXCEPTION TO APPLICATION AND RULES
APPLIES ONLY ON TANK CARS

ITEM 124

KANSAS CITY SOUTHERN RAILWAY COMPANY, THE

Provisions of Item 190 Series, or any other provision allowing for free switching service of an empty freight car (or cars) to or from shop facilities for cleaning, lining, relining, maintenance, modification or repair, will not apply to and from shop facilities served by KCS. Matter of switch charge will be handled by the applicable KCS Tariff.

ITEM 131

NORFOLK SOUTHERN RAILWAY COMPANY

When it is necessary to move a loaded private car to/from shop or repair facilities located on NS, NS will pay mileage payments not to exceed the amount that would have been earned had the car not required additional rail movements to/ from shop or repair facilities, provided that the mileage allowances for the loaded movement are not elsewhere restricted.

ITEM 135

NORFOLK SOUTHERN RAILWAY COMPANY
(EXCEPTION TO ITEM 190) (See NOTE 1)

When a car is released from load on NS, the empty will be returned via the reverse of the loaded route to the origin station of the last loaded movement. If the owner or lessee of the car desires movement via a different route or to a station other than the origin of the last loaded movement, empty billing instructions must be sent prior to release of the empty car via FAX, or NS internet application. If by fax send to:

FAX: 800-580-6092
Norfolk Southern Railway Company
Agency Operation Center
125 Spring Street South West
Atlanta, GA 30303

If the owner or lessee requests movement via a different route, or to a station other than the origin of the last loaded movement, after release of the empty car, diversion provisions and charges, as named in Norfolk Southern Tariff 8002 Series, are applicable.

EXPLANATION OF NOTE

1. If subject tank car has last contained Hazardous Materials, shipping paper must be furnished at the point of origin of the empty car for all moves whether they are reverse or not.

For explanation of terms and explanation of abbreviations and reference marks, see Item 99999, this tariff.

SECTION 1
EXCEPTION TO APPLICATION AND RULES
APPLIES ONLY ON TANK CARS

ITEM 140

PEE DEE RIVER RAILROAD (PDRR)

Mileage allowance will not be paid by the PDRR on movments of five (5) miles or less.

ITEM 145

SANDERSVILLE RAILROAD COMPANY (SAN)

Inbound tank car mileage will be used as an offset to outbound loaded mileage (or vice versa) and the SAN will pay no mileage based on freight mileage table from or to station on its line.

ITEM 148

ST MARYS RAILROAD COMPANY (SM)

Inbound tank car mileage will be used as an offset to outbound loaded mileage and the SM will pay no mileage based on freight mileage table:

From Kingsland, GA to St Marys, GA and from St Marys, GA to Kingsland, GA.

From Kingsland, GA to Kings Bay, GA and from Kings Bay, GA to Kingsland, GA.

ITEM 150

ST RAIL SYSTEM

1. The provisions of Item 190 Series or other provisions for the movement of empty tank cars without charge to or from facilities for cleaning, lining, relining, maintenance, modification or repair, will not apply to such cars moving via ST Rail System from or to said facilities unless the empty movement is immediately preceded by or followed by a loaded revenue movement via the ST Rail System. In all other circumstances, the published tariff charges in Tariff ST 4020 Series for movement of empty cars on their own wheels shall apply.

2. The provisions of Item 180 Series concerning the payment of mileage will not apply to cars which are moving via ST Rail System under rates published in tariffs, quotes or contracts that are identified as "zero mileage rates". In the event that the party responsible for the payment of freight charges associated with zero mileage rates is different than the party to whom the reporting marks for said cars are assigned, the car owner must secure mileage payments from the freight paying party.

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 180

PAYMENT OF MILEAGE

1. Upon written application reporting marks will be assigned to car owner or lessee by the Secretary, Business Services, Association of American Railroads, provided applicants are subscribers to the AAR Mechanical Interchange Agreement. Applications for reporting marks shall state the name and address of the owner and lessee for cars under lease.

2. Mileage allowance must be reported to the car owner (person or company at a single address, to whom the reporting marks are assigned) within one (1) month and ten (10) days from the last day of the month in which it is earned including payment for cars on hand at the end of that month.

3. Mileage allowance for the use of tank cars will be paid only to the person or company at a single address, to whom the reporting marks are assigned provided cars are properly equipped and marked with the assigned reporting marks and car number, and providing further that:

   A. The capacities and assigned reporting marks are properly submitted, not later than the date of the installations of cars in service, to The Official Railway Equipment Register for publication in the next succeeding issue.

   B. A description of each car is furnished to the Secretary, Customer Service Division, AAR, as required in the Universal Machine Language Equipment Register for the assignment of applicable mileage allowances. Such information received by the Secretary by the last working day of the month except, data transfers requiring data entry by AAR staff must be received by the 25th day of the month, will be effective the first day of the subsequent month. Cars registered with transportation code S, X, or Y are not eligible for mileage allowances and will be assigned a zero rate.

4. Reporting marks assigned to private car owners shall consist of four letters including the final letter “X”.

5. Assigned reporting marks must be painted or stenciled on the body of the car. When reporting mileage allowances, the carding, placarding, or boarding of cars will not be recognized.

ITEM 182

DEDUCTIONS AND MILEAGE CLAIM HANDLING PROCEDURES

1. Deductions By Railroads To Private Car Owners

   A. Mileage allowed in error, by a railroad, including, but not limited to mileage allowed at incorrect rates for any reason, may be deducted from the car owner’s account within twenty-four (24) months from the last day of the month for which the mileage was reported as earned, but not later. A railroad may tender an invoice for mileage allowed in error at any time within twenty-four (24) months from the last day of the month for which the mileage was reported as earned. Except as provided in paragraph 3, an owner-lessor of a private car must remit within eight (8) months after the invoice is presented the entire amount of any invoice issued to it.

(Continued on next page)

For explanation of terms and explanation of abbreviations and reference marks, see Item 99999, this tariff.

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 182

DEDUCTIONS AND MILEAGE CLAIM HANDLING PROCEDURES

B. Deductions for amounts of $25.00 or less shall not be taken after the expiration of two (2) months and ten (10) days from the last day of the month the mileage was earned.

2. Claims Issued By Private Car Owners To Railroads.

A. A private car owner must, within twenty-four (24) months from the last day of the month the completed cycle was reported, present any claim for mileage allowance discrepancies, including incorrect rates or omissions, to the applicable rail carrier in the prescribed AAR format, as published in AAR Circular No. OT-3 Series in The Official Railway Equipment Register. Claims not presented in the required format will not be processed. The railroad receiving the claim must within the four (4) months from the date on which the claim was presented allow it in whole or in part, or decline it. The private car owner may reissue its claim, if applicable within four (4) months from the last day of the four (4) months' period allowed the railroad which handled the claim prior to reissuance. The railroad receiving the reissue claim must within four (4) months from the date of which the reissued claim was presented allow it in whole or in part or decline it. If the railroad fails to handle the original or reissued claim within the prescribed time limits, it will constitute a valid claim as last presented and must be honored by the railroad to which presented. Claim for amounts of $25.00 per car per cycle or less shall not be issued. The $25.00 limit is not applicable where no miles were reported for the railroad cycle.

3. Claims by Owners-Lessors

A. If a railroad takes a deduction against or issues an invoice to an owner-lessor for mileage allowed in error, including, but not limited to, mileage allowed at incorrect rates for any reason, but the erroneous allowance payment is not recoverable by the owner-lessor as defined below, the owner-lessor may present a claim for the recovery of the amounts deducted by the railroad or the cancellation of an unpaid invoice within two (2) years of receiving notice of the railroad's deduction or invoice. For application of this tariff provision, an owner-lessor may claim that an erroneous mileage payment is "not recoverable" only when (a) the erroneous mileage payment was actually paid or credited by the owner-lessor to a lessee (except those lessees whose primary business is the leasing of cars to entities other than those within a lessee's corporate family and who ship only incidentally) irrespective of whether the lessee subsequently paid or credited the mileage allowance payment to a sublessee; (b) the erroneous allowance payment cannot be recovered from the lessee because the lessee has declared bankruptcy or sought reorganization or is no longer a lessee of the owner-lessor; (c) the owner-lessor exercised timely efforts to recover the erroneous allowance payment beginning within ninety (90) days of receiving notice of the railroad's deduction or invoice; and (d) the owner-lessor undertook diligent collection efforts to recover the erroneous allowance payments until eight (8) months from the date of such notice or invoice (or until the earlier date of initiation of bankruptcy/reorganization proceedings), including making demands for payment and taking deductions against lessees' accounts.

(Continued in next column)

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 182

DEDUCTIONS AND MILEAGE CLAIM HANDLING PROCEDURES

3. Claims by Owners-Lessors

A. (Cont'd) Such a claim must be accompanied by a certificate asigned by an officer or other person specifically authorized to sign the certificate of the owner-lessor stating how the claim satisfied each of the requirements set forth above, together with documents reflecting the owner-lessor's collection efforts. If, using reasonable efforts, the railroad is unable to determine whether the lessee's primary business is the leasing of cars to entities other than those in the lessee's corporate family, it shall consult with the owner-lessor, which shall provide the railroad with any evidence of the lessee's shipping activities which may be available to the owner-lessor using reasonable efforts. The owner-lessor shall provide the railroad with an assignment of the owner-lessor's claims and rights to collect the amount not recovered upon payment of the claim of cancellation of the invoice by the railroad.

B. If the railroad had deducted the amount of an erroneous allowance payment from an owner-lessor, the railroad must remit to the owner-lessor the amount deducted within four (4) months of its receipt of a properly presented, valid claim from the owner-lessor.

ITEM 185

COMPUTATION OF MILEAGE
(See Exceptions 1 through 6)

1. Mileage will be computed on the basis of actual distance based on freight mileage tables of the individual lines parties to this tariff, lawfully on file, via the route of movement from station of origin or station at which received from connecting line to destination station or to stations at which delivered to connecting line without deduction of mileage through switching districts (see Note 1).

2. When the transportation begins and ends, i.e., when a car is both loaded and unloaded, within a switching district, no mileage will be allowed. Mileage between an industry or public track and freight station at station of origin or destination will not be allowed.

EXPLANATION OF NOTES

1. The intent of the clause "without deduction of mileage through switching districts" is to insure mileage being allowed for the full distance the car moves, via route of movement from freight station of origin to freight station to which destined. When there are two or more freight stations on a road within a switching district, mileage will be paid to or from the station within such district at which the car is actually loaded or unloaded or at which it is received from or delivered to connecting line.

(Continued on next page)

For explanation of terms and explanation of abbreviations and reference marks, see Item 99999, this tariff.

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 185 (Cont'd)

COMPUTATION OF MILEAGE
(See Exceptions 1 through 6)

EXCEPTIONS

1. In computing distances between stations on the UP on the one hand and stations on the KCS on the other hand, via the New Orleans Gateway, deduct 11.5 miles from the actual distance to and from New Orleans via the UP and 5.4 miles from the actual distance to and from New Orleans via the KCS.

2. Mileage will be allowed on movements having origin and destinations at stations or districts within the Chicago Switching District, provided the movements originate at or are destined to industries having private sidings.

3. In computing distances between stations on the UP on the one hand and stations on the IC on the other hand via the New Orleans Gateway, deduct 11.5 miles from the actual distance to and from New Orleans, LA via the UP and 5.1 miles from the actual distance to and from New Orleans via the IC.

4. In computing distances from, to or via KCS on traffic routed via New Orleans, LA, interchanged at Shrewsbury, LA, deduct 5.4 miles from the actual distance to and from New Orleans, LA on the KCS.

5. When for account of the KCS, mileages will be computed on basis of the shortest distance over the route of these lines determined by freight mileage tables lawfully on file , in lieu of actual distance as provided in Paragraph 1 of this item.

6. All traffic between West Lake, LA on KCS and interchange with UP will be made at De Quincy, LA, in lieu of Lake Charles, LA for carriers convenience and to facilitate industries located at West Lake, LA. KCS will not pay mileage allowance between West Lake, LA and De Quincy, LA, when cars are moving under provisions of UP reroute orders.

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 187

EQUALIZATION OF MILEAGE ON TANK CARS OF PRIVATE OWNERSHIP

PART A
AGGREGATE EMPTY MILEAGE VERSUS LOADED MILEAGE
(SEE NOTE 1)

1. Should the aggregate empty mileage accumulated by tank cars carrying any of the reported marks assigned to any one person or company during a calendar year exceed the aggregate loaded mileage during the same calendar year by more than six (6) percent, such excess mileage must be paid for by the person or company to whom the reporting marks are assigned at the rate of fifty-seven (57) cents per mile, without minimum, subject to the procedures outlined in Part D (See Note 2, this item).

2. Mileage on empty cars moving on revenue billing will not be included in the equalization account.

3. Empty mileage accumulated on cars moving to and from repair facilities for modification under DOT mandated retrofit programs or for inspection and/or repair under FRA Emergency Order Nos. 16 and 17, O & M Circular No. 4, or AAR Circular Letter 7697 will not be included in the equalization account. Empty mileage accumulated on cars moving under AAR Early Warning letters to and from repair facilities associated with the removal of certain truck bolsters that were manufactured by the National Castings of Mexico facility in Sahagun, Mexico, will not be included in the equalization account.

4. Except as outlined in Item 190 Series, paragraph 2 (c), no adjustments to loaded or empty mileage will be made in the equalization account for mileage caused by error in handling of the reporting railroad or of another railroad, or for mileage accumulated on cars moving on their own wheels to and from repair facilities due to railroad damage or for mileage accumulated due to longer routes for railroad convenience, detours and Surface Transportation Board Service Orders. Rail carriers will make equalization adjustments to the owners of excess reported on-line empty mileage on cars, they lease and operate under private marks, or cars of other lessees and/ or owners operating on their line for company material, weed killer and similar service.

5. Adjustments to loaded or empty mileage will be made in the AAR equalization account for apparent accounting errors in the total mileage reported for participating rail carriers under the following procedures. In the absence of appropriate adjustments being made by the AAR or a participating carrier for such accounting errors, a private car company or owner may request an appropriate adjustment for mileage summaries reported in error, from the involved rail carrier in the format prescribed by the AAR, provided such request is made within thirty (30) days of the forwarding of the monthly AAR "Year to Date Equalization Register", containing the alleged error, furnishing a duplicate of such request to the Secretary, Business Services, AAR. The rail carriers will have thirty (30) days from the date of such request in which to decline or make all or a portion of the requested adjustment, advising the Secretary of the handling accorded.

(Continued in next column)

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 187 (Cont'd)

EQUALIZATION OF MILEAGE ON TANK CARS OF PRIVATE OWNERSHIP

PART A
AGGREGATE EMPTY MILEAGE VERSUS LOADED MILEAGE (SEE NOTE 1)

5. (Cont'd) If the rail carrier fails to act upon a request for adjustments in the AAR summary totals within the specified time frame, the AAR is authorized to make the adjustment to the equalization account of the private car company or owner for the amount of mileage originally requested. Exceptions to the annual national equalization statement will be handled in accordance with the provisions of Part D (2).

   ALL requests for adjustments to the equalization account must be presented by the private car company or owner to the involved rail carrier(s) or presented by the rail carrier(s) to the private car company or owner within three (3) years from the last day of the reporting month in question. However, such request for adjustments will not be accepted by the AAR if the involved rail carrier or car owner is no longer an operating entity, except as provided for in Part C.

6. Aggregate loaded and empty mileage will be computed on the basis of actual distance, as defined in Item 185-Series. Adjustments made subsequent to the deadline specified in Part D will be computed in the subsequent equalization account year.

PART B
REPORTING OF ACTUAL LOADED AND EMPTY MILEAGE

Each participating carrier will submit a monthly mileage report in the format prescribed by the AAR to the assignee of each reporting mark forty (40) days after the close of the movement month reporting by individual car number the actual loaded and empty miles moved as computed in accordance with Item 185-Series. In addition, total actual monthly loaded and empty mileage accumulated by all cars bearing each reporting mark will be reported to the assignee of such mark in the format prescribed by the AAR, furnishing a duplicate of this summary report to the Secretary, Business Services, AAR. Adjustments for prior months will be indicated on this monthly summary report.

PART C
CHANGE OF OWNERSHIP

When a private tank car company or owner discontinues business or disposes of all tank car equipment, any excess empty mileage balance which has accrued to the date of such action, on the tank cars bearing the reporting marks of such company or owner, shall be subject to bill as of that date, in accordance with the provisions of Parts A and D of Item 187-Series, subject to any applicable adjustments.

(Continued on next page)

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 187 (Cont'd)

EQUALIZATION OF MILEAGE ON TANK CARS OF PRIVATE OWNERSHIP

PART D
ANNUAL NATIONAL EQUALIZATION ACCOUNTING

1. After May 20 of each year, the Secretary, Business Services, AAR will summarize all empty and loaded mileage by reporting mark assigned to any person or company, reporting for the proceeding calendar year, by all participating carriers to this tariff. Should the aggregate empty mileage exceed the aggregate loaded mileage of all participating carriers by more than (6) percent for any such group of reporting marks, the person or company to whom the reporting marks are assigned will be billed at the rate of fifty-seven (57) cents per mile without minimum and must pay the AAR on behalf of each participating carrier for such excess for such empty mileage. The charges collected for this excess empty mileage will be distributed to the participating carriers by the AAR in direct proportion to such carriers portion of excess empty mileage to the total accumulated excess empty mileage. Only that mileage and any related adjustments reported to the Secretary prior to May 20 will be considered in determining and excess empty mileage, as outlined herein (See Notes 1, 2 and 3).

2. An annual national equalization statement detailing the excess empty mileage accumulated and any applicable charges will be tendered by the Secretary to the person or company assigned the reporting mark(s) for such cars for verification no later than July 1 of the year succeeding the equalization accounting year. Exceptions to this statement must be received by the Secretary within 30 days of the date tendered, and payment for all excess empty mileage is due immediately thereafter. Any adjustments made by the participating carriers up to and including the March account applicable to the prior year(s) will be incorporated in the equalization accounts for the prior equalization accounting year. Any railroad or AAR adjustments made subsequent to the March account will be carried over to the following equalization accounting year (see Note 3).

3. A private car company or owner failing to render complete payment for all excess empty mileage within thirty (30) days of the date its equalization statement is tendered by the AAR will be subject to a penalty of one and a half percent (1.5%) interest per month (i.e., annual rate of 18%) for each calendar month or fraction thereof on any outstanding balance due from the date of the AAR's invoice statement. If any portion of a private car company's or owner's equalization statement remains unpaid in excess of 3 months from the date initially tendered, all mileage allowances accrued by the tank cars registered in the UMLER file bearing its reporting marks will be withheld by the carriers participating in this item until such time as complete payment including applicable penalty interest is made. Once complete payment is made, the participating carriers will be notified by the AAR and claims for any applicable mileage allowances withheld will be honored, less a 15% penalty charge for the carriers' administrative expense.

(Continued in next column)

For explanation of terms and explanation of abbreviations and reference marks, see Item 99999, this tariff.

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 187 (Cont'd)

EQUALIZATION OF MILEAGE ON TANK CARS OF PRIVATE OWNERSHIP

PART D
ANNUAL NATIONAL EQUALIZATION ACCOUNTING

EXPLANATION OF NOTES

1. The fifty-seven (57) cents per mile charges for excess empty mileage under the provisions of this item is subject to revision September 1 of each year under Ex Parte No. 328 agreed annual update procedures, and will be retroactively applied to cover the entire calendar year involved.

2. Close out dates specified in Part D may be extended by the AAR for a maximum of 60 days for special national accounting problem conditions, affecting substantially all carriers and all owners.

3. Invoices that have been issued which, after investigation, are determined to have been erroneous due to rail carriers or AAR accounting and/or system errors may be cancelled by the Secretary.

ITEM 190

HANDLING OF EMPTY TANK CARS
(SEE NOTE 2)

1. When a tank car is released from load, the owner or lessee must issue instructions for the disposition of the empty car to the agent at point of unloading either direct or through consignee or via EDI. Empty instructions may also be included with the original loaded shipping instructions if transmitted via EDI. If the owner or lessee fails to have instructions in the hands of the railroad agent having jurisdiction at point of unloading prior to the time the car is released from load to forward the car or written instructions to hold it, the agent is authorized to forward the empty car to the origin point of the last load via reverse of the loaded route. No tank car which last contained hazardous material may be moved without having shipping instructions furnished as per Title 49 Code of Federal Regulations.

2. Empty tank cars will be handled as follows:

   A. Except as otherwise provided in this tariff, cars covered by this section will be moved empty without charge between stations or junction points upon receipt of instructions from the car owner or lessee confirmed in writing. Such instructions must include the specific facility to which such empty car is consigned or the name and address of the person or company which controls the car. No allowance will be made for mileage of such cars during empty movement.

   B. A new car, a car that is restenciled with private reporting marks or a newly acquired car moving prior to its first loaded move in commercial service and a newly acquired car moving prior to its first loaded move in commercial service and a car moving for sale or scrap will be moved upon surrender of a bill of lading and will be subject to applicable rates.(see Note 1).

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 190

HANDLING OF EMPTY TANK CARS
(SEE NOTE 2)

2. Empty tank cars will be handled as follows: (Cont'd)

   C. If the owner or lessee or party issued instructions to forward the empty tank car to the origin point of the last load by specific routing different than the reverse routing of the loaded movement, the total miles of such return movement will be billed at the excess empty mileage rate specified in Item 187-Series without minimum and such empty mileage so billed will be excluded from the equalization account of the owner. This billing will be made to, and collectable from, the person so requesting such variance in the return routing. If the carriers depart from the destinations, junctions or carriers of the reverse route of the load, any resulting excess empty miles will be excluded from the car owner's equalization account by erring carrier.

EXPLANATION OF NOTES

1. A car loaded with railroad company material moving on non-revenue billing will be considered as having been loaded in commercial service on which the railroads derived line-haul revenue.

2. The provisions of this item apply except as otherwise provided in Item 192-Series of this tariff.

ITEM 192

HANDLING AND HOLDING OF EMPTY TANK CARS BY RAILROADS ON RAILROAD TRACKS
(SEE NOTE 1)

1. The rules and charges in this item apply only to empty private tank cars consigned to non-railroad repair facilities; i.e., facilities for cleaning, lining, relining, maintenance, modification or repair.

2. The rules and charges do not apply to:

   A. Empty private tank cars moving as revenue freight under the provisions of Item 190-Series, Paragraph B 2.

   B. Empty private tank cars handled or held for carrier operating convenience.

   C. Empty private tank cars en route to facilities for cleaning, lining, relining or repair for heavy repairs following railroad damage.

   D. Empty private tank cars en route to repair facilities located on the premises of a shipping facility, provided that the empty car, after repair, is subsequently shipped from the facility in revenue freight service.

3. No allowance will be made by carriers for mileage accrued during supplemental empty movement of tank cars that are assessed charges as provided in Paragraph 5.

For explanation of terms and explanation of abbreviations and reference marks, see Item 99999, this tariff.

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 192

HANDLING AND HOLDING OF EMPTY TANK CARS BY RAILROADS ON RAILROAD TRACKS (SEE NOTE 1)

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4. Charges applicable under these provisions will apply to empty private tank cars which the consignee has not ordered to his cleaning, lining, relining, maintenance, modification or repair facility (or his owned or leased tracks in the vicinity thereof) before the expiration of 48 hours free time (not counting Saturdays, Sundays or holidays) after placement. The time calculation will start the first 7 A.M. subsequent to carrier notification to the consignee that the empty private car is ready for placement and the time calculation will stop when the carrier places or forwards the car pursuant to instructions or should have placed or forwarded the car pursuant to instructions.

5. After expiration of free time as provided in Paragraph 4, charges will be as follows: (See Note 2)

   A. Supplementary handling charge of $63.00 per car.

   B. Holding charge of $1 per car per calendar day or fraction thereof including Saturdays, Sundays and holidays while held by carrier on non-leased tracks awaiting disposition.

6. In the event the consignee orders the car to tracks owned or leased by the consignee in the vicinity of the facility for cleaning, lining, relining, maintenance, modification or repair within the forty-eight hour period descr bed under Paragraph 4, this item, there will be no supplementary handling charge for the movement; however, such cars will be subject to the supplementary handling charge of $63.00 per car (See Note 2) at such time that the empty tank car is subsequently ordered and moved onto the facility for cleaning, lining, relining, maintenance, modification or repair or ordered moved from that facility to the tracks or leased by the consignee in the vicinity of the facility.

7. Applicable billing will be monthly to the facility involved.

EXPLANATION OF NOTES

1. The rules and charges in this item do not in any way supersede or duplicate existing, or new written contractual operating, side track, track lease, property lease, etc., agreements or tariffs that contain empty private tank car handling and holding provisions as part of the overall agreement.

2. Per ExParte No. 328, the supplemental handling charge will be revised annually at the same time as the tank car mileage allowance update, utilizing the same method as that prescribed for updating the excess mileage equalization charge.

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 195

MILEAGE RATE ALLOWANCE ON TANK "T" AND HOUSE CAR "XT" (SEE ITEM 196 FOR EXPLANATION OF DESIGNATING SYMBOLS) (SEE NOTE 1)

Mileage rate allowance for cars of foregoing mechanical designations shall be in cents per loaded mile (See Notes 2 and 7) as follows:

COLUMN 1 - Original cost or fair market value in dollars (see Notes 3, 4, 5 and 6, this item).
COLUMN 2 - Cars in service years 1 through 30.
COLUMN 3 - Cars in service years 31 and over.

COLUMN 1	♦ COLUMN 2	▲♦ COLUMN 3
$ 0 – 1000	28.8	28.3
1001 – 2000	29.7	28.4
2001 – 3000	30.6	28.5
3001 – 4000	31.5	28.6
4001 – 5000	32.4	28.7
5001 - 6000	33.3	28.7
6001 - 7000	34.2	28.8
7001 - 8000	35.2	28.9
8001 - 9000	36.1	29.0
9001 - 10000	37.0	29.1
10001 - 11000	37.9	29.1
11001 - 12000	38.8	29.2
12001 - 13000	39.7	29.3
13001 - 14000	40.7	29.4
14001 - 15000	41.6	29.4
15001 - 16000	42.5	29.5
16001 - 17000	43.4	29.6
17001 - 18000	44.3	29.7
18001 - 19000	45.2	29.8
19001 - 20000	46.1	29.8
20001 - 21000	47.1	29.9
21001 - 22000	48.0	30.0
22001 - 23000	48.9	30.1
23001 - 24000	49.8	30.2
24001 - 25000	50.7	30.2
25001 - 26000	51.6	30.3
26001 - 27000	52.5	30.4
27001 - 28000	53.5	30.5
28001 - 29000	54.4	30.6
29001 - 30000	55.3	30.6
30001 - 31000	56.2	30.7
31001 - 32000	57.1	30.8
32001 - 33000	58.0	30.9
33001 - 34000	58.9	30.9
34001 - 35000	59.9	31.0
35001 - 36000	60.8	31.1
36001 - 37000	61.7	31.2
37001 - 38000	62.6	31.3
38001 - 39000	63.5	31.3
39001 - 40000	64.4	31.4

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For explanation of terms and explanation of abbreviations and reference marks, see Item 99999, this tariff.

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 195 (Cont'd)

MILEAGE RATE ALLOWANCE ON TANK "T" AND HOUSE CAR "XT"
(SEE ITEM 196 FOR EXPLANATION OF DESIGNATING SYMBOLS) (SEE NOTE 1)

COLUMN 1	COLUMN 2	COLUMN 3
40001 - 41000	65.4	31.5
41001 - 42000	66.3	31.6
42001 - 43000	67.2	31.7
43001 - 44000	68.1	31.7
44001 - 45000	69.0	31.8
45001 - 46000	69.9	31.9
46001 - 47000	70.8	32.0
47001 - 48000	71.8	32.0
48001 - 49000	72.7	32.1
49001 - 50000	73.3	32.1
50001 - 51000	74.0	32.1
51001 - 52000	74.7	32.1
52001 - 53000	75.4	32.0
53001 - 54000	76.0	32.0
54001 - 55000	76.7	32.0
55001 - 56000	77.3	32.0
56001 - 57000	78.0	31.9
57001 - 58000	78.6	31.9
58001 - 59000	79.3	31.9
59001 - 60000	79.9	31.9
60001 - 61000	80.5	31.9
61001 - 62000	81.2	31.8
62001 - 63000	81.8	31.8
63001 - 64000	82.4	31.8
64001 - 65000	83.1	31.8
65001 - 66000	83.7	31.7
66001 - 67000	84.3	31.7
67001 - 68000	84.9	31.7
68001 - 69000	85.5	31.7
69001 - 70000	86.1	31.7
70001 - 71000	86.7	31.6
71001 - 72000	87.3	31.6
72001 - 73000	87.9	31.6
73001 - 74000	88.5	31.6
74001 - 75000	89.0	31.6
75001 - 76000	89.6	31.5
76001 - 77000	90.2	31.5
77001 - 78000	90.8	31.5
78001 - 79000	91.3	31.5
79001 - 80000	91.9	31.5

(Continued in next column)

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 195 (Cont'd)

MILEAGE RATE ALLOWANCE ON TANK "T" AND HOUSE CAR "XT"
(SEE ITEM 196 FOR EXPLANATION OF DESIGNATING SYMBOLS) (SEE NOTE 1)

COLUMN 1	COLUMN 2	COLUMN 3
80001 - 81000	92.5	31.4
81001 - 82000	93.0	31.4
82001 - 83000	93.6	31.4
83001 - 84000	94.1	31.4
84001 - 85000	94.7	31.4
85001 - 86000	95.2	31.3
86001 - 87000	95.8	31.3
87001 - 88000	96.3	31.3
88001 - 89000	96.9	31.3
89001 - 90000	97.4	31.3
90001 - 91000	97.9	31.2
91001 - 92000	98.5	31.2
92001 - 93000	99.0	31.2
93001 - 94000	99.5	31.2
94001 - 95000	100.0	31.2
95001 - 96000	100.5	31.2
96001 - 97000	101.1	31.1
97001 - 98000	101.6	31.1
98001 - 99000	102.1	31.1
99001 - 100000	102.6	31.1
100001 - 101000	103.1	31.1
101001 - 102000	103.6	31.0
102001 - 103000	104.1	31.0
103001 - 104000	104.6	31.0
104001 - 105000	105.1	31.0
105001 - 106000	105.6	31.0
106001 - 107000	106.0	31.0
107001 - 108000	106.5	30.9
108001 - 109000	107.0	30.9
109001 - 111000	107.5	30.9
110001 - 111000	108.0	30.9
111001 - 112000	108.4	30.9
OVER - 112000	108.9	30.9

EXPLANATION OF NOTES

1. Designating symbols (mechanical designation) will be assigned to car owner or lessee by the Secretary, Technical Services, Association of American Railroads, upon written application.

(Continued on next page)

For explanation of terms and explanation of abbreviations and reference marks, see Item 99999, this tariff.

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 195 (Cont'd)

MILEAGE RATE ALLOWANCE ON TANK "T" AND HOUSE CAR "XT"
(SEE ITEM 196 FOR EXPLANATION OF DESIGNATING SYMBOLS)
(SEE NOTE 1)

EXPLANATION OF NOTES

2. For mileage allowance purposes, the service year of a car is calculated based upon year of construction of underframe. A car's first service year is the year built. Its second service year begins on January 1 of the year following the year built, with succeeding service years starting on January 1 of each following year. If the tank's service year exceeds 30, the car's service year is considered to be in excess of 30 regardless of year of construction of underframe. For those cars constructed without an underframe, the car's service year is calculated based upon year of construction of tank. Service year is determined by subtracting the year of construction (built/rebuilt) from the current calendar year, plus 1, e.g., (2000 - 1970) + 1 = 31, or Service Years 31 and over allowance bracket.

3. For cars built prior to January 1, 1968 assignment of owned or leased cars to value groups will be determined by the undepreciated base classification value. In addition, capitalized additions and betterments shall be added to the value if not already included in the BCV system.

4. Applies as follows:

   A. For cars built between January 1, 1968 and July 1, 1991, assignment of owned or leased cars to value groups will be determined by the original cost as represented to the original buyer by the manufacturer's invoice price at the time of original installation into service. In the case of a manufacturer-lessor, the fair market value or the value which was certified, or would have been certified, for investment tax credit purposes shall be substituted therefore.

   B. Assignment to value groups of cars placed into service after July 1, 1991 will be determined by the original cost of the car to the original buyer as stated in the manufacturer's invoice. In only two circumstances, owners may certify as alternative "true value" in lieu of invoice price: (a) manufacturers who retain cars for their own leasing service and (b) purchasers who can demonstrate that they contributed physical assets of significant value that were used by the manufacturer in fabricating a car, resulting in a reduction of the invoice price by more than $1,000 per car below the price that otherwise would have been charged. For manufacturers "true value" is the price for which a car or group of cars manufactured as a group would have been sold in an arm's length transaction. For purchasers who have made a qualifying contr bution to fabrication, "true value" is the invoice price plus the depreciated value of the contr buted assets distributed over the cars for which the assets were used, subject to the same limitations on "true value" which would apply to a manufacturer.

(Continued in next column)

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 195 (Cont'd)

MILEAGE RATE ALLOWANCE ON TANK "T" AND HOUSE CAR "XT"
(SEE ITEM 196 FOR EXPLANATION OF DESIGNATING SYMBOLS)
(SEE NOTE 1)

EXPLANATION OF NOTES

4. Applies as follows: (Cont'd)

   B. (Cont'd) "True value" shall not exceed the average price of similar cars registered in UMLER at invoice price within the most recent 12 months for which registration information is available in UMLER, adjusted for changes in the market values of new tank cars as reflected in average car prices. If the AAR determines by audit that a certified "true value" exceeds this value limit by an amount that causes a car to be placed in a higher allowance value bracket, the value of the car will be reduced to the appropriate value bracket. In addition, if the AAR determines by audit that a certified, "true value" exceeds this value limit by an amount that causes a car to be placed in allowance value bracket more than one bracket above the otherwise applicable bracket, excess allowances paid as a result of the over valuation shall be reimbursed to the paying railroads.

   Those owners who certify a "true value" in lieu of invoice price during the calendar year must provide to the AAR an officer's certificate at the end of the year stating that, based on all information available to the owner, the owner has complied with the terms of this item. Car owners must supply for entry into UMLER all information required for tank cars in the UMLER Specification Manual. Notwithstanding any other provision of this tariff item, "true value" will be subject to audit directly by the AAR.

   C. If applicable, initial into service transportation costs, capitalized original lining costs, capitalized additions and capitalized betterments shall be added to car values determined pursuant to paragraphs 4 (A) and 4 (B), above, if not already included in the value of the car. For cars built after January 1, 1988, capitalized inspection costs shall be added to the value, if applicable and if not already included in the value, if applicable and if not already included in the value of the car. Values other than invoice price shall be identified in accordance with the current AAR UMLER format at the time cars are submitted to the Secretary, Business Services, AAR, for registration in the UMLER file (see Note 6, this item).

   D. The rebuilt year and rebuilt valuation of a private car will be utilized for the purpose of computing applicable mileage allowances subject to the following conditions:

      1. The car must be rebuilt in accordance with the current requirements of Rule 88, Section C of the Office Manual and Sections A & B of the Field Manual, AAR Interchange Rules, Application for official rebuilt status must be filed with the AAR Technical Services and written formal approval received prior to registering such car in the UMLER file with rebuilt age and valuation data.

(Continued on next page)

For explanation of terms and explanation of abbreviations and reference marks, see Item 99999, this tariff.

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 195 (Cont'd)

MILEAGE RATE ALLOWANCE ON TANK "T" AND HOUSE CAR "XT"
(SEE ITEM 196 FOR EXPLANATION OF DESIGNATING SYMBOLS)
(SEE NOTE 1)

EXPLANATION OF NOTES

D. (Cont'd)

2. Assignment of owned or leased rebuilt cars to value groups will be determined as outlined in Notes 4. (A), 4. (B) and 4. (C) herein, except that the maximum valuation of a rebuilt private car shall not exceed the lesser of:
   a. 75 percent of the original cost of a comparable new car.
   b. 75 percent of the calculated replacement cost of the rebuilt car prior to rebuilding, as computed per AAR Interchange Rule 107.

E. All car ages and values submitted are subject to verification by the AAR, and audit by the AAR or the owners independent public accountant upon reasonable request by the AAR. If the car owner elects to have the audit performed by its independent public accountant, such audit must be performed in a timely fashion in the manner prescr bed by the AAR, will be performed at the car owner's expense and must be duly certified by the car owner's auditor as representing the true value of all cars included in such audit. Failure of the car owner to furnish the required car valuation data to the AAR UMLER file, to arrange for the requested audit, or to correct errors determined as a result of such audit, will result in such car(s) being assigned to the lowest applicable mileage allowance rate group.

F. Maximum original cost of fair market value will be as follows:

1. For cars built in 1981 and prior	$ 64,001
2. For cars built in 1982	$ 58,001
3. For cars built in 1983	$ 56,001
4. For cars built in 1984	$ 51,001
5. For cars built in 1985	$ 54,001
6. For cars built in 1986	$ 66,001
7. For cars built in 1987	$ 62,001
8. For cars built in 1988	$ 63,001
9. For cars built in 1989	$ 64,001
10. For cars built in 1990	$ 67,001
11. For cars built in 1991	$ 71,001
12. For cars built in 1992	$ 70,001
13. For cars built in 1993	$ 76,001
14. For cars built in 1994	$ 74,001
15. For cars built in 1995	$ 80,001
16. For cars built in 1996	$ 83,001
17. For cars built in 1997	$ 84,001
18. For cars built in 1998	$ 89,001
19. For cars built in 1999	$ 94,001
20. For cars built in 2000	$ 92,001
21. For cars built in 2001	$106,001
22. For cars built in 2002	$109,001
23. For cars built in 2003	$ 85,001
24. For cars built in 2004	$ 93,001
25. For cars built in 2005	$101,001
26. For cars built in 2006	$ 97,001
27. For cars built in 2007	$ 112,001
28. For cars built in 2008 and subsequent	$ 112,001

NOTE: Age is determined by subtracting the year of construction (built/rebuilt) from the calendar year plus 1. e.g. (2000-1988) + 1 = 13.

(Continued in next column)

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 195 (Cont'd)

MILEAGE RATE ALLOWANCE ON TANK "T" AND HOUSE CAR "XT"
(SEE ITEM 196 FOR EXPLANATION OF DESIGNATING SYMBOLS)
(SEE NOTE 1)

EXPLANATION OF NOTES

5. For cars built or rebuilt subsequent to December 31, 1977, all values reported to the AAR UMLER file must be stated in equivalent US dollars based on the applicable exchange rate at the time such cars were built or rebuilt. Subsequent capitalized additions and betterments reported to UMLER must also be stated in equivalent US dollars at the time such improvements were made.

6. Applies as follows:

A. Into service transportation costs are those freight charges associated with the movement of a car that is ready for its first load to the locations of the car's original installation into service. Other transportation charges incurred during construction (e.g., to a facility which installs the original lining, etc) may be included in ledger value provided that the cost is capitalized.

B. A capital expenditure is an expenditure intended to benefit future periods in contrast to revenue expenditure/current expense which benefits a current period. It is an addition to a capital asset and is initially reflected on the balance sheet. A capital expenditure normally is subject to depreciation in future years.

C. Applies as follows:

1. An addition or betterment has the effect of:
   a. Extending the useful life of a car beyond the life projected when the car was entered into service; or
   b. Increasing a car's normal use beyond that which was in effect when the car was entered into service; or
   c. Lowering the operating costs beyond that which was in effect at the time the car was entered into service; or
   d. Otherwise adding to the worth of the benefits a car can yield beyond that in effect when the car was entered into service (e.g., enhance safety, etc).
   e. Any repair that maintains a car in its customary state of operating efficiency is NOT an addition or betterment.

2. An addition is the installation of a new component of a car (not a replacement) which meets the above tests. The value registered in UMLER shall be the cost of the component added, including labor.

3. A betterment is the replacement of a component of the car with a superior component. The value registered in UMLER for a betterment should not exceed the cost of the superior component, including labor minus (1) the original value of the component that was replaced (i.e., retired) and (2) the cost (i.e., expense) incurred in removing the old component.

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SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 195 (Cont'd)

MILEAGE RATE ALLOWANCE ON TANK "T" AND HOUSE CAR "XT"
(SEE ITEM 196 FOR EXPLANATION OF DESIGNATING SYMBOLS)
(SEE NOTE 1)

EXPLANATION OF NOTES

C. Applies as follows: (Cont'd)

4. When a unit of property is removed from a car (i.e., partial retirement), the ledger value registered in UMLER shall be reduced by the original value of the unit removed.

5. Any cost recovered under AAR Defect Car Billing, if applicable, must be deducted from the cost of an addition or betterment.

7. Applies as follows:

A. When an owner: (1) makes a valuation correction to the UMLER file; or (2) changes the mechanical designation of cars registered in the UMLER file; and such changes result in an increase or decrease in the mileage allowance rates, the Secretary, Business Services, AAR, will be so notified and the increase or decrease will be applied retroactively. Once cars have been reported to the UMLER file, any of the foregoing corrections or changes that result in a retroactive increase or decrease in the mileage allowance rates will be identified by the Secretary. The car owner is required to furnish the Secretary documented proof of the basis of the correction or change and advise as to any applicable mileage allowance adjustments which are required.

B. Retroactive Mileage Allowance Decrease: Within five (5) months from the date of a change to the UMLER file resulting in a retroactive mileage allowance rate decrease, the owner will notify all using carriers of such decrease with either supporting details or a summary of the over-collections, with a copy to the Secretary. After receiving such notification, the using carrier shall deduct such amount(s), in the next open mileage reports to the car owner, plus fifteen (15) percent to reimburse the handling road for audit and associated administrative expenses. If the owner fails to send notification to the users within five (5) months, the Secretary shall notify carriers of the car initial(s) and number(s) involved and the user(s) shall make an adjustment, as described above.

C. Retroactive Mileage Allowance Increase: Within five (5) months from the date of a change to the UMLER file resulting in a retroactive mileage allowance rate increase, the owner will notify all using carriers of such increase with either supporting details or a summary of the under-collections, with a copy to the Secretary. After receiving such notification, the using carriers shall add such amount(s) in their next open mileage reports to the car owner, less fifteen (15) percent to reimburse the handling roads for audit and associated administrative expense. No retroactive mileage allowance rate increase will be applicable if the owner fails to notify the using carriers of such increase within five (5) months from the date of a change to the UMLER file.

SECTION 1
RULES AND REGULATIONS
APPLIES ONLY ON TANK CARS

ITEM 196

EXPLANATION OF SYMBOLS USED IN ITEM 195

SYMBOL		EXPLANATION
"T"	-	Tank Car. Tank car means any car which is used only for the transportation of liquids, liquefied gases, compressed gases, or solids that are liquefied prior to unloading. Car may be without underframe if container serving as superstructure is designed to serve as underframe. If car has underframe, it must be designed only for the carriage of one or more enclosed containers (with or without compartments) that form the superstructure and are integral parts of the car. All such containers must be securely attached to underframe when offered for transportation but may have demountable features.
"XT"	-	A house car with or without doors either metal lined or enclosing one or more tanks.

For explanation of terms and explanation of abbreviations and reference marks, see Item 99999, this tariff.

EXHIBIT 7

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,	:	
Complainants,	:	STB Docket Nos.
vs.	:	NOR 42144, ET AL.
UNION PACIFIC RAILROAD COMPANY, Defendant.	:	

- - -

Deposition of ARKEMA, INC.

through JONATHAN BRENT GROW as 30(b)(6) witness

King of Prussia, Pennsylvania

Thursday, August 30, 2018

9:00 a.m.

BEFORE:

Gail L. Inghram Verbano:

BA, CLR, RDR, CRR, CSR-CA (No. 8635)

conversations with car lessors?

A. Yes.

Q. Okay. What conversations did Arkema have with car lessors?

A. I do not have those conversations, so I couldn't elaborate on that.

Q. What was the basis for your including that in the email?

A. I knew that -- I believe it was Steve Trombetta had had -- or Mike Turk -- I'm not sure which -- had had conversations with at least a couple of the lessors.

Q. The last sentence of your email at the top of this says, "This will be a new variable to add to the capacity/turnaround/distance equation in the shop selection process for everyone involved."

Do you see that?

A. Yes.

Q. What did you mean by that?

A. Well, the tank car shopping process, particularly for hazardous materials, is a complex process. The decision points, depending on the car ownership, the lessors, et cetera, are numerous; and this was just another variable to add to that decision process.

says, "Shop capacity already undersupplied due to backlog of HM201 inspections."

Do you see that?

A. Yes.

Q. What was the backlog that you're referring to there?

A. The feedback that I was getting from our rail fleet folks was that railcar shop capacity, in general, was experiencing a backlog of all work largely due to, I guess, a glut or a bubble of HM201 inspections that were due.

Q. Was this an Arkema glut or bubble or an industrywide --

A. Industrywide.

Q. Do you understand why there was this industrywide glut or bubble?

A. No.

Q. The next line says, "By necessity, shop disposition is sometimes determined more by capacity/backlog than distance."

A. Yes.

Q. What does that mean?

A. Well, the shop disposition decision is twofold. It's different for leased cars versus owned cars.

For shop disposition of leased cars, the shop -- or the lessor is making a shop disposition determination.

For owned cars, Arkema and QTS on our behalf is making the shop disposition decision. Because of the cost of the asset, the need for the asset, the turnaround time to get those cars back into service is probably the primary decision driver with -- where you can -- where Arkema would choose to get that car repaired.

Q. So does that mean that in order to get a shop that can work on the car quickly, Arkema might be moving a car to a shop that's a greater distance away than a closer shop that would have a longer wait time?

A. In some cases, from what I understand, yes.

Q. That's what this phrase is trying to express?

A. Correct.

Q. On Page 672, the next page, it looks like maybe there are two issues being addressed. One is "HM201 Demand," and then there's "Estimated DOT 111 retrofit capacity."

A. Yes.

REDACTED

REDACTED

Q. What are mileage allowances?

A. Mileage allowances are a mechanism designed to compensate shippers for the use of private railcars shipment.

Q. How are mileage allowances for rail tank cars determined?

A. In terms of the amount?

Q. Yes.

A. I believe that's dictated by the STB.

Q. Are mileage allowances intended to compensate for the costs of owning cars?

A. Owning and the use of the car, yeah.

Q. So are they intended to compensate for the costs of maintaining cars?

A. Within that -- within that definition, yes.

Q. Mileage allowance is intended to provide compensation for the costs of moving cars to shops?

A. Yes.

Q. Does Arkema report its costs for moving

tank cars to shops to leasing companies when it's moving leased cars to shops?

A. No.

Q. Does Arkema report the number of moves to shops to leasing companies when it's moving leased cars?

A. Well, they're obviously aware, since they give us the shop disposition.

Q. Would they be aware what Arkema is moving a car to a shop for cleaning?

A. No.

Q. How does somebody figure out what mileage allowance should be paid for a particular car?

A. That's determined by the STB; right?

Q. Have you ever tried to figure out what the cost is for a particular car?

A. In -- in terms of -- can you be more specific? I'm not sure I understand.

Q. Have you ever tried to -- cars have -- do you understand that cars have certain mileage allowances that are related to the car --

A. Right.

Q. -- particular car.

Have you ever tried to figure out what

REDACTED

Q. Does Arkema believe Union Pacific should be paying mileage allowances for shipments in tank cars to Arkema -- sorry. Let me start again.

Does Arkema believe Union Pacific should be paying mileage allowances for shipments in tank cars supplied by Arkema?

A. We believe it should be an option.

Q. What do you mean by "it should be an option"?

A. We should be able to evaluate whether or not we want to ship in full mileage or zero mileage.

Q. But Arkema doesn't believe that Union Pacific should be paying mileage allowances on shipments Arkema is currently making in the tank cars and supplied by Arkema?

MR. MORENO: Asked and answered.

BY MR. ROSENTHAL:

Q. Please, if you can answer it.

REDACTED

REDACTED

Q. I believe you said that Arkema's contracts before Union Pacific -- well, let me just ask.

Did Arkema ship traffic on UP under contracts at the time Union Pacific adopted Item 55-C's empty shop move charges?

A. Did we ship under contract?

Q. Yes.

A. Yes.

REDACTED

REDACTED

Q. Did Arkema ship traffic on Union Pacific under tariffs at the time Union Pacific

adopted Item 55-C's empty shop move charges?

A. Probably a very limited amount.

Q. Did the tariffs provide for payment of mileage allowances?

A. Not to my knowledge.

REDACTED

REDACTED

REDACTED

REDACTED

MR. ROSENTHAL: Mark this next document as Exhibit 16.

(Grow Exhibit 16, an email communication ending 8-13-15, ARK10058070 to 8074, was marked for identification.)

BY MR. ROSENTHAL:

Q. Do you recognize a document that's been

REDACTED

MR. ROSENTHAL: Just mark this next document as Exhibit 17.

(Grow Exhibit 17, PowerPoint presentation titled "Arkema/Union Pacific Contract Renewal, UPCQ 98736," 3-15-16, ARK10052458 to 2471, was marked for identification.)

BY MR. ROSENTHAL:

Q. Take a look at the document that's been marked Exhibit 17 and tell me whether you recognize it.

(Witness reviews document.)

A. Yes.

Q. What is it?

A. This would have been counterproposals

that I had sent to Union Pacific as part of our contract negotiations for this contract.

Q. When you say "this contract," it's the one that's identified on the cover as UPCQ 98736?

A. Correct.

Q. On the cover there's a date that says "3/15/16." There's some material in the document itself that says "2014 corporate presentation."

Can you tell me, should I be looking at this March 15th, 2016, date? Is that the right date?

A. Yeah, I don't know whether this was the date that I sent it or the date that I did the presentation, but it was close to that.

Q. This 2014 stuff is probably --

A. It's just a boilerplate left over from an old presentation, yeah.

Q. So if you take a look at page ending in 465 -- Page 8 -- numbered Page 8 of the presentation --

A. Yes.

REDACTED

REDACTED

REDACTED

Q. When you need a new rate, how do you make those requests to UP?

A. Typically, through their website.

Q. And on the website is there an indication of whether you're asking for zero-mileage rates?

A. Correct.

Q. Apart from cars carrying latex, which I understand need frequent cleaning, do certain other types of tank cars move to shops more frequently than other tank cars?

A. I believe there is a very small subset of our fleet which is required to be inspected every five years as opposed to every ten, and I believe that's around usually valve specifications, but it's a very small subset.

Q. What product do those cars carry?

A. That, I don't know.

Q. You just know it's a small subset of the fleet?

A. Yeah.

Q. Do tank cars that don't have an immediate -- let me start again.

Do Arkema tank cars that don't have an immediate prior loaded move on Union Pacific and won't move to a loading plant on Union Pacific sometimes move empty to a UP-served shop?

A. I'm not involved in the day-to-day of that. It's a possibility.

Q. Does Arkema agree that empty shop moves to and from shops on Union Pacific impose costs on

Q. When Arkema gets to choose, how does it decide which shop to use?

A. We talked about the criteria list previously in terms of that decision combination of different factors, including shop capacity, distance, repairs needed, product involved, whether the shop has a cleaning rack. There's a number of different factors that go into that decision.

Q. Is the shop's present ability to handle the repairs in a timely manner a factor in the decision?

A. Yes.

Q. How does Arkema learn if a facility is backed up and unable to handle repairs in a timely fashion?

A. With QTS managing Arkema repairs as well as other company repairs, they typically have at least a car or two, maybe more, in several of the shops within the network. So they generally have a pretty good feel for who has got capacity currently and who's got a backlog.

Q. You said distance is one of the factors --

A. Uh-huh.

Q. -- that Arkema considers? Yes?

REDACTED

Q. So Arkema uses mobile repair facilities to perform certain types of work?

Q. Is there a cost difference between mobile repairs and fixed shops when you're looking at the same type of repair?

A. That, I don't know.

Q. Does the existence of Union Pacific's charge for empty shop moves affect the choice between using a mobile repair facility and using a fixed repair facility?

A. It's an additional criteria and factor, yeah.

Q. Because you can use the mobile facility and avoid the charge for moving a car to or from a shop?

A. Right.

Q. Does Arkema know how leasing companies select shops for Arkema's cars?

A. I'm a little too far removed from that to understand their thought process.

Q. Do you know whether leasing companies typically use shops that they own?

A. Several of them have internal shop networks that they have approved, some of which they own. So yes.

Q. Do you know whether -- do some leasing companies have a combination of their own shops and

shops that they've approved?

A. Yes.

Q. Do you know whether they favor owned shops over approved shops when they're the ones who are --

A. My understanding is they favor the owned shops.

Q. Do leasing companies have any incentive to direct cars to shop locations that will have -- let me start again.

Do leasing companies have any incentive to direct cars to shops at locations that will result in lower empty mileage charges to Arkema?

A. As I understand it, distance is also a factor in their decision-making process. So by that criteria, yes.

Q. What's the basis for that understanding?

A. Because it's -- from what I understand, it's rare that we would ever ship a car, let's say, the whole way across the country or all the way up to Washington state when it's in Florida or something like that. So they're aware of where our locations are and they're trying to, within their parameters, stick to some kind of geographic

proximity to that.

Q. But you don't know what their parameters are or how they select shops for Arkema cars?

A. I don't know their process, no.

Q. Do some leasing companies have shop networks that better fit with Arkema's shipping patterns?

A. I can't claim to be intimately familiar with where all of the leasing company shops are, so I couldn't really speak to that.

Q. Has Arkema ever asked a leasing company to add shop locations?

A. I believe through QTS we have.

Q. Can you recall a specific situation?

A. I just remember hearing general conversation along those lines.

Q. Nothing specific?

A. No.

Q. Has Arkema ever asked a leasing company to give Arkema more control over shop selection?

A. We do on occasion push back on the shop selection with the lessors and, based on a number of different criteria, to see if they would consider an alternate shop.

REDACTED

Q. Does Arkema ever need to clean cars before a shop will work on them?

A. Yes.

Q. Under what circumstances?

A. I believe for more or less all hazmat cars, particularly for major repairs or HM201 inspections, where you need there not to be any residue left in a car, we always send it to a cleaning rack.

Q. Are there reasons why cleaning can't be done at the same shop that's performing the repairs?

A. We do that where it's possible. But my understanding is the number of shops that clean cars is not very large, and the number of cars -- and the number shops that clean hazmat cars is even smaller. And then trying to match that with hazmat cleaning shops that actually clean our products specifically is even smaller still. So the circumstances where that works out is not very frequent.

Q. So is it possible there aren't enough shops out there that can both do the cleaning required by Arkema and perform the repairs

preplanning to avoid some of these delays.

Q. But it sounds to me like what Mr. Chaney was saying was that at least at the time he's writing this, there may have been less ability to minimize costs by diverting cars to shops on the return leg of trips?

A. At that moment in time, yes.

Q. So -- but do you understand from that email that QTS is trying to be better about minimizing the cost but there were some difficulties because of the lack of space in shops?

A. Yes.

Q. And because of the lack of space in shops, there may have been some more extra empty moves that were charged at the time?

A. What did you mean by "extra empty moves"?

Q. Well, what happens -- why do you try to divert a car to the shop on the empty return?

A. To minimize the empty freight charges as well as minimize the -- the time that the asset is not being utilized.

Q. And how does that minimize the empty freight charges?

A. Because you can get your essentially

one free return move, which would be to the shop as opposed to the -- or the cleaning rack as opposed to returning all the way to the plant.

Q. What would happen if the car returned all the way to the plant?

A. That would use up your one free return move. And then depending if the plant was located on Union Pacific, let's say, then you might incur an empty shop freight charge to go from the plant to the cleaning rack.

Q. So there would be an extra empty shop move from the plant to the cleaning facility?

A. That's right.

Q. That's what I was referring to by "the extra empty move."

A. Okay.

MR. ROSENTHAL: Let's mark as Exhibit 25 this next document.

(Grow Exhibit 25, an email communication, 11-10-15, ARK10008861 to 8864, was marked for identification.)

BY MR. ROSENTHAL:

Q. Can you take a look at what's been marked as Exhibit 26 and tell me whether you recognize it.

(Witness reviews document.)

A. Yes.

Q. What is?

A. It's an email exchange between Gary Chaney and myself as well as some others at QTS and Mike Turk discussing the 2016 announced increase in the Union Pacific shop tariff as well as our ability to effectively divert cars en route back from customers to cleaning racks and shops.

Q. Did you ever ask QTS to report more formally on efforts to divert cars on their way back to the facility?

A. No.

Q. So they never provided you with any statistics about how frequently they were able to divert cars to cleaning shops as compared to how many times cars made it back to the plant?

A. No.

Q. As I read this email from Chaney back to you, it seems to note a similar issue that we just discussed, that certain lessors were having capacity issues and, therefore, were slow to provide disposition of cars to their plants, so sometimes you would get an extra empty move to a shop because of that?

A. At that time, yes.

Q. You understand that email to be saying --

A. Yes. Yes, similar time frame to the email we just reviewed.

Q. So the prior email, which was Exhibit 24, was in May of 2015?

A. Right.

Q. This one was from November of 2015?

A. Right.

REDACTED

Q. Do you know why QTS was adding facilities to Arkema's network?

A. He was trying to expand the shop network that we were able to utilize to increase the capacity that we had access to, as well as continue to try to optimize our network in terms of our plant locations.

Q. So at least part of the motivation for

efficient to pick a shop with capacity to turn around a car quickly, even if getting to that shop would require a move that incurs more empty mileage charges?

A. Well, I don't think you can necessarily assume that it's -- the shop is further away, because I think the assumption there that shop -- that the car is coming from the plant or the car might be -- we have a fair number of customers, let's say, in the Northeast. So if we were able to add shops in Niagara Falls or other places in Virginia or the Northeast, we might be able to divert shops to those cars en route back from Northeastern customers and reduce both the distance and the time, in terms of transit at least, to return repaired to the plant.

Q. That's fine. I wasn't trying to assume anything. I was trying to understand something you had said.

A. Okay.

Q. I had suggested that there may be some shops closer to where cars would be made empty and more efficient in terms of empty miles, and I thought you had pushed back and said, well, it may be that the shops are more capacity and can turn

around faster.

A. It was -- it's a combination.

Q. You just look at the balance and try to decide what's best for Arkema?

A. Right.

MR. ROSENTHAL: Let's mark as Exhibit 26 the next document here.

(Grow Exhibit 26, an email communication ending 1-22-16, ARK10006865 to 6868, was marked for identification.)

BY MR. ROSENTHAL:

Q. It's a bit tough to read, but this is how it was produced.

REDACTED

been marked as Exhibit 28?

A. No.

Q. This is a document labeled ARK1002445 through 449. And I don't think your name is on this one --

A. No.

Q. -- either.

This is one where I'm also trying to see if my understanding of the document is consistent with Arkema's understanding of its car movements and management.

REDACTED

REDACTED

Q. So apparently some of these shops were still having capacity issues in at least June of 2016.

A. Yes.

Q. And as a result of this particular incident, Arkema moved the car a longer distance from somewhere in Canada to Texas?

A. Yes.

Q. Rather than a shorter distance to a shop in Ohio?

A. Yes. That's not our decision. It's the lessor's decision.

Q. So what, if anything, is Arkema doing today to mitigate the cost associated with UP's charges for empty shop moves?

A. We're essentially following the same procedures. I know that Gary Chaney, on our behalf, is constantly looking to try to get new shops qualified and available for work so that we have more options in terms of both capacity and geography to try to minimize -- maximize use of the asset and minimize transit distance.

Q. What else?

A. I know that, in particular, our ACR latex group is auditing the charges to ensure that it's not, as we discussed earlier, an empty return moving along the same route as the loaded move, the outbound move.

Beyond that, I don't know of any significant efforts.

REDACTED

REDACTED

Q. Has Union Pacific's adoption of Item 55-C's empty shop move charges had any impact on Arkema's -- on Arkema's business other than the costs of moving empty cars to and from shops?

A. I would say yes.

Q. What are those impacts?

A. Administrative, processing and payment of the invoice; auditing an invoice; adding to the complexity of the shop process and decision; adding

additional communications to try to make sure that we're diverting cars when we have the opportunities as opposed to letting them come back to the plant.

Q. Can you think of other impacts on Arkema's business?

A. Nothing else comes to mind at the moment.

Q. When you said "adding complexity," do you mean that now Arkema has to consider the fact that there are charges for empty shop moves when it's picking a shop facility?

A. Yes.

Q. Has Union Pacific's adoption of Item 55-C empty shop charges had any impact on Arkema's loaded freight moves?

REDACTED

saying -- and tell me if I'm wrong because I don't want to mischaracterize what you're saying -- Union Pacific couldn't go out and publish a rate with a mileage allowance that would satisfy Arkema even if the differential were based on the tariff calculation of mileage allowances where the mileage allowances are correctly calculated.

A. Right. I think 20 years ago or 15 years ago, when the chemical industry, the crude oil industry and a lot of different folks who utilized tank cars, largely converted from full mileage to zero mileage, at that time it was easy to understand the differential because you knew what you were paying as a full-mileage rate that that was -- that was the market rate. So you could understand the discount.

But now I think the industry, by and large, has been on zero-mileage basis for so long that it's difficult to understand what that differential truly would be to the current market.

Q. Were you in the industry during the time of the conversion? Did you see any of that happen?

A. Yes.

Q. Where were you working then?

A. Sunoco.

Q. Sunoco. Was Sunoco a company that converted from full-mileage rates to zero-mileage rates?

A. Yes.

Q. And you sort of recall that conversion happening?

A. Uh-huh.

Q. And at the time Sunoco converted from full-mileage rates to zero-mileage rates, did Sunoco see a discount that reflected conversion?

A. Yes. But currently in this market, we really have no benchmark or way to verify what that discount looks like.

Q. And you have no benchmark because you've all essentially been seeing escalations from those initial discounted zero-mileage rates, but you don't know what would have happened to the other path?

A. I've never been told what the discount is. I've never been offered a way to verify the discount. There's no tariffs to compare it to. There's no basis of comparison.

Q. Not since the original conversion?

A. By and large, yes.

Q. What do you mean by "by and large"?

A. In terms of timing, when you guys stopped publishing full-mileage tariffs and those kinds things. I don't know the time frame.

Q. With Sunoco, did Sunoco have rates on what was then Union Pacific?

A. Yes.

Q. And those were some of the rates that were converted?

A. I believe so.

Q. So zero-mileage rates?

A. Yes.

MR. ROSENTHAL: Let me take five minutes to go over my notes.

(Recess.)

BY MR. ROSENTHAL:

Q. I just have a couple more quick --

We talked a little bit just before the break about Sunoco's experience transitioning from full-mileage rates to zero-mileage rates.

A. Right.

Q. Were the -- was your experience with that transition some of the things that were showing through when we looked at Exhibit 14 and -- I'll wait until you get that.

REDACTED

MR. ROSENTHAL: Okay. That's all I have, depending on what Jeff has to say?

MR. MORENO: Probably just take a minute or two at most.

EXAMINATION

EXHIBIT 8

Redacted

Highly Confidential/Confidential

EXHIBIT 9

Redacted

Highly Confidential/Confidential

EXHIBIT 10

Redacted

Highly Confidential/Confidential

EXHIBIT 11

Redacted

Highly Confidential/Confidential

EXHIBIT 12

Redacted

Highly Confidential/Confidential

EXHIBIT 13

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,	:	
Complainants,	:	STB Docket Nos.
vs.	:	NOR 42144, et al.
UNION PACIFIC RAILROAD COMPANY, Defendant.	:	

- - -

Deposition of ARKEMA, INC.

through STEPHEN TROMBETTA as 30(b)(6) witness

King of Prussia, Pennsylvania

Thursday, August 30, 2018

1:50 p.m.

BEFORE:

Gail L. Inghram Verbano:

BA, CLR, RDR, CRR, CSR-CA (No. 8635)

GATX.

Q. But do you recall what you discussed?

A. I don't. Normally it's -- as you can see in this one, it's a short agenda, three things. Normally there's a couple to several issues that we talk to them about. Sometimes it's just to learn information about what's going on in the market.

Q. I see on this agenda there's also HM201 on-site qualification --

A. Yes.

Q. -- bullet point that says, "Are any customers performing on-site qualification?"

A. Yes.

Q. Do you remember what that discussion was?

A. That one I do remember. Specifically it was our hydrogen peroxide business was concerned about the number of cars that they had coming due in the future years, and they said they had heard of other people that could do on-site qualification at their own facilities.

So we were asking people, "Have you heard of this? If so, what does it entail?"

Q. And what did you find out from Trinity?

A. It's not something that Arkema would

have been able to do. My understanding, it was a pretty complicated process to get the approval to do it and however we needed to set up our site to be able to do this work.

REDACTED

REDACTED

Q. Could you take a look at the document that's marked Exhibit 13? Yes, that's it.

Can you tell me whether you recognize that document?

A. I do.

Q. Can you tell me what it is?

A. This is our annual tank car strategy that gets put together and sent over to the executive committee in France every year.

Q. Who creates this document?

A. I do.

Q. I was looking -- is this the most recent version of the tank car strategy that Arkema has?

A. Correct. The 2019 project has not kicked off yet officially.

Q. Okay. So when you turn a couple of pages in to -- and I'm going to be referring to some of these numbers on the bottom of the page.

REDACTED

REDACTED

Q. Does the length of the lease term affect the lease rate in any systematic way?

A. It could. Generally speaking, you would think the longer your lease term is the better your lease rate is.

Q. I assume -- well, is there also, though, a market factor in there of where people think the market is going?

A. Yes, we expect the car owner to hedge on where they think the market is going, just as I'm hedging on where I think it's going.

Q. But generally, longer terms would mean lower rates?

A. Generally.

Q. Is there any industry standard lease

BY MR. ROSENTHAL:

Q. Do you recognize what's been marked as Exhibit 21?

A. I do. It's the Union Tank Car master lease agreement.

Q. It says on the first page here, "Union Tank Car Company Car Service Agreement, Effective this first day of March" -- I think it's supposed to be "1992" -- and then it's Union Tank Car Company and Elf Atochem --

A. Yes.

Q. Is that a predecessor?

A. Predecessor company.

Q. If you look at the last page of this document, it looks like there's some recognition here that it was assigned to Arkema?

A. Yes.

Q. And this is an example of a full-service lease?

A. Correct.

Q. Do Arkema's full-service leases contemplate that Arkema will pay the cost of empty moves to and from shops?

A. We pay the freight to get it to the shop.

REDACTED

REDACTED

Q. What are mileage allowances?

A. I don't recall.

Q. This is not something that you generally have to deal with?

A. No.

REDACTED

company all AllTranstek. I don't remember which one of those would be involved in that.

Q. But one of them might be involved in that?

A. Correct.

Q. Would reports of those loaded versus empty miles go to you?

A. Me, no. There's a gentlemen that works for me, and he would get them if there are such reports.

Q. Who is that?

A. Mike Turk.

Q. Mileage equalization just hasn't been a significant enough issue to hit your radar?

A. Correct.

REDACTED

Q. Do you monitor loaded versus empty

miles in cars that Arkema owns?

A. I do not.

Q. Do you know whether Mr. Turk does?

A. It's possible, but it's not anything significant, as far as I know. It's not been brought to my attention.

Q. There's no process in place, as far as you know?

A. As far as I know, no.

Q. It hasn't been a significant enough issue for Arkema?

A. Correct.

Q. Just hasn't gotten your attention?

A. No.

Q. Have you had any communications with leasing companies about mileage equalization?

A. Not that I recall.

Q. Do I understand correctly that when Arkema leases a car under a full-service lease, the lessor will designate the repair facility to which the car moves?

A. Correct.

Q. If a cleaning is required, that's something that Arkema chooses?

A. I don't -- I wouldn't say all the time,

EXHIBIT 14

BEFORE THE SURFACE TRANSPORTATION BOARD

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.	NOR 42144
UNION PACIFIC RAILROAD COMPANY,	
Defendant.	

Wednesday, September 20th, 2017

9:00 a.m.

HIGHLY CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

Deposition of KEVIN ZIMSKI, convened at the offices of Cargill Incorporated, 15407 McGinty Road West, Wayzata, Minnesota 55391, pursuant to 30(b)(6) notice, the proceedings being recorded stenographically by Jonathan Wonnell, RMR, a Registered Court Reporter (NCRA #835577) and transcribed under his direction.

REDACTED

Q. Does UP's adoption of Item 55-C, does it affect that process, the renew or terminate decision?

REDACTED

Q. Is that something you have actually factored into decisions about renewing or returning cars?

REDACTED

Q. And when a lease is expiring and Cargill wants to retain at least the existing size of the

REDACTED

A. Correct.

Q. And what was that again? I'm sorry. I just --

REDACTED

Q. When Cargill is going out to lease new cars and getting bids, do leasing companies typically offer the same bid for the same car and term?

A. Are you asking if we were to go out to bid to eight different suppliers, did they always --

Q. Yeah. Yes, are you going to get the same answer from all of them?

A. No.

Q. How do you then decide between or among the suppliers?

REDACTED

Q. Are there some leasing companies that will only use their own shopping network for cars?

A. I think their primary focus is to keep that dollar in-house, but not always.

Q. So does that mean that there are no

leasing companies that will always insist on using their own network of shops?

REDACTED

Q. Are high mileage terms of lease agreements a meaningful factor in Cargill's leasing decisions? Let me start -- do you know what I mean by "high mileage term"?

A. Yes.

Q. What do you understand that term to mean?

A. So high mileage, basically just a mileage allowance within a lease contract.

Q. So if --

A. Yeah. I guess there's mileage allowance

A. I wouldn't be able to say a number.

REDACTED

Q. Okay. So when we're talking about returning cars, I just want to be clear. REDACTED

REDACTED

Q. That's usually -- I'm sorry.

A. No.

REDACTED

Q. And those repair facilities, can they do

some cleaning activities?

A. Yes.

REDACTED

Q. Are there particular specialized facilities that Cargill uses just for cleaning?

A. Yes.

Q. Can you name -- tell me what a few of them are, the most commonly used ones?

REDACTED

Q. Where are they located?

REDACTED

Q. Other facilities that are just used for cleaning?

A. Yeah. I think there's probably an expansive number of locations where we probably have used dependent on, again, proximity to origin or

needed a car.

Q. Companies other than REDACTED can you just -- what are the --

A. I mean, I'm sure we used

REDACTED

Q. Do Cargill's leases provide that Cargill will pay the costs of empty moves to and from shops?

REDACTED

MR. ROSENTHAL: If we could mark as Exhibit 9 a document titled REDACTED REDACTED It's CI000665 through -671.

(Zimski Exhibit 9 was marked for identification.)

BY MR. ROSENTHAL:

Q. Feel free to look through this document. We might come back to it later on. I was just particularly focusing on Section 3.08 on page 669. The language -- I think it's the second to last sentence, which reads, REDACTED

REDACTED

Do you see that?

A. Yes.

Q. So Cargill, reading that,

REDACTED

A. Yes.

REDACTED

MR. ROSENTHAL: All right. It's 12:00. Why don't we go off the record for a second.

(Whereupon, an off the record discussion was held from 12:02 p.m to 12:03 p.m.)

BY MR. ROSENTHAL:

Q. What are mileage allowances?

intended to provide compensation for the costs of sending cars to shops?

A. That, I do not know.

REDACTED

Q. I'm sorry?

REDACTED

Q. Do you know how someone would figure out what mileage allowance should be paid for a particular car?

A. Not specifically. I think -- so a mileage allowance would be based off of what the projection was in the marketplace on what the cost of owning the cars is. I think there would have to be an extraction of information that detailed whether that's inflation, cost of steel. I think there's many factors that would go into identifying really what that charge should be or at least what that allowance should be.

REDACTED

MR. ROSENTHAL: I'd like to ask the reporter to mark as Exhibit 10 a document -- handwritten on top it says

REDACTED

It's document CI000641 through -651.

(Exhibit 10 was marked for identification.)

BY MR. ROSENTHAL:

Q. Again, please feel free to take your time and look through as much of it as you need to feel comfortable. I was going to ask you a question specifically about Section 7, which is on page CI000643.

A. (Perusing document).

Q. Have you had a chance to look at it? Are you okay?

A. Yes.

Q. I mentioned I was interested in Section 7, which is mileage earnings. And it says,

REDACTED

Did I get that -- did I read that correctly?

A. Yes, you did.

REDACTED

A. I do not.

Q. Is -- yeah. Go ahead.

REDACTED

REDACTED

Q. Does Cargill believe that Union Pacific should be paying Cargill mileage allowances for shipments in tank cars?

A. Could you repeat the question?

Q. Does Cargill believe that Union Pacific should be paying Cargill mileage allowances for shipments in tank cars?

A. They may believe it, but they don't exist, so...

Q. You keep saying they don't exist. What do you mean?

A. Well, I guess what I'm just saying is that, I mean, from what I'm familiar with is that we've said zero-mileage rates. So I guess all I'm saying is that if we believed that we should be receiving some compensation for operating private tank cars, my answer would be yes. But I'm just -- I'm basing it off of the knowledge of being within

A. Correct.

Q. Does Cargill communicate with lessors about whether it expects railroads to pay mileage allowances on leased cars?

A. Could you restate the question, please?

Q. Does Cargill communicate with lessors about whether it expects railroads to pay mileage allowances on its leased cars?

A. We do not.

MR. ROSENTHAL: I'd like to ask the court reporter to mark as Exhibit 11 a document with the words REDACTED It says REDACTED REDACTED It's CI00112 through CI00116.

(Zimski Exhibit 11 was marked for identification.)

BY MR. ROSENTHAL:

Q. Again, feel free to take the time to look at this document to get comfortable with it. I was going to focus on some language on page 113, Section 5 at the very top.

A. (Reading).

Q. Are you okay? Have you had a chance to look at the document?

A. Yes.

Q. So on page 113, Section 5, the first sentence says,

REDACTED

Do you see that language?

A. I do.

REDACTED

REDACTED

Q. No. I'm asking which contracts, agreements or arrangements with railroads.

A. I don't have that knowledge.

Q. Do you know who at Cargill would?

A. I do not.

MR. MONROE: Let the record reflect your Exhibit Number 11 REDACTED

REDACTED

BY MR. ROSENTHAL:

Q. Do you know whether

REDACTED

Q. So the record is clear on this, can we mark as Exhibit 12 a document

REDACTED

(Zimski Exhibit 12 was marked for identification.)

BY MR. ROSENTHAL:

Q. Again, take a look at it. It's a very short document. I think this is only intended to confirm that there's still --

REDACTED

A. I do not.

Q. Do you know someone who would?

A. I believe, which would be Jeff Reiber on my team, would receive an equalization estimate.

Q. Do you know whether his files were searched as part of the discovery process?

A. Yes.

Q. Yes, you know? Yes, they were searched? Or both?

A. Yes. He was a part of that.

Q. Does Cargill try to manage its cars to avoid incurring mileage equalization charges from leasing companies?

REDACTED

REDACTED

Q. Are there actions --

MR. MONROE: Mike, before you go too much farther, you opened this topic about equalization. Are you referring to any equalization programs or only the U.S. equalization program?

MR. ROSENTHAL: U.S.

MR. MONROE: Okay.

BY MR. ROSENTHAL:

Q. And if that matters, please tell me. But

do you know, is there anything that Cargill does as far as directing movements of tank cars to avoid having to pay equalization?

A. I don't know.

MR. ROSENTHAL: Let's mark as Exhibit 14 -- it's also -- it's a document that says REDACTED Bates label is also CI000821. This one has an extension 4.19. Again, because I think that's how Cargill had -- one way Cargill designated the file when it was produced.

(Zimski Exhibit 14 was marked for identification.)

BY MR. ROSENTHAL:

Q. Do you recognize that document?

A. Yes. It was also reviewed.

Q. All right. What is this document?

REDACTED

A. It may depend on what type of commodity it is and what's wrong with the bottom outlet valve in order to determine that.

Q. In talking about these percentages, is there a difference between owned and leased cars, percentage of cars moving to a shop in a particular year?

A. There may be. Again, I can't determine exact numbers on what that percentage would be.

Q. In terms of the types of issues that might arise that would require to a car to be sent to a shop, is there a difference between the cars Cargill owns and the cars Cargill leases?

A. No.

REDACTED

Do certain types of tank cars move empty

to shops more frequently than others?

A. I can't think of a reason why there would be a difference in that.

Q. Would the commodity moving in the tank car make a difference as to whether a car is more likely to move to a shop?

A. If it has a corrosive nature, you may have a higher frequency for shopping events for those types of commodities.

Q. Is that because the nature of the product might be more likely to do something to the car that would require the car to visit a shop?

A. That may be a potential.

Q. Are there other reasons why the type of product would affect whether a car is more likely to go a shop?

A. Yeah. I mean, if you have the explosive nature of the car, and hot work or welding can't done -- let's say done on site from where the repair could be done from a mobile perspective -- the car has to be shopped. If you have cup washers, I think there's a higher level of scrutiny. The FRA certainly is keeping eyes on ethanol tanks.

Q. So there's some types of repairs that can only be performed in shops if a car was carrying a

particular commodity?

A. That could be a reason.

Q. But, I mean, that may be a reason -- that could be a reason. All right. Is that a reason?

A. Yes.

Q. What percentage of Cargill's empty moves to shops require part of the move to go over Union Pacific Railroad?

A. I don't know the exact number.

Q. Well, approximately.

A. Shipment percentage is what you're asking?

Q. Movement to shop percentage.

A. It's tough to determine a percentage in that. 50 percent.

Q. 50 percent of the moves to shops go over Union Pacific on their journey to the shop?

A. Again, I don't know exact numbers.

Q. I really am just looking for an approximation.

A. Right. And I guess I'm not knowledgeable really even to give an approximation on that.

Q. I mean, who's -- which department knows how cars move to shops and which railroads they've got to move over when going to shops?

A. Our rail execution team.

REDACTED

REDACTED

REDACTED

Q. Why is that?

REDACTED

REDACTED

way of road.

Q. Are shop networks ever a subject of lease negotiations?

A. It's been mentioned.

REDACTED

REDACTED

REDACTED

A. I wouldn't promise it.

Q. But that's what you're trying to do?

A. Correct.

REDACTED

Q. How do leasing companies communicate with Cargill about when and where to move cars to repair facilities?

REDACTED

Q. Do lessors have systems by which if a car needs to be moved to a shop for, say, requalification they send some sort of message to Cargill?

A. Yeah.

REDACTED

REDACTED

A. So you're saying is there any reason why it can't be?

Q. Right.

A. No.

Q. It can be timed just like the cars that require compliance testing?

A. Correct.

Q. Is there any reason why a tank car moving from a Cargill origin or destination served by Union Pacific has to move to a shop that's served exclusively by Union Pacific?

A. Just so I understand, is there a reason it has to? Is that what you're saying?

Q. Yes.

A. No. Unless a full-service -- if it's a

full-service lease, we may not -- it just may not happen to be that they're going to choose a UP shop.

Q. If it moves to a UP shop, it would be because it's the lessors' decision, right?

A. Potentially.

Q. But there's no reason why just because the car is cycling, say, between UP-served points that a car has to go to a UP-served shop?

A. No reason.

Q. The lessor could choose to send it to a shop on CSX or BNSF or Norfolk Southern or somebody else?

A. Correct.

Q. Are there Cargill tank cars that don't have an immediately prior loaded move on Union Pacific or won't be followed by a loaded move on Union Pacific that sometimes would move to a shop that's served by Union Pacific?

A. Yes.

MR. ROSENTHAL: It's probably a good time for a break.

(Whereupon, a recess was taken from 3:23 p.m to 3:33 p.m.)

MR. ROSENTHAL: I'll ask the reporter to mark as document 19 a document that says on the cover

which it believes Union Pacific failed to bill Cargill under Item 55-C?

A. Not that I'm aware of.

Q. When Union Pacific bills Cargill for empty movements under Item 55-C, are the empty miles excluded from mileage equalization?

A. That I'm not aware of.

MR. ROSENTHAL: I'll ask the reporter to mark as Exhibit 25 a document that begins with an e-mail from Phil Deeney sent Monday, May 16th, 2016, Bates labeled CI003979 through -3980.

(Zimski Exhibit 25 was marked for identification.)

BY MR. ROSENTHAL:

Q. Take an opportunity to look at that document.

A. (Reading).

Q. Okay. Have you had a chance to look at it?

A. Yes.

Q. All right. So in this first e-mail, this last e-mail in the string, I should say, Deeney writes under "Hopper Cars,"

REDACTED

REDACTED

Do you see that?

A. I do.

REDACTED

Q. Has Cargill had any communications with leasing companies about Item 55-C?

REDACTED

Q. Have Cargill and leasing companies communicated about responsibility for paying Item 55-C charges?

REDACTED

page 3152, but, again, if you need the context, you can go back and read it all. But I was going to ask you about an e-mail from Phil Deeney to Jeff Agan, Brad Hildebrand and others, July 16th, 2015, where he says,

REDACTED

Do you see that?

A. I do.

REDACTED

Q. Have you been part of any of those types of discussions?

REDACTED

Q. Are you aware of any changes that Cargill made in handling empty repair moves as a result of the fact that railroads are charging for the empty

moves?

REDACTED

Q. Do you know whether there were any communications within the execution team as far as how to respond to these empty repair move charges from railroads?

A. Specifically, no.

Q. You just don't know whether there were any communications at that time?

A. There weren't any formal communications.

Q. You know there weren't any formal communications?

A. That's -- so that's what I'm answering. There's no formal communications that I'm aware of.

Q. Okay. Did you ever ask anyone from the execution team whether there were formal communications about handling empty cars in light of these railroad charges?

A. I have not.

Q. So it's just none have come to your attention at the time that you've been at Cargill?

Q. Brad Hildebrand?
A. Yes.
Q. To make sure it comports with his understanding?

REDACTED

Q. For cars that Cargill owned, has Cargill tried to shift from moves that would go to UP shops to moves that go to shops on other railroads as a way of avoiding the Item 55-C charges?
A. I'm not aware of specific examples where we had done that.

REDACTED

REDACTED

A. No.

Q. Is Cargill more often cleaning cars at repair facilities as a result of Union Pacific's charges under Item 55-C?

A. I wouldn't say so.

Q. Is it more often using -- is Cargill more often using mobile repair facilities as a result of Union Pacific's charges under Item 55-C?

A. If the repair can be done by a mobile repair unit, yes.

Q. So Cargill is more often using mobile repair units than it was before Item 55-C charges?

A. I don't have any increase data to back that up, but I would say that if we can avoid freight charges to shop, we're going to do so.

Q. But you have no data showing it's actually occurred?

A. Not in front of me.

Q. Well, I mean, anywhere? Have you actually looked into this and studied the possibility of more often using mobile repair facilities?

A. I have not.

Q. Is there anything concrete that Cargill has done to mitigate the costs associated with Item 55-C that you can point me to?

REDACTED

Q. And you provided that to whom?

A. I mentioned Craig Swanger and Erlene Marigold and my boss Brad.

Q. And Craig Swanger does what?

A. Excuse me. And for the record, Jalene Ferber.

EXHIBIT 15

Redacted

Highly Confidential/Confidential

EXHIBIT 16

Redacted

Highly Confidential/Confidential

EXHIBIT 17

Redacted

Highly Confidential/Confidential

EXHIBIT 18

BEFORE THE SURFACE TRANSPORTATION BOARD

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.	NOR 42144
UNION PACIFIC RAILROAD COMPANY,	
Defendant.	

Thursday, October 19th, 2017

9:00 a.m.

HIGHLY CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

Deposition of BRAD HILDEBRAND, convened at the offices of Cargill Incorporated, 15407 McGinty Road West, Wayzata, Minnesota 55391, the proceedings being recorded stenographically by Jonathan Wonnell, RMR, a Registered Court Reporter (NCRA #835577) and transcribed under his direction.

what percentage of the time they go to a shop, what percentage of the time they go to a different origin?

A. It's not something we would typically look at.

Q. Has Cargill ever tried to look at that issue?

REDACTED

REDACTED

REDACTED

Q. What else did the study show?

REDACTED

REDACTED

Q. Were these moves of covered hopper cars?

A. Those are hoppers.

REDACTED

Q. And, again, I think you said those were hopper cars?

A. Covered hoppers, right.

Q. Is there anything else that Cargill did as a result of the study?

A. Those are the two that I recall.

Q. Do you remember whether the study pointed

A. They should have been included if we had any charges for tank cars for empty moves.

Q. So was the study just looking at moves where there were separate charges applied to movements of cars?

A. Empty cars.

Q. Of empty cars?

A. That's correct.

Q. So it might have looked at empty tank cars moving for the first time on rail, something like that?

A. That's correct. Yup. That would have been included because it would have been a chargeable event the way the railroad set things up.

Q. But would it have looked at a movement to a shop and back if the shop move wasn't -- or the move back wasn't a chargeable event?

A. If it wasn't a chargeable -- excuse me. If it wasn't included under miles equalization, it should have showed up.

Q. What if the movement was included under mileage equalization? Would it have shown up in your study?

A. No.

Q. Because Cargill wasn't paying for those

moves?

A. That's right.

Q. So it didn't care in the same way that it cared about these covered hopper moves?

A. That's correct.

Q. How many tank cars does Cargill currently own? And by "own" I mean own or possess under a net lease or a net synthetic lease.

A. I don't have the exact number.

Q. Approximately?

A. Approximately REDACTED

Q. And has that number changed significantly in the past five years?

A. Not significantly.

Q. How many cars does Cargill have under full-service leases.

A. I don't know the exact number.

Q. Again, approximately?

A. This would be a guess, only a guess.

Q. Why does Cargill both own and lease tank cars?

REDACTED

Q. What are mileage allowances?
A. Can you be more specific? It's just a term, mileage allowances?
Q. I think you mentioned you reviewed the Railinc --
A. Yes.
Q. -- 2007 tariff to prepare for the deposition.
A. I did.
Q. Did the tariff discuss mileage allowances?
A. Yes.
Q. So can you give me your understanding of what mileage allowances are?

REDACTED

Q. Were you familiar with the concept of mileage allowances before this case?
A. Yes.
Q. How are mileage allowances for tank cars determined?
A. We don't get mileage allowances for tank cars.
Q. Do you know, does the tariff that you looked at tell you what the mileage allowances for

REDACTED

REDACTED

Q. If Cargill's contracts with Union Pacific contain that language, should Union Pacific be paying mileage allowances on shipments under those contracts?

MR. MONROE: Objection, to the extent it's calling for a legal conclusion.

MR. ROSENTHAL: You can answer.

MR. MONROE: You can answer as your own opinion.

A. Restate your question, please.

MR. ROSENTHAL: Could you just read that back?

(Whereupon, the requested portion of testimony was read back by the reporter.)

A. If our contracts included this language (indicating)?

BY MR. ROSENTHAL:

Q. If your contracts -- you can set that document aside.

REDACTED

REDACTED

MR. MONROE: I'm going to renew my objection to the extent that you're asking for a legal conclusion. You can answer.

BY MR. ROSENTHAL:

Q. Yeah. I'm just looking for an answer as someone who's negotiated these contracts with that language.

REDACTED

Q. Fair enough.

REDACTED

Q. Does Union Pacific ship traffic -- strike that.

BY MR. ROSENTHAL:

REDACTED

adopted Item 55-C's empty shop move charges?

A. Any other tank car contracts other than the one I just cited with the Union Pacific?

Q. Or renewals.

A. Not that I recall.

REDACTED

Q. I'll ask you to go back to Exhibit 2, the first amended complaint.

A. Yeah.

Q. I'm curious particularly about paragraph 33 which is on page 9. Are you on that page?

A. I am.

Q. It says,

REDACTED

REDACTED

REDACTED

Q. So as far as you know Cargill hasn't calculated mileage allowance payments that would be due on the cars it owns if they were being paid, mileage allowance payments were being paid?

(Hildebrand Exhibit 5 was marked for identification.)

BY MR. ROSENTHAL:

Q. I'll be coming back to this document a couple of times.

A. This one?

Q. The one that you're looking at.

A. Okay.

Q. Feel free to take a look at the whole thing now if it will help. I'm going to first ask you specifically about the e-mail on the second page from Jeff Agan sent Wednesday July 15th, 2015, but it's part of an e-mail chain, so feel free to take a look at the whole thing before we begin.

A. (Reading document). Okay.

Q. Do you recognize this document?

A. Uh-huh. I vaguely remember this discussion, so...

Q. This is an e-mail chain?

A. Mm-hmm. That I was on.

Q. And you were one of the parties on the e-mail chain?

A. Yup. And I was -- I participated in this e-mail exchange.

Q. You can just focus on the second page,

3152. There's an e-mail from Jeff Agan sent Wednesday, July 15th, 2015. There's a second sentence that says,

REDACTED

Do you see that?

A. I do.

REDACTED

REDACTED

REDACTED

EXHIBIT 19

BEFORE THE SURFACE TRANSPORTATION BOARD

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.	NOR 42144
UNION PACIFIC RAILROAD COMPANY,	
Defendant.	

Thursday, April 27th, 2017

9:00 a.m.

HIGHLY CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

Deposition of PHILIP SPIECKERMANN, convened at the offices of Poet, 4615 North Lewis Avenue, Sioux Falls, South Dakota 57104, pursuant to 30(b)(6) notice, the proceedings being recorded stenographically by Jonathan Wonnell, RMR, a Registered Court Reporter (NCRA #835577) and transcribed under his direction.

"repair facilities" and it has a definition. Are you okay if today we use the term "repair facilities" to refer to facilities that clean, line, reline, maintain, modify, repair or retrofit cars as the definition?

A. Yes.

Q. Are you comfortable if I refer to them as shop facilities? Is that also -- do you see those as equivalent?

A. Yes.

Q. Okay. If for any reason you don't understand a term I use, whether it's repair facilities or shops, or you think it's important to distinguish between types of facilities, please let me know so that we're on the same page when talking about it.

A. Yes. Will do.

Q. Thank you. Did you review any other UP tariffs as part of preparing for this deposition?

A. No.

Q. Did you review any of Poet's contracts with Union Pacific?

A. No.

Q. Are you at all familiar with Railinc's tariff that addresses mileage allowances and mileage

equalization?

A. I am familiar with it.

Q. Did you review that to prepare?

A. No.

Q. Do you understand that Poet produced certain documents as part of discovery in this case?

A. Yes.

Q. Were you involved in producing documents as parts of the case?

A. Yes.

Q. Can you tell me without getting into any instructions from your lawyers generally what your involvement was in producing documents for this case?

A. My main involvement was collecting rail car leases and providing those for the discovery process.

Q. Did you provide e-mails regarding tank car movements as part of the discovery process?

A. Yes. We did as a company, yes.

Q. You weren't involved in the collection process?

A. I believe we provided documents with -- we did a specific word search through our e-mails.

Q. Were there also -- do you have hard copies of documents that are communications with tank car

lease, responsibility to pay for the cars under the lease, when that terminates.

MR. WILCOX: Pay rent?

MR. ROSENTHAL: Pay rent, yes.

THE WITNESS: My understanding was rent, is how you phrased it.

BY MR. ROSENTHAL:

Q. The rental period ends, you return the cars and washed your hands of them?

A. Yes.

Q. For [REDACTED] you have some agreements where it's after the cars have been cleaned?

A. Yes.

Q. For most of -- for other agreements when does your responsibility for the cars to pay rent end?

A. It can be after final inspections are done at the repair facility or it can be when the car is at its final location as determined by the car owner.

Q. So are there some returns where you would clean -- where Poet would clean a car at a location and then move it to another repair facility?

A. It could, yes. Not all repair facilities have cleaning capability.

Q. Why not?

A. I don't know. I would have to speculate on those decisions.

Q. But not all locations where you have to return cars under a lease agreement have cleaning facilities?

A. Not all.

Q. What happens if you were to return a car that wasn't cleaned?

A. I don't know. I don't know that we have returned a car that wasn't cleaned.

Q. And you don't know what would happen if you did?

A. Again, I would have to speculate. And there would be a discussion with the leasing company at that time or if there was a reason that they didn't want to clean the car.

Q. Do you know about -- can you give me a sense of what percentage of the time there is a empty move to a return location after a car is cleaned?

A. I couldn't put a percentage on it.

REDACTED

Q. So in those cases -- when you're returning

pay the cost of empty moves to and from repair shops?

MR. WILCOX: I would object to the form, Mike. You have a lot of leases. Are you trying to say every lease or -- can we go off the record just for a second?

(Whereupon, an off the record discussion was held from 11:12 a.m to 11:14 a.m.)

BY MR. ROSENTHAL:

Q. Let me try it again. Under Poet's leases, is Poet responsible for paying the cost of moving cars to and from shops or repair facilities?

A. REDACTED

Q. Do you know of any circumstances, any leases where you're not responsible for those costs?

A. I would have to probably go through each of our leases to determine if we weren't.

Q. Is the general rule that Poet's responsible for the cost of moving cars to and from repair facilities?

A. I think the general rule is that the lessee typically is responsible for into service freight and freight to return the car.

Q. So when a car moves to a repair facility for one of these ten-year qualifying inspections, is Poet responsible for paying the freight?

A. I believe so.

Q. Do you know how they do that?

A. No.

Q. Are they intended to provide compensation for the costs of moving cars to repair facilities?

A. Not to my knowledge.

Q. Does Poet report the amount of its costs to move cars to repair facilities to leasing companies?

A. REDACTED

Q. Does Poet report the number of moves to repair facilities to leasing companies?

A. REDACTED

Q. Do you know how someone would go about figuring out what mileage allowances should be paid for a particular car?

A. I do not know that calculation.

Q. Does Poet receive mileage allowances for any railroad movement of tank cars?

A. We have not.

Q. Do Poet's tank car leases address mileage allowances?

A. Yes, they do.

Q. Do they -- do you know what they say about mileage allowances?

movements?

A.

REDACTED

Q. And does Poet think it's entitled to payments on mileage allowances for tank car movements?

A. According to the way the leases are written,

REDACTED

Q. The document that we just looked at, PEP0001, it says that

REDACTED

A.

MR. ROSENTHAL: I'm going to ask the reporter to mark as Exhibit 7 a document designated PEP00222 through PEP00225.

MR. WILCOX: Can we put 6 away, Mike?

MR. ROSENTHAL: For now.

(Exhibit 7 was marked for identification.)

BY MR. ROSENTHAL:

Q. Do you recognize the document that's been marked as Exhibit 6?

A. (Reading). Yes.

Q. What is that document?

A. I believe it is a lease agreement between us and REDACTED **for tank cars.**

Q. Does that agreement apply to cars that are currently in Poet's portfolio of cars?

A. I believe these are have all been returned. They are not in our current active service.

Q. If you look on page 2, PEP00223 -- again, feel free to look at the whole document if it helps -- under provision Roman numeral 12-F it says,

REDACTED

MR. WILCOX:

REDACTED

MR. ROSENTHAL: Thank you.

BY MR. ROSENTHAL:

Q. REDACTED Did I read that correctly?

A. Yes. That's how it's written.

Q. What does that mean in this context?

A. My understanding would be that the railroads are providing zero-mileage rates.

Q. And what does that mean?

A. That there would be no mileage

compensation paid on shipments in these cars, would be my interpretation.

Q. So is Poet deciding through its rate agreements with railroads whether mileage allowances are paid or aren't paid?

A. Could you please restate that question?

Q. Does Poet decide based on its rate agreements with railroads whether mileage allowances are paid or aren't paid?

MR. HENDRICKSON: Objection. Are you referring to just this one agreement or to all --

MR. ROSENTHAL: Only one lawyer can play in this deposition game. I think that's Mr. Wilcox here.

MR. WILCOX: Well, I am going to object to the form. You're talking about a car lease and the one reference to REDACTED and then you're extrapolating this out to all their negotiations with railroads. You can see why Mr. Spieckermann is hesitating.

MR. ROSENTHAL: I'm simply asking Mr. Spieckermann, based on his position here as the person designated by Poet to address communications with leasing companies and railroads regarding mileage allowances, whether Poet determines based on

rates that Union Pacific charges Poet. And I'm asking why Poet hasn't asked Union Pacific to pay mileage allowances.

BY MR. ROSENTHAL:

Q. Do you have an answer, Mr. Spieckermann?

A. We didn't know it was an option.

Q. Do you now think it's an option?

A. I don't believe that it's an option based on the fact that Union Pacific doesn't pay mileage allowances per their tariff in their rates.

Q. And you've never asked?

A. I have not.

Q. Have you recently negotiated contract rates with Union Pacific? And by recently I mean since this case began.

A. Yes.

Q. And in those negotiations did you talk about mileage allowances and whether Union Pacific would pay mileage allowances?

A.

REDACTED

Q. Has Poet ever asked Union Pacific whether -- anything about mileage allowances?

A. REDACTED

Q. Has Poet ever asked Union Pacific to

have charged Poet for mileage equalization?

A. REDACTED

Q. Does Poet keep track of empty versus loaded miles during the year?

A. We get -- we utilize the same data that we get from the rail car owner that we use for the high mileage calculations. It's the same data.

Q. And does Poet try to monitor that data to ensure that it's not operating cars in ways that will lead empty mileage to exceed loaded mileage by 6 percent?

A. We look at it. But like I said earlier, a lot of that data is not realtime. So it's more of a retroactive look.

MR. ROSENTHAL: I'll have the reporter mark as Exhibit 8 a document where the first page is labeled PEP01704 and then it's followed by a couple of pages with that same main number and then dash 1 through dash 4.

(Exhibit 8 was marked for identification.)

BY MR. ROSENTHAL:

Q. Do you recognize the data that was part of that Exhibit 8?

A. Yes.

adoption of Item 55-C?

A. We have continued to focus on moving cars off of -- or moving cars off of loaded trips if they have to go in a repair facility or if they have to go in for return.

Q. Anything else?

A. No.

Q. Have there been any impacts on Poet's business from UP's adoption of Item 55-C other than the costs Poet's being charged, I guess, not paying under Item 55-C?

A. The costs are the main impact.

Q. Are there any other impacts?

A. No.

Q. Has there been any change to Poet's loaded movements?

A. Not as a result of 55-C.

Q. As a result of BNSF's charge?

A. As a result of the market, our marketing team, they're constantly looking for opportunities to sell ethanol. So those shipments, rail shipments can change, truck shipments can change. It's a function of the market.

Q. They're not changing as a result of railroads imposing charges on empty movements to

REDACTED

Q.

A.

Q.

A.

MR. ROSENTHAL: We'll mark as Exhibit 14 the document PEP00106 through PEP00109.

(Exhibit 14 was marked for identification.)

BY MR. ROSENTHAL:

Q. Do you recognize this document marked Exhibit 14?

A. Yes.

Q. What is it?

A.

REDACTED

Q.

REDACTED

A. REDACTED

Q.

A.

REDACTED

REDACTED

A. REDACTED

MR. ROSENTHAL: We'll mark as Exhibit 15 a document labeled PEP00039 through PEP00041.

(Exhibit 15 was marked for identification.)

BY MR. ROSENTHAL:

Q. Do you recognize that document?

A. Yes.

Q. What is it?

A. It is an agreement to lease cars to the REDACTED

Q. And under this agreement -- am I reading it correctly that the cars would be loaded at a Poet Ethanol facility? I was looking at the paragraph number 1.

A. (Reading). Yes. These were loaded at our facility.

Q. Why would Poet be entering into a leasing arrangement to load cars at its facility?

MR. WILCOX: I would object to the form, Mike. Did you say -- characterize this as an agreement to load cars at a facility?

MR. ROSENTHAL: I asked why Poet would be entering into a lease agreement where cars were being loaded at a Poet facility.

EXHIBIT 20

Redacted

Highly Confidential/Confidential

EXHIBIT 21

Redacted

Highly Confidential/Confidential

EXHIBIT 22



From: KyleFox@poetep.com
Sent: Tuesday, March 03, 2015 8:35 PM
To: PhilSpieckermann@poetep.com
Subject: Re: Shops for GE

Cleaning shop with the wack measurement is Nebraska Railcar Cleaning Co out of Omaha, NE. As far as shops are you asking about shops that they will approve or shops that they want to own? I think that they should be looking at some of the Union Tank car shops as well as Transco in Sioux city. What would really help, especially with the crap fees the railroads are charging for empties to shop, is to get cleaning at their facilities, especially those closest to our plants. We are going to have to be strategic about cars going to shop and distances and freight to get them there. If there was a chance that they could build a qualification site on a mobile basis at one of our plants that would be ideal as we could avoid the fees from the railroads.

> On Mar 3, 2015, at 4:32 PM, Phil Spieckermann <PhilSpieckermann@poetep.com> wrote:
>
>
> Is there any shops you want GE to look at or that would make sense for them to be in for any of our cars? Kevin is asking and they are wanting to engage some people. And where was the shop that had the measurement issue? He wants to get that solved if possible
>

EXHIBIT 23

BEFORE THE SURFACE TRANSPORTATION BOARD

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.	NOR 42144
UNION PACIFIC RAILROAD COMPANY,	
Defendant.	

Thursday, April 27th, 2017
2:30 p.m.

HIGHLY CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

Deposition of KYLE FOX, convened at the offices of Poet, 4615 North Lewis Avenue, Sioux Falls, South Dakota 57104, pursuant to 30(b)(6) notice, the proceedings being recorded stenographically by Jonathan Wonnell, RMR, a Registered Court Reporter (NCRA #835577) and transcribed under his direction.

that cannot be repaired at one of our facilities or by a mobile repair crew.

Q. And how often would a -- strike that.

Would cars also move to a shop for cleaning before they're returned to the leasing company?

A. Yes.

Q. And might cars move empty to a repair facility on return to a leasing company?

A. Yes.

Q. Are there reasons other than returns to the leasing company why a car would move empty to a cleaning facility?

A. Generally speaking, yes.

Q. What situations would that be?

REDACTED

Q. Are these the same facilities used to load the cars?

A. Yes. Yes and no. In some situations, yes. In some situations it's places that are

convenient to --

REDACTED

A. It's just matter of whether or not you have the denatured or undenatured. There are different percentages of denaturing.

Q. And by denaturing, is that when you're adding gas --

A. Natural gasoline.

Q. -- natural gasoline to the ethanol?

A. Correct.

REDACTED

Q. Okay. So when would they be cleaned?

A. We have a program that we try to adhere to of a once every REDACTED **years outside of qualification.**

Q. So it doesn't relate to a shifting of products; it's just a good practice to clean the cars every REDACTED years?

A. Correct.

REDACTED

A. No.

Q. Sometimes it's done at somebody else's facility?

A. It can be, yeah.

shop that performs the repair?

REDACTED

Q. Do you know whether Poet has considered permanent cleaning facilities or permanent cleaning capability at its facilities?

A. Could you repeat that? I'm sorry.

Q. Do you know whether or not Poet has considered developing more permanent cleaning capability at its plants, at its facilities?

REDACTED

Q. So in some cases it's -- well, strike that.

When a car needs to be moved to a facility for cleaning, qualification, some other repair, does Poet ever get to choose which shop it moves to?

A. Yes.

Q. Under what circumstances does Poet get to choose?

A. If we have a relationship with a

particular shop, something that's close to one of our facilities, or if we have a mutually agreed upon place with a car owner.

Q. Are there times when a car owner will say you've got to use a particular shop?

A. Typically there is options. They don't just say a single shop. They'll give you options.

Q. And how does Poet if it has options choose among those options?

REDACTED

A. Typically a shop will provide a turnaround time, a current turnaround time. So it depends on the information that they have available for you.

Q. So if a car has to go to a shop, someone from Poet might reach out to the shop and say how long is it going to be?

A. Yeah. Either Poet or the car owner.

Q. When these communications occur, are they e-mails, phone calls? What kind of --

A. It could be either.

Q. How many times a year would a typical car move empty to a shop for whatever reason, cleaning,

A. If that's where the shop is located, it would have to go on the UP. If it's not a shop on the UP then you wouldn't get it to the shop.

Q. If Poet would prefer that it move to a shop that's not on Union Pacific, is there a -- are there reasons why the car couldn't move to a shop that's not on the Union Pacific?

A. You have to repeat it again to make sure I'm hearing you correct.

Q. Sure. There's a loaded move from a Poet facility to a destination. The loaded move occurred on Union Pacific.

A. Okay.

Q. The empty car now has to move to a shop. Poet says, I don't want to move it to a shop on Union Pacific, I want to go to a different shop. Is there any reason that couldn't be done?

A. No, it could be done.

Q. Any reason why a lessor wouldn't agree or a leasing company wouldn't agree to use a non-Union Pacific-served shop?

A. The only reason I can think of is if they didn't have a relationship with that shop.

Q. But if they had a relationship with the shop, if it's an approved shop, no reason why that

couldn't --

A. No. They should be able to do that.

Q. Turn it around a little bit. Do cars that don't have, say, an immediately prior loaded move on Union Pacific sometimes end up getting moved to shops served by Union Pacific? Poet tank cars, we're talking about.

A. Yes, there would be instances where that might occur.

Q. Because that shop on the Union Pacific might be more convenient or better availability or for whatever reason?

A. It could be because that's the only routing, the only option, the only way to get it to a particular shop.

MR. ROSENTHAL: I'll mark as Exhibit 18 a document -- the first page is PEP01073 and there are some additional pages, dash 1, dash 2 and dash 3.

(Exhibit 18 was marked for identification.)

BY MR. ROSENTHAL:

Q. I'll tell you that the cover page says file produced as native. It was something produced by Poet in discovery and then I printed out the other pages and added the dash 1, dash 2, dash 3.

EXHIBIT 24

BEFORE THE SURFACE TRANSPORTATION BOARD

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.	NOR 42144
UNION PACIFIC RAILROAD COMPANY,	
Defendant.	

Friday, April 28, 2017

9:00 a.m.

HIGHLY CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

Deposition of JEFF SIEBRECHT, convened at the offices of Poet, 4615 North Lewis Avenue, Sioux Falls, South Dakota 57104, pursuant to 30(b)(6) notice, the proceedings being recorded stenographically by Jonathan Wonnell, RMR, a Registered Court Reporter (NCRA #835577) and transcribed under his direction.

REDACTED

A. No.

REDACTED

A. Nope.

Q. And I believe you said Poet doesn't track miles per car?

A. Correct. We don't watch that.

Q. Do the leasing companies provide Poet with reports on mileages for movements in tank cars?

A. I believe it's a quarterly summary that we receive, yes.

Q. Do you do anything with these quarterly summaries?

A. I do not.

Q. Do you keep them?

A. No.

Q. Do they send them by e-mail?

A. No.

Q. How do the leasing companies --

REDACTED

Q. And when you get them in the mail you toss them in the trash?

A. Yes.

A. Depending on the product that the car hauls or if it needed to be cleaned out prior to the inspection.

Q. Just focusing on the corn oil that Poet Nutrition ships, for those types of cars can the qualifications be done at a mobile facility?

MR. WILCOX: Again, object to the form. You're talking about qualifications now as opposed to the qualifications for their cars that will be in 2023. You're talking presently tank cars generally?

MR. ROSENTHAL: I'm asking.

MR. WILCOX: All right. If you can answer.

A. We've never done one either in a shop or mobile. So that's not something I've looked into yet.

BY MR. ROSENTHAL:

Q. You don't know how cars carrying corn oil can be requalified today?

A. I believe the main issue would be if it needed to be washed. I think it could be requalified in the field. But if there was too much product left on the inside, it would need to probably be washed first, which could also be done via mobile.

Q. That was going to be my next question.

Can cars be cleaned -- carrying corn oil be cleaned in the field if that's required?

A. Yeah. Corn oil is non-hazardous. It's just corn oil.

Q. Does Poet's current fleet of tank cars, does Poet ever clean those cars?

A. We have not yet.

Q. Is cleaning ever going to be -- are there reasons why Poet could clean the cars?

A. Yes. If they were sent the wrong location and loaded with product that wasn't ours, we would have to clean it out. But that has not happened.

Q. Is there any other reason why a car would have to be cleaned?

A. Not today.

Q. In your team at Poet you've never sent a car to be cleaned?

A. We have not.

Q. Do you have any agreements with companies to clean cars if cleaning becomes necessary?

A. No.

Q. Has Poet ever returned any of the cars that it has under lease because the lease terms expired?

REDACTED

REDACTED

Q. Have any of these cars that Poet has under lease ever moved to a shop for repair work?

REDACTED

Q. All right. Are you doing okay?

MR. WILCOX: We've been going about an hour? Do you want to just take a quick break?

THE WITNESS: Sure.

MR. WILCOX: Just ten minutes?

MR. ROSENTHAL: That's fine.

(Whereupon, a recess was taken from 9:57 a.m to 10:10 a.m.)

BY MR. ROSENTHAL:

Q. What are mileage allowances?

A. Mileage allowances are intended for the railroads to pay the car owners for the mileages that we ship tank cars on their system.

Q. Is that a concept Poet was familiar with before this case?

A. We knew of the concept, yes.

Q. And how are mileage allowances for tank cars determined?

A. Well, that's hard to say because, I mean, they've never been paid.

Q. Does Poet know what the mileage allowances would be if they were paid on tank cars?

A. I've never seen one, so, no, I don't know.

Q. Does Poet -- has Poet paid mileage allowances on any of its movers in covered hopper cars?

A. No.

Q. Does Poet own any covered hopper cars?

REDACTED

Q. Does Poet use any rail-provided covered hopper cars?

A. We have not.

Q. Does Poet know whether mileage allowances are paid on -- sometimes paid on covered hopper cars?

A. I don't know.

Q. Has Poet ever looked at -- maybe I just asked this -- what the mileage allowances would be if they were paid on tank cars?

A. On tank cars, I've never seen them be

MR. WILCOX: Objection. Are you referring to prior to the case being filed?

MR. ROSENTHAL: Prior to the case being filed.

BY MR. ROSENTHAL:

Q. It's something you've never taken up?

A. Again, the UP tariff says that they are not paid. So it's nothing that I've worked with the car owners on to fix the UP tariff.

Q. Have you ever asked anyone why isn't UP following the rules?

A. No. It's just the way it's been.

REDACTED

Q. You haven't received mileage allowances or credits from movements on any other railroads, have

mobilely is the only reason we're shopping those cars.

Q. Setting aside the issue of railroad-damaged cars, does Poet get charged for moving covered hoppers to shops?

A. There is a freight charge for those.

Q. With regard to your tank cars, when they need repair work -- valves, gaskets, the type of things that Poet is responsible for -- who performs that work?

A. Mobile repair units.

Q. Are there companies that Poet hires to perform the work?

A. Yeah. It's the same companies we have relationships with for the hoppers.

Q. Are there contracts just for this work -- that covers this work when it arises?

A. There is a labor rate and a mileage rate and then, you know, a material cost. But, again, we've only repaired one car this way for our tank car fleet. One valve we've replaced, I believe.

Q. Other work that's done on the car that aren't done by -- is there other work on the car that's done by Poet?

REDACTED

EXHIBIT 25

Redacted

Highly Confidential/Confidential

EXHIBIT 26

Redacted

Highly Confidential/Confidential

EXHIBIT 27

Redacted

Highly Confidential/Confidential

EXHIBIT 28

Redacted

Highly Confidential/Confidential

EXHIBIT 29

Redacted

Highly Confidential/Confidential

EXHIBIT 30

Redacted

Highly Confidential/Confidential

EXHIBIT 31

Redacted

Highly Confidential/Confidential

EXHIBIT 32

Redacted

Highly Confidential/Confidential

EXHIBIT 33

ORIGINAL

BEFORE THE

INTERSTATE COMMERCE COMMISSION

No. 35404
General American Transp. Corp. v. Indiana Harbor Belt Railroad Co.

No. 39380
General American Transp. Corp., et al. v. Baltimore and Ohio Terminal Railroad Co., et al.

COMMENTS OF THE

CHEMICAL MANUFACTURERS ASSOCIATION



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Chemical Manufacturers Association
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Washington, D.C. 20037
(202) 887-1160

Dated: November 9, 1984

ENTERED
Office of the Secretary
NOV 13 1984
35354 45 8 Part of Public Record

BEFORE THE

INTERSTATE COMMERCE COMMISSION

No. 35404
General American Transp. Corp. v. Indiana Harbor Belt Railroad Co.

No. 39380
General American Transp. Corp., et al. v. Baltimore and Ohio Terminal Railroad Co., et al.

COMMENTS OF THE

CHEMICAL MANUFACTURERS ASSOCIATION

The Chemical Manufacturers Association ("CMA") is a nonprofit trade association representing most of the shippers of industrial chemicals in the United States. Its members own or lease approximately 80,000 tank cars. That accounts for about 40 percent of the currently operated private tank car fleet of approximately 180,000 tank cars. CMA's members also own or lease a comparably large portion of the private covered hopper fleet.

CMA has been an active participant in most of the Commission and court cases pertaining to the level of private car compensation and the rules and regulations affecting the carriers' use of private cars. CMA was a prominent participant in the proceeding entitled General American Transportation Corporation, Union Tank Car Company, and North American Car

Corporation v. Indiana Harbor Belt Railroad Co., 357 I.C.C. 102 (1977), aff'd. Sub nom, IHB RR Co. v. Gen'l. Amer. Trans., et al. 577 F.2d 394 (7th Cir. 1978)("IHB" case).

IHB has been reopened for comment by Commission order in this proceeding served October 9, 1984. The same order likewise reopened Docket No. 39380, Gen'l. Amer. Trans., et al. v. Baltimore & Ohio Terminal RR Co. and IHB RR Co. ("B&O-CT" case). On September 12, 1984, CMA filed its "Reply in Opposition" to the railroads' petition for administrative review of the Review Board's decision in the latter case. CMA is prompted to submit these written comments by the advice in the Commission's October 9, 1984 order to the effect that:

> We may modify or reverse our prior decisions in these two cases [the IHB and the B&O-CT cases] as being in conflict with the revenue adequacy, rate flexibility, and car service provisions of the Railroad Reorganization and Regulatory Reform Act of 1976 and the Staggers Rail Act of 1980. (October 9, 1984 order)

BACKGROUND

This case involves much more than the question of whether two Chicago-based terminal switching railroads can or should assess a separate and extra charge for moving empty private tank cars to or from repair shops situated on their respective lines. B&O-CT's own July 3, 1984, "Petition for Administrative Review" lays it squarely on the line:

> The subject of the review Board's decision is in itself a matter of great importance to the nation's railroads. Switching movements of empty, privately-owned rail cars for repair place a substantial burden on the nation's railroads. The two small switching railroads involved in this proceeding have been switching substantial numbers of empty, privately-owned rail cars for repair before and after the tariffs at issue in this proceeding took effect. Unless railroads are permitted to recover adequate compensation for such switching movements, those movements will be a substantial drain on their earnings. (B&O-CT Pet. for Adm. Review, dated July 3, 1984, at p. 3; emphasis added)

If these two terminal railroad subsidiaries of large line-haul railroads*/ are permitted to violate both the IHB principle and the equalization rule prescribed in Ex Parte 328 1/, the walls will come tumbling down. The parent companies and every other U.S. railroad, large and small, will rush comparable tariff supplements into print.

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*/ B&O-CT is a Chessie System subsidiary, and IHB is owned by the line haul railroads serving Chicago.

1/ The Commission's 1977 order in IHB required IHB to participate in a 105 percent equalization provision contained in Item 120 of Doyle's mileage charge 7-F (357 I.C.C. at 137). Subsequently, the Commission, in its June 19, 1979 order in Ex Parte 328, required all respondent railroads in that proceeding (including IHB) to adopt and adhere to the equalization plan therein prescribed, which raised the ratio to 106 percent (June 19, 1979 unprinted report, at sheets 2 & 4). The equalization rule requires respondent railroads to handle empty private tank car movements (including reverse-routed empty returns and shopping movements) without charge, except for annually calculated "excess" empty mileage assessments for mileage exceeding the currently applicable ratio (106 percent).

B&O-CT's parent railroad, the Chessie System, has such a tariff supplement already on file with the Commission (Supplement 8 et seq., to ICC B&O 8004-C, item 265). It has been on file with the Commission for the last six months, with its effective date being postponed from time to time (currently effective in January, 1985) while awaiting the outcome of this case.

By reopening its 1977 decision in IHB and seeking comments from all affected parties, the Commission itself acknowledges the wide-ranging impact which a decision reversing the IHB principle would have. It is, therefore, appropriate that we examine the IHB principle in context, to be sure that the Commission is fully aware of the consequences of its contemplated action. The operative addage must be "don't tear down a fence before you know why it was built and can be sure that it is no longer needed."

The present system has been in place for seven years and has functioned well and to nearly everyone's satisfaction, despite some nipping around the edges by carriers who handle a relatively small percentage of total empty movements. 2/ That

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2/ The Review Board's last decision notes that the B&O-CT moves 33 empty cars per day and that IHB moved 116,610 empty private cars "to or from repair facilities" in four years (June 19, 1979 report at p. 1). That is about 100 cars per day, which can only be a tiny fraction of the empty movements required by the private fleet which is now approximately 300,000 cars strong.

system should not lightly be dismantled or destroyed. If any change is considered to be warranted after a review of the current situation, it should only be made after careful analysis of its consequences and must be accompanied by adequate measures to ensure that the new or modified system operates within the law.

SUMMARY OF ARGUMENT

As common carriers of commodities including bulk materials, U.S. railroads must furnish all the facilities required for their safe and efficient carriage, including properly maintained tank and covered hopper cars. When they fail to maintain a fleet of such cars sufficient to accomodate the reasonable requirements of the shipping public, they must fully reimburse the ownership costs borne by the shipper who supplies the car in order to use rail service not otherwise available to him. An inescapable ownership cost is the expense incurred in maintaining cars so that they can reliably and safely carry their intended cargos. Railroads who use private cars to generate revenues under full-service rates are required either to supply and maintain their own fleets, or to pay private car shippers an allowance sufficient to cover the cost of maintaining private cars in good repair. No one, not even the particular railroads party to these cases, disputes this.

Cars must be carried empty on their own wheels to and from repair shops in what are called "shopping" movements. This transport expense is as necessary to the cars' ability to function in revenue service as is the expense of the repairs themselves. But the repair company has no prior obligation (apart from his repair contract) to keep cars in good repair, whereas the railroads have that obligation by virtue of their collection and retention of the revenues generated by loads moved in repaired cars.

The shipper pays his repair bill and is reimbursed by a repair-inclusive allowance. If railroads collected charges for such movements, they would only have to return them in allowances fixed sufficiently high to cover shopping moves as an element of repair expense. Such movements have traditionally been performed without separate charges beyond those collected on loaded movements.

The problem which gives rise to this litigation is that some railroads serve more shops than others and are required to perform a disproportionate share of shopping moves. They are upset by the rule that cars carried not as property but as intrumentalities of transportation are carried without charge. Accordingly they have published freight rates for shopping movements not immediately preceeded or followed by loaded movements on their lines. They say it is inequitable to make them bear the brunt of non-chargeable empty carriage while

other railroads enjoy the loaded revenues without proportionately sharing the cost of the empty movements.

After full and deliberate consideration of a series of cases tried in the seventies, the Commision issued its consolidated report in the IHB case, laying down the "IHB principle" which the Commision now proposes to reconsider. The IHB report points out that there would be even greater inequities to shipper car providers if carriers who significantly participated in loads were permitted to assess charges for necessary repair moves. IHB also notes that railroads and shippers had, shortly prior to the report's issuance, agreed upon a mechanism for solving the "perplexing" problem of disproportionate empty carriage.

The solution mechanism was a revised Equalization Rule under which the AAR annually collected and dispersed charges for empty movements deemed to be "excessive", by virtue of exceeding a stipulated percentage of the annual loaded mileage (initially 105 percent later raised to 106 percent). The monies so collected were distributed to the railroads according to their respective carriage of the empties. The Commision concluded that this was a sufficient protection for all carriers who significantly participate in loaded private car movements to justify denying such carriers the right to asses a separate and additional charge for necessary empty car movements even when disproportionately performed.

CMA opposes the repeal of this "no extra charge" rule because it has governed the industry well for almost a decade. There has been no such demonstration of deficiencies or fault in such a well considered and judicially affirmed precedent as to justify reversing it. The respondent railroads in this case have offered no basis for doing so, other then self-interest.

If, despite the lack of any substantial basis for doing so, the Commission nonetheless concludes to reverse the IHB principle, CMA urges that conditions be imposed to avoid the more damaging and improper consequences of such a reversal. CMA insists that no empty charges be permitted until a mechanism is in place to assure (1) that shipper car providers will be compensated for the resulting increase in their repair expense, and (2) that there will be no avoidable delay in the application of appropriately increased allowances.

ARGUMENT
The Two Primary Questions Here Raised Must be Kept Distinct

Two logically distinct questions are present here. The same two questions were also before the Commission in its original 1977 decision in IHB. The first question is fundamental, although it was never directly posed in IHB. The question is: where should the economic burden of necessary

"shopping" 3/ moves ultimately fall, as between the railroad community and the private car shippers who own or lease repaired cars.

The second question is posed on the assumption that the first answer holds the railroad community ultimately responsible for car repairs and for the concommitant shopping moves which precede and follow them. The second question is: which railroad(s) should initially bear the cost of shopping moves, and how should the economic burden of such moves be channeled to the right one(s)?

1. Repair costs for private cars, including the associated movement expense, are a railroad responsibility.

The freight rates collected for moving commodities in tank cars or covered hoppers are generally published on a car-inclusive basis. 4/ The private car shipper who relieves the carriers of the obligation of providing cars at their own direct expense pays the same rate as the shipper who asks for and gets railroad supplied cars. As common carriers, the railroads are obligated to supply cars for the liquid or dry bulk commodities which they hold themselves out to carry under

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3/ "Shopping" moves include any line-haul or switching movement of empty private cars to or from a repair facility where they are repaired so as to be available for carrying liquid cargoes in common carrier rail service under full service rates.

4/ See next page.

such rates. They must, therefore, reimburse a shipper who assumes the car-furnishing responsibility where they default. The IHB decision makes this plain:

> ... the use of privately owned tank cars permitted the railroads to fulfill their obligations as common carriers in providing transportation of liquid commodities. While the railroads historically have never been a primary supplier of tank cars, their use of private cars does not diminish their duty to furnish cars and they must be prepared to accept any and all traffic tendered. Use of Privately Owned Refrigerator Cars, 201 I.C.C. 323, 377 (1934.) A common carrier must furnish cars in good order, reasonably safe for the purposes intended. To the extent that movements to and from repair shops enable it to fulfill this duty, it will derive economic benefit when it uses any cars in this national tank car fleet for revenue-producing movements of any sort. (IHB case, 357 I.C.C. 102, at pp. 123-24)

The railroads' obligation to pay allowances covering the full cost of furnishing private cars is implemented by Sections 11122 and 10706(a)(5)(6). 5/ In the case of car-related services hired from outside sources (like independent car repair shops), repair bills are factored into the car cost formula and added to the prescribed allowances along with interest and other directly-borne costs of car ownership. (See, e.g., July 19, 1979 I.C.C. order in Ex Parte 328 prescribing allowances for tank cars, at sheet 8.)

4/ Where "shipper-car" rates are negotiated and published, they are lower than standard rates, by virtue of the carrier's lesser obligation, and the movement is exempted from the allowance provisions carried in the currently applicable Positano tariff.

5/ See next page.

In the case of necessary car services directly provided by the railroads themselves (like reverse-routed empty returns and empty moves to shops for needed repairs), the historic practice has been for the railroads to perform the service without separate extra charge (in addition to the applicable line-haul rate). They treat the connected empty movements as included within the service "package" purchased through the payment made for the loaded movement. The legal rationale is explained in the IHB decision. The Commission in the course of noting its previous rejection of a proposed 100 percent equalization rule says:

> The Mileage Allowance cases [I&S 8406, 337 I.C.C. 23 (1970)] rejected a proposed 100-percent equalization rule whereby excess empty car-miles [i.e., empty mileage exceeding the loaded mileage] transported during the prior calendar year would be charged tariff rates ... * * * To the extent that the [100-percent equalization] rule would have resulted in imposition of charges on empty movements of instrumentalities of transportation, it was found unjust and unreasonable. Such movements were described as an integral part of the transportation function itself, which should not be made to bear transportation costs as ordinary freight. (357 I.C.C. at 124-25)

5/ IHB notes that the Commission's power over allowances is not limited to fixing maximum allowances under 15(15). Rather, it also includes the power to require railroads to maintain allowances high enough to cover the full cost of car ownership under section 1(14)(a) (now Section 11122). (See, 357 I.C.C. at p. 116.)

EXHIBIT 34

Redacted

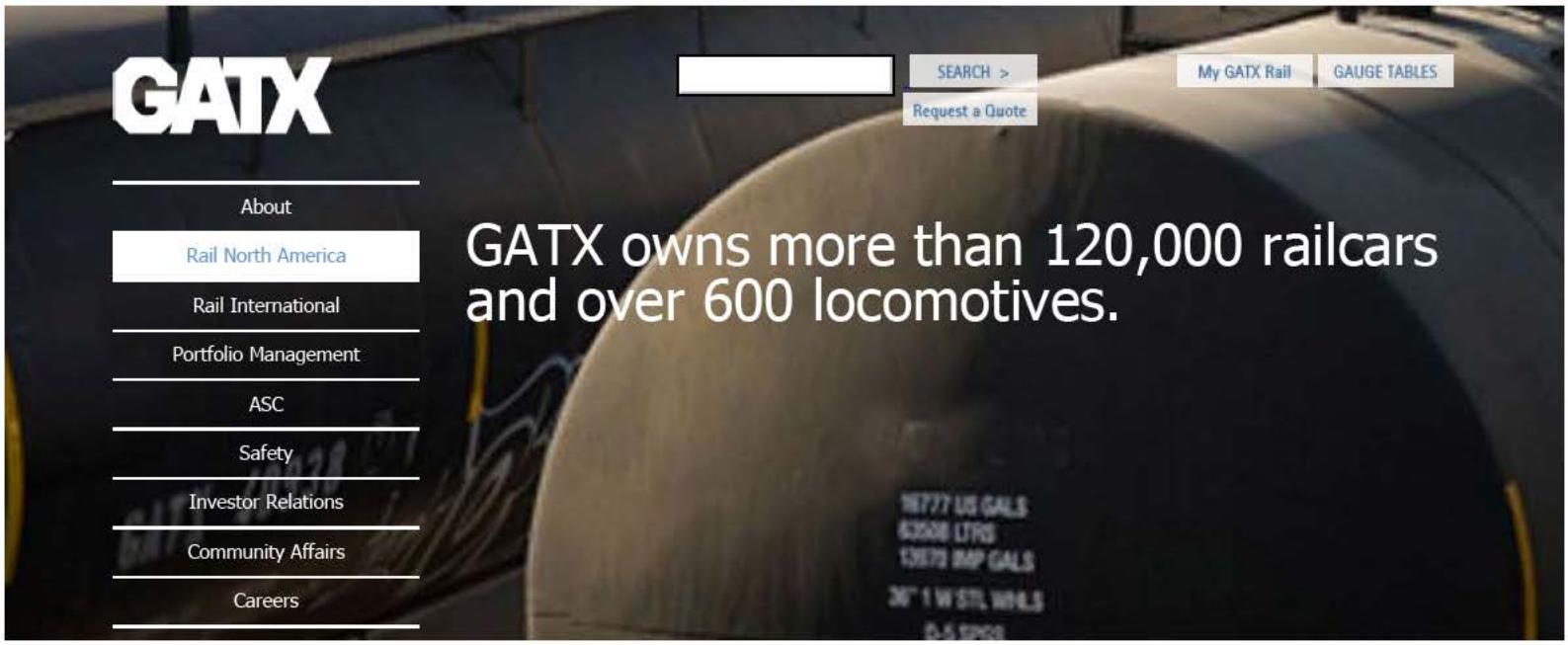
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EXHIBIT 35

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EXHIBIT 36



Services
Products
MyGATXRail.com
Gauge Tables
Rail Francais
> Customer Care
- Master Contract and Riders
- Rental Abatement
- Railcar Maintenance
- Mileage
- Summary of Customer Responsibilities
- End of Lease Returns
- Rail Invoices
- Responsible Care
- AAR Circular OT-5 K
Contact Us



RESPONSIBLE CARE®

Mileage

What is the basis for mileage earnings?

Mileage earnings primarily apply to tank railcars in the United States and to tank and hopper railcars in Canada. When putting together a quote or a contract with a railroad, freight rates can be negotiated with reduced or eliminated mileage rates on private (leased) equipment, resulting in either a capped or zero rate mileage rate. Under full mileage, you pay the quoted freight rate to the railroad. The railroad then pays an amount for every loaded mile the car(s) travel, based on the car(s) value, age and commodity carried. For more information, refer to Item 195 in the 6007IS Mileage Tariff at the website of the Association of American Railroads.

How are mileage rates established in the United States?

Rates are determined by a formula based, in part, on the age and value of the railcar. Mileage rates are consistent across most railroads in the U.S.

How are full mileage credit payments made?

Credits are made to the owner of the railcar, generally within 60 days. If you lease cars from GATX, railroads pay mileage credits to GATX, which credits the lessee for that amount. The process generally takes about three months. It is your responsibility, as lessee, to review the reported mileage data and audit it for accuracy. If there appear to be errors, your customer service representative can provide information about filing a claim.

What is "zero-rated mileage" and how is it applied?

Zero-mileage rates have been offered since railroads were deregulated. A zero-mileage rate means no mileage compensation is received from the railroad. Instead, the railroad charges a lower freight rate because it will not pass on credits to the owner or lessor for the loaded mileage traveled. There are different benefits to full- and zero-mileage rate structures. Customers must determine which option is best based on discussions with the billing railroad. If you enter into a zero-mileage rate contract, please provide the following information to GATX in writing, so we can ensure the correct application of the terms:

- The beginning and ending dates of the contract routes;
- The railroads involved;
- The commodity being shipped.

Do the same provisions apply to rail shipments in Canada and Mexico?
While Canadian railroad practices are similar to those in the United States, each railroad maintains its own rate schedule and tracks its own movement of loaded and empty cars. There also are differences in how equalization is handled. (See "equalization" below.) Railroads in Mexico generally do not issue credits for mileage.

How long does it take for a railroad to send mileage earned to the car owner?
Railroads generally process mileage earnings within 60 days following the month in which they were earned. As the owner of the cars you lease, GATX passes these earnings on to you when payment is received from the billing railroad. The whole process averages about 90 days. However, the tariff allows railroads to make adjustments up to 24 months after a move has been reported.

What is "equalization?"
If the combined empty miles traveled in a year by a customer's leased tank railcars are more than 106% of combined loaded miles, a penalty will be assessed against the difference in the third quarter of every year. Canadian railroads have different penalty percentages, and apply equalization to both tank and hopper railcars.

What is an "excess mileage charge" and when does it apply?
In most new contracts, there is a clause noting that there will be a per mile charge for every mile a railcar travels in excess of a stated limit of miles during a calendar year. This provision offsets the greatly increased maintenance expenses associated with railcars traveling above the average number of miles.

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EXHIBIT 37

Redacted

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EXHIBIT 38

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EXHIBIT 39

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EXHIBIT 40

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EXHIBIT 41

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EXHIBIT 42

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EXHIBIT 43

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Highly Confidential/Confidential

EXHIBIT 44

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Highly Confidential/Confidential

EXHIBIT 45

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EXHIBIT 46

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EXHIBIT 47

VALERO ENERGY CORPORATION AND SUBSIDIARIES
EARNINGS RELEASE TABLES
FINANCIAL HIGHLIGHTS
(millions of dollars, except per share amounts)
(unaudited)

	Three Months Ended December 31,		Year Ended December 31,	
	2017	**2016**	**2017**	**2016**
Statement of income data				
Operating revenues	$ 26,392	$ 20,712	$ 93,980	$ 75,659
Cost of sales:				
Cost of materials and other	23,671	18,302	83,037	65,962
Operating expenses (excluding depreciation and amortization expense reflected below)	1,123	1,114	4,462	4,207
Depreciation and amortization expense	477	455	1,934	1,846
Lower of cost or market inventory valuation adjustment (a)	—	—	—	(747)
Total cost of sales	25,271	19,871	89,433	71,268
Other operating expenses (b)	17	—	61	—
General and administrative expenses (excluding depreciation and amortization expense reflected below)	238	208	835	715
Depreciation and amortization expense	13	13	52	48
Asset impairment loss (c)	—	—	—	56
Operating income	853	620	3,599	3,572
Other income, net	26	21	76	56
Interest and debt expense, net of capitalized interest	(114)	(112)	(468)	(446)
Income before income tax expense (benefit)	765	529	3,207	3,182
Income tax expense (benefit) (c) (d) (e)	(1,635)	113	(949)	765
Net income	2,400	416	4,156	2,417
Less: Net income attributable to noncontrolling interests	29	49	91	128
Net income attributable to Valero Energy Corporation stockholders	$ 2,371	$ 367	$ 4,065	$ 2,289
Earnings per common share	$ 5.43	$ 0.81	$ 9.17	$ 4.94
Weighted-average common shares outstanding (in millions)	435	451	442	461
Earnings per common share – assuming dilution	$ 5.42	$ 0.81	$ 9.16	$ 4.94
Weighted-average common shares outstanding – assuming dilution (in millions)	437	453	444	464
Dividends per common share	$ 0.70	$ 0.60	$ 2.80	$ 2.40

See Notes to Earnings Release Tables on Table Page 15.

EXHIBIT 48

Andeavor
Statements of Consolidated Operations

	Note	Year Ended December 31, 2017	2016	2015
		(in millions except per share amounts)		
Revenues (a)		**$ 34,975**	$ 24,582	$ 28,711
Cost and Expenses:				
Cost of materials and other (excluding items shown separately below) (a)		**28,480**	19,658	21,928
Lower of cost or market inventory valuation adjustment	**5**	**—**	(359)	317
Operating expenses (excluding depreciation and amortization)		**3,182**	2,541	2,455
Depreciation and amortization expenses		**1,021**	851	756
General and administrative expenses		**742**	401	386
Loss on asset disposals and impairments		**25**	9	42
Operating Income		**1,525**	1,481	2,827
Interest and financing costs, net		**(439)**	(274)	(217)
Equity in earnings of equity method investments	**8**	**23**	13	7
Other income, net		**6**	57	13
Earnings Before Income Taxes		**1,115**	1,277	2,630
Income tax expense (benefit)	**13**	**(560)**	427	936
Net Earnings from Continuing Operations		**1,675**	850	1,694
Earnings (loss) from discontinued operations, net of tax	**4**	**8**	10	(4)
Net Earnings		**1,683**	860	1,690
Less: Net earnings from continuing operations attributable to noncontrolling interest		**155**	126	150
Net Earnings Attributable to Andeavor		**$ 1,528**	$ 734	$ 1,540
Net Earnings (Loss) Attributable to Andeavor:				
Continuing operations		**$ 1,520**	$ 724	$ 1,544
Discontinued operations		**8**	10	(4)
Total		**$ 1,528**	$ 734	$ 1,540
Net Earnings (Loss) Per Share - Basic:				
Continuing operations		**$ 10.85**	$ 6.11	$ 12.53
Discontinued operations		**0.06**	0.08	(0.03)
Total		**$ 10.91**	$ 6.19	$ 12.50
Weighted average common shares outstanding - Basic	**16**	**140.1**	118.5	123.2
Net Earnings (Loss) Per Share - Diluted:				
Continuing operations		**$ 10.75**	$ 6.04	$ 12.39
Discontinued operations		**0.06**	0.08	(0.03)
Total		**$ 10.81**	$ 6.12	$ 12.36
Weighted average common shares outstanding - Diluted	**16**	**141.3**	119.9	124.6
Dividends per Share		**$ 2.28**	$ 2.10	$ 1.85
Supplemental Information:				
(a) Includes excise taxes collected by our Marketing segment		**$ 771**	$ 577	$ 561

The accompanying notes are an integral part of these consolidated financial statements.

Andeavor
Statements of Consolidated Comprehensive Income

	Note	Year Ended December 31, 2017	2016	2015
			(in millions)	
Net Earnings		**$ 1,683**	$ 860	$ 1,690
Pension and other postretirement benefit liability adjustments	**14**	**(85)**	(65)	—
Income tax benefit on pension and other postretirement benefit liability adjustments		**21**	26	—
Total Comprehensive Income		**1,619**	821	1,690
Less: Noncontrolling interest in comprehensive income		**155**	126	150
Comprehensive Income Attributable to Andeavor		**$ 1,464**	$ 695	$ 1,540

The accompanying notes are an integral part of these consolidated financial statements.

EXHIBIT 49

ARKEMA
INNOVATIVE CHEMISTRY

Colombes, 22 February 2018

Arkema: Full year 2017 results

- A very good year end, driving an excellent full-year performance for 2017 and demonstrating the rationale of the Group's strategy
- **€8,326 million** in **sales**, **up 10.5%** on 2016, with 8.9% organic growth
- **EBITDA up 17%** to **€1,391 million**, led by strong growth for all three of the Group's divisions
- **EBITDA margin** at **16.7%** (15.8% in 2016)
- **Adjusted net income up 42%** to **€592 million,** representing **€7.82** per share (€5.56 per share in 2016)
- Very strong cash generation, with **€565 million in free cash flow** and a significant reduction in net debt to **€1,056 million** (versus €1,482 million at 31 December 2016), *i.e.* 0.8 times 2017 EBITDA
- Proposed **dividend** increase from €2.05 to **€2.30** per share

The Board of Directors of Arkema met on 21 February 2018 to approve the Group's consolidated financial statements for 2017 and the annual financial statements of the parent company. At the close of the meeting, Chairman and CEO Thierry Le Hénaff stated:

"Our very good performance in 2017 reflects the quality of our underlying strategy and the strength of the growth projects for our specialty businesses. We largely exceeded the medium-term financial targets we set ourselves in 2014, with close to €1.4 billion in EBITDA, excellent cash generation and a low level of debt.

The Group is reaping the benefits of its successful innovations for advanced materials meeting our customers' high demand for lighter materials, new energies, 3D printing and consumer goods as demonstrated by our ranking, for the seventh consecutive year, in the Top 100 Global Innovators by Clarivate Analytics.

With Bostik, we have created a leading growth platform in adhesives, which currently represents almost a quarter of our overall sales. Bostik is proving all its potential, with its EBITDA up by more than 50% since it joined Arkema three years ago.

Lastly, our intermediate chemical businesses achieved an excellent performance supported by a very solid environment and the development and productivity initiatives undertaken since several years.

Arkema has demonstrated over the past three years and in different types of operating contexts, the quality of its portfolio of businesses with one of the best growth rates in its industry."

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A French *société anonyme* (joint stock corporation) with share capital of €758 705 060 – Registered in Nanterre under no. RCS 445 074 685
arkema.com

EXHIBIT 50

POET IS BIGGEST EARNING COMPANY IN SOUTH DAKOTA

JEFF HARKNESS | April 2, 2018

Getty Images

SHARE ON TWITTER SHARE ON FACEBOOK

When you think of billion dollar businesses in the United States, South Dakota companies usually don't come to mind. But the largest earning company in the Mount Rushmore State brought in revenues in the nine-zero range last year.

POET, the Sioux Falls-based ethanol and biorefined product manufacturer, had $4 billion in revenues in 2017, making it the largest earning company in South Dakota, based on figures from S&P Global.

FEATURED

SIOUX FALLS

RECOMMENDED



The Girl from 'Mrs Doubtfire' is 31 No and Absolutely Gorgeous



EXHIBIT 51

BNSF Rules Book 6100-B



Issued: July 12, 2018

Effective: August 1, 2018

Changes: 20, 28, 29

Item 6050 – Continued…

As used in this Item, the terms "forwarding instructions" and "loader" will be as defined in BNSF Demurrage Book 6004-Series. The charges provided in this Item are in addition to applicable demurrage, storage and extended use fees (EUF) charges as named in BNSF Demurrage Book 6004-Series and BNSF Rules Book 6100-Series or, diversion/reconsignment charges named in BNSF Diversion Book 6200-Series when applicable, and will not be absorbed in whole or in part.

NOTE: Nothing in this Item will be construed as authorization to charge any connecting carrier for railroad error moves.

Item 6060 - Operation Of BNSF Owned Or Controlled Mechanical Units

While mechanical units are being used by railroad, railroad shall perform such in transit temperature inspections as may be necessary and proper, at its expense. Railroad shall also perform routine servicing and running repairs to units. Railroad shall bill car owner, and car owner shall pay railroad, for services performed (other than inspection) and supplies furnished on the following basis:

1. Bills for fuel supplied or lube oil furnished mechanical cars should show equipment reference, service date, service location, gallons of fuel supplied and should be supported by information stating whether equipment was empty or loaded when service was performed and/or waybill date and number.

2. Bills for the pretrip inspection made prior to okaying car for loading, for the purpose of testing unit to determine that it is functioning satisfactorily or in need of repairs, will be rendered on the basis of $25.00 per car.

3. Refrigerant, antifreeze, supplies and repairs to units shall be billed as provided for in the field and office manuals of the code of interchange rules promulgated by the Association of American Railroads.

Item 6080 - Empty Movement Of Privately Owned Cars

The provisions of this item apply to rates published on shipments in cars of private ownership with the provision that the use of such cars is not subject to the payment of mileage allowances or to the provisions of Mileage Tariff and RIC 6007-Series. Except as may otherwise be specifically provided in the Exempt rate quote, circular or memorandum, such rates include the movement of the empty car or cars to the point of prior loading via the reverse of the loaded route. Any other empty movement by the BNSF will be subject to charges provided in the applicable BNSF Tariff.

Item 6100 - Return Of Pallets, Pallet Sides, Platforms, Skids, Dunnage, Etc.

Return of Pallets, Pallet Sides, Platforms, Skids, Dunnage, etc. shall not be included in rates for temperature controlled shipments (Rules 705 and 710).

EXHIBIT 52

Guidelines Governing Shipments of Empty Private Railcars Moving On Own Wheels

This document is for information purposes only. In the event of a discrepancy between this document and CN 890000 Series, RIC 6007 or any other commercial tariff, contract, or publication, the latter shall govern.

Item 200 – United States

Guidelines for Shipments with Origin and Destination in United States

Bill of Lading and Charge Guidelines Applicable on Empty[1] Private Freight Cars Moving on Their Own Wheels Originating AND Destined to Points in United States

Railcar Is	Railcar Type is	Railcar is	Standard Transportation Commodity Code (STCC) must be[2]	Revenue Status[3]
Privately owned or leased	Tank	New or newly acquired or re-stenciled or moving to be re-stenciled	3742213	The current movement is always a revenue movement subject to applicable freight charges under CN 890000 Series or other commercial publications.
		Moving on CN's rail network for the first time	3742217 or 3742263	
		Moving to be dismantled or scrapped.	3742293 or 3742295	**If the railcar's previous movement on CN was a loaded revenue movement**: The current movement is non-revenue and subject to Mileage Equalization provisions in accordance with RIC 6007 Series[4]. **If the railcar's previous movement on CN was not a loaded revenue movement**: The current movement is revenue and subject to applicable freight charges under CN 890000 Series or other commercial publications.
		Moving for cleaning, lining, relining, maintenance, modification, retrofit, repair or storage	3742263 or 3742297	
		Moving for any other purpose (Ex. For repositioning)	3742217	**Non Revenue Movement:** Subject to Mileage Equalization provisions in accordance with RIC 6007.[4]
Privately owned or leased	All other car types	New or newly acquired or re-stenciled or moving to be re-stenciled	3742213	The current movement is always a revenue movement subject to applicable freight charges under CN 890000 Series or other commercial publications.
		Moving on CN's rail network for the first time	3742217 or 3742263	
		Moving to be dismantled or scrapped	3742293 or 3742295	**If the railcar's previous movement on CN was a revenue movement**: The current movement is non-revenue.[4] **If the railcar's previous movement on CN was a non-revenue movement**: The current movement is revenue and subject to applicable freight charges under CN 890000 Series or other commercial publications.
		Moving for cleaning, lining, relining, maintenance, modification, retrofit, repair or storage	3742263 or 3742297	
		Moving for any other purpose (Ex. For repositioning)	3742217	

[1] For a railcar to qualify as being "empty" for shipping purposes, the maximum weight of any lading, including residue or debris, must not exceed 2,500 pounds.

[2] For full commodity descriptions and additional STCC numbers, please refer to Item 500

[3] If there is a discrepancy between the Bill of Lading and CN's actual movement records, the latter shall govern for the purposes of determining the revenue status of a shipment.

[4] In the case of revenue movements interchanged off of CN's network to another railroad, the empty railcar must be returned to CN by the same railroad at the same interchange point in order to be considered a non-revenue movement.

EXHIBIT 53



PRIVATE EQUIPMENT

Tariff 6

www.cpr.ca

Movement of empty private railcars

Item 25 ✓ TEXT

Private empty railcar movements on CP that are (i) immediately subsequent to a CP linehaul movement, and (ii) billed within **180 days** of the waybill date of the prior CP linehaul movement, are considered non-revenue and not subject to freight charges. All other private empty railcars moving on CP are considered revenue movements and are subject to freight charges. The below tables describe how private empty railcar movements are managed on CP and designate the parties responsible for payment of applicable charges.

Table A: Empty[1] railcar movements in CANADA or TRANSBORDER applicable to all private railcars

Movement	Revenue Status [2]	Responsible Parties [3]
car moving on CP for the first time, or more than 180 days after prior CP linehaul	***revenue*** movement subject to CPRS 4000 or other applicable agreement	payer of freight shipper consignee
re-stenciled car, car not listed in UMLER, or car moving to be scrapped or dismantled		
car moving to/from a repair facility or storage	***revenue*** movement subject to CPRS 4000 or other applicable agreement if previous movement was non-revenue	
previous movement was non-revenue		
all other private empty railcar movements	***non-revenue*** movement, subject to mileage equalization per Item 30	

Table B: Empty[1] railcar movements in the UNITED STATES applicable to private tankcars only

Movement	Revenue Status [2]	Responsible Parties [3]
new tankcar moving prior to first loaded movement in commercial service, or more than 180 days after prior CP linehaul	***revenue*** movement subject to CPRS 4000 or other applicable agreement	payer of freight railcar owner
re-stenciled car, car not listed in UMLER, or car moving to be scrapped or dismantled		
car moving to/from storage, or to/from a facility for cleaning, (re)lining, maintenance, modification or repair	***revenue*** movement subject to CPRS 4000 or other applicable agreement if previous movement was non-revenue	
all other private empty tankcar movements	***non-revenue*** movement, subject to mileage equalization per Item 30	

Table C: Empty[1] railcar movements in the UNITED STATES applicable to private cars other than tankcars

Movement	Revenue Status [2]	Responsible Parties [3]
new car moving prior to first loaded movement in commercial service, or more than 180 days after prior CP linehaul	***revenue*** movement subject to CPRS 4000 or other applicable agreement	payer of freight railcar owner
re-stenciled car, car not listed in UMLER, or car moving to be scrapped or dismantled		
car moving to/from a facility for cleaning, (re)lining, maintenance, modification or repair	***revenue*** movement subject to CPRS 4000 or other applicable agreement if previous movement was non-revenue	
car moving to/from storage facilities		
all other private empty railcar movements	***non-revenue*** movement, not subject to mileage equalization	

1. For a railcar to qualify as 'empty' for shipping purposes, the weight of any lading, including residue or debris, must not exceed 2,500 lbs.
2. If there is a discrepancy between the bill of lading and CP's movement records, the latter shall prevail in determining the revenue status of a shipment.
3. Responsible par ies may be jointly and severally liable.

EXHIBIT 54

All previous issues of CSXT 6051 are cancelled as of the effective date shown below.

CSX

TRANSPORTATION

PUBLIC PRICE LIST CSXT 6051

CONTAINING PRICES ON

TRANSPORTATION EQUIPMENT (WILL NOT APPLY ON RAILROAD ROLLING STOCK EQUIPPED WITH FRICTION BEARINGS)

Prices are subject to increase, change or expiration. Any change to the prices will be shown in supplements to or a reissue of this document or through advanced notification. Except as otherwise noted, ancillary charges contained in Publication CSXT 8100, as of the date of shipment tender, shall apply.

EFFECTIVE: July 16, 2018
(except as otherwise noted)

EXPIRATION: June 30, 2019

CSX TRANSPORTATION
METALS&EQUIP
www.ShipCSX.com
Jacksonville, FL 32202



June 22, 2018

RECITAL

CSXT offers common carrier rail transportation service for the Commodity (defined below) on the following terms and subject to the provisions set forth herein.

TERMS AND CONDITIONS OF SERVICE

APPLICATION:

This Public Price List ("Price List") contains pricing for freight properly identified by the Standard Transportation Commodity Codes (STCCs) included in the attached Public CSXT 6051 (0) workbook (the "Workbook"). The Workbook is incorporated by this reference, and is a part of this Price List. Capitalized terms within this Price List shall have the meaning accorded to them in Publication CSXT 8100 unless otherwise provided herein.

This Price List applies to freight tendered to CSXT when a Customer adds the following to a Uniform Straight Bill of Lading or electronic data package requesting rail transportation services, or any similar shipment instruction (each, a "Shipment Instruction"):

"Subject to CSXT 6051."

As of July 16, 2018, this Price List supersedes and cancels all prior Price Lists bearing the same number, CSXT 6051.

PRICE INCREASES:

CSXT may increase the prices set forth in this Price List. New prices may be effective in as little as twenty (20) days after publication.

6051 COMMODITIES

Generally, Carriers move empty railcars and locomotives in the same manner as any other freight. CSXT shall charge for the transportation of empty railcars as set forth in this Section 2. All empty movements are subject to the charges set forth in the Workbook.

a. Movement of Leased Cars: CSXT reserves the right to bill the owner of leased railcars for any revenue empty movements on CSXT lines. CSXT will exercise this option in the event payment is not made by the parties listed on the bill of lading for the movements of such railcars. The owner of the leased equipment will be responsible for paying the freight charges in such cases. If the empty Bill of Lading does not specify the freight payor, the owner of the railcar will be liable for any charges that arise from movement of the car(s).

b. Movement of Empty Railcars, Excluding Tank Cars: Empty railcars moving on their own wheels are subject to charges in this Price List if they meet at least one of the following criteria:

i. they are new cars or cars that are re-stenciled with new initials and/or numbers
ii. they are not listed in UMLER
iii. they are moving for scrapping or sale

Empty railcars will be handled without charge if the empty movement was immediately preceded by a revenue line-haul move on the CSXT network within the previous **180** days **and** the railcar is taken to location that is capable of reloading that railcar.

Railcars "bad ordered" on CSXT will be moved as directed under the provisions of AAR Circular No. OT-16.

c. Movement of Empty Tank Cars: Empty tank cars moving on their own wheels that meet at least one of the following criteria are subject to charges outlined in this Price List:

i. New cars
ii. Cars that are re-stenciled with new initials and/or numbers
iii. All new car moves prior to its first loaded move in commercial service are treated as newly acquired cars and are chargeable
iv. Any car moving for sale or scrap will be subject to prices published herein

Otherwise, tank cars will move without charge in accordance with Item 190, RIC 6007.

d. Railcars Registered to Other Railroads: After participating in a loaded revenue movement, CSXT has an obligation to return the same railcar either to the origin of the movement or to the railcar's owner. A railcar with this obligation for return is said to have record rights. A freight railcar's record rights are established after a loaded revenue movement.

When CSXT ships a loaded foreign railroad railcar off line, the railcar maintains its record rights and CSXT will receive the empty railcar back. A railcar can be re-stenciled without losing its record rights, but will lose its record rights when the car changes ownership.

A revenue empty move does not give record rights to a foreign railroad railcar.

If CSXT has a handling obligation based on the record rights of a foreign railroad railcar:

i. The railcar moves free until record rights are satisfied by returning the car to the origin or owner
ii. The railcar can be sent to a shop for free and then sent back from a shop for free
iii. Although Service Rules allow for billing empty miles in excess of loaded miles, CSXT does not bill for differences in mileage

If CSXT has no handling obligation based on record rights of a foreign railcar, empty movement back to the owner is subject to the rates and charges set forth in this Price List.

EXHIBIT 55

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

IN CONNECTION WITH

PARTICIPATING CARRIERS SHOWN IN ITEM 2.10 OF THE TARIFF

Tariff KCS 37 B

(change in items 1.5, 2, 20, 100, 110 and add Item 120)

(Cancels and Supersedes Tariff KCS 37 A)

RULES AND CHARGES GOVERNING TRANSPORTATION OF

COMMODITIES
(FOR APPLICATION, SEE ITEM 20)

INFORMATION NOTICE
RATES EXEMPT FROM REGULATION

This tariff also contains rates, charges, rules and regulations in connection with the transportation of commodity rates contained herein which are exempt from regulation and are provided as a matter of information.

ISSUED: December 1, 2016

EFFECTIVE: February 1, 2017
EXPIRATION: December 31, 9999

THE KANSAS CITY SOUTHERN RAILWAY COMPANY
427 WEST 12TH STREET
KANSAS CITY, MO 64105
CUSTOMER SERVICE AT 1-800-468-6527

**FOR BILLING AND CAR INQUIRY,
PLEASE CONTACT CUSTOMER SERVICE AT 1-800-468-6527, option 2**

ITEM 65

OVERLOADED CARS

1. Cars discovered to be overloaded, either at origin, destination or while in transit, will be handled in accordance with rules and charges published in KCS 9012-Series

ITEM 70

PRIVATE LINE MILEAGE ALLOWANCE

1. Rates and charges DO NOT include payment of private line mileage allowance.

ITEM 75

RETURNED, REFUSED OR REJECTED SHIPMENTS

1. If shipment, moving at rates and charges published herein, is ordered back to the loading point for reasons other than KCS error, car will be returned and the rate billed on the original shipment will be assessed.

ITEM 80

STATION LISTS AND CONDITIONS

1. This tariff is governed by Tariff OPSL 6000-Series issued to the extent shown below:

PREPAY REQUIREMENTS AND STATION CONDITIONS

A. For additions and abandonments of stations and except as otherwise shown herein, for prepay requirements, changes in names of stations, restrictions as to acceptance or delivery of freight and changes in station facilities. When a station is abandoned as of a date specified in the above named tariff, the rates from and to such stations as published in this tariff are inapplicable on and after that date.

ITEM 85

TERMINAL OR TRANSIT PRIVILEGES OR SERVICES

1. Rates and charges DO NOT include such services.

ITEM 90

WEIGHING

1. Rates and charges DO NOT include the cost of weighing or switching necessary to move car(s) to or from scales. Upon request and while car(s) is on KCS, weighing will be performed and the rules and charges published in KCS 8100-Series, will be applied and charged against the party making the request. One additional intra-terminal switch charge, as published in KCS 8100-Series, applicable at the terminal where weighing is performed will be assessed.

ITEM 100

MOVEMENT OF EMPTY PRIVATE CARS OTHER THAN TANK CARS

A. Empty private cars moving on own wheels while on the KCS will be subject to charges published in KCS 3700 when:
   1. New car(s) move prior to first loaded move in commercial service (STCC 3742213).
   2. Restenciled cars move with new initials and/or numbers prior to first loaded revenue move in commercial service (STCC3742213).
   3. Car(s) moves for scrapping or sale (STCC 3742293).
   4. Car(s) moves empty on KCS immediately preceding an empty move on KCS resulting in back to back empty move.
   5. Car(s) move to and from storage facilities.
   6. Car(s) move to and from contract shop locations

B. KCS will assess a switch charge per KCS 8100 when privately owned cars move between a KCS classification yard, lease track, or interchange track and repair, storage, or cleaning facilities within the same switching district, unless covered under contract between KCS and the repair facility.
   1. This charge will not apply if KCS receives line haul revenue in lieu of a switch charge to or from the repair or storage location.

C. When a car is released from load on KCS, the empty car will be returned free to the received interchange or origin station of the last loaded movement via the reverse of the inbound route. If the owner or lessee of the car desires movement of the empty car via a different route or station other than the origin of the last loaded movement, KCS will permit one diversion or reconsignment without charge, providing it occurs prior to the car's arrival at the initial destination and KCS does not incur additional switching, connecting line charges, mileage or backhaul. All subsequent diversions on KCS will be charged at the applicable charge and be subject to rules governing diversion in KCS 9213. Diversion request will only be processed when a request is submitted to KCS, by the following methods:
   - KCS' Shipment Tracking tool on the Internet http: www.kcsouthern,com;
   - Call to KCS' Customer Service Center (CSC) at telephone # (800) 468-6527;
   - Email to KCS' Customer Service Center (CSC) at csolutions@kcsouthern.com.

D. Except when moving to a storage facility, empty cars will be handled without charge if the empty movement was immediately preceded by a loaded revenue move on KCS.

E. Shipper as shown on the bill of lading and car owner, as designated in UMLER, are each jointly and severably responsible for payment of charges due under this Item.

ITEM 110

MOVEMENT OF EMPTY RAILROAD OWNED OR RAILROAD CONTROLLED CARS OTHER THAN KCS OWNERSHIP (except as noted)

(subject to **Exception**)

A. Empty railroad owned or railroad controlled cars moving on own wheels while on the KCS will be subject to charges published in KCS 3700 when:
   1. New car(s) move prior to first loaded move in commercial service (STCC 3742213).
   2. Restenciled cars move with new initials and/or numbers prior to first loaded revenue move in commercial service (STCC3742213).
   3. Car(s) moves for scrapping or sale (3742293).
   4. Car(s) moves empty on KCS immediately preceding an empty move on KCS resulting in back to back empty moves.
   5. Car(s) move to and from storage facilities, includes KCS owned cars.
   6. Car(s) move to and from contract shop locations

B. KCS will assess a switch charge per KCS 8100 when railroad owned or railroad controlled cars move to or from a KCS classification yard, lease track, or interchange track and repair, storage, or cleaning facilities within the same switching district, unless covered under contract between KCS and the repair facility.
   1. This charge will not apply if KCS receives line haul revenue in lieu of a switch charge to or from the repair or storage location.

C. When a car is released from load on KCS, the empty car will be returned free to the received interchange or origin station of the last loaded movement via the reverse of the inbound route. If the owner or lessee of the car desires movement of the empty car via a different route or station other than the origin of the last loaded movement, KCS will permit one diversion or reconsignment without charge, providing it occurs prior to the car's arrival at the initial destination and KCS does not incur additional switching, mileage or backhaul. All subsequent diversions on KCS will be charged at the applicable charge and be subject to rules governing diversion in KCS 9213 Diversion request will only be processed when a request is submitted to KCS, by the following methods:
   - KCS' Shipment Tracking tool on the Internet http: www.kcsouthern,com;
   - Call to KCS' Customer Service Center (CSC) at telephone # (800) 468-6527;
   - Email to KCS' Customer Service Center (CSC) at csolutions@kcsouthern.com.

D. Except when moving to a storage facility, empty cars will be handled without charge if the empty movement was immediately preceded by a loaded revenue move on KCS

E. Shipper as shown on the bill of lading and car owner, as designated in UMLER, are each jointly and severably responsible for payment of charges due under this Item.

Exception: Not applicable on equipment moving under rule SCO-90 in Circ OT-10.

ITEM 120

MOVEMENT OF EMPTY PRIVATE TANK CARS

A. Empty Private Tank cars moving on own wheels while on the KCS will be subject to charges published in KCS 3700 when:
   1. New Tank car(s) moving prior to first loaded move in commercial service (STCC 3742213).
   2. Restenciled Tank cars moving with new initials and/or numbers prior to first loaded revenue move in commercial service (STCC3742213).
   3. Tank car(s) moving for sale, dismantling, or scrapping (STCC 3742293).
   4. Tank car(s) moving empty on KCS immediately preceding an empty move on KCS resulting in back to back empty moves.
   5. Tank car(s) moving outbound empty from storage facilities.
   6. Tank car(s) moving inbound empty to storage facilities immediately following an empty move.

ITEM 500

COMMODITIES AND STCC NUMBERS

RAILROAD OR STREET CARS EXC. RAILWAY MAINTENANCE MACHINERY 3742100 – 3742299

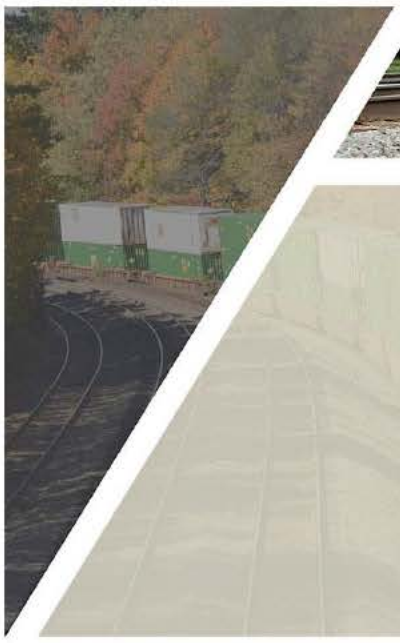
LOCOMOTIVES OR TENDERS 3741110 – 3741115

STCC numbers that are greater than 3742100 and less than 3742299 are applicable to the rates provided herein.
STCC numbers that are greater than 3741110 and less than 3741115 are applicable to the rates provided herein.

EXHIBIT 56









NS 8002-A

LOCAL AND JOINT FREIGHT TARIFF PUBLISHING RULES AND CHARGES ON ACCESSORIAL SERVICES AT STATIONS ON NORFOLK SOUTHERN RAILWAY COMPANY

ISSUED: ***MARCH 1, 2019***
EFFECTIVE: ***APRIL 1, 2019***

NORFOLK SOUTHERN

Three Commercial Place
Norfolk, VA 23510
www.nscorp.com

(B) If a single diversion order, given at one time contains a request for more than one change in the billing/shipping document, only one charge will be assessed, which will be for the change bearing the highest charge.

SECTION 3 - RULES AND CHARGES FOR HANDLING RAIL CARS FROM AND TO REPAIR, STORAGE, DISMANTLING, OR CLEAN OUT FACILITIES

ITEM 3000 - HANDLING PRIVATE EQUIPMENT FROM AND TO REPAIR, STORAGE, OR CLEAN-OUT FACILITIES

(See Exception)

A. NS will assess a round trip handling charge of **$350.00** when private equipment, including tank cars are moved between an NS classification yard, or interchange track and repair, storage or clean out facilities within the same switching district. This charge will be billed when the car is delivered to the repair or storage facility. This charge will always apply on empty tank cars; unless NS receives line haul revenue to or from the repair or storage location.

B. Empty cars moving on own wheels will be subject to charges published in NSRQ 4900-Series when:
   1. Cars are new or have been restenciled with new initials and initials and/or numbers
   2. Cars are not listed in UMLER
   3. Cars are moving for scrapping or sale
   4. Private equipment, other than tank cars, moving from an NS origin, classification yard, or interchange track to (i) a repair, storage or clean out facility located outside of the switching limits of the car's then-current location or (ii) a repair, storage or cleanout facility on another carrier will be transported at mileage rates published in NSRQ 4900-Series. Once ready for revenue service, the car will move free out of the repair, storage or clean out facility located on NS' system to a location on NS' system, or an interline interchange track. Except as provided in the preceding sentence, a subsequent move or moves from the initial movement into the repair, storage or clean out facility to another repair, storage or clean out facility will be subject to mileage rates published in NSRQ 4900-Series.

C. Private equipment, other than tank cars, moving from an NS origin, classification yard, or interchange track to a repair, storage or clean out facility located outside of the switching limits of the origin station, NS classification yard, or interchange track, will be transported at mileage rates published in NSRQ 4900-Series. Once ready for revenue service, the car will move free out of the repair, storage or clean out facility to a location on NS' system, or an interline interchange track. Except as provided in the preceding sentence, a subsequent move or moves from the initial movement into the repair, storage or clean out facility to another repair, storage or clean out facility will be subject to mileage rates published in NSRQ 4900-Series.

D. In absence of advance written instructions requesting otherwise, handling charge and mileage rates subject to the rules in tariff NSRQ 4900-Series will be assessed against the car owner. Holding/Storage charges will be assessed against the repair facility as stipulated in Freight Tariff NS 6004-Series.

E. Refer to RIC 6007-Series for additional guidance applicable to this section.

Exception:
Handling charge will not be assessed on cars of TTX Company ownership, or on multi-level cars.

ITEM 3010 - LINE-HAUL MOVEMENT OF EMPTY RAILROAD MARKED CARS OF OTHER THAN NS OWNERSHIP

The following line-haul movements of empty railroad marked cars of other than NS ownership on NS are chargeable subject to the rates and provisions of NSRQ 4900-Series:

A. New cars prior to first loaded move
B. Restenciled cars prior to first loaded move
C. Cars shipped for dismantling
D. Cars moving to shop, except:
   a. When obligated by the provisions outlined in OT 16
E. Cars moving out of shop, except:
   a. When obligated by the provisions outlined in OT 16

EXHIBIT 57

Tank Car Data Collection Program

Reports

Annual Tank Car Facility Survey

FAQs

Other Resources

Tank Car Specifications & Terms

DOT-117 or 117R specifications: A non-pressurized tank car with a shell thickness of 9/16 of an inch and insulating material providing thermal protection. The tank cars have protected top fittings, a fully protected head shield, and a bottom outlet valve with an enhanced handle designed to prevent the tank car from emptying its contents in an incident. All the enhancements are designed to protect the tank from being punctured and to prevent the valves from being disrupted. DOT-117R tank cars are cars that have been retrofitted to meet the 117 specifications, to include a jacket and head shield.

DOT-117: These tank cars can be an 117A, 117J, or 117P specification.

CPC-1232: Industry-sponsored specification, intended to be safer than DOT-111 tank cars for carrying petroleum crude oil and ethanol. Cars ordered after October 2011 were required to meet this specification. These tank cars include a pressure relief valve, more extensive top fittings than on the DOT-111 rail tank cars, and a full height or half-height head shield. The shell of non-jacketed tank cars must be ½ inch thick, and for jacketed tank cars must be 7/16 inch thick.

DOT-111: A non-pressurized tank car with a thinner shell (7/16 of an inch) than is now required for the DOT-117 tank cars. These tank cars can carry both hazardous and non-hazardous liquids. These cars are not required to have head shields to protect the tank car from an adjacent car in an incident. The fittings and valves are not protected and are vulnerable to being sheared off in an incident leading to a release of contents. These tank cars also do not have a pressure relief device sized to protect against rupture in the event of a large fire.

DOT-105: A pressurized tank car that has additional safety features than what is

required on DOT-111 class non-pressurized tank cars.

DOT-112: A pressurized tank car that has additional safety features than what is required on DOT-111 class non-pressurized tank cars.

DOT-114: A pressurized tank car that has additional safety features than what is required on DOT-111 class non-pressurized tank cars. There are very few of these cars actively operating in the fleet carrying Class 3 flammable liquids.

DOT-115: A non-pressurized tank car that is similar to the DOT-111 but includes an inner container surrounded by an outer shell. The inner container may be split into multiple compartments. There are very few of these tank cars actively operating in the fleet carrying Class 3 flammable liquids.

DOT-120: A pressurized tank car that has additional safety features than what is required on non-pressurized tank cars. There are very few of these tank cars actively operating in the fleet carrying Class 3 flammable liquids.

DOT-211: A non-pressurized tank car which is similar to the DOT-111 rail tank cars. There are very few of these tank cars actively operating in the fleet carrying Class 3 flammable liquids.

Other, Please Specify: If this facility is working on a tank car not otherwise listed, as being built or retrofit to the 117 or 117R specification, please list it in the box below and include the estimated number approved and projected.

Retrofit: DOT-117R tank cars are other tank cars that have been enhanced to meet the 117 specifications, to include a jacket, pressure relief devices, and head shield.

Updated: Wednesday, April 18, 2018

Share

BUREAU OF TRANSPORTATION STATISTICS
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590
800-853-1351
Phone Hours: 8:30-5:00 ET M-F

Sign up for Email Updates

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Ask a Librarian
DOT Data Inventory
FAQs
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National Transportation Library
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U.S. DOT
Search for on-time flight data
Privacy Policy
Information Quality
Web Policies
FOIA
Civil Rights
Ethics
OIG Hotline
Office of the Inspector General
No Fear Act
Buy America
USA.gov
Whitehouse.gov

EXHIBIT 58

Redacted

Highly Confidential/Confidential

EXHIBIT 59

BEFORE THE
SURFACE TRANSPORTATION BOARD

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,	)	STB Docket Nos. 42144, 42150 and 42152 (Consolidated)
and	)	
VALERO MARKETING AND SUPPLY COMPANY; and VALERO RAIL PARTNERS, LLC	)	
and	)	
TESORO REFINING & MARKETING COMPANY, LLC; TESORO GREAT PLAINS GATHERING & MARKETING LLC; and DAKOTA PRAIRIE REFINING, LLC	)	
Complainants,	)	
vs.	)	
UNION PACIFIC RAILROAD COMPANY	)	
Defendant.	)	

STIPULATION AGREEMENT

Complainants[1] and Defendant[2] in the above-captioned proceeding hereby enter into this "Stipulation Agreement" pursuant to which they have agreed to litigate the claims in this

[1] For the purposes of this Stipulation Agreement, "Complainants" refers to the Complainants in Docket No. 42144, which are The North America Freight Car Association; the American Fuel & Petrochemicals Manufacturers; The Chlorine Institute, Inc.; The Fertilizer Institute; the American Chemistry Council; Ethanol Products, LLC d/b/a Poet Ethanol Products; Poet Nutrition, Inc.; and Cargill Incorporated.

[2] The Defendant is Union Pacific Railroad Company ("UP").

proceeding based upon certain stipulations of facts, that those stipulations shall be accepted by the parties as establishing complete, or in some instances partial, responses to discovery requests, and that the stipulated facts shall be taken as true without the need for production of evidence, shall not be rebutted or contradicted by the parties in this proceeding, and shall be binding on the Board in its subsequent management of this proceeding and in any final decision, all as set forth herein. A party may move to strike the evidence of any other party that contravenes this Stipulation Agreement. The parties of course remain free to litigate the legal significance of the stipulated facts.

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

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

***Stipulation #2*: In the ordinary course of business from at least 2010 to the present, Defendant seldom, if ever, has established tariff rates or proposed contract rates that offered a choice between a line-haul rate with full mileage allowance payments or zero-mileage[3] rates.**

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

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

---

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

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

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

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

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

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

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

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

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

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

Defendant is willing to enter into the foregoing Stipulation Nos. 10-11 with the understanding that it may produce documents responsive to Complainants' discovery requests addressing circumstances in which it has established rates for movements in tank cars that provide for

payment of a mileage allowances or expressly informed shippers that the rates it established for movements in tank cars were reduced in lieu of paying mileage allowances.

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

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

The foregoing stipulations constitute all stipulations entered into by the Complainants and Defendant in Docket No. 42144 as of the date of this Stipulation Agreement.

DATED: August 9, 2017

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Counsel for Union Pacific Railroad Company

EXHIBIT 60

Redacted

Highly Confidential/Confidential

EXHIBIT 61

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, Complainants, v. UNION PACIFIC RAILROAD COMPANY, Defendant.	NOR 42144

OBJECTIONS AND RESPONSES OF CARGILL INCORPORATED TO UNION PACIFIC'S THIRD SET OF DISCOVERY REQUESTS

Complainant Cargill, Incorporated ("Cargill") hereby submits its Objections and Responses to Defendant Union Pacific Railroad Company's ("UP") Third Set of Discovery Requests. Cargill's objections and responses to the Second Discovery Requests are based on information presently known to Cargill. Cargill's responses herein are based upon information presently known to Cargill. However, Cargil is continuing its investigation of the facts and information relating to the issues in this case, and therefore reserves the right to modify and/or supplement its responses if and when additional information becomes known.

Cargill hereby incorporates by reference into these Objections and Responses the General Objections, Objections to Definitions, and Objections to Instructions set forth in Cargill's

Responses and Objections to UP's First Set of Discovery Requests, served on June 30, 2015, and reasserts those objections to each of the discovery requests herein.

REQUESTS FOR ADMISSION

Request for Admission No. 1

Admit that You have never requested that Union Pacific establish a rate for a movement in tank cars that included payment of a mileage allowance. If Your answer is anything other than an unqualified admission: (i) identify (a) the date of Your request, (b) the person to whom You made Your request, (c) the method You used to communicate Your request, (d) the product to be transported, (e) the origin and destination of the proposed movement, and (f) Union Pacific's response to Your request; and (ii) produce all documents relating to Your request and Union Pacific's response.

Response: Cargill objects to this Request on the grounds that the information it seeks is neither relevant to the subject matter at issue in this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. Cargill further objects to this Request on the grounds it is overbroad and unduly burdensome.

Subject to and without waiving its objections, Cargill states that it cannot admit or deny that it has never requested that UP establish a rate for a movement in tank cars that included payment of a mileage allowance due to insufficient knowledge and information. However, based upon a reasonable inquiry, Cargill states that no current Cargill employee with responsibility for railroad transportation in tank cars is aware of any such request for the period since 2001, and that such requests are not made in the ordinary course of business because UP generally offers only rates that do not include mileage allowances.

Request for Admission No. 2

Admit that You have never requested that a railroad other than Union Pacific establish a rate for a movement in tank cars that included payment of a mileage allowance. If Your answer is anything other than an unqualified admission: (i) identify (a) the date of Your request, (b) the product to be transported, (c) the origin and destination of the proposed movement, and (d) the response to Your request; and (ii) produce all documents relating to Your request and the other railroad's response.

Response: Cargill objects to this Request on the grounds that the information it seeks regarding railroads other than UP is neither relevant to the subject matter at issue in this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. Cargill further objects to this Request on the grounds it is overbroad and unduly burdensome.

Request for Admission No. 3

Admit that You have never requested that Union Pacific establish a reduced line-haul rate for a movement in tank cars to reflect Your furnishing tank cars for the movement. If Your answer is anything other than an unqualified admission: (i) identify (a) the date of Your request, (b) the person to whom You made Your request, (c) the method You used to communicate Your request, (d) the product to be transported, (e) the origin and destination of the proposed movement, and (f) Union Pacific's response to Your request; and (ii) produce all documents relating to Your request and Union Pacific's response.

Response: Cargill objects to this Request on the grounds that the information it seeks is neither relevant to the subject matter at issue in this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. Cargill further objects to this Request on the grounds it is overbroad and unduly burdensome. Cargill further objects to this Request on the

grounds that it is vague, ambiguous and seeks subjective information that Cargill cannot reasonably determine based upon a reasonable inquiry.

Subject to and without waiving its objections, Cargill states that it cannot admit or deny that it has never requested that UP establish a reduced line-haul rate for a movement in tank cars to reflect Cargill's furnishing tank cars for the specific movement, due to insufficient knowledge and information. However, based upon a reasonable inquiry, Cargill states that no current Cargill employee with responsibility for railroad transportation in tank cars is aware of any request that UP establish a reduced line-haul rate specifically in consideration for Cargill providing a tank car for the movement for the period since 2001, and that such requests are not made in the ordinary course of business.

Request for Admission No. 4

Admit that You have never requested that a railroad other than Union Pacific establish a reduced line-haul rate for a movement in tank cars to reflect Your furnishing tank cars for the movement. If Your answer is anything other than an unqualified admission: (i) identify (a) the date of Your request, (b) the product to be transported, (c) the origin and destination of the proposed movement, and (d) the response to Your request; and (ii) produce all documents relating to Your request and the other railroad's response.

Response: Cargill objects to this Request on the grounds that the information it seeks regarding railroads other than UP is neither relevant to the subject matter at issue in this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. Cargill further objects to this Request on the grounds it is overbroad and unduly burdensome.

Request for Admission No. 5

Admit that You have never shipped traffic in a tank car under a contract, tariff, or other rate document that provided for payment of a mileage allowance. If Your answer is anything other than an unqualified admission: (i) produce the rate document that provided for payment of a mileage allowance, and (ii) identify the shipment's origin and destination, the number of cars, and the product shipped.

Response: Cargill objects to this Request on the grounds that the information it seeks relating to railroads other than UP is neither relevant to the subject matter at issue in this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. Cargill further objects to this Request on the grounds it is overbroad and unduly burdensome.

Subject to and without waiving its objections, Cargill states that its cannot admit or deny that it has never shipped traffic in a tank car under a contract, tariff, or other rate document that provided for payment of a mileage allowance for the period since 2001, due to insufficient knowledge and information. However, based upon a reasonable inquiry, Cargill states that no current Cargill employee with responsibility for railroad transportation in tank cars is aware of any traffic shipped on UP in a tank car under a contract, tariff, or other rate document that provided for payment of a mileage allowance for the period since 2007.

Request for Admission No. 6

Admit that the contracts, tariffs, or other price documents governing rates Union Pacific has charged You for movements in tank cars state Union Pacific would not pay mileage allowances. If Your answer is anything other than an unqualified admission, identify all price documents that do not state Union Pacific would not pay mileage allowances.

Response: Cargill objects to this Request on the grounds that the information it seeks is neither relevant to the subject matter at issue in this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. Cargill further objects to this Request on the grounds it is overbroad and unduly burdensome.

Subject to and without waiving its objections, Cargill states that its cannot admit or deny that all of the contracts, tariffs, or other price documents governing rates UP has charged Cargill for movements in tank cars since 2001 state UP will not pay mileage allowances due to insufficient knowledge or information. However, based upon a reasonable inquiry, Cargill states that no current Cargill employee with responsibility for railroad transportation in tank cars is aware of any UP contract, tariff, or other price document governing rates UP has charged Cargill for movements in tank cars that do not state that UP will not pay mileage allowances.

Request for Admission No. 7

Admit that the agreements under which You lease tank cars from other persons provide that You are entitled to any mileage allowance payments or an equivalent credit toward Your lease payments with regard to transportation provided in those tank cars during the term of the lease. If your answer is anything other than an unqualified admission, identify the agreements that do not entitle you to mileage allowance payments.

Response: Cargill objects to this Request on the grounds that the information it seeks is neither relevant to the subject matter at issue in this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. Cargill further objects to this Request on the grounds it is overbroad and unduly burdensome.

Subject to and without waiving its objections, Cargill states that its cannot admit or deny that all of the contracts, tariffs, or other price documents governing rates UP has charged Cargill

for movements in tank cars since 2001 state UP will not pay mileage allowances due to insufficient knowledge or information. However, based upon a reasonable inquiry, Cargill states that no current Cargill employee with responsibility for railroad transportation in tank cars is aware of any tank car lease from other persons that does not provide that Cargill is entitled to receive mileage allowances or an equivalent credit up to the value of the lease payment for transportation provided in the leased tank cars during the term of the lease.

Request for Admission No. 8

Admit that prior to filing the Complaint, You never requested that Union Pacific pay You mileage allowances for movements in tank cars You furnished. If Your answer is anything other than an unqualified admission, (i) identify (a) the date of Your request, (b) the person to whom You made Your request, (c) the method You used to communicate Your request, (d) the product transported, (e) the origin and destination of the movement, and (f) Union Pacific's response to Your request; and (ii) produce all documents relating to Your request and Union Pacific's response.

Response: Cargill objects to this Request on the grounds that the information it seeks is neither relevant to the subject matter at issue in this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. Cargill further objects to this Request on the grounds it is overbroad and unduly burdensome.

Subject to and without waiving its objections, Cargill states that its cannot admit or deny that it has never requested that UP pay Cargill mileage allowances for movements in tank cars Cargill furnished due to insufficient knowledge or information. However, based upon a reasonable inquiry, Cargill states that no current Cargill employee with responsibility for railroad transportation in tank cars is aware of any such request for the period since 2001, and that such

requests are not made in the ordinary course of business because UP generally offers only rates that do not include mileage allowances.

Respectfully submitted,

/s/ David K. Monroe

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Counsel for Cargill, Incorporated

Dated: June 20, 2016

CERTIFICATE OF SERVICE

I do hereby certify that on this 20th day of June, 2016, I have served a copy of the foregoing via electronic mail and regular mail to counsel for Defendant at the following addresses:

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Kavita Pillai
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/s/ David K. Monroe

EXHIBIT 62

Redacted

Highly Confidential/Confidential

EXHIBIT 63

BEFORE THE
SURFACE TRANSPORTATION BOARD

PUBLIC VERSION

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	)	**NOR 42144, 42150, 42152, 42153**
vs.	)	
UNION PACIFIC RAILROAD COMPANY	)	

RESPONSES AND OBJECTIONS OF TESORO REFINING & MARKETING COMPANY LLC, TESORO GREAT PLAINS GATHERING & MARKETING LLC, AND DAKOTA PRAIRIE REFINING, LLC TO UNION PACIFIC'S SECOND SET OF DISCOVERY REQUESTS

Complainants Tesoro Refining & Marketing Company LLC, Tesoro Great Plains Gathering & Marketing LLC, and Dakota Prairie Refining, LLC (collectively, "Tesoro" or "Complainants") submit their Responses and Objections to Defendant Union Pacific Railroad Company's ("Union Pacific's" or "Defendant's") Second Set of Discovery Requests ("Discovery Requests"). Tesoro's responses to the Discovery Requests are based on information presently known at this stage of the proceeding. Because Tesoro continues to investigate the facts and information relating to the issues in this case, Tesoro reserves the right to modify and/or supplement any of its responses if additional responsive information becomes known.

Tesoro hereby incorporates into each specific response and/or objection to each Request for Admission its general objections, objections to definitions, and objections to instructions.

GENERAL OBJECTIONS

The following general objections and statements apply to each of Defendant's Requests for Admission and are hereby incorporated within each specific response set forth below:

1. Complainants object to Defendant's Requests for Admission to the extent Defendant seeks to impose upon Complainants any obligation or responsibility other than those mandated by 49 C.F.R. § 1114.21 *et seq.*

2. Complainants object to Defendant's Requests for Admission to the extent that Defendant seeks information from entities affiliated with Tesoro who are not named Complainants in NOR 42152.

3. Complainants object to Defendant's Requests for Admission to the extent Defendant purports to impose on Complainants the burden to collect, produce, or disclose information that cannot be found in the course of a reasonable inquiry under 49 C.F.R. § 1114.27.

4. Complainants object to Defendant's Requests for Admission to the extent Defendant seeks information outside Complainants' possession, custody, or control.

5. Complainants object to Defendant's Requests for Admission to the extent Defendant seeks information before January 1, 2015, which is the relevant time period for NOR 42152 and the relief sought by Complainants in that case.

6. Complainants object to Defendant's Requests for Admission to the extent Defendant seeks information that is already within Defendant's possession, custody, or control, equally available to Defendant, or that is more appropriately sought from third parties to whom discovery requests may be directed.

7. Complainants object to Defendant's Requests for Admission to the extent Defendant seeks to require Complainants to search for and disclose or produce information that is a matter of public record or otherwise as accessible to Defendant as to Complainants.

8. Complainants object to Defendant's Requests for Admission to the extent that Defendant seeks to require Complainants to search for and review documents prior to the conclusion of Complainants' ongoing search and review of documents responsive to Union Pacific's First Set of Discovery Requests.

9. Complainants object to Defendant's Requests for Admission to the extent that it seeks to impose a deadline for document discovery prior to the December 31, 2017 date set by order of Administrative Law Judge John P. Dring on October 3, 2107.

10. By responding to any Request for Admission, Complainants do not adopt Defendant's definitions of words and phrases contained in the Discovery Requests. Complainants object to words and phrases to the extent they are undefined and/or inconsistent with (a) the ordinary and customary meaning of such words and phrases and/or (b) the rules governing the permissible scope of discovery.

11. Complainants' discovery and investigation into the matters specified is ongoing. These answers and objections are made as of the date stated and include information located or obtained up to that time after reasonable inquiry. Complainants do not purport to have reviewed and extracted information from every potentially relevant document. Further information responsive to Defendant's Requests for Admission may be ascertained or identified at a later time, and Complainants reserve the right to amend their answers and objections to rely on such information and to assert additional objections as necessary.

12. The information and documents supplied in response to Defendant's Requests for Admission are for this proceeding only and for no other purpose.

13. The applicable general objections made in paragraphs 1–12 are incorporated into each of the specific objections and answers that follow. The assertion of the same, similar, or additional objections and specific objections to an individual request, or the failure to assert any additional objection to an individual request, shall not be construed as a waiver of any objection by Complainants.

OBJECTIONS TO DEFINITIONS

The following objections and statements apply to each of Defendant's Requests for Admission and are hereby incorporated within each specific response set forth below:

1. Complainants hereby incorporate by reference their objections to the Definitions in Union Pacific's First Set of Discovery Requests, as laid out in the Responses and Objections of Tesoro Refining & Marketing Company LLC, Tesoro Great Plains Gathering & Marketing LLC, and Dakota Prairie Refining, LLC to Union Pacific's First Set of Discovery Requests served May 19, 2017.

2. Complainants object to the definition of "Complaint" to the extent that it exceeds the scope of discoverable material under, or imposes any obligation or responsibility in excess of those required under 49 C.F.R. § 1114.21 *et seq*.

3. Complainants object to the definition of "Document" to the extent that it exceeds the scope of discoverable material under, imposes any obligation or responsibility in excess of those required under 49 C.F.R. § 1114.21 *et seq*.

4. Complainants object to the definitions of "Identify," as set forth in Definitions E through G of Union Pacific's First Set of Discovery Requests, to the extent that they impose any obligation or responsibility in excess of those required under 49 C.F.R. § 1114.21 *et seq.*

5. Complainants object to the definitions of "You" and "Your" as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence in that they include Complainants' outside attorneys, advisers, consultants, and other persons or entities not within Complainants' control, as well as Complainants' parent companies, subsidiaries, and other persons or entities not party or relevant to this Proceeding. Complainants further object to these definitions to the extent that they call for discovery of information protected by attorney-client, common interest, or other privileges.

OBJECTIONS TO INSTRUCTIONS

The following objections and statements apply to each of Defendant's requests and are hereby incorporated within each specific response set forth below:

1. Complainants hereby incorporate by reference their objections to the Instructions in Union Pacific's First Set of Discovery Requests, as laid out in the Responses and Objections of Tesoro Refining & Marketing Company LLC, Tesoro Great Plains Gathering & Marketing LLC, and Dakota Prairie Refining, LLC to Union Pacific's First Set of Discovery Requests served May 19, 2017.

2. Complainants object to Instruction No. 1 to the extent that it is overly broad, unduly burdensome, and not reasonably limited in time, as it requests discovery "from January 1, 2001."

REQUESTS FOR ADMISSION

Request for Admission No. 1

Admit that You have never requested that Union Pacific establish a rate for a movement in tank cars that included payment of a mileage allowance. If Your answer is anything other than an unqualified admission: (i) identify (a) the date of Your request, (b) the person to whom You made Your request, (c) the method You used to communicate Your request, (d) the product to be transported, (e) the origin and destination of the proposed movement, and (f) Union Pacific's response to Your request; and (ii) produce all documents relating to Your request and Union Pacific's response.

Response

Complainants object to the above Request for Admission as irrelevant, overbroad, and unduly burdensome in that it has no beginning date for the time period covered. {redacted} . Complainants further object to the demand that they provide the information described in items (i) and (ii) as irrelevant, overly burdensome, and not required under 49 C.F.R. § 1114.27.

Request for Admission No. 2

Admit that You have never requested that a railroad other than Union Pacific establish a rate for a movement in tank cars that included payment of a mileage allowance. If Your answer is anything other than an unqualified admission: (i) identify (a) the date of Your request, (b) the product to be transported, (c) the origin and destination of the proposed movement, and (d) the response to Your request; and (ii) produce all documents relating to Your request and the other railroad's response.

Response

Complainants object to the above Request for Admission as irrelevant, overbroad, and unduly burdensome in that it has no beginning date for the time period covered. {redacted}

Complainants further object to the demand that they provide the information described in items (i) and (ii) as irrelevant, overly burdensome, and not required under 49 C.F.R. § 1114.27.

Request for Admission No. 3

Admit that You have never requested that Union Pacific establish a reduced line-haul rate for a movement in tank cars to reflect Your furnishing tank cars for the movement. If Your answer is anything other than an unqualified admission: (i) identify (a) the date of Your request, (b) the person to whom You made Your request, (c) the method You used to communicate Your request, (d) the product to be transported, (e) the origin and destination of the proposed movement, and (f) Union Pacific's response to Your request; and (ii) produce all documents relating to Your request and Union Pacific's response.

Response

Complainants object to the above Request for Admission as irrelevant, overbroad, and unduly burdensome in that it has no beginning date for the time period covered. {redacted} Complainants further object to the demand that they provide the information described in items (i) and (ii) as irrelevant, overly burdensome, and not required under 49 C.F.R. § 1114.27.

Request for Admission No. 4

Admit that You have never requested that a railroad other than Union Pacific establish a reduced line-haul rate for a movement in tank cars to reflect Your furnishing tank cars for the movement. If Your answer is anything other than an unqualified admission: (i) identify (a) the date of Your request, (b) the product to be transported, (c) the origin and destination of the proposed movement, and (d) the response to Your request; and (ii) produce all documents relating to Your request and the other railroad's response.

Response

Complainants object to the above Request for Admission as irrelevant, overbroad, and unduly burdensome in that it has no beginning date for the time period covered. {redacted} Complainants further object to the demand that they provide the information described in items (i) and (ii) as irrelevant, overly burdensome, and not required under 49 C.F.R. § 1114.27.

Request for Admission No. 5

Admit that You have never shipped traffic in a tank car under a contract, tariff, or other rate document that provided for payment of a mileage allowance. If Your answer is anything other than an unqualified admission: (i) produce the rate document that provided for payment of a mileage allowance, and (ii) identify the shipment's origin and destination, the number of cars, and the product shipped.

Response

Complainants object to the above Request for Admission as irrelevant, overbroad, and unduly burdensome in that it has no beginning date for the time period covered. {redacted} Complainants further object to the demand that they provide the information described in items (i) and (ii) as irrelevant, overly burdensome, and not required under 49 C.F.R. § 1114.27.

Request for Admission No. 6

Admit that the contracts, tariffs, or other price documents governing rates Union Pacific has charged You for movements in tank cars state that Union Pacific would not pay mileage allowances. If Your answer is anything other than an unqualified admission, identify all contracts, tariffs, or other price documents that do not state that Union Pacific would not pay mileage allowances.

Response

Complainants object to the above Request for Admission as irrelevant, overbroad, and unduly burdensome in that it has no beginning date for the time period covered. {redacted} Complainants further object to the demand that they provide any contracts, tariffs, or other price documents as irrelevant, overly burdensome, and not required under 49 C.F.R. § 1114.27.

Request for Admission No. 7

Admit that prior to filing the Complaint, You never requested that Union Pacific pay You mileage allowances for movements in tank cars You furnished. If Your answer is anything other than an unqualified admission, (i) identify (a) the date of Your request, (b) the person to whom You made Your request, (c) the method You used to communicate Your request, (d) the product transported, (e) the origin and destination of the movement, and (f) Union Pacific's response to Your request; and (ii) produce all documents relating to Your request and Union Pacific's response.

Response

Complainants object to the above Request for Admission as irrelevant, overbroad, and unduly burdensome in that it has no beginning date for the time period covered. {redacted} Complainants further object to the demand that they provide the information described in items (i) and (ii) as irrelevant, overly burdensome, and not required under 49 C.F.R. § 1114.27.

Dated: November 17, 2017

Respectfully submitted,

/s/ Houston Shaner
Houston Shaner, Esq.
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(202) 637-5600

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

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of November, 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 42144, NOR 42150, NOR 42152, and NOR 42153.

/s/ Houston Shaner
Houston Shaner

EXHIBIT 64

BEFORE THE
SURFACE TRANSPORTATION BOARD

PUBLIC VERSION

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	)	**NOR 42144, 42150, 42152, 42153**
vs.	)	
UNION PACIFIC RAILROAD COMPANY	)	

RESPONSES AND OBJECTIONS OF VALERO MARKETING AND SUPPLY COMPANY AND VALERO RAIL PARTNERS, LLC TO UNION PACIFIC'S SECOND SET OF DISCOVERY REQUESTS

Complainants Valero Marketing and Supply Company and Valero Rail Partners, LLC (collectively, "Valero" or "Complainants") submit their Responses and Objections to Defendant Union Pacific Railroad Company's ("Union Pacific's" or "Defendant's") Second Set of Discovery Requests ("Discovery Requests"). Valero's responses to the Discovery Requests are based on information presently known at this stage of the proceeding. Because Valero continues to investigate the facts and information relating to the issues in this case, Valero reserves the right to modify and/or supplement any of its responses if additional responsive information becomes known.

Valero hereby incorporates into each specific response and/or objection to each Request for Admission its general objections, objections to definitions, and objections to instructions.

GENERAL OBJECTIONS

The following general objections and statements apply to each of Defendant's Requests for Admission and are hereby incorporated within each specific response set forth below:

1. Complainants object to Defendant's Requests for Admission to the extent Defendant seeks to impose upon Complainants any obligation or responsibility other than those mandated by 49 C.F.R. § 1114.21 *et seq.*

2. Complainants object to Defendant's Requests for Admission to the extent that Defendant seeks information from entities affiliated with Valero who are not named Complainants in NOR 42150.

3. Complainants object to Defendant's Requests for Admission to the extent Defendant purports to impose on Complainants the burden to collect, produce, or disclose information that cannot be found in the course of a reasonable inquiry under 49 C.F.R. § 1114.27.

4. Complainants object to Defendant's Requests for Admission to the extent Defendant seeks information outside Complainants' possession, custody, or control.

5. Complainants object to Defendant's Requests for Admission to the extent Defendant seeks information before January 1, 2015, which is the relevant time period for NOR 42150 and the relief sought by Complainants in that case.

6. Complainants object to Defendant's Requests for Admission to the extent Defendant seeks information that is already within Defendant's possession, custody, or control, equally available to Defendant, or that is more appropriately sought from third parties to whom discovery requests may be directed.

7. Complainants object to Defendant's Requests for Admission to the extent Defendant seeks to require Complainants to search for and disclose or produce information that is a matter of public record or otherwise as accessible to Defendant as to Complainants.

8. Complainants object to Defendant's Requests for Admission to the extent that it seeks to impose a deadline for document discovery prior to the December 31, 2017 date set by order of Administrative Law Judge John P. Dring on October 3, 2107.

9. By responding to any Request for Admission, Complainants do not adopt Defendant's definitions of words and phrases contained in the Discovery Requests. Complainants object to words and phrases to the extent they are undefined and/or inconsistent with (a) the ordinary and customary meaning of such words and phrases and/or (b) the rules governing the permissible scope of discovery.

10. Complainants' discovery and investigation into the matters specified is ongoing. These answers and objections are made as of the date stated and include information located or obtained up to that time after reasonable inquiry. Complainants do not purport to have reviewed and extracted information from every potentially relevant document. Further information responsive to Defendant's Requests for Admission may be ascertained or identified at a later time, and Complainants reserve the right to amend their answers and objections to rely on such information and to assert additional objections as necessary.

11. The information and documents supplied in response to Defendant's Requests for Admission are for this proceeding only and for no other purpose.

12. The applicable general objections made in paragraphs 1–11 are incorporated into each of the specific objections and answers that follow. The assertion of the same, similar, or additional objections and specific objections to an individual request, or the failure to assert any

additional objection to an individual request, shall not be construed as a waiver of any objection by Complainants.

OBJECTIONS TO DEFINITIONS

The following objections and statements apply to each of Defendant's Requests for Admission and are hereby incorporated within each specific response set forth below:

1. Complainants hereby incorporate by reference their objections to the Definitions in Union Pacific's First Set of Discovery Requests, as laid out in the Responses and Objections of Valero Marketing and Supply Company and Valero Rail Partners, LLC to Union Pacific's First Set of Discovery Requests served May 8, 2017.

2. Complainants object to the definition of "Complaint" to the extent that it exceeds the scope of discoverable material under, or imposes any obligation or responsibility in excess of those required under 49 C.F.R. § 1114.21 *et seq*.

3. Complainants object to the definition of "Document" to the extent that it exceeds the scope of discoverable material under, imposes any obligation or responsibility in excess of those required under 49 C.F.R. § 1114.21 *et seq*.

4. Complainants object to the definitions of "Identify," as set forth in Definitions E through G of Union Pacific's First Set of Discovery Requests, to the extent that they impose any obligation or responsibility in excess of those required under 49 C.F.R. § 1114.21 *et seq.*

5. Complainants object to the definitions of "You" and "Your" as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence in that they include Complainants' outside attorneys, advisers, consultants, and other persons or entities not within Complainants' control, as well as Complainants' parent companies, subsidiaries, and other persons or entities not party or relevant to this Proceeding. Complainants

further object to these definitions to the extent that they call for discovery of information protected by attorney-client, common interest, or other privileges.

OBJECTIONS TO INSTRUCTIONS

The following objections and statements apply to each of Defendant's requests and are hereby incorporated within each specific response set forth below:

1. Complainants hereby incorporate by reference their objections to the Instructions in Union Pacific's First Set of Discovery Requests, as laid out in the Responses and Objections of Valero Marketing and Supply Company and Valero Rail Partners, LLC to Union Pacific's First Set of Discovery Requests served May 8, 2017.

2. Complainants object to Instruction No. 1 to the extent that it is overly broad, unduly burdensome, and not reasonably limited in time, as it requests discovery "from January 1, 2001."

REQUESTS FOR ADMISSION

Request for Admission No. 1

Admit that You have never requested that Union Pacific establish a rate for a movement in tank cars that included payment of a mileage allowance. If Your answer is anything other than an unqualified admission: (i) identify (a) the date of Your request, (b) the person to whom You made Your request, (c) the method You used to communicate Your request, (d) the product to be transported, (e) the origin and destination of the proposed movement, and (f) Union Pacific's response to Your request; and (ii) produce all documents relating to Your request and Union Pacific's response.

Response

Complainants object to the above Request for Admission as irrelevant, overbroad, and unduly burdensome in that it has no beginning date for the time period covered. {redacted}

Complainants further object to the demand that they provide the information described in items (i) and (ii) as irrelevant, overly burdensome, and not required under 49 C.F.R. § 1114.27.

Request for Admission No. 2

Admit that You have never requested that a railroad other than Union Pacific establish a rate for a movement in tank cars that included payment of a mileage allowance. If Your answer is anything other than an unqualified admission: (i) identify (a) the date of Your request, (b) the product to be transported, (c) the origin and destination of the proposed movement, and (d) the response to Your request; and (ii) produce all documents relating to Your request and the other railroad's response.

Response

Complainants object to the above Request for Admission as irrelevant, overbroad, and unduly burdensome in that it has no beginning date for the time period covered. {redacted} Complainants further object to the demand that they provide the information described in items (i) and (ii) as irrelevant, overly burdensome, and not required under 49 C.F.R. § 1114.27.

Request for Admission No. 3

Admit that You have never requested that Union Pacific establish a reduced line-haul rate for a movement in tank cars to reflect Your furnishing tank cars for the movement. If Your answer is anything other than an unqualified admission: (i) identify (a) the date of Your request, (b) the person to whom You made Your request, (c) the method You used to communicate Your request, (d) the product to be transported, (e) the origin and destination of the proposed movement, and (f) Union Pacific's response to Your request; and (ii) produce all documents relating to Your request and Union Pacific's response.

Response

Complainants object to the above Request for Admission as irrelevant, overbroad, and unduly burdensome in that it has no beginning date for the time period covered. {redacted} Complainants further object to the demand that they provide the information described in items (i) and (ii) as irrelevant, overly burdensome, and not required under 49 C.F.R. § 1114.27.

Request for Admission No. 4

Admit that You have never requested that a railroad other than Union Pacific establish a reduced line-haul rate for a movement in tank cars to reflect Your furnishing tank cars for the movement. If Your answer is anything other than an unqualified admission: (i) identify (a) the date of Your request, (b) the product to be transported, (c) the origin and destination of the proposed movement, and (d) the response to Your request; and (ii) produce all documents relating to Your request and the other railroad's response.

Response

Complainants object to the above Request for Admission as irrelevant, overbroad, and unduly burdensome in that it has no beginning date for the time period covered. {redacted} Complainants further object to the demand that they provide the information described in items (i) and (ii) as irrelevant, overly burdensome, and not required under 49 C.F.R. § 1114.27.

Request for Admission No. 5

Admit that You have never shipped traffic in a tank car under a contract, tariff, or other rate document that provided for payment of a mileage allowance. If Your answer is anything other than an unqualified admission: (i) produce the rate document that provided for payment of a mileage allowance, and (ii) identify the shipment's origin and destination, the number of cars, and the product shipped.

Response

Complainants object to the above Request for Admission as irrelevant, overbroad, and unduly burdensome in that it has no beginning date for the time period covered. {redacted} Complainants further object to the demand that they provide the information described in items (i) and (ii) as irrelevant, overly burdensome, and not required under 49 C.F.R. § 1114.27.

Request for Admission No. 6

Admit that the contracts, tariffs, or other price documents governing rates Union Pacific has charged You for movements in tank cars state that Union Pacific would not pay mileage allowances. If Your answer is anything other than an unqualified admission, identify all contracts, tariffs, or other price documents that do not state that Union Pacific would not pay mileage allowances.

Response

Complainants object to the above Request for Admission as irrelevant, overbroad, and unduly burdensome in that it has no beginning date for the time period covered. {redacted} Complainants further object to the demand that they provide any contracts, tariffs, or other price documents as irrelevant, overly burdensome, and not required under 49 C.F.R. § 1114.27.

Request for Admission No. 7

Admit that prior to filing the Complaint, You never requested that Union Pacific pay You mileage allowances for movements in tank cars You furnished. If Your answer is anything other than an unqualified admission, (i) identify (a) the date of Your request, (b) the person to whom You made Your request, (c) the method You used to communicate Your request, (d) the product transported, (e) the origin and destination of the movement, and (f) Union Pacific's response to

Your request; and (ii) produce all documents relating to Your request and Union Pacific's response.

Response

Complainants object to the above Request for Admission as irrelevant, overbroad, and unduly burdensome in that it has no beginning date for the time period covered. {redacted} Complainants further object to the demand that they provide the information described in items (i) and (ii) as irrelevant, overly burdensome, and not required under 49 C.F.R. § 1114.27.

Dated: November 20, 2017

Respectfully submitted,

/s/ Houston Shaner
Houston Shaner, Esq.
Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600

Counsel for Valero Marketing and Supply Company and Valero Rail Partner, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November, 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 42144, NOR 42150, NOR 42152, and NOR 42153.

/s/ Houston Shaner
Houston Shaner

EXHIBIT 65

Redacted

Highly Confidential/Confidential

EXHIBIT 66

Redacted

Highly Confidential/Confidential

EXHIBIT 67

Redacted

Highly Confidential/Confidential