

247180

247181

247182

247183

**BEFORE THE
SURFACE TRANSPORTATION BOARD ENTERED**

Office of Proceedings

February 22, 2019

Docket No. NOR 42144

Part of

Public Record

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 v. UNION PACIFIC RAILROAD COMPANY

Docket No. NOR 42150

VALERO MARKETING AND SUPPLY COMPANY
AND VALERO RAIL PARTNERS, LLC v. UNION PACIFIC RAILROAD COMPANY

Docket No. NOR 42152

TESORO REFINING & MARKETING COMPANY LLC;
TESORO GREAT PLAINS GATHERING & MARKETING, LLC;
AND DAKOTA PRAIRIE REFINING, LLC v. UNION PACIFIC RAILROAD COMPANY

Docket No. NOR 42153

ARKEMA INC. v. UNION PACIFIC RAILROAD COMPANY

**OPENING EVIDENCE AND ARGUMENT OF
TESORO REFINING & MARKETING COMPANY LLC;
TESORO GREAT PLAINS GATHERING & MARKETING, LLC;
AND DAKOTA PRAIRIE REFINING, LLC**

Elizabeth H. Titus, Esq.
Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5558

*Counsel for American Fuel &
Petrochemical Manufacturers; Tesoro
Refining & Marketing Company, LLC;
Tesoro Great Plains Gathering &
Marketing LLC; Dakota Prairie Refining,
LLC; Valero Marketing and Supply
Company; and Valero Rail Partners, LLC*

February 22, 2019

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
A. Summary of the Argument.....	1
B. Procedural History	2
II. STATEMENT OF FACTS	3
A. UP’s Item 55-C Forced Tesoro, a Tank Car Provider, to Bear the Cost of Empty Tank Car Repair Moves Without Compensation.....	3
B. Tesoro Has Incurred Significant Damages as a Result of UP’s Implementation of Item 55-C.	6
C. Tesoro Took Reasonable Measures to Minimize the Impacts of Item 55-C Charges.	7
III. ARGUMENT.....	9
A. UP’s Item 55-C Tariff on Tank-Car Repair Moves Violates the Railroad’s Statutory Obligation to Compensate Tank-Car Providers for Ownership Costs and Is an Unreasonable Practice in Violation of Federal Law.	9
1. Item 55-C is Unlawful Because UP Fails to Compensate Tesoro for Costs Associated with Tank Car Repair Moves in Violation of 49 U.S.C. § 11122 and Agency Precedent.....	10
2. UP’s Adoption of Item 55-C is an Unreasonable Practice in Violation of Federal Law.	13
B. Tesoro Is Entitled to Damages Because It Has Suffered Specific Harm Resulting from UP’s Failure to Compensate Tesoro for Costs Associated with Tank Car Repair Moves and Its Unreasonable Practice of Implementing Item 55-C.	15
1. Tesoro Is Entitled to Damages Because It Suffered Specific Harm Resulting from UP’s Failure to Compensate and Unreasonable Practice.	16
2. Federal Regulation Entitles Tesoro to an Award of Interest on Its Damages.....	16
IV. CONCLUSION.....	18

TABLE OF EXHIBITS

Exhibit No.	Description
1	Verified Statement of John Hack
2	Deposition Transcript of John Hack

I. INTRODUCTION

Complainants Tesoro Refining & Marketing Company LLC, Tesoro Great Plains Gathering & Marketing, LLC, and Dakota Prairie Refining, LLC (collectively “Tesoro”) submit this Supplemental Opening Evidence and Argument in support of their challenge to the lawfulness of Item 55-C, Subpart D, in UP Tariff 6004-C (“Item 55-C”) imposed by defendant Union Pacific Railroad Company (“UP”).¹

A. Summary of the Argument

This case is about the greed and deception of UP in violation of federal law. In the wake of anticipated increases in movements of empty tank cars to repair facilities to satisfy new federal safety regulations, UP devised a scheme to impose new charges for these tank-car movements. {{ }}—not any reasonable business or policy purpose—motivated UP to implement this plan. UP deceived its customers, including Tesoro, about its true motive. And, despite UP’s obligation to compensate shippers for tank-car ownership costs, UP forced Tesoro (via Item 55-C) to bear the costs of tank-car repair moves without reimbursing Tesoro for this cost of ownership. For these reasons, UP’s scheme and its actions are manifestly unreasonable and a violation of federal law.

In conjunction with the Joint Opening Evidence and Argument filed by the complainants in these consolidated proceedings, including Tesoro, Tesoro submits this Opening Evidence and Argument to provide supplemental evidence that UP’s implementation of Item 55-C violates its statutory obligation to compensate Tesoro under 49 U.S.C. §§ 11121 and 11122, and constitutes an unreasonable practice in violation of 49 U.S.C. § 10701. Tesoro has suffered substantial harm as a direct result of UP’s violations of federal law. To comply with UP’s unlawful tariff, Tesoro

¹ All references to “Item 55-C” hereinafter refer solely to subpart D.

has paid UP substantial sums to cover the costs associated with empty tank-car repair moves subject to Item 55-C. These charges are specifically identifiable, and Tesoro has thoroughly documented the repair-move charges it paid to UP under Item 55-C.

Tesoro therefore requests that the Board (1) declare that UP's adoption of Item 55-C and its related assessment of charges is unlawful under 49 U.S.C. §§ 10701, 11121, and 11122; (2) order UP to immediately rescind Item 55-C and the associated charges as they apply to tank-car movements to and from repair facilities; and (3) award Tesoro damages in the amount of money Tesoro has paid to UP as a result of Item 55-C.

B. Procedural History

Tesoro filed its complaint on December 30, 2016, challenging the lawfulness of Item 55-C. UP moved to consolidate Tesoro's complaint with *North America Freight Car Association v. Union Pacific*, NOR 42144 (filed March 31, 2015) and *Valero Marketing and Supply Company v. Union Pacific*, NOR 42150 (filed December 19, 2016). In a decision served on March 31, 2017, the Board granted UP's motion over the objection of Tesoro and the complainants in Dockets NOR 42144 and NOR 42150. On October 5, 2017, over the objection of Tesoro and the complainants in Dockets NOR 42144 and NOR 42150, the Board granted UP's subsequent motion to consolidate these proceedings with *Arkema, Inc. v. Union Pacific*, NOR 42153 (filed August 1, 2017). UP then pursued extensive discovery of the complainants in the consolidated actions. After the parties filed a Joint Status Report and Motion for Modification of Procedural Schedule on January 23, 2019, the Board granted the parties' proposed modifications to procedural schedule set forth in the Board's March 31, 2017 decision.

II. STATEMENT OF FACTS

A. UP's Item 55-C Forced Tesoro, a Tank Car Provider, to Bear the Cost of Empty Tank Car Repair Moves Without Compensation.

Tesoro is a refiner and marketer of petroleum products in the United States, which requires use of rail tank cars to transport its goods throughout the United States.² Tesoro provides tank cars that enable rail carriers to fulfill their statutory common-carrier obligations to provide transport across their rail networks.³ {{

}}⁴ Tesoro ships a variety of petroleum products in tank cars, including crude oil, LPG, and diesel.⁵

Tesoro moves a significant amount of its product on UP's rail network. {

}⁶ {{

}}⁷ {

}⁸

At times, Tesoro must move empty tank cars to repair facilities for a variety of events, such as for compliance testing and requalification, retrofits, cleanings, and mechanical repairs.⁹

{

10

² Ex. 1, V.S. of John Hack ("Hack V.S.") ¶¶ 4–5.

³ *Id.* ¶ 6.

⁴ Ex. 2, Deposition Transcript of John Hack ("Hack Tr.") 37:14–20; 50:18–21.

⁵ *Id.* at 53:1–6.

⁶ *Id.* at 32:8–9; Hack V.S. ¶ 7.

⁷ Hack Tr. 48:11–24; Hack V.S. ¶ 8.

⁸ *See* Hack Tr. 32:9–12.

⁹ Hack Tr. 134:2–15; 134:23–135:2.

¹⁰ *Id.* at 72:21–23.

.¹¹

.¹²

13

}¹⁴

As explained in the consolidated Joint Opening Evidence and Argument (hereafter “Joint Brief”), railroads have historically met their statutory obligation to compensate tank car providers for the costs associated with supplying the car—including maintenance and repair costs—in the form of mileage allowances.¹⁵ UP rarely pays mileage allowances.¹⁶ In fact, UP paid mileage allowances on only {{ }} of its loaded tank-car moves from 2014 through 2017.¹⁷ Consistent with UP’s practice, {{ }}¹⁸ {

¹¹ *Id.* at 73:5–13; 152:13–153:3.

¹² *Id.* at 131:6–16.

¹³ *Id.* at 126:19–127:4.

¹⁴ *Id.* at 121:9:24; 129:7–14.

¹⁵ Joint Br. 2.

¹⁶ Docket NOR 42144, Answer to First Am. Compl., ¶¶ 17–18, 32. *See also* Joint Br. Ex. 12, Stipulation Agreement between Complainants and UP (“Stipulation Agreement”), Stipulation No. 10. The parties have entered into a “Stipulation Agreement” pursuant to which they have agreed to litigate the claims in this proceeding based upon certain stipulations of fact which shall be taken as true without the need for production of evidence, shall not be rebutted or contradicted by the parties, and shall be binding on the Board in its management of this proceeding and in any final decision.

¹⁷ Attach. to Joint Br., V.S. of Thomas Crowley (“Crowley V.S.”) 10.

¹⁸ Hack Tr. 108:4–6; Hack V.S. ¶ 9.

} {{

}}¹⁹ {{

}}²⁰ But

because UP does not offer {{

}} {

}²¹

As set forth in the Joint Brief, {{

}}that

would be needed to comply with the tank-car retrofit requirements for existing DOT-111 tank cars imposed by a new rule published by the Pipeline and Hazardous Materials Safety Administration (“PHMSA”).²² At its core, this scheme entailed {{

}}.

{

23

}²⁴ Accordingly, once UP implemented Item 55-C, Tesoro was required to pay charges for its empty shop moves that were not preceded by a loaded move.²⁵

¹⁹ Hack Tr. 89:22–23, 94:20–24; Hack V.S. ¶ 10.

²⁰ Hack Tr. 95:16–96:7.

²¹ See *id.* at 112:1–25; Hack V.S. ¶ 11.

²² Joint Br. Part II.A.

²³ Hack Tr. 90:19–91:1.

²⁴ Hack Tr. 92:2–7; 88:19–20.

²⁵ *Id.* at 79:11–19; Hack V.S. ¶ 12.

B. Tesoro Has Incurred Significant Damages as a Result of UP's Implementation of Item 55-C.

Item 55-C provides that the line-haul charges published in Tariff UPRR 4703-series shall apply to empty tank cars moving to and from "Repair Facilities" except: (i) empty movements that are immediately preceded by a loaded line-haul revenue movement on UP; (ii) empty tank cars taken out of service by UP inspection and way billed by UP's Mechanical Department under Rule 1 of the AAR Interchange Rules; and (iii) empty tank cars damaged by UP.²⁶ UPRR 4703 establishes three tiers of charges for tank-car repair moves, which UP has increased annually since 2015. The applicable rates on January 1, 2015, and as of 2019, are set forth below:

	<u>2015 Rates</u> ²⁷	<u>2019 Rates</u> ²⁸
1-250 miles	\$1,317 per car	\$1,555 per car
251-500 miles	\$1,477 per car	\$1,744 per car
Above 500 miles	\$2.96 per mile	\$3.49 per mile

Tesoro's accounting practices track the charges it receives from UP under Item 55-C.²⁹

{

}³⁰ Since the implementation of Item 55-C, Tesoro has paid at least {{
}} for its tank-car repair moves that are subject to UP's tariff.³¹ {

²⁶ Joint Br. Ex. 1, Item 55-C.

²⁷ Joint Br. Ex. 2, Item 1100.

²⁸ Joint Br. Ex. 6, Item 1200-C.

²⁹ Hack Tr. 36:5-7.

³⁰ Hack V.S. ¶ 17; *id.* at Ex. A.

³¹ Hack V.S. ¶ 18, *id.* at Ex. A.

}.³² In nearly every instance, these are charges that Tesoro would not have incurred but for the imposition of Item 55-C.³³

C. Tesoro Took Reasonable Measures to Minimize the Impacts of Item 55-C Charges.

Once UP implemented Item 55-C, Tesoro examined its operations and contractual obligations to determine what measures it could take to mitigate the impacts of UP’s tariff. To mitigate these costs, {{

}}³⁴ {

}³⁵ {

}³⁶

{

}³⁷ {

}³⁸ {

}³⁹ {

³² *Id.* ¶ 17.

³³ *Id.* ¶ 19.

³⁴ Hack Tr. 221:8–23; Hack V.S. ¶ 21.

³⁵ Hack Tr. 222:2–14.

³⁶ *Id.* at 222:15–21.

³⁷ *Id.* at 73:21–23; Hack V.S. ¶ 24.

³⁸ Hack Tr. 156:4–10.

³⁹ *Id.* at 157:15–18.

}⁴⁰

{

}⁴¹ {

}⁴² {

}⁴³

{

}⁴⁴

{

}⁴⁵ {

}⁴⁶

Tesoro took reasonable efforts to utilize the closest repair facilities capable of performing the required work and reduce its charges under Item 55-C. {

} In most instances,

Tesoro could not realistically avoid the Item 55-C charges while continuing to meet its

⁴⁰ *Id.* at 156:24–157:3.

⁴¹ Hack V.S. ¶ 25.

⁴² *Id.*; Hack Tr. 153:15–21.

⁴³ Hack Tr. 154:4–13.

⁴⁴ *Id.* at 154:18–155:2.

⁴⁵ Hack V.S. ¶ 26.

⁴⁶ *Id.*

contractual obligations and business needs. Accordingly, to ensure that it could continue conducting business, Tesoro continued to pay UP for the charges under Item 55-C that Tesoro should not need to pay.⁴⁷

III. ARGUMENT

A. UP's Item 55-C Tariff on Tank-Car Repair Moves Violates the Railroad's Statutory Obligation to Compensate Tank-Car Providers for Ownership Costs and Is an Unreasonable Practice in Violation of Federal Law.

Tesoro's arguments that Item 55-C violates federal law are fully set forth in the Joint Brief. In considering Tesoro's claims, Tesoro respectfully requests that the Board keep the following principles front of mind. First, Item 55-C wrongfully places the burden on Tesoro for the costs of tank-car ownership by requiring Tesoro to pay for repair movements. Thus, this practice violates Board precedent and UP's statutory obligation under 49 U.S.C. § 11122 to compensate tank-car providers for their ownership costs. Second, Item 55-C is an unreasonable practice in violation of 49 U.S.C. § 10702(2) because UP implemented this new tariff without a reasonable business or policy purpose. Rather, {{
}}.

UP has caused direct, quantifiable harm to Tesoro by adopting Item 55-C. Instead of compensating Tesoro for ownership-related costs generated by repair moves, as required by both 49 U.S.C. § 11122 and this Board's precedent, {{
}}. And, as applied specifically to Tesoro, UP's implementation of Item 55-C is an unreasonable practice because UP had no reasonable business or policy purpose for applying its empty repair move charges to Tesoro. Accordingly, for the reasons set

⁴⁷ Hack Tr. 84:3–7.

out below in conjunction with the Joint Brief, Tesoro respectfully requests that the Board find UP's Item 55-C and its related charges unlawful.

1. Item 55-C is Unlawful Because UP Fails to Compensate Tesoro for Costs Associated with Tank Car Repair Moves in Violation of 49 U.S.C. § 11122 and Agency Precedent.

Pursuant to its common-carrier obligations, UP is required to supply necessary rail equipment or compensate Tesoro for the costs of owning and maintaining the tank cars that Tesoro provides for use on UP's rail network.⁴⁸ These include costs to transport tank cars to and from repair facilities for inspection, maintenance, and repair.⁴⁹ Under Item 55-C, however, UP charges Tesoro for tank-car repair movements but fails to compensate Tesoro for these costs. This practice violates both UP's statutory obligations and this Board's precedent requiring compensation of tank-car providers.

As set out in the Joint Brief, rail carriers historically were prohibited from charging tank-car providers for movements to and from repair facilities.⁵⁰ The ICC loosened this prohibition three decades ago and allowed railroads to charge tank-car providers for repair-facility movements initially, but it did so under the assumption that railroads would ultimately bear responsibility for these payments by compensating tank-car providers through mileage allowances pursuant to Ex Parte No. 328.⁵¹ Payment of mileage allowances constituted a safe harbor for compliance with rail carriers' statutory requirement to compensate tank-car

⁴⁸ 49 U.S.C. §§ 11101, 11121; *see also* Joint Br. Part III.A.1.a.

⁴⁹ 49 U.S.C. §§ 11121–22; *see also* Joint Br. Part III.A.1.

⁵⁰ Joint Br. Part III.A.1.a.

⁵¹ *Id.*; *see also Gen. Am. Transp. Corp. v. Indiana Harbor Belt R.R. Co.*, 3 I.C.C. 2d 599, 608 (1987) 608 (“No statutory requirement would be violated if private car owners initially pay repair move costs and then are reimbursed for those expenses through the allowance system.”).

providers.⁵² Payment of mileage allowances is a transparent method of tracking a railroad's payment of costs associated with tank-car ownership.

Consistent with its requirements under federal statute and Board precedent, UP used to compensate Tesoro for its tank-car ownership costs, including costs for tank-car repair movements, through mileage allowances. But UP {{

}} { } {{

}} Accordingly, neither Tesoro nor this Board has insight into whether {

} Thus, UP

satisfies neither the safe harbor for compliance with its obligation to compensate Tesoro for tank-car ownership costs nor the ICC's predicate for allowing railroads to charge tank-car providers like Tesoro for repair movements.

UP claims that it compensates Tesoro through discounted zero-mileage rates that are lower than the rates it would charge if it provided for mileage allowances.⁵³ But, as discussed in the Joint Brief, Board precedent precludes UP from offering to compensate Tesoro through purportedly discounted zero-mileage rates because UP does not also offer Tesoro full-service rates in railroad-supplied cars.⁵⁴ Instead, Tesoro must provide tank cars to UP so Tesoro can ship its commodities on UP's rail network. Moreover, Board precedent does not allow UP to offer Tesoro two different rates for the same transportation in Tesoro-supplied tank cars because

⁵² Joint Br. Part III.A.1.a.

⁵³ Docket NOR 42144, Answer to First Am. Compl., ¶ 33.

⁵⁴ Joint Br. Part III.A.2.

such a scheme would provide no assurances that UP actually compensates Tesoro for the costs of tank-car ownership.⁵⁵

Even if UP could lawfully offer Tesoro discounts through zero-mileage rates, UP’s claim that these rates are lower than hypothetical mileage-allowance-inclusive rates has no basis in fact.⁵⁶ There is no contemporaneous evidence to suggest that UP’s zero-mileage rates include the costs of ownership imposed on Tesoro under Item 55-C.⁵⁷ To the contrary, {{

}}.⁵⁸ {

} {{

}} Thus, UP’s claim that it discounts its zero-mileage rates against nonexistent full-service rates is without merit.

In sum, UP charges Tesoro for costs associated with tank-car ownership under Item 55-C but fails to compensate Tesoro for these repair movements. At the same time, UP has opted out of a program that would have clearly demonstrated compliance with its compensation obligation when it {{ }} And UP fails to compensate Tesoro for its tank-car ownership costs through { } Accordingly, UP’s implementation of Item 55-C violates its obligation to compensate Tesoro for tank-car ownership costs in violation of 49 U.S.C. § 11121 and Board precedent.

⁵⁵ *Id.*; see also *LO Shippers Action Comm. v. Aberdeen & Rockfish Ry. Co.*, 4 I.C.C. 2d 1, 17–18 (1987).

⁵⁶ Joint Br. Part III.A.3.

⁵⁷ *Id.*

⁵⁸ *Id.*; Joint Br. Ex. 31, Deposition Transcript of Douglass Craven (“Craven Tr.”) 111:13–21.

2. UP's Adoption of Item 55-C is an Unreasonable Practice in Violation of Federal Law.

Rail carriers are required to engage in reasonable practices with respect to their management of railroads.⁵⁹ Rail practices must have a reasonable business or policy purpose, such as encouraging efficient management of railroads.⁶⁰ Rail carriers engage in unreasonable practices when they misrepresent their practices or mislead their customers.⁶¹

UP's adoption of Item 55-C had no underlying reasonable business or policy purpose.⁶²

{{

}}.⁶³ It also intended to replace the ICC-

prescribed mileage-equalization program's charges for excessive empty tank-car movements

{{

}}.⁶⁴ Moreover, UP misrepresented its motivation

behind implementing Item 55-C, publicly claiming that the tariff was necessary to encourage

efficient fleet management and reduce empty miles {{

}}.⁶⁵

In addition to the reasons raised in the Joint Brief, UP's adoption of Item 55-C is an unreasonable practice as applied specifically to Tesoro because Tesoro was already operating its

⁵⁹ See Joint Br. Part III.B.1.

⁶⁰ *Id.*; NOR 42060 (Sub- 1), *N. Am. Freight Car Ass'n v. BNSF Ry. Co.*, slip op. at 7 (served Jan. 26, 2007); see also 49 U.S.C. § 10101(9) (United States' policy is "to encourage honest and efficient management of railroads").

⁶¹ Joint Br. Part III.B.1; Ex Parte No. 661, *Rail Fuel Surcharges*, slip op. at 7 (STB served Jan. 26, 2007).

⁶² Joint Br. Part III.B.1.

⁶³ Joint Br. Ex. 16, UPRR0003937; Joint Br. Ex. 15, UPRR0025231.

⁶⁴ Joint Br. Part III.B.1.

⁶⁵ *Id.*

tank-car shipments efficiently. Long before UP adopted Item 55-C, {

} Tesoro needed no additional motivation or change in UP policy to encourage efficient tank-car movements. Moreover, there is no evidence to suggest that { } did not adequately and fairly compensate UP for the costs associated empty tank-car moves.

UP's implementation of Item 55-C is also an unreasonable practice as to Tesoro because UP misrepresented its intent behind the new tariff. As discussed in the Joint Brief, UP's external materials claimed that UP adopted Item 55-C to encourage efficient fleet management and reduce empty miles.⁶⁶ {{

}}.⁶⁷ UP misled Tesoro and its other customers about the purpose behind its new tariff. For this reason, UP's implementation of Item 55-C is an unreasonable practice in violation of federal law.

⁶⁶ *Id.*

⁶⁷ *Id.*

B. Tesoro Is Entitled to Damages Because It Has Suffered Specific Harm Resulting from UP's Failure to Compensate Tesoro for Costs Associated with Tank Car Repair Moves and Its Unreasonable Practice of Implementing Item 55-C.

Tesoro seeks damages for the harm it has suffered as a result of UP's unreasonable practice and failure to compensate, including interest.

"A rail carrier providing transportation subject to the jurisdiction of the Board under this part is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this part."⁶⁸ To recover damages under this provision, a party must file his complaint within two years after the party's claim accrues.⁶⁹

The statutory prerequisites to recover damages are plainly established here. UP does not dispute that it is a rail carrier subject to the jurisdiction of this Board. Tesoro filed its complaint on December 30, 2016, less than two years after Item 55-C took effect on January 1, 2015 and Tesoro's claims accrued. All of Tesoro's claims against UP arise under "this part"—namely, Part A of Subtitle IV of Title 49.⁷⁰ And Tesoro has suffered substantial, specifically identifiable damages as a result of UP's failure to compensate Tesoro for use of its tank cars, as required under § 11122, and UP's unreasonable practices in violation of § 10702. Accordingly, Tesoro is entitled to an award of damages amounting to the specific harm it has suffered since Item 55-C took effect plus interest.

⁶⁸ 49 U.S.C. § 11704(b).

⁶⁹ *Id.* § 11705(c); *see also Shintech v. Union Pac. R.R.*, No. 40135, 1987 WL 99779, at *1 (I.C.C. Oct. 29, 1987) ("A complaint to recover damages from a rail carrier for an unreasonable practice must be filed within two years after the claim accrues").

⁷⁰ *See* 49 U.S.C. §§ 10702, 11121–22.

1. Tesoro Is Entitled to Damages Because It Suffered Specific Harm Resulting from UP's Failure to Compensate and Unreasonable Practice.

The Board has a duty “to award the full amount of damages sustained in consequence of any violation” where a complainant demonstrates that it has suffered specific harm.⁷¹ In *Baltimore & Ohio*, for example, the ICC held that because mandatory special train service for carrying radioactive materials was an unreasonable practice, the complainants had “clearly been harmed in the exact amount the charges for unnecessary services ha[d] been assessed and paid, i.e., the difference between special and regular train service.”⁷²

Here, Tesoro has suffered specific harm measurable as the exact amount of charges UP assessed and Tesoro paid for empty tank car repair moves subject to Item 55-C. Since implementation of Item 55-C, Tesoro has paid {{ }} in charges specifically imposed by Item 55-C. Tesoro's accounting records confirm the specific amount of damages to which Tesoro is entitled as a result of UP's unreasonable practice of implementing Item 55-C and its failure to compensate Tesoro for its repair-move costs in violation of federal law.

2. Federal Regulation Entitles Tesoro to an Award of Interest on Its Damages.

The Board historically has recognized and included as an element of damages loss of interest on unlawful charges.⁷³ “A delay in the receipt of payment for damages is as much a source of injury as the initial loss of income comprising the damages awarded.”⁷⁴ An award of interest at a market-based rate adequately compensates a complainant for the financial costs of

⁷¹ *U.S. Dep't of Energy v. Balt. & Ohio R.R. Co.*, 364 I.C.C. 951, 975 (1981).

⁷² *Id.*

⁷³ *Louisville & N.R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 239 (1925).

⁷⁴ *Louisiana Railcar, Inc. v. Missouri Pac. R.R. Co.*, 7 I.C.C. 2d 30, 44 (1990).

delayed compensation and neither punishes the railroad nor provides a windfall for the complainant.⁷⁵

Pursuant to current regulations, the interest rate in a complaint proceeding “shall be the U.S. Prime Rate as published by The Wall Street Journal in effect on the day when the unlawful charge is paid.”⁷⁶ Until damages are paid, the interest rate “shall be updated whenever The Wall Street Journal publishes a change to its reported U.S. Prime Rate.”⁷⁷ “[T]he annual percentage rate shall be the same as the annual nominal (or stated) rate.”⁷⁸

The Wall Street Journal U.S. Prime Rate on February 27, 2015, {{
}} was 3.25%.⁷⁹ The rate has increased nine times since then, and as of this filing, the Wall Street Journal U.S. Prime Rate is 5.50%.⁸⁰ Because the rate may increase again before damages are paid, as it has repeatedly since Tesoro’s claim accrued, Tesoro respectfully requests that the Board retain jurisdiction to reassess its award of interest until damages are paid in full.

⁷⁵ *Id.*

⁷⁶ 49 C.F.R. § 1141.1(a)(2). Although classified as a regulation governing rate procedures, earlier versions of this regulation have been used to calculate interest rates in non-rate cases as well. *See, e.g., Louisiana Railcar, Inc.*, 7 I.C.C. 2d at 44.

⁷⁷ *Id.*

⁷⁸ *Id.* § 1141.1(c).

⁷⁹ Market Data Center, Wall Street. J. (Mar. 9, 2015), http://www.wsj.com/mdc/public/page/2_3020-moneyrate-20150309.html?mod=mdc_pastcalendar; *see also* Hack V.S. Ex. A {{
}}.

⁸⁰ Market Data Center, Wall Street. J. (Feb. 21, 2019), http://www.wsj.com/mdc/public/page/2_3020-moneyrate.html.

IV. CONCLUSION

UP adopted an unreasonable practice in violation of federal law when it implemented an unprecedented tariff {{

}}. UP further violated federal law when it failed to compensate Tesoro for this new tank-car ownership cost, as it is obliged to do. Tesoro has suffered substantial harm as a result of UP's violations, including loss of revenue to which Tesoro was entitled. For these reasons, Tesoro is entitled to an award of damages and interest.

Accordingly, for the foregoing reasons, Tesoro requests that the Board (1) declare that UP's adoption of Item 55-C and its related charges constitute an unreasonable practice and that UP has failed to compensate Tesoro for tank-car ownership costs, and (2) order UP to rescind its tariff and pay reparations to Tesoro for the tariff charges incurred, including an award of interest on those charges.

Respectfully submitted,



Elizabeth H. Titus, Esq.
Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5558

*Counsel for American Fuel &
Petrochemical Manufacturers; Tesoro
Refining & Marketing Company, LLC;
Tesoro Great Plains Gathering &
Marketing LLC; Dakota Prairie Refining,
LLC; Valero Marketing and Supply
Company; and Valero Rail Partners, LLC*

February 22, 2019

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2019, I have caused a copy of the foregoing **OPENING EVIDENCE AND ARGUMENT OF TESORO REFINING & MARKETING COMPANY LLC; TESORO GREAT PLAINS GATHERING & MARKETING, LLC; AND DAKOTA PRAIRIE REFINING, LLC** to be served by hand, email, or first-class mail on counsel for the parties of record for NOR 42144, NOR 42150, NOR 42152, and NOR 42153.

/s/ Elizabeth H. Titus _____
Elizabeth H. Titus

EXHIBIT 1

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42144

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 v. UNION PACIFIC RAILROAD COMPANY

Docket No. NOR 42150

VALERO MARKETING AND SUPPLY COMPANY
AND VALERO RAIL PARTNERS, LLC v. UNION PACIFIC RAILROAD COMPANY

Docket No. NOR 42152

TESORO REFINING & MARKETING COMPANY LLC;
TESORO GREAT PLAINS GATHERING & MARKETING, LLC;
AND DAKOTA PRAIRIE REFINING, LLC v. UNION PACIFIC RAILROAD COMPANY

Docket No. NOR 42153

ARKEMA INC. v. UNION PACIFIC RAILROAD COMPANY

**VERIFIED STATEMENT OF JOHN HACK IN SUPPORT OF OPENING EVIDENCE
AND ARGUMENT OF TESORO REFINING & MARKETING COMPANY LLC;
TESORO GREAT PLAINS GATHERING & MARKETING, LLC;
AND DAKOTA PRAIRIE REFINING, LLC**

I, John Hack, declare as follows:

1. I am a natural person over the age of eighteen years and I am competent to testify to the matters stated in this Verified Statement.
2. I have personal knowledge of the facts set forth in this Verified Statement and I could and would competently testify thereto under oath.

3. I am the Director, Rail Operations at Tesoro Refining & Marketing Company LLC, a wholly owned subsidiary of Marathon Petroleum Corporation and an affiliate of Tesoro Great Plains Gathering & Marketing, LLC and Dakota Prairie Refining, LLC (collectively, “Tesoro”).

4. Tesoro is a refiner and marketer of petroleum products in the United States.

5. Tesoro requires use of rail tank cars to transport its goods throughout the United States.

6. Tesoro provides the tank cars that enable rail carriers to fulfill their statutory common-carrier obligations to provide transport across their rail networks.

7. {

}

8. {{

}}

9. {{

}}

10. {

}}

11. {

}} {

}

12. Once UP implemented Item 55-C, Subpart D (“Item 55-C”), Tesoro was required to pay charges for its empty shop moves that were not preceded by a loaded move for its leased tank cars.

13. UP has not informed Tesoro or otherwise represented to Tesoro that UP’s line-haul transportation rates have been discounted to compensate Tesoro for providing tank cars in which UP provides freight services.

14. Instead of reducing Tesoro’s line-haul rates after implementing Item 55-C, UP actually increased Tesoro’s non-contract line-haul rates in each year since Item 55-C became effective.

15. Tesoro diligently reviews and processes empty freight bills separately from its loaded freight bills. Tesoro tracks Item 55-C charges it has incurred and for which it has paid UP since Item 55-C took effect on January 1, 2015.

16. Attached as **Exhibit A** to this Verified Statement is a true and correct copy of a spreadsheet prepared under my supervision and direction, which reflects Tesoro’s payments to UP for Item 55-C charges for which UP billed Tesoro from January 1, 2015 through December 31, 2018. I have personal knowledge of the contents of this spreadsheet and, if called upon to testify, I could and would competently testify thereto under oath.

17. {

}

18. Since the implementation of Item 55-C, Tesoro has paid {{ }} for its empty tank-car moves that are subject to UP's tariff.

19. In nearly every instance, these are charges that Tesoro would not have incurred but for the imposition of Item 55-C.

20. Once UP implemented Item 55-C, Tesoro examined its operations and contractual obligations to determine what measures it could take to mitigate the impacts of UP's tariff.

21. To mitigate these costs, {{

}}

22. {

}

23. { }

24. {

}

25. {

}

26. {

}

27. Despite Tesoro's reasonable efforts to reduce its charges under Item 55-C, in most instances, Tesoro could not realistically avoid these charges while continuing to meet its contractual and business needs.

[Signature Page Follows]

I declare under penalty of perjury that the foregoing is true and correct.

Further affiant sayeth not.

Dated this 22 day of February, 2019.



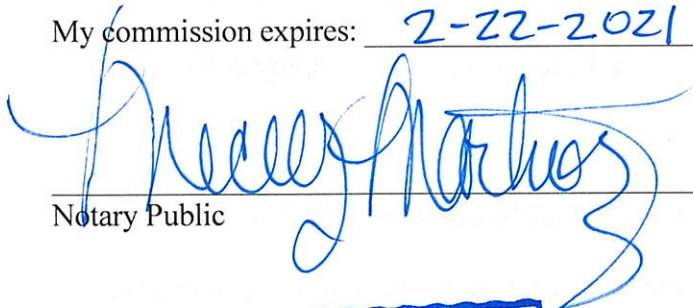
John Hack

STATE OF Texas)
COUNTY OF Bexar) ss.
)

The foregoing instrument was subscribed and sworn to before me this 22 day of February, 2019,
by John Hack.

Witness my hand and official seal.

My commission expires: 2-22-2021



Notary Public



EXHIBIT A

**HIGHLY CONFIDENTIAL
MATERIAL SUBJECT TO
PROTECTIVE ORDER**

EXHIBIT 2

CONFIDENTIAL
MATERIAL SUBJECT TO
PROTECTIVE ORDER

EXHIBIT 2

CONFIDENTIAL
MATERIAL SUBJECT TO
PROTECTIVE ORDER