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February 22, 2019

Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: STB Docket No. NOR 42144, *North American Freight Car Association, et al. v. Union Pacific Railroad Company* (consolidated)

Dear Ms. Brown:

Accompanying this letter for filing in the above referenced proceeding is the Supplemental Opening Evidence and Argument of Cargill, Incorporated. Please note that this filing contains material that has been designated HIGHLY CONFIDENTIAL pursuant to the terms of the protective order in this proceeding. Accordingly, both HIGHLY CONFIDENTIAL and PUBLIC versions of the filing are being submitted.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

David K. Monroe
Attorney for Cargill, Incorporated

cc: All Parties



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PUBLIC VERSION

**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

**SUPPLEMENTAL OPENING EVIDENCE AND ARGUMENT OF COMPLAINANT
CARGILL, INCORPORATED**

I. INTRODUCTION

Pursuant to the Procedural Schedule adopted by the Surface Transportation Board (hereinafter, “STB” or “Board”), Complainant Cargill, Incorporated (“Cargill”) hereby submits its Supplemental Opening Evidence and Argument (hereinafter, “Cargill’s Supplemental Opening Evidence”) in Docket No. NOR 42144. Cargill’s Supplemental Opening Evidence hereby adopts and incorporates by reference the Joint Opening Evidence and Argument (“Joint

Opening”) submitted by Cargill and the other complainants in the various proceedings consolidated under Docket No. 42144.¹

Cargill’s Supplemental Opening Evidence provides supplemental evidence and argument specific to Cargill’s claim for reparations and damages, including a description of Cargill’s (1) business operations and tank car shipments by rail, (2) provision of private tank cars to Defendant Union Pacific Railroad Company (hereinafter, “UP”), (3) acquisition and management of its tank car fleet, (4) business dealings with UP, and (5) the damages caused by UP’s unlawful practices and conduct – specifically UP’s implementation of freight charges for moving empty tank cars to repair facilities and its failure to pay mileage allowances as required by 49 U.S.C. § 11122 and *Ex Parte No. 328*. This Supplemental Opening Evidence and Argument is supported by the attached Verified Statement of Kevin Zimski, Cargill’s Corporate Rail Fleet Manager (“Zimski V.S.”) and Verified Statement of John Kieras, formerly an employee of Union Tank Car Company (“Kieras V.S.”).

II. SUMMARY OF CARGILL’S SUPPLEMENTAL OPENING EVIDENCE AND ARGUMENT

Cargill is a large industrial shipper of bulk commodities transported in rail tank cars by UP. Because UP does not provide any of the tank cars necessary to transport Cargill’s products and commodities, Cargill is required to maintain a large fleet of privately owned and leased tank cars that Cargill provides to UP in order to receive rail transportation service from UP in tank cars. Cargill incurs substantial expense to acquire, manage, maintain, and repair the tank cars used by UP to provide rail transportation and to generate revenue for UP, but UP does not reimburse or otherwise compensate Cargill for the costs of providing tank cars to UP.

¹ Cargill will repeat evidence or arguments presented in the Joint Opening only to the extent required for the purposes of clarity, coherence and context.

Cargill asserts two separate, but related, claims against UP. In Count I of the Amended Complaint, Cargill asserts that UP has also violated Sections 10702, 11121, and 11122 of the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”) by adopting Tariff UP 6004, Item 55-C, Part D (hereinafter, “Item 55-C” or “55-C”), effective January 1, 2015.² Item 55-C imposes mileage-based freight charges for the movement of privately owned empty rail tank cars to and from “Repair Facilities.”³ Item 55-C imposes on Cargill an expense that is rightfully the sole responsibility of UP pursuant to its statutory obligation to provide adequate car service – just as it would be UP’s responsibility if UP owned the tank cars it used in revenue service. UP renewed and increased the rates charged pursuant to Item 55-C in 2016, 2017, 2018 and 2019, and continues to assess charges for the movement of empty tank cars to repair facilities to the present date. Moreover, UP double charges under Item 55-C for tank cars that must be moved to a cleaning facility before they can be sent to a repair shop – despite the fact that doing so is inconsistent with UP’s tariff.⁴

In Count II of the Amended Complaint, Cargill asserts that UP has violated its statutory obligations under Sections 11121 and 11122 of ICCTA by failing to properly compensate Cargill for supplying railroad tank cars that UP uses in revenue service. In particular, UP has failed to either directly reimburse Cargill for the costs it incurs in providing tank cars to UP or to pay

² The mileage-based charges established in Item 55-C, Part D initially were set forth in Item 1100 of Tariff UP 4703. The minimum and per-mile charges for repair movements are now set forth in Item 1200 of Tariff 4703. Freight charges under Item 55-C apply to all empty tank car movements to or from repair facilities not immediately preceded by a loaded move.

³ Item 55-C defines “Repair Facility” broadly to include facilities that performing cleaning services required before repairs on some tank cars can be undertaken.

⁴ Cargill contends that double-billing for Item 55-C charges violates the clear language of UP’s own tariff, and is also an unreasonable practice in violation of § 10702 of ICCTA.

mileage allowances on loaded revenue movements in tank cars as set forth in the industry-wide agreement approved by the Interstate Commerce Commission in *Ex Parte No. 328*.⁵

UP's imposition of freight charges for the movement of empty tank cars under Item 55-C – clearly designed for the sole purpose of increasing UP's revenues at the expense of shippers like Cargill who provide private tank cars for UP's use in revenue service – is doubly inequitable because of UP's failure to pay mileage allowances under *Ex Parte No. 328*. Thus, UP not only fails to compensate Cargill in any way for UP's use of Cargill's tank cars to generate revenue for UP, it also now imposes a new and unprecedented additional cost on providers of private tank cars like Cargill under Item 55-C charges. During the period from January 1, 2015 through December 2018, Cargill has been required to pay over \${{[REDACTED]}} in charges under Item 55-C – all for the dubious privilege of providing tank cars to UP without compensation.

Cargill is entitled to receive reparations for the damages it has suffered as a result of UP's violations of its statutory obligations under ICCTA. Specifically, Cargill is entitled to recover the amounts it has paid pursuant to Item 55-C for the movement of Cargill's empty tank cars to and from repair facilities for the period January 1, 2015 to the present. In addition, Cargill is entitled to be reimbursed for Cargill's cost of providing tank cars for UP's use in revenue service from March 31, 2013 to the present in the form of mileage allowances on loaded shipments in tank cars provided by Cargill to UP.

⁵ Ex Parte No. 328, *Investigation of Tank Car Allowance System*, 3 I.C.C. 2d 196 (1986) (“*Ex Parte No. 328*”).

III. SUPPLEMENTAL STATEMENT OF RELEVANT FACTS⁶

A. Cargill's Reliance on Rail Transportation in Tank Cars

Cargill is a large international producer and marketer of food, agricultural, financial, and industrial products and services headquartered in Wayzata, Minnesota. Zimski V.S. at ¶¶3-4. Cargill has operations in 70 countries and employs approximately 155,000 employees worldwide. *Id.* at ¶4. Cargill's worldwide operations generated \$109.7 billion in revenue during 2017. *Id.* Cargill's customers are primarily large industrial companies that require the delivery of products and commodities in bulk shipments. *Id.* As a result, Cargill is a major shipper of bulk commodities by rail, moving approximately {{[REDACTED]}} carloads and paying over \${{[REDACTED]}} billion in freight charges annually. *Id.*

Cargill ships a variety of products and commodities by rail that require the use of rail tank cars, including corn sweeteners, edible oils such as corn oil, soybean oil and canola oil, as well as non-edible commodities like ethanol. *Id.* at ¶5. While Cargill also uses specialized trucks to transport some of the commodities it ships in rail tank cars, trucking large volumes of such commodities over long distances is neither economically nor operationally practicable. *Id.* As a result, the great majority of Cargill's products that must be shipped in tanks are transported by rail. *Id.* Consequently, Cargill relies heavily on rail transportation for products that must be transported in tank cars. *Id.*

Cargill operates approximately 200 facilities in the United States that are served by rail. *Id.* at ¶6. Because many of Cargill's production, processing and distribution facilities are located in the Western United States, approximately 25% of Cargill's tank car shipments are transported on UP. *Id.* As a result, Cargill relies extensively on UP for rail service in tank cars. *Id.* Cargill

⁶ Cargill hereby adopts and incorporates by reference the Relevant Statement of Facts and Law set forth in the Joint Opening, filed in Docket No. 42144.

typically sells products transported in rail tank cars on a delivered price basis – meaning that Cargill pays all railroad freight and related charges associated with the shipment of Cargill’s products to its customers. *Id.* During the 2013-2018 time period, Cargill has tendered to UP approximately {{[REDACTED]}} tank car loads per year of various commodities and has paid UP approximately \$ {{[REDACTED]}} million per year in freight charges for movements in tank cars. *Id.* The great majority of Cargill’s tank car shipments on UP move under common carrier tariffs or exempt rate quotes, with the remaining shipments moving under rail transportation contracts. *Id.*

B. Cargill Is Required to Provide Privately Owned/Leased Tank Cars to UP in Order to Receive Rail Transportation Services in Tank Cars

UP does not offer or provide rail transportation in tank cars owned or leased by UP. *Id.* at ¶7. In order to ship commodities by rail in tank cars, therefore, Cargill is required to provide privately owned – *i.e.*, non-railroad owned – tank cars to UP. *Id.* Consequently, Cargill has been required to acquire, manage, and maintain a large fleet of rail tank cars for use by UP and other railroads in providing rail transportation of Cargill commodities requiring such tank cars. *Id.* During the period 2013-2018, the size of Cargill’s tank car fleet has varied between approximately {{[REDACTED]}} tank cars. *Id.* Currently, the Cargill fleet of rail tank cars consists of approximately {{[REDACTED]}} tank cars of various types and sizes – including 17,000-19,000 gallon tank cars used to transport corn sweeteners, 25,000-29,000 gallon tank cars used to transport edible oils and 30,000-31,800 gallon tank cars used to move ethanol. *Id.*

Cargill’s rail tank car fleet consists both of tank cars owned by Cargill as well as tank cars leased by Cargill. *Id.* at ¶8. Tank cars purchased by Cargill as well as most of those acquired by net or synthetic net leases are assigned Cargill car marks and are treated for most purposes as tank cars “owned” by Cargill. *Id.* Tank cars that Cargill acquires under full-service leases retain the car marks of the lessors and are considered tank cars “leased” by Cargill for the

purposes of mileage allowances and equalization. *Id.* The percentage of Cargill's tank car fleet that is leased varies depending on economic and commercial circumstances including the level of lease rates. *Id.* Currently, Cargill owns slightly more than {{[REDACTED]}} of the tank cars in its fleet; the remainder of its fleet of tank cars are leased from a number of rail car leasing companies. *Id.*

Lease rates for tank cars can vary greatly from time to time based on the age and condition of the rail cars, supply and demand for tank cars, Cargill's current need for tank cars, and other factors. *Id.* at ¶9. Cargill negotiates and/or renews lease agreements for groups of tank cars on a staggered basis in order to both hedge the lease rates it pays and to maintain flexibility regarding the size and composition of its tank car fleet. *Id.* As a result, Cargill's tank car fleet is constantly in flux with tank cars coming on lease and going off lease on an ongoing basis. *Id.*

Lease agreements for tank cars are largely standardized, containing many "boilerplate" provisions that are not subject to significant negotiation. *Id.* at ¶10. The primary lease provisions that are subject to negotiation are the lease rates, the number, age, and types of tank cars, the allowable miles during the lease term, and the length of the lease term. *Id.* Cargill seeks multiple quotes and negotiates tank car lease agreements with a number of rail car lessors in order to obtain the best rates and other terms available in the market. *Id.*

Cargill's full-service lease agreements for tank cars typically provide that Cargill is responsible for the cost of only certain minor repairs and maintenance, primarily involving components like valves, plugs, chains, and fittings handled by Cargill or its customers during loading and unloading. *Id.* at ¶11. Under full service leases, tank car lessors are generally responsible for all other maintenance, major repairs, retrofits, as well as most of the costs of mandatory ten-year qualification inspections. *Id.*

Cargill's tank car lease agreements also typically address the disposition of mileage allowance payments received by the lessor for loaded movements in the tank cars leased by Cargill. *Id.* at ¶12. Mileage allowances are payments railroads are required to make to tank car owners to cover the cost of providing privately-owned tank cars used by railroads in revenue service.⁷ *Id.* Under the procedures implementing *Ex Parte No. 328*, (1) mileage allowance payments are calculated based on the number of loaded miles traveled by each tank car, and (2) mileage allowance rates are calculated each year by Railinc – an organization affiliated with the American Association of Railroads. *Id.* Mileage allowance rates vary depending on the age and cost of the particular tank car. *Id.*

Cargill is entitled to receive all of the mileage allowances earned by tank cars that Cargill owns. *Id.* at ¶13. In addition, most of Cargill's tank car leases provide that Cargill is entitled to at least some portion of mileage allowance payments received by the tank car lessor. *Id.* Some tank car leases require the lessor to pay over to Cargill all or a portion of mileage allowance payments received. *Id.* Other leases provide that mileage allowance payments received by the lessor will be credited in whole or in part against lease payments due from Cargill. *Id.* Contrary to its obligations under *Ex Parte No. 328*, UP for many years has not paid mileage allowances for loaded movements in either leased or owned tank cars that Cargill has provided to UP for UP's revenue service. *Id.*

Cargill's tank car lease agreements generally require Cargill to pay for the cost of transporting the leased tank cars to and from the point at which they are turned over to UP or another railroad for use in providing rail transportation for Cargill. *Id.* at ¶14. However, because the cost of moving empty tank cars to repair facilities has historically been the responsibility of

⁷ See *Ex Parte No. 328* and 49 U.S.C. § 11122 (requiring that railroads compensate providers of private rail cars used in revenue service).

the railroad using the tank car, Cargill's tank car leases generally have not specified whether the lessor or the lessee is responsible for freight charges associated with moving empty tank cars to and from repair shops. *Id.* Since UP implemented freight charges for empty movements to and from repair shops in 2015, however, UP and tank car lessors have required Cargill to pay freight charges for moving empty tank cars to and from repair facilities. *Id.*

C. Cargill's Incurs Substantial Expense to Provide Tanks Cars to UP and Other Railroads

The cost to Cargill of providing tank cars to UP for use in transporting Cargill's tank car shipments in revenue service is substantial. *Id.* at ¶15. During the period 2013-2018, Cargill has been required to maintain a fleet of approximately {{REDACTED}} tank cars in order to meet its rail shipping needs. *Id.* In addition, Cargill has incurred the cost of purchasing outright over {{REDACTED}} tank cars at an approximate average cost of \${{REDACTED}} per car for an approximate total of \${{REDACTED}} million in total. Cargill has also incurred annual rental payments of approximately \${{REDACTED}} million per year to lease approximately {{REDACTED}} additional tank cars. *Id.*

In addition to the costs of acquiring tank cars through purchase or lease, Cargill has been required to spend an average of \${{REDACTED}} million per year on repair and maintenance costs relating to tank cars during the 2013-2018 time period. *Id.* at ¶16. Moreover, Cargill employs a staff of four employees to acquire and manage its fleet of tank cars, and also uses the services of an outside fleet management service. *Id.* In addition to the substantial out-of-pocket costs incurred by Cargill to provide tank cars to UP, Cargill also incurs the significant risks of maintaining a fleet of tank cars appropriately sized for its business needs. *Id.*

D. Cargill's Management of Its Rail Tank Car Fleet

Cargill closely manages its fleet of rail cars to ensure efficient utilization of its owned and leased tank cars. *Id.* at ¶17. Cargill utilizes Alltrantek – an outside fleet management service – to assist Cargill's fleet management team in finding the most efficient and cost-effective options for sending tank cars for required maintenance and repairs as well as working closely with Cargill's lessors to encourage the selection of repair facilities that will minimize the time tank cars are out of service. *Id.* Cargill generally seeks to have its tank cars routed from the Cargill facility at which it is loaded to its customer where it is unloaded and then moved directly back to the same Cargill facility where it was loaded. *Id.* While tank cars sometimes may have to be diverted to cleaning and repair facilities for required maintenance or repair, Cargill seeks to minimize the distance that empty tank cars will have to travel to and from repair shops in order to minimize the time that the tank cars will be out of service. *Id.* Cargill's efficient fleet management has ensured that the annual empty miles of its fleet of tank cars are substantially less than the number of free empty miles allowed under the mileage equalization program approved in *Ex Parte No. 328*. *Id.*

The mileage equalization program is designed to incentivize owners of private tank cars to manage the movement of their tank cars to minimize the number of empty miles relative to loaded miles. *Id.* at ¶18. Under the mileage equalization program, tank cars are allowed empty movements of up to 106% of the number of total loaded miles without additional charges from the railroads. *Id.* For the purposes of the equalization program, loaded and empty miles are calculated on an annual fleet-wide basis. *Id.* If a fleet of tank cars exceeds the 106% threshold, a specified per-mile freight rate is assessed on the car owner for empty miles in excess of the 106% threshold. *Id.* During the 2013-2018 time period, Cargill's fleet of tank cars has

consistently remained below the 106% equalization threshold, and Cargill therefore has not been assessed freight charges under the mileage equalization program.⁸ *Id.*

Cargill seeks to efficiently manage its tank car fleet not only to avoid paying equalization charges, but also to maximize utilization of its tank cars for loaded moves carrying Cargill's products. *Id.* at ¶19. Maximizing the efficient utilization of its tank cars allows Cargill to ship products to its customers using the fewest number of tank cars. *Id.* As a result, Cargill manages its tank car fleet to minimize the number of empty miles its tank cars must travel to repair facilities because the more miles a tank car must travel to move to a shop, the longer it will remain out of service. *Id.*

Cargill also endeavors to minimize the number and length of empty maintenance and repair moves by conducting minor maintenance and repairs at its own facilities when practicable. *Id.* at ¶20. Cargill also makes use of mobile repair providers – companies that can undertake certain repairs where the tank car is located rather than moving the tank car to a repair facility. *Id.* However, most major repairs, mandatory inspections,⁹ and retrofitting of tank cars must be performed at a repair facility qualified and available to do the work. *Id.*

When a tank car owned by Cargill must be sent to a repair facility, Cargill endeavors to schedule the diversion for repairs and select an appropriate repair facility in a manner that minimizes the time the tank car will be out of service. *Id.* at ¶21. For example, except in cases where the need for repair work is immediate or urgent, Cargill attempts to schedule a diversion

⁸ The 106% threshold was negotiated by railroads and car owners in *Ex Parte No. 328* to account for additional empty movements to and from repair facilities – empty movements that were acknowledged to be the responsibility of the railroads using private tank cars to provide rail transportation services.

⁹ Tank cars are required to undergo a comprehensive inspection and requalification every ten years. These mandatory inspections can only be performed at a qualified tank car repair facility. *Zimski V.S.* at ¶20, n. 1.

to repair facilities when the empty tank car is near an appropriate repair shop. *Id.* More generally, Cargill considers numerous factors in selecting the repair facility to which its tank cars will be sent, including (1) the location of the shop relative to the current location of the tank car, (2) whether the shop is qualified to perform the type of work required, (3) whether the shop has available capacity to handle the work in a timely manner, (4) the shop's reputation regarding the quality of its services, and (5) the price charged by the shop relative to alternative shops. *Id.*

Cargill's selection of an appropriate repair facility may also be affected by the location and availability of qualified tank car cleaning facilities. *Id.* at ¶22. For most inspections and significant repair work, a tank car must be completely unloaded and cleaned of all product residue before the work can be commenced. *Id.* Many tank car repair facilities are not equipped to provide the required cleaning and product disposal services for the variety of commodities and products that Cargill ships in tank cars. *Id.* As a result, specialized cleaning services are generally required to remove and dispose of residual and sometimes hazardous commodities remaining in the tank car after it has been unloaded. *Id.* While a qualified cleaning facility is often located near the empty tank car's location or the repair facility selected to work on the tank car, that is not always the case. *Id.* Consequently, tank cars needing repairs sometimes have to be first moved a considerable distance to be cleaned before they can be routed to the appropriate repair facility. *Id.*

For tank cars that are leased by Cargill, the selection of an appropriate repair facility is controlled by the lessor, who is typically responsible for most, if not all, of the costs of the inspection, maintenance or repairs. *Id.* at ¶23. Some tank car lessors prefer to primarily use their own repair facilities or shops operated by affiliated entities to perform work on Cargill's leased tank cars. *Id.* Other lessors may prefer to use third-party repair facilities with which they have

contracts to perform work on Cargill's leased tank cars. *Id.* While Cargill attempts to influence the lessor's selection of repair facilities in order to minimize the time Cargill's tank cars will be out of service, tank car leases grant the lessor the right to unilaterally select where the tank car will be repaired or inspected. *Id.* Despite Cargill's inability to exercise absolute control over the selection of repair facilities for all of its tank cars, Cargill has been able to limit the annual empty miles of its tank car fleet to well below the 106% threshold allowed by the equalization program. *Id.*

E. UP's Imposition of Item 55-C Charges for Movements of Private Tank Cars to Repair Facilities

In December 2014, UP announced that starting January 1, 2015, it would for the first time begin charging Cargill and other tank car shippers for moving empty tank cars to repair facilities. *Id.* at ¶24. Prior to UP's announcement, the movement of empty tank cars to repair facilities historically had always been at the expense of UP and performed without charge to providers of privately-owned tank cars used by UP in revenue service. *Id.* Despite the unprecedented nature of UP's announced charges for empty movements to repair facilities and the significant financial impact those charges would have on tank car shippers like Cargill, UP never discussed its plans to charge for empty repair moves with Cargill – or, it appears, the industry at large – before announcing Item 55-C, Part D. *Id.* Similarly, although UP's announcement suggested that UP was implementing charges for empty tank car movements to repair facilities in order to, among other things, provide more timely feedback to shippers about efficient fleet management and to reduce the empty miles on UP's network, UP never discussed those issues with Cargill or provided any facts to suggest that tank car fleets were being managed inefficiently. *Id.*

Cargill protested UP's announced plan to charge for empty tank car repair moves. *Id.* at ¶25. For example, Cargill's Rail Transportation Manager during the 2014-2015 time period,

Peter Cleary – who also served as Chairman of the North America Freight Car Association’s (“NAFCA”) Operating Committee - signed a letter dated December 22, 2014 on behalf of NAFCA and its members formally requesting that UP withdraw its announced tariff revision to impose charges for empty tank car moves to repair shops. *Id.*¹⁰ UP refused to reconsider its decision to implement Item 55-C charges for empty repair movements for tank cars. *Id.*¹¹

Notwithstanding NAFCA’s protest, UP issued Tariff UP 6004, Item 55-C, Part D, to be effective January 1, 2015. *Id.* at ¶26. Item 55-C established substantial mileage-based charges for the movement of empty tank cars to and from repair facilities, effective on January 1, 2015:

1-250 miles	\$1317 per car
251-500 miles	\$1477 per car
501 or greater miles	\$2.96 per mile ¹²

UP has imposed annual increases to its Item 55-C charges in 2016, 2017, 2018, and 2019.

The current 2019 Item 55-C charges are:

1-250 miles	\$1555 per car
251-500 miles	\$1744 per car
501 or greater miles	\$3.49 per mile ¹³

UP assesses a fuel surcharge on each empty tank car movement in addition to Item 55-C charges. *Id.* Item 55-C charges do not apply to the first empty move following a loaded line-haul revenue move on UP. *Id.* Item 55-C defines “Repair Facility” broadly to include facilities at which tank cars are sent to be cleaned before being routed to a repair shop. *Id.*

The per-mile charges established by Item 55-C are far in excess of the charges applicable under the equalization program for empty moves exceeding 106% of the loaded miles. *Id.* at

¹⁰ See also Joint Opening at 16-17.

¹¹ See also Joint Opening at 17, n. 42.

¹² Zimski V.S. at ¶26.

¹³ Zimski V.S. at ¶26.

¶27. In January 2015, the equalization charge was \$.96 per mile, but applied only to empty miles in excess of 106%. UP's Item 55-C per-mile charge applies to empty movements to and from repair shops regardless of how efficiently Cargill manages its tank car fleet. *Id.* Moreover, in January 2015, UP's Item 55-C per-mile charge was \$2.96 (for empty moves in excess of 500 miles), but for moves less than 250 miles, could easily exceed \$25.00 per mile. *Id.* By issuing Item 55-C, UP unilaterally removed itself from the equalization program for empty tank car moves to repair facilities and substituted charges for those moves that are multiples of the equalization charge. *Id.*

UP's imposition of a large minimum charge for short empty tank car movements greatly increases the cost to Cargill of moving its tank cars to repair facilities. *Id.* at ¶28. As an initial matter, in many if not most cases, Cargill's tank cars must be moved to a cleaning facility before they can be routed to a repair shop. *Id.* For the purposes of Item 55-C, however, UP treats the required move to the cleaning facility, the subsequent move to the repair shop, and the third move back to a Cargill facility as separate empty moves – with the latter two assessed freight charges under Item 55-C. *Id.* Thus, for example, in 2019, an empty tank car that moves 50 miles to a cleaning facility, then 50 miles to the nearest repair shop, and then 50 miles back to Cargill's facility would be charged under Item 55-C for the latter two moves – each subject to the minimum charge of \$1555 per car or \$3110 in total. *Id.*

UP's implementation of Item 55-C significantly interferes with the efficient management of Cargill's tank car fleet. *Id.* at ¶29. The imposition of Item 55-C charges for each leg of an empty move to and from a repair facility - except for the first such move after a loaded revenue move - distorts Cargill's decision-making process when selecting where to send the tank car for repair. *Id.* In cases where it would otherwise be more efficient or cost-effective to send a tank

car to a repair shop near its point of unloading, the substantial freight charges assessed under Item 55-C dictate that the tank car instead be moved to a repair shop closer to the tank car's next anticipated loading point. *Id.*

UP's assessment of Item 55-C charges for empty tank car moves to and from repair facilities has had a significant financial impact on Cargill. *Id.* at ¶30. UP has invoiced Cargill under Item 55-C for both the tank cars Cargill owns as well as the tank cars Cargill leases. *Id.* As shown in Exhibit B to the Zimski V.S. attached hereto, during the period from January 1, 2015 through December 31, 2018, Cargill has paid 5,677 UP invoices under Item 55-C, Part D totaling \${{[REDACTED]}}. *Id.* Cargill has continued to receive and pay invoices from UP for Item 55-C charges since the end of 2018. *Id.*

F. UP's Failure to Pay Mileage Allowances for Loaded Tank Car Movements

Cargill provides thousands of tank cars to UP for UP's use in providing rail transportation services from which UP earns substantial revenues from Cargill. *Id.* at ¶31. In order to provide the tank cars that UP uses in its revenue service, Cargill incurs great expense to acquire, maintain and manage its tank car fleet. *Id.* Despite UP's mileage allowance obligations and the fact that Cargill's tank cars generate approximately \${{[REDACTED]}} million per year in revenue for UP, UP does not compensate Cargill in any way for the use of the tank cars that Cargill provides to UP. *Id.*

Nor does UP pay mileage allowances for loaded movements in tank cars owned by Cargill and has not done so for as long as anyone at Cargill can remember. *Id.* at ¶32. No one in Cargill's rail transportation department can recall UP offering any freight rate for tank car shipments that included the payment of mileage allowances. *Id.* In fact, UP offers, quotes and charges only rates designated as "zero allowance" rates that specify that UP will not pay mileage allowances. For example, all of UP's common carrier tariffs governing Cargill's tank car

shipments expressly state that mileage allowance payments on private equipment will not apply. *Id.*

UP does not compensate Cargill in any other way for UP's use of tank cars owned by Cargill. *Id.* at ¶33. For example, UP does not directly reimburse Cargill for the costs of providing tank cars for UP's use in revenue service. *Id.* In addition, although UP has argued in this proceeding that it offers discounted "zero allowance" line haul rates to Cargill in place of the mileage allowance payments it owes to Cargill, that is simply not accurate. *Id.* UP has never represented to Cargill's that its freight rates are discounted to compensate Cargill for the use of its tank cars, nor has UP ever indicated to Cargill the amount by which its freight rates are supposedly discounted or how those purported discounts are calculated. *Id.*

UP also does not pay mileage allowances for loaded movements in tank cars leased by Cargill and has not done so since well before 2013. *Id.* at ¶34. Under most of Cargill's tank car leases, mileage allowances due on leased tank cars would be paid in the first instance to the lessors of the tank cars. *Id.* However, under most of Cargill's leases, the lessor is obligated to pay over to Cargill some or all of the mileage allowances received from UP and other railroads – either in form of direct payments or credits against rental payments owed by Cargill under the leases. *Id.* Cargill has not received any payments or credits from its tank car lessors for any mileage allowances from UP since well before 2013 because UP has not made mileage allowance payments to Cargill's lessors. *Id.*

Further, UP has never offered Cargill a choice of freight rates for tank car shipments. *Id.* at ¶35. For instance, UP has never offered Cargill a true choice of rates – a full service rate in an UP-provided tank car or a discounted zero mileage allowance rate in a private tank car – because UP does not offer tank car transportation in tank cars owned by UP. *Id.* UP has not even offered

Cargill a choice of rates in private tank cars – that is, a choice of a full allowance rate (including payment of mileage allowances to Cargill) or a discounted zero allowance rate (with no payment of mileage allowances to Cargill). *Id.* UP offers only one kind of rate for tank car movements in Cargill-provided tank cars – a freight rate without the payment of mileage allowances. *Id.* All of the UP tank car tariffs under which Cargill ships expressly disavow the payment of any mileage allowances. *Id.*

Cargill has been given no reason to believe that UP even considers mileage allowances or the costs incurred by Cargill in providing tank cars to UP when UP establishes rates for Cargill's tank car shipments. *Id.* at ¶36. Based on Cargill's experience in its dealings with UP, UP sets its freight rates for tank car shipments based solely on what it believes the market will bear in order to maximize UP's revenues and profit. *Id.* In fact, UP's conduct since it began imposing 55-C charges in 2015 demonstrates that UP is not offering discounted rates in place of paying mileage allowances or otherwise compensating Cargill for providing tank cars used in UP's revenue service. *Id.* If UP were actually discounting its freight rates for tank car shipments to compensate Cargill for the costs incurred in providing tank cars to UP, UP would have reduced its rates in January 2015 to reflect the additional cost to Cargill of paying to move empty tank cars to repair facilities. *Id.* However, UP did not reduce its freight rates for tank car shipments when it began charging for moving empty tank cars to repair facilities in 2015 or since. *Id.* Nor did UP reduce its tank car freight rates when it raised the rates it charges under Item 55-C in 2016, 2017, 2018, and 2019. *Id.* Instead, UP has continued to raise its line haul rates since it implemented Item 55-C, Part D in January 2015.

During the period from 2013 through 2018, Cargill's fleet of tank cars accumulated {{[REDACTED]}} loaded miles on UP. *Id.* at 37. Based on the composition of Cargill's fleet

during the 2013-2018 period, Cargill estimates that UP should have paid more than \${{[REDACTED]}} million in mileage allowances for loaded movements in tank cars provided by Cargill. – an average of more than \${{[REDACTED]}} million per year. *Id.* at 37-38.

IV. ARGUMENT

A. UP’s Imposition and Implementation of Item 55-C, Part D Violates 49 U.S.C. §§ 10702, 11121, and 11122, *Ex Parte No. 328*, and the ICC’s Decision in *IHB II*

1. UP Cannot Charge Cargill for the Costs of Empty Tank Car Movements That Are by Statute the Responsibility of UP

UP has a statutory obligation as a common carrier railroad to provide adequate car service, or in the alternative, to adequately compensate providers of private rail cars that UP uses to provide revenue-producing rail transportation services.¹⁴ If UP met its statutory car service obligation by providing tank car service in UP-owned tank cars, UP would obviously be responsible for all costs associated with owning and using its own tank cars in revenue service, including the cost of moving those tank cars to repair shops. Section 11122 of ICCTA makes clear that UP remains responsible for all of those same costs – including the costs of moving empty tank cars to and from repair shops – if it uses privately-owned tank cars to provide revenue service.¹⁵

Prior to implementing Item 55-C, UP has historically recognized its obligations under Section 11121 and 11122 to move Cargill’s empty tank cars to repair shops without charge. UP’s sudden and unexplained implementation in January 2015 of Item 55-C charges for movements of empty tank cars to and from repair shops is a blatant attempt by UP to foist upon

¹⁴ See 49 U.S.C. §§11121-11122.

¹⁵ See *General American Transp. Corp. v. Indiana Harbor Belt Railroad Co.*, 3 I.C.C. 2d at 600 (1987) (“*IHB II*”) (the costs of moving empty tank cars to repair facilities must ultimately be borne by railroads that use those tank cars in revenue service).

Cargill the costs of moving empty tank cars to and from repair shops – costs that are by statute solely the responsibility of UP. For this reason alone, Item 55-C should be declared unlawful, and UP should be required to immediately withdraw Item 55-C.

Moreover, UP's issuance of Item 55-C to impose charges for empty tank car movements to repair facilities also violated its obligations under *Ex Parte No. 328*. At the same time that UP announced the imposition of 55-C charges, it also announced that UP was unilaterally withdrawing empty tank car movements to and from repair facilities from the equalization program. The equalization program is part of an industry-wide agreement that was approved by the ICC in *Ex Parte No. 328* and is an agreement that UP is not free to ignore or abrogate at will. UP did not seek Board approval to withdraw from the equalization program. Nor did UP offer any legal authority for its unilateral abrogation of its obligations under *Ex Parte No. 328* at the time it announced the imposition of Item 55-C charges. Indeed, UP appears to have given no consideration to the effect its unilateral withdrawal from the equalization program would have on the equitable allocation of the costs of providing private tank cars for UP's use in revenue service.

2. The ICC Decision in *IHB II* Does Not Support UP's Imposition of Item 55-C Charges

UP apparently intends to rely on the ICC's decision in *IHB II* to support its implementation of 55-C charges. For the reasons set forth in the Joint Opening, *IHB II* does not support UP's attempt to shift the costs of moving empty tank cars to repair facilities onto Cargill and other car providers through the device of Item 55-C.¹⁶ To the contrary, the ICC made clear in *IHB II* that the cost of moving privately-owned empty tank cars to repair facilities must be

¹⁶ See Joint Opening at 21-29.

borne by the railroads using those tank cars in revenue service.¹⁷ Accordingly, the ICC decision in *IHB II* to allow certain terminal railroads to charge for empty tank car moves to repair facilities was expressly conditioned on the assumption that tank car providers would be able to recover those costs through mileage allowances paid by line haul railroads on loaded movements.

However, UP admits it does not pay mileage allowances on loaded tank cars movements, nor does it compensate Cargill in any other way for UP's use of Cargill's tank cars in revenue service. UP's self-serving contention that it compensates Cargill through discounted "zero allowance" rates is both completely unsupported and inconsistent with UP's documented motives and actions in implementing Item 55-C. UP has never advised Cargill that its freight rates are discounted to account for the lack of mileage allowance payments, much less specified the amount of the purported discounts or even attempted to demonstrate to Cargill that the purported discounts would be sufficient to compensate Cargill for its costs of providing tank cars for UP's use. Similarly, UP does not offer Cargill a choice of freight rates that includes payment of mileage allowances. More importantly, as set forth in the Joint Opening, since UP does not provide tank car service in UP-owned tank cars, it cannot offer a true "dual rate" option sufficient to allow Cargill and the Board to determine whether UP's purportedly discounted rates are in fact discounted at all.¹⁸

UP's claim that, behind the scenes and unbeknownst to Cargill, it has been discounting Cargill's rates in some unspecified amount is also belied by UP's motives and conduct in implementing 55-C charges. As discussed in detail in the Joint Opening, {{ [REDACTED]

[REDACTED]

¹⁷ *IHB II* at 608.

¹⁸ See Joint Opening at 29-32.

████████████████████}} – is inconsistent with any intent to compensate Cargill for the use of Cargill’s tank cars or to return UP’s 55-C charges through discounted rates.¹⁹ More to the point, after UP implemented 55-C charges for empty tank car movements to repair facilities, UP did not reduce its tank car rates to reflect the windfall revenues it planned to extract from Cargill and other tank car shippers.

Since UP does not pay mileage allowances or otherwise compensate Cargill for providing tank cars for UP’s revenue service, UP’s imposition of Item 55-C charges clearly violates its common carrier car service obligations under 49 U.S.C §§ 11121 and 11122 as well as *Ex Parte No. 328* and *IHB II*.

3. UP Misrepresented the Reasons for Implementing Item 55-C Charges in Violation Of 49 U.S.C. § 10702

Section 10702 of ICCTA requires rail carriers to establish and implement reasonable practices relating to the provision of rail transportation services.²⁰ Railroad practices that involve misrepresentations or misleading conduct by a rail carrier are unreasonable and therefore violate Section 10702.²¹ Consequently, UP was obligated to present Item 55-C, Part D to its shippers in an honest and forthright manner.

As set forth in detail in the Joint Opening, UP was not honest and forthright with its shippers when it announced and implemented Item 55-C, Part D.²² In order to avoid or dampen shipper opposition to the unprecedented imposition of 55-C charges, UP misrepresented UP’s true motive and reason for assessing 55-C charges on empty tank movements. In particular, UP represented to Cargill and the shipping public that Item 55-C was intended to promote efficient

¹⁹ See Joint Opening at 23-29.

²⁰ See 49 U.S.C § 10702.

²¹ See *Ex Parte No. 661, Rail Fuel Surcharges*, slip op. at 7 (served Jan. 26, 2007).

²² See Joint Opening at 15-17 and 38-43.

fleet management while UP's internal communications make clear {{ [REDACTED]

}}.

Even if UP's scheme to foist upon its shippers costs that are rightfully the responsibility of UP had been lawful – and it was not – UP's misrepresentation of its motivation and purpose in implementing 55-C would still be unreasonable and in violation of Section 10702.

4. UP's Practice of Double Charging Cargill for Multi-Leg Movements to Repair Facilities Is an Unreasonable Practice

UP's practice of double charging for movements to and from a repair facility is inconsistent with UP's own tariff and thus is also an unreasonable practice under Section 10702. UP's Tariff 4703 states that Item 55-C charges will not apply to the first empty move following a loaded line-haul revenue move. When a Cargill tank car moves (a) from its unloading point to a cleaning facility, (b) then on to a repair shop, and (c) then back to Cargill's facility for loading, UP charges for both (b) the empty move from the cleaning facility to the repair shop and also (c) the empty move from the repair shop back to the Cargill facility where it will be loaded.

However, to the extent UP charges for the empty move from the cleaning facility to the repair shop, that move should be considered a loaded line-haul revenue move – since UP is imposing a freight charge for moving the tank car - where the car itself is the loaded commodity.²³ Consequently, the following empty move from the repair facility back to Cargill's facility should be not be assessed 55-C charges according to the terms of UP's tariff, since it is an empty move following a loaded revenue move. UP's unreasonable practice of double charging for movements to and from repair facilities has not only required Cargill to pay an

²³ The STC code under which 55-C charges are assessed – STCC 3742217 – applies to “Revenue movement, cars, railway freight, not railway owned, not new, not newly acquired, not re-stenciled, or not for sale, moved on own wheels (private marked).”

additional 55-C charge not justified by UP's own tariff, it has also in some cases deprived Cargill of the benefit of a portion of empty return miles for which Cargill has paid.²⁴

B. UP's Failure to Compensate Owners of Private Tank Cars for Providing Rail Cars That UP Uses in Revenue Service Violates Sections 49 U.S.C. §11122 as Well as *Ex Parte No. 328*

UP has a clear and unambiguous statutory duty under Section 11122 of ICCTA to compensate Cargill and other providers of privately-owned tank cars for UP's use of those tank cars in revenue service.²⁵ As set forth in detail in the Joint Opening, UP is required to satisfy its obligation to compensate providers of private tank cars by paying mileage allowances pursuant to the industry-wide agreement approved by the ICC in *Ex Parte No. 328*.²⁶ Notwithstanding its clear legal obligation to do so, UP has admitted that it does not pay mileage allowances to Cargill for loaded shipments in tank cars owned by Cargill nor does UP pay mileage allowances for loaded shipments in tank cars that Cargill leases.²⁷

Moreover, as discussed in the Joint Opening and above, UP does not compensate Cargill for the use of Cargill's tank cars in any other manner. UP's claim that it offers Cargill discounted "zero allowance" rates in lieu of mileage allowances is entirely without support. UP has never represented to Cargill's that its freight rates are discounted in lieu of compensating Cargill for the use of its tank cars, nor has UP ever indicated to Cargill the amount by which its rates are supposedly discounted or how such purported discounts are calculated. Indeed, Cargill

²⁴ The line haul rate that Cargill pays for loaded tank car movements includes the cost of the empty return of the tank car to origin after it has been unloaded – which is why tank car shippers are entitled to a free empty return move after a loaded move. UP's practice of assessing 55-C charges generally, and its practice of double charging in particular, has the effect of depriving Cargill of the empty return miles that it pays for in its loaded line haul rates.

²⁵ See 49 U.S.C. § 11122.

²⁶ See Joint Opening at 20-23.

²⁷ The UP common carrier tariffs under which Cargill ships uniformly disavow the payment of mileage allowances.

is aware of no evidence that UP even considers mileage allowances or the costs incurred by Cargill in providing tank cars to UP when UP establishes rates for Cargill's shipments. To the contrary, based on Cargill's experience in its dealings with UP, UP sets its freight rates for tank car shipments based solely on what the market will bear in order to maximize UP's revenues and profit.

UP's conduct since it began imposing 55-C charges also demonstrates that UP is not offering discounted rates in lieu of paying mileage allowances or otherwise satisfying its obligation to compensate Cargill for providing tank cars used in UP's revenue service. If UP were actually discounting its freight rates for tank car shipments to compensate Cargill for the costs incurred in providing tank cars to UP, UP would have reduced its rates in January 2015 to reflect the additional cost to Cargill of paying to move empty tank cars to repair facilities. However, UP did not reduce its freight rates for tank car shipments when it began charging for moving empty tank cars to repair facilities in 2015. Nor did UP reduce its tank car freight rates when it raised the rates it charges under Item 55-C in 2016, 2017, 2018 and 2019.

Moreover, as explained in the Joint Opening, UP cannot satisfy its statutory duty to compensate providers of tank cars that UP uses in revenue service by means of purportedly discounted rates.²⁸ Because UP does not provide or even offer tank car service in UP-owned tank cars, it cannot establish a true dual rate structure sufficient to satisfy its obligations under 49 U.S.C. § 11122. Only a true dual rate structure that provided a choice between a full service rate in a railroad-owned tank car and zero allowance rate in a private car would be sufficient to allow Cargill and the Board to determine whether the purportedly discounted rate was (1) in fact

²⁸ See Joint Opening at 29-32.

discounted at all, and (2) sufficiently discounted to adequately compensate Cargill for the use of its tank cars in lieu of the payment of the mileage allowances mandated by *Ex Parte No. 328*.

C. Cargill Is Entitled to Collect Reparations for the Period March 31, 2013 to the Present

1. Cargill Is Entitled to Recover the Item 55-C Charges It Has Paid Since January 1, 2015

As of December 31, 2018, Cargill has paid \${{[REDACTED]}} to UP in charges under Item 55-C, Part D for the movement of empty tank cars to repair facilities.²⁹ For the reason set forth in its Supplemental Opening Evidence as well as the Joint Opening, Cargill is entitled to recover as reparations the entire amount it has paid to UP pursuant to Item 55-C, Part D. Accordingly, Cargill requests that the Board issue an order (1) finding that the freight charges assessed under Item 55-C, Part D is unlawful, (2) directing UP to withdraw Item 55-C, Part D from Tariff No. 6004, and (3) requiring UP to refund all amounts Cargill has paid or will pay to UP under Item 55-C, Part D during the pendency of this proceeding, with interest at the applicable legal rate.

2. Cargill Is Entitled to Recover Unpaid Mileage Allowances for Loaded Moves in Tank Cars Owned or Leased by Cargill for the Period from March 31, 2013 to the Present

In addition to the foregoing, the Board should also determine that UP has failed to compensate any party for the use of the tank cars Cargill has provided to UP. Under current law, the proper amount of compensation in compliance with 49 U.S.C. §11122 are mileage allowances calculated pursuant to the formula established by *Ex Parte No. 328*. Cargill is entitled to damages in the form of the mileage allowances that should have been paid by UP to

²⁹ A summary and compilation of the amounts paid by Cargill in Item 55-C, Part D freight charges is attached to the Zimski V.S. as Exhibit B.

Cargill for tank cars owned by Cargill for the period from March 31, 2013 until the date of the Board's final order in the proceeding.³⁰

Cargill is also entitled to damages in the form of the mileage allowances that should have been paid to Cargill's tank car owner lessors from March 31, 2013 to present, adjusted by the terms of Cargill's car leases in effect over this time period. Pursuant to the terms of Cargill's leases, Cargill's lessors, upon receiving mileage allowance payments from UP would be obligated to pass through or credit Cargill all or some portion of the mileage allowances received from UP. Cargill is therefore entitled to recover its rightful portion of the mileage allowances owed by UP to Cargill's lessors as a third-party beneficiary of UP's obligation to the car lessors.

Cargill does not possess the data necessary to calculate the mileage allowances owed on its tank cars over the relevant period of March 31, 2013 to present. However, this calculation can be made by Railinc.³¹ Cargill accordingly requests that the Board order an accounting to calculate the appropriate mileage allowances due and owing to Cargill and its tank car lessors.

As set forth in Exhibit C to the Zimski Verified statement, filed in support of this Supplemental Opening, Cargill estimates that UP should have paid \${{[REDACTED]}} in mileage allowances for loaded moves in tank cars provided by Cargill during the period 2013-2018. In addition to being directed to pay past allowance amounts owed on Cargill's tank cars, UP should also be directed to continue making such payments on a going forward basis from the date of the Board's decision, unless and until the Board determines an alternative means by which parties who provide UP tank cars can be adequately compensated pursuant to 49 U.S.C. §11122.

³⁰ The Complaint in Docket No. 42144 was filed on March 31, 2015. Pursuant to 49 U.S.C. §11705(c), retroactive reparations are available for the two-year period preceding the Complaint.

³¹ Cargill adopts and incorporates by reference the Verified Statement of John Kieras submitted herewith. Mr. Kieras is a former employee of Union Tank Car Company for 42 years who administered the mileage allowance program for that company. Mr. Kieras provides a summary explanation of how Railinc calculates mileage allowance pursuant to *Ex Parte No. 328*.

V. CONCLUSION

For all the foregoing reasons, as well as those set forth in the Joint Opening, Cargill submits that UP's imposition of freight charges pursuant to Item 55-C, Part D should be declared unlawful and the Board should order UP to pay reparations to Cargill, with interest, for the amounts it has paid pursuant to Item 55-C, Part D. In addition, the Board should hold that UP wrongfully failed to pay mileages allowances on loaded shipments moving in tank cars provided by Cargill and order UP to pay appropriate reparations, with interest, for the period from March 31, 2013 to the effective date of the Board's decision.

Respectfully submitted,



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February 22, 2019

PUBLIC VERSION

**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 KEVEN ZIMSKI

I, Kevin Zimski, make this verified statement in support of complaint of Cargill, Incorporated (“Cargill”) filed in the above-referenced Docket No. 42144 of the Surface Transportation Board (“STB”).

1. I am currently employed by Cargill as Corporate Rail Fleet Manager of Cargill’s fleet of railcars in North America. My business address is 15407 McGinty Road West, Wayzata, MN 55391. My responsibilities as Corporate Rail Fleet Manager include (1) procurement of railcars by purchase or lease, and (2) the overall management of Cargill’s railcar fleet including

arranging for and monitoring the repair, maintenance and qualification of railcars in Cargill's fleet. I am therefore familiar with the size and composition of Cargill's railcar fleet, the negotiation of railcar leases of all types as well as their relevant provisions, and the movement of Cargill's railcars to and from repair shops.

2. Prior to assuming my current position at Cargill in September 2016, I was employed by CHS Inc. – a large cooperative primarily owned by agricultural cooperatives, farmers and ranchers – as Logistics and Private Fleet Manager for approximately two years with responsibilities for rail fleet management similar to those in my current position with Cargill. Prior to working at CHS Inc., I was employed for approximately eight years by Land O'Lakes – a large member-owned agricultural cooperative primarily focused on the dairy industry. My responsibilities at Land O'Lakes included fleet management of railcars as well as rate negotiations with railroads and similar responsibilities for trucking.

A. Cargill's Reliance on Rail Service in Tank Cars

3. Cargill is a large international producer and marketer of food, agricultural and industrial products and services. Cargill buys, processes and distributes grains, oilseeds and other commodities to makers of food and animal nutrition products. Cargill also provides products and services to producers of crops and livestock. In addition, Cargill produces and sells high-quality ingredients, meat and poultry products, and health-promoting ingredients and ingredient systems to food and beverage manufacturers, foodservice companies and retailers of foodstuffs. Finally, Cargill serves industrial users of salt, starch, agricultural feedstocks, energy, and steel products.

4. Cargill is a Delaware corporation headquartered in Wayzata, Minnesota. Cargill has operations in 70 countries and employs approximately 155,000 workers worldwide. Cargill's worldwide operations generated \$109.7 billion in revenue during 2017. Cargill's customers are primarily large industrial companies that require the delivery of products and commodities in bulk

shipments. As a result, Cargill is a major shipper of bulk commodities by rail, moving approximately {{[REDACTED]}} carloads and paying over \${{[REDACTED]}} billion in freight charges annually.

5. Cargill ships a variety of products and commodities by rail that require the use of rail tank cars, including corn sweeteners, edible oils such as corn oil, soybean oil and canola oil, as well as non-edible commodities like ethanol. While Cargill also uses specialized trucks to transport some of the commodities it ships in rail tank cars, trucking large volumes of such commodities over long distances is neither economically nor operationally practicable. As a result, the great majority of Cargill's products that must be shipped in tanks are transported by rail. Consequently, Cargill relies heavily on rail transportation for products that must be transported in tank cars.

6. Cargill operates approximately 200 facilities in the United States that are served by rail. Because many of Cargill's production, processing and distribution facilities are located in the Western United States, approximately 25% of Cargill's tank car shipments are transported on UP. As a result, Cargill relies extensively on UP for rail service in tank cars. Cargill typically sells products transported in rail tank cars on a delivered price basis – meaning that Cargill pays all railroad freight and related charges associated with the shipment of Cargill's products to its customers. During the 2013-2018 time period, Cargill has tendered to UP approximately {{[REDACTED]}} tank car loads per year of various commodities and has paid UP approximately \${{[REDACTED]}} million per year in freight charges for movements in tank cars. The great majority of Cargill's tank car shipments on UP move under common carrier tariffs or exempt rate quotes, with the remaining shipments moving under rail transportation contracts.

B. Cargill's Tank Car Fleet

7. UP does not offer or provide rail transportation in tank cars owned or leased by UP. In order to ship commodities by rail in tank cars, therefore, Cargill is required to provide privately

owned – i.e., non-railroad owned – tank cars to UP. Consequently, Cargill has been required to acquire, manage, and maintain a large fleet of rail tank cars for use by UP and other railroads in providing rail transportation of Cargill commodities requiring such tank cars. During the period 2013-2018, the size of Cargill’s tank car fleet has varied between approximately 9,450 and 10,250 tank cars. Currently, the Cargill fleet of rail tank cars consists of approximately 10,250 tank cars of various types and sizes – including 17,000-gallon tank cars used to transport corn sweeteners, 25,000 to 29,000-gallon tank cars used to transport edible oils and 31,800-gallon tank cars used to move ethanol.

8. Cargill’s rail tank car fleet consists both of tank cars owned by Cargill as well as tank cars leased by Cargill. Tank cars purchased by Cargill as well as those acquired by net or synthetic net leases are assigned Cargill car marks and are treated for most purposes as tank cars “owned” by Cargill. Tank cars that Cargill acquires under full-service leases retain the car marks of the lessors and are considered tank cars “leased” by Cargill for the purposes of mileage allowances and equalization. The percentage of Cargill’s tank car fleet that is leased varies depending on economic and commercial circumstances including the level of lease rates. Currently, Cargill owns slightly more than {{[REDACTED]}} of the tank cars in its fleet; the remainder of its fleet of tank cars are leased from a number of rail car leasing companies.

9. Lease rates for tank cars can vary greatly from time to time based on the age and condition of the rail cars, supply and demand for tank cars, Cargill’s current need for tank cars, and other factors. Cargill negotiates and/or renews lease agreements for groups of tank cars on a staggered basis in order to both hedge the lease rates it pays and to maintain flexibility regarding the size and composition of its tank car fleet. As a result, Cargill’s tank car fleet is constantly in flux with tank cars coming on lease and going off lease on an ongoing basis.

10. Lease agreements for tank cars are largely standardized, containing “boilerplate” provisions that are not subject to significant negotiation. The primary lease provisions that are subject to negotiation are the lease rates, the number, age, and types of tank cars, the allowable miles during the lease term, and the length of the lease term. Cargill seeks multiple quotes and negotiates tank car lease agreements with a number of rail car lessors in order to obtain the best rates and other terms available in the market.

11. Cargill’s full-service lease agreements for tank cars typically provide that Cargill is responsible for the cost of only certain minor repairs and maintenance, primarily involving components like valves, plugs, chains, and fittings handled by Cargill or its customers during loading and unloading. Under full service leases, tank car lessors are generally responsible for all other maintenance, major repairs, retrofits, as well as most of the costs of mandatory ten-year qualification inspections.

12. Cargill’s tank car lease agreements also typically address the disposition of mileage allowance payments received by the lessor for loaded movements in the tank cars leased by Cargill. Mileage allowances are payments railroads are supposed to make to tank car owners to cover the cost of providing privately-owned tank cars used by railroads in revenue service. My understanding is that (1) mileage allowance payments are calculated based on the number of loaded miles traveled by each tank car, and (2) the mileage allowance rates are calculated each year by Railinc – an organization affiliated with the American Association of Railroads – and vary depending on the age and cost of the particular tank car.

13. Cargill is entitled to receive all of the mileage allowances earned by tank cars that Cargill owns. In addition, most of Cargill’s tank car leases provide that Cargill is entitled to at least some portion of mileage allowance payments received by the tank car lessor. Some tank car leases

require the lessor to pay over to Cargill all or a portion of mileage allowance payments received. Other leases provide that mileage allowance payments received by the lessor will be credited in whole or in part against lease payments due from Cargill. I have provided examples of such lease provisions in Exhibit A to this verified statement. As discussed in detail below, UP does not pay mileage allowances for loaded movements in either leased or owned tank cars that Cargill provides to UP for UP's revenue service.

14. Cargill's tank car lease agreements generally require Cargill to pay for the cost of transporting the leased tank cars to and from the point at which they are turned over to UP or another railroad for use in providing rail transportation for Cargill. However, because the cost of moving empty tank cars to repair facilities has historically been understood to be the responsibility of the railroad using the tank car, Cargill's tank car leases generally do not specify whether the lessor or the lessee is responsible for freight charges associated with moving empty tank cars to and from repair shops. Since UP implemented freight charges for empty movements to and from repair shops in 2015, however, UP and tank car lessors have required Cargill to pay freight charges for moving empty tank cars to and from repair facilities.

C. Cargill's Incurs Substantial Expense to Provide Tanks Cars to UP and Other Railroads

15. The cost to Cargill of providing tank cars to UP for use in transporting Cargill's tank car shipments in revenue service is enormous. During the period 2013-2018, Cargill has been required to maintain a fleet of approximately 10,000 tank cars in order to meet its rail shipping needs. In addition, Cargill has incurred the cost of purchasing outright over 3000 tank cars at an approximate average cost of \${{[REDACTED]}} per car or \${{[REDACTED]}} in total. Cargill has also incurred annual rental payments of approximately \${{[REDACTED]}} million per year to lease approximately {{[REDACTED]}} additional tank cars.

16. Also in the 2013-2018 time period, in addition to the costs of acquiring tank cars through purchase or lease during 2013-2018, Cargill has also spent an average of \${{█}} million per year on repair and maintenance costs relating to tank cars. Moreover, Cargill employs a staff of four employees to acquire and manage its fleet of tank cars. Finally, Cargill incurs the risks of maintaining an appropriately sized fleet for its business needs.

D. Cargill's Management of its Rail Tank Car Fleet.

17. Cargill closely manages its fleet of rail cars to ensure efficient utilization of its owned and leased tank cars. Cargill utilizes Alltranstek – an outside fleet management service – to assist Cargill's fleet management team in finding the most efficient and cost-effective options for sending tank cars for required maintenance and repairs as well as working closely with Cargill's lessors to encourage the selection of repair facilities that will minimize the time tank cars are out of service. Cargill generally seeks to have its tank cars routed from the Cargill facility at which it is loaded to its customer where it is unloaded and then moved directly back to the same Cargill facility where it was loaded. While tank cars sometimes may have to be diverted to cleaning and repair facilities for required maintenance or repair, Cargill seeks to minimize the distance that empty tank cars will have to travel to and from repair shops in order to minimize the time that the tank cars will be out of service. Cargill's efficient fleet management has ensured that the annual empty miles of its fleet of tank cars are substantially less than the number of free empty miles allowed under the mileage equalization program approved in Ex Parte 328.

18. The mileage equalization program is designed to incentivize owners of private tank cars to manage the movement of their tank cars to minimize the number of empty miles relative to loaded miles. Under the mileage equalization program, tank cars are allowed empty movements of up to 106% of the number of total loaded miles without additional charges from the railroads. For the purposes of the equalization program, loaded and empty miles are calculated on an annual

fleet-wide basis. If a fleet of tank cars exceeds the 106% threshold, a specified per-mile freight rate is assessed on the car owner for empty miles in excess of the 106% threshold. During the 2013-2018 time period, Cargill's fleet of tank cars has consistently remained below the 106% equalization threshold, and Cargill therefore has not been assessed freight charges under the mileage equalization program.

19. Cargill seeks to efficiently manage its tank car fleet not only to avoid paying equalization charges, but also to maximize utilization of its tank cars for loaded moves carrying Cargill's products. Maximizing the efficient utilization of its tank cars allows Cargill to ship products to its customers using the fewest number of tank cars. As a result, Cargill manages its tank car fleet to minimize the number of empty miles its tank cars must travel to repair facilities because the more miles a tank car must travel to move to a shop, the longer it will remain out of service.

20. In addition, Cargill endeavors to minimize the number and length of empty maintenance and repair moves by conducting minor maintenance and repairs at its own facilities when practicable. Cargill also makes use of mobile repair providers – companies that can undertake certain repairs where the tank car is located rather than moving the tank car to a repair facility. However, most major repairs, mandatory inspections¹, and retrofitting of tank cars must be performed at a repair facility qualified and available to do the work.

21. When a tank car owned by Cargill must be sent to a repair facility, Cargill endeavors to schedule the diversion for repairs and select an appropriate repair facility in a manner that minimizes the time the tank car will be out of service. For example, except in cases where the

¹ Tank cars are required to undergo a comprehensive inspection and requalification every ten years. These mandatory inspections can only be performed at a qualified tank car repair facility.

need for repair work is immediate or urgent, Cargill attempts to schedule a diversion to repair facilities when the empty tank car is near an appropriate repair shop. More generally, Cargill considers a considerable number of factors in selecting the repair facility to which its tank cars will be sent, including (1) the location of the shop relative to the current location of the tank car, (2) whether the shop is qualified to perform the type of work required, (3) whether the shop has available capacity to handle the work in a timely manner, (4) the shop's reputation regarding the quality of its services, (5) and the price charged by the shop relative to alternative shops.

22. Cargill's selection of an appropriate repair facility may also be affected by the location and availability of qualified tank car cleaning facilities. For most inspections and significant repair work, a tank car must be completely unloaded and cleaned of all product residue before the work can be commenced. Many tank car repair facilities are not equipped to provide the required cleaning and product disposal services for the variety of commodities and products that Cargill ships in tank cars. As a result, specialized cleaning services are generally required to remove and dispose of residual and sometimes hazardous commodities remaining in the tank car after it has been unloaded. While a qualified cleaning facility is often located near the empty tank car's location or the repair facility selected to work on the tank car, that is not always the case. Consequently, tank cars needing repairs sometimes have to be first moved a considerable distance to be cleaned before it can be routed to the appropriate repair facility.

23. For tank cars that are leased by Cargill, the selection of an appropriate repair facility for tank cars leased by Cargill is controlled by the lessor, who is typically responsible for most, if not all, of the costs of the inspection, maintenance or repairs. Some tank car lessors prefer to primarily use their own repair facilities or shops operated by affiliated entities to perform work on Cargill's leased tank cars. Other lessors may prefer to use third-party repair facilities with which

they have contracts to perform work on Cargill's leased tank cars. While Cargill attempts to influence the lessor's selection of repair facilities in order to minimize the time Cargill's tank cars will be out of service, tank car leases grant the lessor the right to unilaterally select where the tank car will be repaired or inspected pursuant the terms of the lease. Despite Cargill inability to exercise absolute control of the selection of repair facilities for all of its tank cars, Cargill has been able to limit the annual empty miles of its tank car fleet well below the 106% threshold allowed by the equalization program.

E. UP's Imposition of Item 55-C Charges for Movements of Cargill's Tank Cars to Repair Facilities

24. In November 2014, UP announced that starting January 1, 2015, it would – for the first time – begin charging Cargill and other tank car shippers for moving empty tank car to repair facilities. Prior to UP's announcement, the movement of empty tank cars to repair facilities historically had always been at the expense of UP and performed without charge to providers of privately-owned tank cars used by UP in revenue service. Despite the unprecedented nature of UP's announced charges for empty movements to repair facilities and the significant financial impact those charges would have on tank car shippers like Cargill, UP never discussed its plans to charge for empty repair moves with Cargill – or to the best of my knowledge, the industry at large – before announcing Item 55-C, Part D. Similarly, although UP's announcement suggested that UP was implementing charges for empty tank car movements to repair facilities in order to, among other things, provide more timely feedback to shippers about efficient fleet management and to reduce the empty miles on UP's network, UP never discussed those issues with Cargill or provided any facts to suggest that tank car fleets were being managed inefficiently.

25. Cargill protested UP's announced plan to charge for empty tank car repair moves. For example, Cargill's Rail Transportation Manager during the 2014-2015 time period, Peter

Cleary – who also served as Chairman of the North America Freight Car Association’s (“NAFCA”) Operating Committee - signed a letter dated December 22, 2014 on behalf of NAFCA and its members formally requesting that UP withdraw its announced tariff revision to impose charges for empty tank car moves to repair shops. UP refused to reconsider its decision to implement Item 55-C charges for empty repair movements for tank cars.

26. Notwithstanding NAFCA’s protest of UP’s unprecedented decision to charge for empty tank car moves to repair facilities, UP issued Tariff UP 6004, Item 55-C, Part D, to be effective January 1, 2015. Item 55-C established substantial mileage-based charges for the movement of empty tank cars to and from repair facilities, effective on January 1, 2015:

1-250 miles	\$1317 per car
251-500 miles	\$1477 per car
501 or greater miles	\$2.96 per mile

UP has imposed annual increases to its Item 55-C charges in 2016, 2017, 2018, and 2019.

The current 2019 Item 55-C charges are:

1-250 miles	\$1555 per car
251-500 miles	\$1744 per car
501 or greater miles	\$3.49 per mile

UP assesses a fuel surcharge on each empty tank car movement in addition to Item 55-C freight rates. Item 55-C charges do not apply to the first empty move following a loaded line-haul revenue move on UP. Item 55-C defines “Repair Facility” broadly to include facilities at which tank cars are sent to be cleaned before being routed to a repair shop.

27. The per-mile rates established by Item 55-C are far in excess of the rates applicable under the equalization program for empty moves exceeding 106% of the loaded miles. In January 2015, the equalization rate was \$.96 per mile, but applied only to empty miles in excess of 106%.

UP's Item 55-C per-mile rate applies to empty movements to and from repair shops regardless of how efficiently Cargill manages its tank car fleet. Moreover, in January 2015, UP's Item 55-C per-mile rate was \$2.96 (for empty moves in excess of 500 miles), but for moves less than 250 miles, the applicable 55-C rate could easily exceed \$25.00 per mile. For example, the effective freight rate for moving an empty tank car 50 miles under 55-C is more than \$25.00 per mile. By issuing Item 55-C, UP unilaterally removed itself from the equalization program for empty tank car moves to repair facilities and substituted rates for those moves that are multiples of the equalization rate.

28. UP's imposition of a large minimum charge for short empty tank car movements greatly increases the cost to Cargill of moving its tank cars to repair facilities. As an initial matter, in many if not most cases, Cargill's tank cars must be moved to a cleaning facility before they can be routed to a repair shop. For the purposes of Item 55-C, however, UP treats the required move to the cleaning facility, the subsequent move to the repair shop, and the third move back to a Cargill facility as separate empty moves – with the latter two assessed freight charges under Item 55-C. Thus, for example, in 2019, a tank car that moves 50 miles to a cleaning facility, then 50 miles to the nearest repair shop, and then 50 miles back to Cargill's facility would be charged under Item 55-C for the latter two moves – each subject to the minimum charge of \$1,555 per car or \$3,110 in total.

29. UP's implementation of Item 55-C charges significantly interferes with the efficient management of Cargill's tank car fleet. The imposition of Item 55-C charges for each leg of an empty move to and from a repair facility - except for the first such move after a loaded revenue move - distorts Cargill's decision-making process when selecting where to send the tank car for repair. In cases where it would otherwise be more efficient or cost-effective to send a tank car to

a repair shop near its point of unloading, the substantial freight charges assessed under Item 55-C dictate that the tank car instead be moved to a repair shop closer to the tank car's next anticipated loading point.

30. UP's assessment of Item 55-C charges for empty tank car moves to and from repair facilities has had a significant financial impact on Cargill. UP has invoiced Cargill under Item 55-C for both the tank cars Cargill owns as well as the tank cars Cargill leases. Cargill's accounting department has tracked the payment of invoices to UP for 55-C freight charges invoiced by UP since January 1, 2015. As shown in Exhibit B to my Verified Statement, during the period from January 1, 2015 through December 31, 2018, Cargill paid 5,677 UP invoices under Item 55-C, Part D totaling \$ {{[REDACTED]}}. Cargill has continued to receive and pay invoices from UP for Item 55-C charges since the end of 2018.

F. UP's Failure to Pay Mileage Allowances for Loaded Tank Car Movements

31. Cargill provides thousands of tank cars to UP for UP's use in providing rail transportation services from which UP earns substantial revenues from Cargill. In order to provide the tank cars that UP uses in its revenue service, Cargill incurs great expense to acquire, maintain and manage its tank car fleet. While UP uses Cargill's tank cars in revenue service to generate approximately \${{[REDACTED]}} million per year in revenue for UP, UP does not compensate Cargill in any way for the use of the tank cars that Cargill provides to UP.

32. UP does not pay mileage allowances for loaded movements in tank cars owned by Cargill and has not done so for as long as anyone at Cargill can remember. No one in Cargill's rail transportation department can recall UP offering any freight rate for tank car shipments that included the payment of mileage allowances. In fact, UP offers, quotes and charges only rates designated as "zero allowance" rates that specify that UP will not pay mileage allowances. For

example, all of UP's common carrier tariffs governing Cargill's tank car shipments expressly state that mileage allowance payments on private equipment will not apply.

33. UP does not compensate Cargill in any other way for UP's use of tank cars owned by Cargill. For example, UP does not directly reimburse Cargill for the costs of providing tank cars for UP's use in revenue service. In addition, although I understand that UP has argued in this proceeding that it offers discounted "zero allowance" line haul rates to Cargill in place of the mileage allowance payments it owes to Cargill, that is simply not accurate. UP has never represented to Cargill's that its freight rates are discounted to compensate Cargill for the use of its tank cars, nor has UP ever indicated to Cargill the amount by which its freight rates are supposedly discounted or how those purported discounts are calculated.

34. UP also does not pay mileage allowances for loaded movements in tank cars leased by Cargill and has not done so since at least 2013 and likely well before 2013. Under most of Cargill's tank car leases, mileage allowances due on leased tank cars would be paid in the first instance to the lessor of the tank cars. However, under most of Cargill's leases, the lessor is obligated to pay over to Cargill some or all of the mileage allowances received from UP and other railroads – either in form of direct payments or credits against rental payments owed by Cargill under the leases. Cargill has not received any payments or credits from its tank car lessors for any mileage allowances from UP since before 2013 because UP has not made mileage allowance payments to Cargill's lessors.

35. UP has never offered Cargill a choice of freight rates for tank car shipments. UP has never offered Cargill a true choice of rates – a zero allowance rate in an UP-provided tank car or a full mileage rate in a private tank car – because UP does not offer tank car transportation in tank cars owned by UP. UP has not even offered Cargill a choice of rates in private tank cars –

that is, a choice of a full allowance rate (including payment of mileage allowances to Cargill) or a discounted zero allowance rate (with no payment of mileage allowances to Cargill). UP offers only one kind of rate for tank car movements in Cargill-provided tank cars – a freight rate without the payment of mileage allowances. All of the UP tank car tariffs under which Cargill ships expressly disavow the payment of any mileage allowances.

36. I am aware of no reason to believe that UP even considers mileage allowances or the costs incurred by Cargill in providing tank cars to UP when UP establishes rates for Cargill's tank car shipments. Based on Cargill's experience in its dealings with UP, UP sets its freight rates for tank car shipments based solely on what it believes the market will bear in order to maximize UP's revenues and profit. In fact, UP's conduct since it began imposing 55-C charges in 2015 demonstrates that UP is not offering discounted rates in place of paying mileage allowances or otherwise compensating Cargill for providing tank cars used in UP's revenue service. If UP was actually discounting its freight rates for tank car shipments to compensate Cargill for the costs incurred in providing tank cars to UP, UP would have reduced its rates in January 2015 to reflect the additional cost to Cargill of paying to move empty tank cars to repair facilities. However, UP did not reduce its freight rates for tank car shipments when it began charging for moving empty tank cars to repair facilities in 2015 or since. Nor did UP reduce its tank car freight rates when it raised the rates it charges under Item 55-C in 2016, 2017, 2018, and 2019. Instead, UP has continued to raise its line haul rates since the implementation of Item 55-C, Part D.

37. Cargill does not have all the information required to calculate the exact mileage allowances due for each of its tank cars during the period from 2013 to 2018. I believe that Railinc is capable of accurately calculating mileage allowances on a per tank car basis. However, based on information Cargill has received from Railinc, tank car lessors and vendors, and UP in the

normal course of business, I have estimated the mileage allowances that UP should have paid on Cargill's loaded movements in tank cars during the period from 2013 through 2018. During the 2013-2018 time period, Cargill's tank car fleet accumulated a total of {{[REDACTED]}} loaded miles on UP – an average of {{[REDACTED]}} loaded miles per year. Based on an average tank car value of \${{[REDACTED]}} and an average age of 25 years for tank cars in Cargill's fleet, I have estimated the average applicable mileage allowance rate to be \${{[REDACTED]}} per mile, based on Tariff RIC-6007-O issued on February 19, 2015.

38. As shown in Exhibit C to my Verified Statement, applying the average mileage allowance rate of \${{[REDACTED]}} per mile to the loaded miles accumulated by Cargill's tank car fleet on UP for the period 2013-2018 shows that UP should have paid \${{[REDACTED]}} in mileage allowances during the 2013-2018 period – or an average of \${{[REDACTED]}} per year. I believe my estimates are reasonable and conservative because my calculation used a conservative average value of the tank cars in Cargill's fleet. As shown on Exhibit C, I prepared similar calculations using slightly higher and lower tank car valuations and mileage allowance rates to demonstrate that UP's mileage allowance obligation would remain substantially similar even if the estimate of the average value of Cargill's tank cars values were changed.

VERIFICATION

I, Kevin Zimski, hereby certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on this 22nd day of February, 2019.



Kevin Zimski
Corporate Rail Fleet Manager

Exhibit A

REDACTED

Exhibit B
REDACTED

Exhibit C

REDACTED

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February, 2019, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or a more expeditious manner of delivery, on all of the parties of record in NOR 42144, *et al* (consolidated).



David K. Monroe