

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**ENTERED
Office of Proceedings
September 8, 2016
Part of
Public Record**

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

**CARGILL, INCORPORATED’S REPLY TO UNION PACIFIC’S MOTION TO
COMPEL RESPONSES TO THIRD SET OF DISCOVERY REQUESTS**

I. INTRODUCTION

Complainant Cargill, Incorporated (“Cargill”) hereby submits its Reply to the “Motion to Compel Responses to Third Set of Discovery to Cargill Incorporated” (“Second Motion to Compel”), filed by Defendant Union Pacific Railroad Company (“UP”), on August 19, 2016. UP’s Second Motion to Compel seeks responses to three Requests for Admissions relating to Cargill’s dealings with railroads other than UP. The primary issue raised in UP’s Second Motion to Compel – whether Cargill’s dealings with railroads other than UP are relevant to the issues in this proceeding – is the subject of a previous motion to compel filed by UP on May 25, 2016

(UP's "First Motion to Compel").¹ The issue of the relevance of Cargill's dealings with other railroads has been fully briefed and a hearing on outstanding discovery matters, including UP's First Motion to Compel, is scheduled for September 20, 2016.

In a "meet and confer" telephone conversation with UP's counsel relating to the Requests for Admissions at issue in UP's Second Motion to Compel, Cargill suggested that UP did not need to file a second motion to compel. Cargill pointed out that the issue of whether Cargill's dealings with other railroads are relevant would be resolved in connection the UP's First Motion to Compel, and further advised that Cargill would abide by the ruling of the Administrative Law Judge on that issue with respect to the Requests for Admissions. In other words, Cargill advised that it would stipulate to respond to the Requests for Admissions at issue if its dealings with other railroads were determined to be relevant in connection with UP's First Motion to Compel.

II. BACKGROUND

Cargill hereby incorporates and adopts the extensive summary of the background of the applicable law and this case set forth in Part I of the Association Complainants² Reply to "Union Pacific's Motion to Compel Discovery of Member Information from Association Complainants," filed June 6, 2016. As additional background, Cargill is a shipper of commodities on UP in private tank cars provided by Cargill. In particular, Cargill owns and/or leases a fleet of rail tank cars that it supplies to UP for use in the transportation of a variety of commodities shipped by Cargill. Cargill is both a member of Complainant NAFCA and an individual Complainant in this proceeding. As an individual complainant, Cargill is seeking as reparations under Count I, the

¹ UP's first motion to compel relates to Interrogatories and Documents Requests addressed to Cargill.

² The Association Complainants are North America Freight Car Association ("NAFCA"); American Fuel and Petrochemicals Manufacturers; the Chlorine Institute; the Fertilizer Institute; and the American Chemistry Council.

refund of the amounts it has paid to UP pursuant the empty repair move tariff at issue in this proceeding.³ Cargill is also seeking to recover as reparations under Count II, mileage allowances that UP is required to pay to Cargill pursuant to 49 U.S.C. § 11122 and Ex Parte No. 328⁴ to compensate Cargill for providing tank cars used by UP in providing rail service.

III. APPLICABLE LEGAL STANDARDS

Parties may seek discovery of non-privileged, relevant material. 49 C.F.R. § 1114.21(a). But “[a]ll discovery requests entail the balancing of the relevance of the information sought against the burden of producing that information.” Docket No. FD-35557, *Reasonableness of BNSF Rwy. Co. Coal Dust Mitigation Tariff Provision*, at 4 (S.T.B. served June 25, 2012). “[D]iscovery may be denied if it would be unduly burdensome in relation to the likely value of the information sought.” Docket No. FD-30186, *Tongue River R.R. Co. – Rail Constr. & Operation – In Custer, Powder River & Rosebud Counties, Mont.*, at 4 (S.T.B. served Sept. 10, 2014) (citing 49 C.F.R. § 1114.21(c)). Discovery requests must therefore be “narrowly drawn” lest they create excessive costs. Docket No. NOR-42051, *Wisc. Power & Light Co. v. Union Pac. R.R. C*, at 4. (S.T.B. served June 21, 2000). Similarly, a discovery request creates an inherently disproportionate burden when it requires production of redundant information or information readily accessible to the requesting party. See Finance Docket No. 35081, *Canadian Pac. Rwy. Co. – Control – Dakota Minn. & E. R.R. Corp.*, at 3 (S.T.B. Mar. 26, 2014) (rejecting a motion to compel responses that were “duplicative of other document requests”); I.C.C. Docket No. 38239S, *Amstar Corp. v. The Ala. Great S.R.R.*, 1989 WL 238989, at *6 (I.C.C. July 14,

³ UP’s empty repair move tariff, UP Tariff 6004, Item 55-C, became effective on January 1, 2015.

⁴ Ex Parte No. 328, *Investigation of Tank Car Allowance System*, 3 I.C.C. 2d 196 (1986).

1989). The Board has broad discretion to limit discovery that would be irrelevant, unduly burdensome, or otherwise objectionable. *See* 49 C.F.R. § 1114.21(c).

IV. UP’S MOTION TO COMPEL RESPONSES FROM CARGILL SHOULD BE DENIED

UP’s Second Motion to Compel, like its First Motion to Compel, seeks discovery from Cargill about its interactions with railroads other than UP – information that simply is not relevant to the issues in the Complaint. The argument advanced by UP in this Motion for seeking such information from Cargill is the same argument it raised in its First Motion to Compel. UP claims that discovery as to “other railroads” is relevant because, if other railroads are engaged in the same practices as UP, that is evidence that UP’s practices are reasonable industry practices. *See* Second Motion to Compel at 1-2. In essence, UP is arguing that any violation of its clear statutory and regulatory duty to pay mileage allowances may be somehow excused if other railroads are also violating the same statutory and regulatory requirements.

UP cites a number of cases suggesting that industry practice should be considered in determining whether a railroad’s practice is reasonable. However, none of those cases are applicable to the present circumstances because none of the cited cases involved practices that were flatly inconsistent with a clear statutory or regulatory requirement. UP has a clear legal obligation to pay mileage allowance under 49 U.S.C. § 11122 and Ex Parte No. 328. If UP has failed to fulfill its legal obligation to compensate Cargill for the use of its railcars, it is no defense that others also may have violated the law.

Moreover, there is no need to debate UP’s “everyone else is doing it too” defense for the purpose of discovery. All of the Complainants have offered to stipulate to UP’s main factual contention – that other railroads also charge zero-allowance rates and generally do not pay mileage allowances for tank car movements. Thus, even if that information were relevant, there

would be no justification for the discovery UP is attempting to obtain from Cargill, since a stipulation to that effect would obviate the need for any discovery relating to other railroads.

Finally, UP points out that Cargill has previously agreed to produce some information relating to other railroads and could respond to the three requests for admissions in dispute in the same manner that Cargill responded to requests for admissions addressing Cargill's dealings with UP. But otherwise objectionable discovery requests do not become relevant because a party has previously acquiesced to requests that seek irrelevant information. Moreover, as demonstrated in its Second Motion to Compel, UP will seek to use as justification for further irrelevant requests, Cargill's prior decision to provide information notwithstanding its belief that the information is not relevant. Thus, to the extent Cargill were to voluntarily respond to the three requests for admissions at issue, it would only open itself up to further irrelevant and burdensome discovery relating to its dealing with other railroads.

V. CONCLUSION

The party seeking discovery has the burden of demonstrating that the requested information is relevant, and UP has not done so. UP's Second Motion to Compel should be denied.

Respectfully submitted,

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Dated: September 8, 2016

CERTIFICATE OF SERVICE

I do hereby certify that on this 8th day of September, 2016, I have served a copy of the foregoing via electronic mail and regular mail on the following parties of record:

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