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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

ENTERED  
Office of Proceedings  
February 22, 2019  
Part of  
Public Record

Docket No. NOR 42144

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  
VALERO MARKETING AND SUPPLY COMPANY AND  
VALERO RAIL PARTNERS, LLC**

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Company; and Valero Rail Partners, LLC*

February 22, 2019

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## **I. INTRODUCTION**

Complainants Valero Marketing and Supply Company and Valero Rail Partners, LLC (collectively “Valero”) 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”).<sup>1</sup>

### **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 Valero, about its true motive. And, despite UP’s statutory obligation to compensate shippers for tank-car ownership costs, UP forced Valero via Item 55-C to bear the costs of tank-car repair moves without reimbursing Valero 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 Valero, Valero submits this Opening Evidence and Argument to provide supplemental evidence that UP’s implementation of Item 55-C violates its statutory obligation to compensate Valero under 49 U.S.C. §§ 11121 and 11122, and constitutes an unreasonable practice in violation of 49 U.S.C. § 10701. Valero has suffered substantial harm as a direct result of UP’s violations of federal law. To comply with UP’s unlawful tariff, Valero has paid UP substantial sums to cover the costs associated with empty tank-car repair moves

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

subject to Item 55-C. These charges are specifically identifiable, and Valero has thoroughly documented the repair-move charges it paid to UP under Item 55-C. Valero is further entitled to damages in the amount of costs associated with implementing new administrative processes to pay empty freight, costs it would not have incurred but for UP's implementation of Item 55-C.

Moreover, Valero undertook reasonable steps to mitigate its damages resulting from UP's implementation of Item 55-C by considering numerous avenues to reduce its costs associated with repair moves and implementing reasonable measures to reduce these costs. Some of these measures, including moving tank cars to repair shops served by other railroads, required Valero to incur costs it would not have needed to pay had UP not implemented Item 55-C. Accordingly, Valero is entitled to damages that include Valero's costs associated with mitigating its damages.

Valero 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 Valero damages in the amount of money Valero has paid to UP as a result of Item 55-C, plus interest on its damages.

## **B. Procedural History**

Valero filed its complaint on December 19, 2016, challenging the lawfulness of Item 55-C. UP moved to consolidate Valero's complaint with *North America Freight Car Association*, NOR 42144 (filed March 31, 2015) and *Tesoro Refining & Marketing Co. v. Union Pacific*, NOR 42152 (filed December 30, 2016). In a decision served on March 31, 2017, the Board granted UP's motion over the objection of Valero and the complainants in Dockets NOR 42144 and NOR 42152. On October 5, 2017, over the objection of Valero and the complainants in Dockets NOR 42144 and NOR 42152, 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 Valero, a Tank-Car Provider, to Bear the Cost of Empty Tank-Car Repair Moves Without Compensation.

Valero provides privately owned or leased tank cars that enable UP to fulfill its statutory common-carrier obligation to provide transport across UP’s rail network. Valero is a purchaser, trader, and supplier of crude oil, ethanol, and refined products.<sup>2</sup> In addition to crude oil and ethanol, the full spectrum of products Valero ships includes asphalt, refined products, gasoline, diesel, sulfur, LPGs, butanes, propanes, propylenes, aromatic petrochemicals, benzene, toluene, xylene, and corn oil.<sup>3</sup> As a shipper, {

}<sup>4</sup> {

}.<sup>5</sup> The Valero-owned tank-car fleet consists of approximately {{

}}.<sup>6</sup>

{{

}}.<sup>7</sup>

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<sup>2</sup> Ex. 1, Verified Statement of Robert Buchek (“Buchek V.S.”) ¶ 4.

<sup>3</sup> *Id.* ¶ 5; Ex. 2, Deposition Transcript of Robert Buchek (“Buchek Tr.”) 63:14–20.

<sup>4</sup> Buchek Tr. 85:18–20.

<sup>5</sup> *Id.* at 10:9–23.

<sup>6</sup> *Id.* at 49:22–25, 85:11–20.

<sup>7</sup> *Id.* at 79:22–23, 80:20–22.

Valero moves a significant amount of its product on UP's rail network.<sup>8</sup> {{

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}.<sup>10</sup> {

}.<sup>11</sup> As a result of its successful fleet-management practices,

Valero {{

}}.<sup>12</sup>

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.<sup>13</sup> UP rarely pays mileage allowances.<sup>14</sup> In fact, UP

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<sup>8</sup> Buchek V.S. ¶ 6.

<sup>9</sup> Buchek Tr. 82:23–83:23

<sup>10</sup> *Id.* at 153:16–23.

<sup>11</sup> *Id.* at 77:5–20.

<sup>12</sup> *Id.* at 78:18–22, 146:6–8; Buchek V.S. ¶ 9.

<sup>13</sup> Joint Br. 2.

<sup>14</sup> 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.

paid mileage allowances on only {{ }} of its loaded tank-car moves from 2014 through 2017.<sup>15</sup> Consistent with UP’s practice, {{

}}.<sup>16</sup> {

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As set forth in the Joint Brief, {{

}}

that would be needed 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”).<sup>19</sup> At its core, this scheme entailed {{

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{{

}}.<sup>20</sup>

Accordingly, once UP implemented Item 55-C, Valero was required to pay charges for its empty shop moves that were not preceded by a loaded move for both its owned and leased tank cars.<sup>21</sup>

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<sup>15</sup> Attach. to Joint Br., V.S. of Thomas Crowley (“Crowley V.S.”) 10.

<sup>16</sup> Buchek Tr. 114:19–24.

<sup>17</sup> *Id.* at 118:8–18.

<sup>18</sup> *Id.*

<sup>19</sup> Joint Br. Part II.A.

<sup>20</sup> Buchek Tr. 111:6–14.

<sup>21</sup> Buchek V.S. ¶ 11; Buchek Tr. 89:24–90:4.

**B. Valero 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.<sup>22</sup> 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> <sup>23</sup> | <u>2019 Rates</u> <sup>24</sup> |
|-----------------|---------------------------------|---------------------------------|
| 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                 |

{

}.<sup>25</sup> {

}.<sup>26</sup> Since the implementation of

Item 55-C, Valero has paid {{ }} for its tank-car repair moves that are subject to UP’s tariff.<sup>27</sup> In nearly every instance, these are charges that Valero would not have incurred but for the imposition of Item 55-C.<sup>28</sup>

<sup>22</sup> Joint Br. Ex. 1, Item 55-C.

<sup>23</sup> Joint Br. Ex. 2, Item 1100.

<sup>24</sup> Joint Br. Ex. 6, Item 1200-C.

<sup>25</sup> Buchek Tr. 42:19–43:12.

<sup>26</sup> *Id.* at 45:2–5.

<sup>27</sup> Buchek V.S. ¶ 16.

<sup>28</sup> *Id.* ¶ 17.

{{

}}.<sup>29</sup> As a result of UP's implementation of Item

55-C, Valero needed to adopt new administrative practices to handle payment of empty freight and process transactional load invoices that it had not previously needed to process.<sup>30</sup>

{{

}}.<sup>31</sup>

Valero estimates this cost to be approximately {{ }}.<sup>32</sup>

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

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<sup>29</sup> Buchek Tr. 238:3–14.

<sup>30</sup> Buchek V.S. ¶ 18.

<sup>31</sup> Buchek Tr. 238:6–10.

<sup>32</sup> Buchek V.S. ¶ 22.

<sup>33</sup> *Id.* ¶ 23.

<sup>34</sup> Buchek Tr. 162:7–15.

<sup>35</sup> Buchek V.S. ¶ 24.

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Accordingly, Valero undertook a variety of measures to mitigate the impacts of Item 55-

C. In some instances, {{ }}<sup>37</sup> {{

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{

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}}.<sup>42</sup> Valero also sought to

mitigate the impacts of Item 55-C by {{

}}<sup>43</sup> {{

}}.<sup>44</sup>

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<sup>36</sup> *Id.* ¶ 25.

<sup>37</sup> Buchek Tr. 174:3–6.

<sup>38</sup> *Id.* at 175:19–176:16.

<sup>39</sup> *Id.* at 223:6–25.

<sup>40</sup> *Id.* at 234:4–10; Buchek V.S. ¶ 29.

<sup>41</sup> Buchek Tr. 169:2–12.

<sup>42</sup> *Id.* at 234:7–10.

<sup>43</sup> *Id.* at 186:9–187:7.

<sup>44</sup> *Id.* at 199:23–200: 9.

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<sup>45</sup> *Id.* at 180:2–9; Buchek V.S. ¶ 31.

<sup>46</sup> Buchek V.S. ¶ 32–33.

<sup>47</sup> *Id.* ¶ 34.

<sup>48</sup> *Id.* ¶ 35.

<sup>49</sup> *Id.* ¶ 36.

<sup>50</sup> Buchek Tr. 64:9–24.

<sup>51</sup> *Id.* at 66:6–23.

<sup>52</sup> Buchek V.S. ¶ 38.

}.<sup>53</sup> {

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}.<sup>59</sup> As a result, Valero could not time all of its shop moves to ensure that such a move was always preceded by a loaded movement.

Valero took reasonable measures to utilize the closest repair facilities capable of performing the required work. However, for the reasons stated above, in many instances Valero

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<sup>53</sup> Buchek Tr. 157:18–25.

<sup>54</sup> Buchek V.S. ¶ 40.

<sup>55</sup> Buchek Tr. 158:19–23.

<sup>56</sup> *Id.* at 158:24–159:6.

<sup>57</sup> *Id.* at 159:14–160:5.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 160:9–18.

had little or limited discretion over shop selection. In most instances, Valero could not realistically avoid the Item 55-C charges and while continuing to meet its contractual obligations and business needs.

### **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.**

Valero's arguments that Item 55-C violates federal law are fully set forth in the Joint Brief. In considering Valero's claims, Valero respectfully requests that the Board keep the following principles front of mind. First, Item 55-C wrongfully places the burden on Valero for the costs of tank-car ownership by requiring Valero 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 Valero by adopting Item 55-C. Instead of compensating Valero 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 Valero, 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 Valero. Accordingly, for the reasons set out below in conjunction with the Joint Brief, Valero 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 Valero 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 Valero for the costs of owning and maintaining the tank cars that Valero provides for use on UP's rail network.<sup>60</sup> These include costs to transport tank cars to and from repair facilities for inspection, maintenance, and repair.<sup>61</sup> Under Item 55-C, however, UP charges Valero for tank-car repair movements but fails to compensate Valero 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.<sup>62</sup> 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.<sup>63</sup> Payment of mileage allowances constituted a safe harbor for compliance with rail carriers' statutory requirement to compensate tank-car providers.<sup>64</sup> Payment of mileage allowances is a transparent method of tracking a railroad's payment of costs associated with tank-car ownership.

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<sup>60</sup> 49 U.S.C. §§ 11101, 11121; *see also* Joint Br. Part III.A.1.

<sup>61</sup> 49 U.S.C. §§ 11121–22; *see also* Joint Br. Part III.A.1.

<sup>62</sup> Joint Br. Part III.A.1.a.

<sup>63</sup> *Id.*; *see also* *Gen. Am. Transp. Corp. v. Indiana Harbor Belt R.R. Co.*, 3 I.C.C. 2d 599, 608 (1987) (“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.”).

<sup>64</sup> Joint Br. Part III.A.1.a.

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

Accordingly, neither Valero nor this Board has insight into whether these zero-mileage rates compensate tank-car providers for the costs of tank-car ownership. Thus, UP satisfies neither the safe harbor for compliance with its obligation to compensate Valero for tank-car ownership costs nor the ICC's predicate for allowing railroads to charge tank-car providers like Valero for repair movements.

UP claims that it compensates Valero through discounted zero-mileage rates that are lower than the rates it would charge if it provided for mileage allowances.<sup>65</sup> But, as discussed in the Joint Brief, Board precedent precludes UP from offering to compensate Valero through purportedly discounted zero-mileage rates because UP does not also offer Valero full-service rates in railroad-supplied cars.<sup>66</sup> Instead, Valero must purchase or lease all of its own tank cars to supply to UP so Valero can ship its commodities on UP's rail network. Moreover, Board precedent does not allow UP to offer Valero two different rates for the same transportation in Valero-supplied tank cars because such a scheme would provide no assurances that UP actually compensates Valero for the costs of tank-car ownership.<sup>67</sup>

Even if UP could lawfully offer Valero discounts through zero-mileage rates, UP's claim that these rates are lower than hypothetical mileage-allowance-inclusive rates has no basis in

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<sup>65</sup> Docket NOR 42144, Answer to First Am. Compl. ¶ 33.

<sup>66</sup> Joint Br. Part III.A.2.

<sup>67</sup> *Id.*; see also *LO Shippers Action Comm. v. Aberdeen & Rockfish Ry. Co.*, 4 I.C.C. 2d 1, 17–18 (1987).

fact.<sup>68</sup> There is no contemporaneous evidence to suggest that UP’s zero-mileage rates include the costs of ownership imposed on Valero under Item 55-C.<sup>69</sup> To the contrary, {{

}}.<sup>70</sup> {

} and UP has never represented to Valero that its zero-mileage rates include such discounts.<sup>71</sup> Thus, UP’s claim that it discounts its zero-mileage rates against nonexistent full-service rates is without merit.

In sum, UP charges Valero for costs associated with tank-car ownership under Item 55-C but fails to compensate Valero 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 Valero for its tank-car ownership costs through any alternative to mileage-allowance payments. Accordingly, UP’s implementation of Item 55-C violates its obligation to compensate Valero for tank-car ownership costs in violation of 49 U.S.C. § 11121 and Board precedent.

## **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.<sup>72</sup> Rail practices must have a reasonable business or policy purpose,

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<sup>68</sup> Joint Br. Part III.A.3.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*; Joint Br. Ex. 31, Deposition Transcript of Douglass Craven (“Craven Tr.”) 111:13–21.

<sup>71</sup> Buchek Tr. 118:8–18; Buchek V.S. ¶ 12.

<sup>72</sup> See Joint Br. Part III.B.1.

such as encouraging efficient management of railroads.<sup>73</sup> Rail carriers engage in unreasonable practices when they misrepresent their practices or mislead their customers.<sup>74</sup>

UP's adoption of Item 55-C had no underlying reasonable business or policy purpose.<sup>75</sup>

{{

}}.<sup>76</sup> It also intended to replace the ICC-prescribed mileage-equalization program's charges for excessive empty tank-car movements {{

}}.<sup>77</sup> 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 {{

}}.<sup>78</sup>

UP's adoption of Item 55-C is an unreasonable practice as applied specifically to Valero because Valero was already operating as efficiently as possible under the mileage-equalization system. Long before UP adopted Item 55-C, {

}

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<sup>73</sup> *Id.*; NOR 42060 (Sub- 1), *N. Am. Freight Car Ass'n v. BNSF Railway 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").

<sup>74</sup> Joint Br. Part III.B.1; Ex Parte No. 661, *Rail Fuel Surcharges*, slip op. at 7 (STB served Jan. 26, 2007).

<sup>75</sup> Joint Br. Part III.B.1.

<sup>76</sup> Joint Br. Ex. 16, UPRR0003937; Joint Br. Ex. 15, UPRR0025231.

<sup>77</sup> Joint Br. Part III.B.1.

<sup>78</sup> *Id.*

Valero needed no additional motivation or change in UP policy to encourage efficient tank-car movements, and UP has pointed to no specific need to encourage further efficiency from Valero.

To the contrary, Valero's attempts to minimize its Item 55-C charges and mitigate costs associated with UP's illegal new tariff have instead resulted in *inefficient* movement of tank cars. To lower Valero's costs, {

}. Such movements further demonstrate that, as applied to Valero, UP's charges associated with Item 55-C are unreasonable because they *encourage* increased inefficient tank-car movements.

UP's implementation of Item 55-C is also an unreasonable practice as to Valero 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.<sup>79</sup> {{

}}.<sup>80</sup> UP misled Valero 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.

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

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

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

“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.”<sup>81</sup> To recover damages under this provision, a party must file his complaint within two years after the party’s claim accrues.<sup>82</sup>

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. Valero filed its complaint on December 19, 2016, less than two years after Item 55-C took effect on January 1, 2015 and Valero’s claims accrued. All of Valero’s claims against UP arise under “this part”—namely, Part A of Subtitle IV of Title 49.<sup>83</sup> And Valero has suffered substantial, specifically identifiable damages as a result of UP’s failure to compensate Valero for use of its tank cars, as required under § 11122, and UP’s unreasonable practices in violation of § 10702. Accordingly, Valero is entitled to an award of damages amounting to the specific harm it has suffered since Item 55-C took effect, costs associated with reasonably mitigating its damages, and interest.

**1. Valero 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.<sup>84</sup> 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

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<sup>81</sup> 49 U.S.C. § 11704(b).

<sup>82</sup> *Id.* § 11705(c); see also *Shintech v. Union Pacific Railroad*, 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”).

<sup>83</sup> See 49 U.S.C. §§ 10702(2), 11121–22.

<sup>84</sup> *U.S. Dep’t of Energy v. Balt. & Ohio R.R. Co.*, 364 I.C.C. 951, 975 (1981).

harm[ed] 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.” *Id.*

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

Moreover, Valero is entitled to damages in the amount of costs associated with implementing its administrative process to pay empty freight. Because of Valero’s efficient fleet management practices, Valero had not paid for empty moves under the mileage-equalization system since at least late 2013. Item 55-C’s implementation required Valero to establish new scheduling and accounting processes to handle transactional load invoices that it had not previously needed to process. These costs likewise are specifically measurable and constitute a portion of the “full amount of damages sustained” by Valero as a result of UP’s unreasonable practice and failure to compensate.<sup>85</sup> For these reasons, Valero is entitled to damages in the amount of the specific administrative costs it has incurred to comply with Item 55-C.

## **2. Federal Regulation Entitles Valero 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.<sup>86</sup> “A delay in the receipt of payment for damages is as much a

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<sup>85</sup> *Id.*

<sup>86</sup> *Louisville & N.R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 239 (1925).

source of injury as the initial loss of income comprising the damages awarded.”<sup>87</sup> An award of interest at a market-based rate adequately compensates a complainant for the financial costs of delayed compensation and neither punishes the railroad nor provides a windfall for the complainant.<sup>88</sup>

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.”<sup>89</sup> 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.”<sup>90</sup> “[T]he annual percentage rate shall be the same as the annual nominal (or stated) rate.”<sup>91</sup>

The Wall Street Journal U.S. Prime Rate on March 9, 2015, {{  
}} was 3.25%.<sup>92</sup> The rate has increased nine times since then, and as this filing, the Wall Street Journal U.S. Prime Rate is 5.50%.<sup>93</sup> Because the rate may increase again before damages are paid, as it has repeatedly since Valero’s claim accrued, Valero requests that the Board retain jurisdiction to reassess its award of interest until damages are paid in full.

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<sup>87</sup> *Louisiana Railcar, Inc. v. Missouri Pac. R.R. Co.*, 7 I.C.C. 2d 30, 44 (1990).

<sup>88</sup> *Id.*

<sup>89</sup> 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.

<sup>90</sup> 49 C.F.R. § 1141.1(a)(2).

<sup>91</sup> *Id.* § 1141.1(c).

<sup>92</sup> Market Data Center, Wall Street. J. (Mar. 9, 2015), [http://www.wsj.com/mdc/public/page/2\\_3020-moneyrate-20150309.html?mod=mdc\\_pastcalendar](http://www.wsj.com/mdc/public/page/2_3020-moneyrate-20150309.html?mod=mdc_pastcalendar); see also *Buchek V.S. Ex. A* {{  
}}.

<sup>93</sup> Market Data Center, Wall Street. J. (Feb. 21, 2019), [http://www.wsj.com/mdc/public/page/2\\_3020-moneyrate.html](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 Valero for this new tank-car ownership cost, as it is obliged to do. Valero has suffered substantial harm as a result of UP's violations, including loss of revenue to which Valero was entitled. For these reasons, Valero is entitled to an award of damages and interest.

Accordingly, for the foregoing reasons, Valero 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 Valero for tank-car ownership costs, and (2) order UP to rescind its tariff and pay reparations to Valero for the tariff charges incurred, including an award of interest on those charges.

Respectfully submitted,



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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 VALERO MARKETING AND SUPPLY COMPANY AND VALERO RAIL PARTNERS, 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 &  
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

**VERIFIED STATEMENT OF ROBERT BUCHEK IN SUPPORT OF OPENING  
EVIDENCE AND ARGUMENT OF VALERO MARKETING AND SUPPLY COMPANY  
AND VALERO RAIL PARTNERS, LLC**

I, Robert Buchek, 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 of Rail Transportation at Valero Services, Inc., a subsidiary of Valero Energy Corporation and an affiliate of Valero Marketing & Supply Company (collectively, “Valero”).

4. Valero is a purchaser, trader, and supplier of crude oil, ethanol, and refined products.

5. In addition to crude oil and ethanol, the full spectrum of products shipped by Valero includes asphalt, refined products, gasoline, diesel, sulfur, LPGs, butanes, propanes, propylenes, aromatic petrochemicals, benzene, toluene, xylene, and corn oil.

6. Valero moves a significant amount of its product on Union Pacific Railroad Company’s (“UP”) rail network.

7. {{  
}}

8. {  
}

9. As a result of its successful fleet-management practices, Valero {{  
}}

10. {  
}

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

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

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

14. Valero has diligently tracked its Item 55-C charges and payments to date. 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 Valero’s payments to UP for Item 55-C charges incurred from January 1, 2015 through February 19, 2019. 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.

15. {

}

16. From on or about January 1, 2015 through February 19, 2019 Valero has paid {{ }} for its tank-car repair moves pursuant to Item 55-C.

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

18. As a result of UP's implementation of Item 55-C, Valero needed to adopt new administrative practices to handle payment of empty freight and process invoice transactions that it had not previously needed to process.

19. {

}

20. Attached as **Exhibit B** to this Verified Statement is a true and correct copy of a spreadsheet prepared under my supervision and direction, which reflects Valero's one-time and ongoing personnel costs associated with the administrative burden to pay empty freight associated with the new Item 55-C charges. 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.

21. {

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22. From on or about January 1, 2015 through February 19, 2019, the estimated cost of the administrative burden associated with the process of paying empty freight is approximately {{ }}

23. {

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24. {

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25. {

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26. Valero undertook a variety of measures to mitigate the impacts of Item 55-C.

27. {{

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33. {

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40. {

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41. {

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42. {

}

43. In most instances, Valero could not realistically avoid the Item 55-C charges while continuing to meet its contractual obligations and business needs.

*[Signature Page Follows]*

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# **EXHIBIT A**

**HIGHLY CONFIDENTIAL  
MATERIAL SUBJECT TO  
PROTECTIVE ORDER**

# **EXHIBIT B**

**HIGHLY CONFIDENTIAL  
MATERIAL SUBJECT TO  
PROTECTIVE ORDER**

# **EXHIBIT 2**

**CONFIDENTIAL**  
**MATERIAL SUBJECT TO**  
**PROTECTIVE ORDER**