

**PUBLIC VERSION**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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June 13, 2022  
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Public Record

|                                 |   |                      |
|---------------------------------|---|----------------------|
| Sanimax USA LLC,                | ) |                      |
|                                 | ) | DOCKET NO. NOR 42171 |
| Complainant,                    | ) |                      |
|                                 | ) |                      |
| v.                              | ) |                      |
|                                 | ) |                      |
| Union Pacific Railroad Company, | ) |                      |
|                                 | ) |                      |
| Defendant.                      | ) |                      |

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**SANIMAX USA LLC'S OPPOSITION  
TO UNION PACIFIC RAILROAD COMPANY'S MOTION TO DISMISS**

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**I. INTRODUCTION**

Sanimax USA LLC (“Sanimax”) respectfully submits this reply in opposition to the Motion to Dismiss of Union Pacific Railroad Company (“UP”), as filed on May 24, 2022 (the “Motion”).

UP’s request to dismiss this case as moot came as a surprise to Sanimax. UP [REDACTED] [REDACTED] and filed its Motion with no prior notice to Sanimax or counsel of either the Motion or that UP considered [REDACTED] as full relief. In fact, Sanimax *has not* received the full relief it is seeking from the Surface Transportation Board (“Board”), and UP’s [REDACTED] actions do not resolve all the issues in this case. The case is definitely not moot.

Instead, UP offers a partial, limited solution to its rail service failures: [REDACTED]  
[REDACTED]

This is, on its face, temporary and incomplete relief, not the full correction of UP’s service failures

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and remediation as Sanimax has demanded. Further, UP has not provided monetary compensation to Sanimax for its service failures, as demanded by Sanimax. Had UP consulted with Sanimax or its counsel before filing the Motion, Sanimax would have assured UP that [REDACTED]. Live issues and controversy remain in this case, for which only the Board can grant Sanimax effective relief. UP's attempt to dismiss this case with a wave of its hand after unilaterally reducing its service by 40%, engaging the time and resources of the Board, and causing Sanimax to spend significant time and money is unacceptable. Moreover, this case presents the Board with an opportunity to exercise its jurisdiction in the broader public interest and offer direction to the railway industry on the proper contours of the common carrier obligation. Respectfully, UP's Motion should be denied.

## II. ARGUMENT

UP's offer [REDACTED] does not render this case moot.<sup>1</sup> The Board has observed that a complaint becomes moot when it "no longer presents a case or controversy for the Board to resolve." *American Fuel & Petrochemical Manufacturers v. BNSF Railway Co.*, Docket No. 42146, slip op. at 2 (STB served July 17, 2018). However, a complaint ceases to present a case or controversy for resolution only when "it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Service Employees Intern. Union, Local 1000*, 567 U.S. 298, 307 (2012) (cleaned up) (citation omitted). "As long as

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<sup>1</sup> [REDACTED]  
[REDACTED]. Sanimax strongly disagrees with this approach, and the Board should reject it also. In fairness, UP cannot seek to dismiss this case on the basis of actions that it refuses to disclose. [REDACTED]. In this Reply, however, to avoid ancillary disputes about the scope of the Protective Order, Sanimax will follow UP's approach.

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the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.” *Id.* at 307-08.

Specifically, a defendant’s voluntary cessation of the challenged conduct does not automatically render a case moot. *See id.* at 307. Indeed, a party’s attempt to evade a decision before a tribunal by declaring the matter moot should be “viewed with a critical eye.” *Id.*; *see also Kifafi v. Hilton Hotels Retirement Plan*, 701 F.3d 718, 724 (D.C. Cir. 2012) (a party cannot “deprive a court of jurisdiction with a wave of its hand”). Voluntary cessation does not moot a case because a party would be free to resume its conduct as soon as the case is dismissed. *Knox*, 567 U.S. at 307. Voluntarily ceasing the challenged conduct can moot a case only where it is “absolutely clear” the conduct cannot reasonably be expected to recur. *United States v. Concentrated Phosphate Export Ass’n*, 393 U.S. 199, 203 (1968); *compare id.* at 202-03 (informal assurance not to resume the challenged activity was not sufficient to make the case moot) *and Halet v. Wend Investment Co.*, 672 F.2d 1305, 1307-08 (9th Cir. 1982) (defendant’s “promise” to maintain a new policy did not moot plaintiff’s challenge where there is no reasonable expectation that defendant would not revert back to the challenged policy), *with Dalton v. NPC International, Inc.*, 932 F.3d 693, 695 (8th Cir. 2019) (“*permanent*” physical changes to a parking lot to remediate alleged ADA violations made the case moot because recurrence of the violations were not reasonably likely) (emphasis added).

**A. [REDACTED] Does Not  
Resolve The Controversy**

UP’s proposal [REDACTED] provides incomplete relief to Sanimax in an effort to evade a Board decision. Sanimax requested a Board

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order compelling UP “to restore scheduled service to Sanimax to five days per week.”<sup>2</sup> Sanimax did not request [REDACTED]. [REDACTED], subject to the Board’s determination of proper relief – and this is entirely consistent with UP’s common carrier obligation under the Interstate Commerce Act to provide adequate rail service to Sanimax. Once the Board orders UP to provide adequate common carrier rail service to Sanimax, UP cannot thereafter abandon those common carrier obligations, and the requirement to abide by the Board’s determination, without Board approval. *See, e.g., Thompson v. Texas Mexican Rwy.*, 328 U.S. 134, 143-45 (1946) (“*Tex-Mex*”). This is a key common carrier service obligation that is crucial to Sanimax, and it shows that Sanimax maintains a “concrete interest . . . in the outcome of the litigation.” *Knox*, 567 U.S. at 307-08. Clearly, Sanimax has not “received the . . . [remedy] it sought” and its Complaint cannot be dismissed as moot. *Cf. Application of the National R.R. Pass. Corp. Under 49 U.S.C. § 24308(E)—CSX Transp., Inc. and Norfolk S. Rwy. Co.*, Docket No. FD 36496, slip op. at 11 (STB served Aug. 6, 2021).

Similar to the defendant in *Halet v. Wend Investment Co.*, *supra*, UP could [REDACTED] and UP “has not demonstrated that there is no reasonable expectation of such an occurrence.” 672 F.2d at 1308. In *Halet*, plaintiff filed a civil rights challenge to defendant’s policy of renting apartments to adults-only. *Id.* at 1307. Defendant argued the case was moot because defendant changed its policies after plaintiff filed the complaint to allow rentals with minor children. *Id.* However, the Ninth Circuit disagreed with the defendant. Because there was no binding authority, like a change in municipal regulations, to hold defendant to its policy change, the court found there was no

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<sup>2</sup> *See* Verified Compl., *Sanimax USA LLC v. Union Pacific Railroad Co.*, Docket No. NOR 42171, at 11 (Nov. 6, 2020).

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reasonable expectation that defendant would not resume the offending policy after the case was dismissed. *Id.* at 1308.

Similarly, nothing here prevents UP [REDACTED]

[REDACTED] is not consistent with the common carrier obligation under the Interstate Commerce Act, [REDACTED]

[REDACTED]. *See Tex-Mex, supra.*, 328 U.S. at 143-45.<sup>3</sup> Accordingly, [REDACTED]

[REDACTED].

**B. Sanimax’s Claim for Damages is Unresolved**

Sanimax’s claim for damages is preserved and remains unresolved for the Board to decide. The damages claim is not moot.

Beginning with the filing of its complaint on November 6, 2020, Sanimax has consistently sought an award of damages for UP’s failure to fulfill its common carrier obligations.<sup>4</sup> UP claims that Sanimax’s Opening Statement “did not pursue its damages claims against Union Pacific.” UP Motion at 2. That assertion is incorrect. Sanimax did not give up seeking damages from UP.

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<sup>3</sup> [REDACTED]

<sup>4</sup> *See Verified Compl., Sanimax USA LLC v. Union Pacific Railroad Co.*, Docket No. NOR 42171, at 11 (Nov. 6, 2020) (requesting that the Board “award damages to Sanimax for such violations as may be proven in an investigation of this Complaint”).

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Rather, in order to simplify resolution of this case, Sanimax’s Opening Statement asked to hold the damages claim in abeyance until the Board’s decision on UP’s liability.<sup>5</sup> The fact is, Sanimax continued to suffer damages from November 2, 2021 (under the Board’s retroactivity determination<sup>6</sup>) until UP resumed adequate common carrier service. Sanimax could not know if or when UP would cease its offending behavior, so Sanimax had no way to calculate damages accurately until the Board ruled on UP’s liability – in particular, *when* UP would be ordered to resume five-days-per-week service. In order to promote efficient litigation and not waste Board resources, Sanimax held its damages claim in abeyance and reserved the right to submit evidence as to damages at an appropriate time. This is an entirely permissible common-sense approach.

Additionally, contrary to UP’s assertion, Sanimax *did* submit initial evidence of damages in its Opening Statement.<sup>7</sup> UP’s service failures have damaged Sanimax in two ways: (1) imposition of increased costs on Sanimax associated with shipping finished goods when UP failed to service the South St. Paul facility, and (2) lost profits associated with the opportunity cost of delivering finished goods to customers via truck instead of rail.<sup>8</sup>

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<sup>5</sup> See Sanimax USA LLC’s Opening Statement, *Sanimax USA LLC v. Union Pacific Railroad Co.*, Docket No. NOR 42171, at 17 n.14 (Mar. 2, 2022) (“Sanimax Opening Statement”).

<sup>6</sup> Decision, *Sanimax USA LLC v. Union Pacific Railroad Co.*, Docket No. NOR 42171 (STB served Feb. 25, 2022).

<sup>7</sup> See Sanimax Opening Statement at Ex. 10.

<sup>8</sup> Although attorneys’ fees and litigation costs are not a traditional component of damages in STB common carrier complaints, Sanimax will also point out that it has had to bear attorneys’ fees running to approximately [REDACTED] – not to mention the major diversion of staff and executive time – since the complaint was filed in this case in order to fight UP’s dereliction of its common carrier duties and return service to an acceptable frequency which allows Sanimax to fulfill its key role in the agri-food industry. [REDACTED] is an acknowledgment that Sanimax should never have been forced to incur the costs of this litigation.

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When UP's service failures force Sanimax to ship finished goods via truck, Sanimax faces increased labor and handling costs to load the trucks. And, Sanimax may incur increased transportation charges using trucks. As a result of UP's service failures, between November 2, 2021 and January 25, 2022, Sanimax incurred at least [REDACTED] in the increased costs associated with trucking finished goods.<sup>9</sup>

When UP's actions force Sanimax to ship finished goods via truck, Sanimax also incurs damages in the form of lost profits. Sanimax is able to earn higher sales prices on its finished goods when shipping them via rail. In combination with lower shipping costs associated with rail, Sanimax can earn larger margins on its finished goods shipped via rail. As a result of UP's service failures, between November 2, 2021 and January 25, 2022, Sanimax incurred damages in the form of lost profits of at least [REDACTED].<sup>10</sup>

Sanimax emphasizes that the above damages amounts are only partial; they are computed through January 25, 2022, reflecting the evidentiary record as it stands now.<sup>11</sup> Sanimax has asked the Board to allow submission of final evidence as to damages at an appropriate future time when the Board determines liability. Such an approach is efficient and will allow Sanimax to present an accurate picture of damages. Nevertheless, contrary to UP's assertion, there is evidence of

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<sup>9</sup> See Sanimax Opening Statement at Ex. 10. Sanimax's damages figures presented here differ from the figures presented in its first supplemental responses and objections to Union Pacific Railroad Company's first set of interrogatories, as served on January 31, 2022, because of different start dates for the computations. Prior to Board's retroactivity decision on February 25, 2022, Sanimax presented damages figures from August 3, 2020, when UP restricted its service, through January 25, 2022. Sanimax's evidence supports the damages figures shown here for the period *November 2, 2021 through January 25, 2022*.

<sup>10</sup> See *id.*

<sup>11</sup> Informally and tentatively, Sanimax estimates increased costs plus lost profits for the period November 2, 2021 through [REDACTED] to total at least [REDACTED].

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damages in the record if the Board chooses to address the issue at this time, though Sanimax requests that the computation of damages continue to be held in abeyance.

### **C. UP's Voluntary Actions Do Not Resolve the Revocation of the Commodity Exemptions**

In addition to the unresolved scheduled-service and damages issues, UP's Motion does not address, or even mention, another key aspect of this case: the Board's revocation of the commodity exemptions that allowed this case to proceed. The Board revoked the regulatory exemptions applicable to Sanimax's commodities "to the extent necessary to consider the issues raised in Sanimax's complaint."<sup>12</sup> [REDACTED] has not resolved – and cannot resolve – how the commodity exemption revocation will apply going forward. Granting UP's Motion and dismissing the case as moot, without the Board ever "consider[ing] the issues raised in Sanimax's complaint," would leave the parties with significant uncertainties on this issue. This is a further reason not to consider the dispute as moot.

### **III. CONCLUSION**

For the foregoing reasons, Sanimax's claims against UP are not moot. Sanimax is an integral player in the nation's agri-food supply chain and it has spent considerable resources ensuring it can continue to fulfill its role in the supply chain by fighting to ensure UP also fulfills its obligations as a common carrier. However, UP has not fulfilled its obligations and cannot dismiss this case with [REDACTED]. The Board should deny UP's Motion to Dismiss.

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<sup>12</sup> Decision, *Sanimax USA LLC v. Union Pacific Railroad Co.*, Docket No. NOR 42171, at 7 (STB served Nov. 2, 2021).

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Respectfully submitted,

Date filed: June 13, 2022

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 13, 2022, the foregoing Sanimax USA LLC's Opposition to Union Pacific Railroad Company's Motion to Dismiss was served by email and first class mail on Union Pacific's attorneys and on the Association of American Railroads (Public version only) at the following addresses:

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