

242571

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
February 7, 2017
Part of
Public Record

NORTH AMERICA FREIGHT CAR
ASSOCIATION; AMERICAN FUEL &
PETROCHEMICALS MANUFACTURERS;
THE CHLORINE INSTITUTE; THE
FERTILIZER INSTITUTE; AMERICAN
CHEMISTRY COUNCIL; ETHANOL
PRODUCTS, LLC D/B/A POET ETHANOL
PRODUCTS; POET NUTRITION, INC.; and
CARGILL INCORPORATED,

Complainants,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

NOR 42144

**STATUS REPORT TO ADMINISTRATIVE LAW JUDGE AND REQUEST FOR
ESTABLISHMENT OF DISCOVERY END DATES**

Complainants in this case hereby submit the following report on the status of discovery in this case, and respectfully request that Your Honor establish deadlines for the completion of document and deposition discovery in this proceeding. Contemporaneously with this filing Complainants are submitting a similar status report to the Surface Transportation Board (the "Board") requesting that the Board re-institute a procedural schedule in this case to commence with the end dates for discovery.

A. Status Report

Since the last correspondence with Your Honor on November 8, 2016, the parties have made significant strides in completing their respective document and deposition discovery. As of the date of this filing:

1. All of the Association Complainants have completed their document production to Defendant Union Pacific Railroad Company ("UP"), subject to production of privilege logs by the North America Freight Car Association and American Fuel & Petrochemical Manufacturers.
2. On December 14, 2016, Complainants took the depositions of two UP employees in Omaha, Nebraska.
3. Complainants Ethanol Products, LLC d/b/a POET Ethanol Products, and POET Nutrition, Inc., completed their document production to UP in January, 2017, subject to a few follow up requests for documents by UP that neither POET entities oppose.
4. On January 19, 2017, UP noticed the depositions of employees of POET Ethanol Products, POET Nutrition, Inc. and Cargill. The employees to be deposed have not yet been designated and the dates for these depositions have not yet been set.
5. Cargill has produced substantial cost and other data to UP pursuant to agreements reached at the discovery conferences before Your Honor, and is in the process of completing its production of other documents. Cargill expects to complete that production before the end of this month.
6. On October 27, 2016, UP counsel informed Complainants' counsel via email that "my understanding is that, subject to checking on one or two open issues, we should complete our production of documents next week. I'm not yet certain about the privilege log." On

January 19, 2017, however, in response to a request for UP to confirm it had completed its production, UP counsel informed Complainants via email that “Union Pacific still has some documents left to produce. We also expect to produce an update of our traffic data, covering movements through 2016, by late February.”

7. During the week of January 16, 2017, Complainants’ counsel commenced discussions with UP counsel aimed at potentially reaching an agreement on end dates for document production, depositions, and production of privilege logs¹ to present to Your Honor. The end dates for discovery discussed by the parties’ counsel were substantially similar to the schedule proposed below in Section B. On January 26, however, prior to any agreement being reached, UP filed a motion to consolidate this case with Docket Nos. NOR 42150 and NOR 42152. Upon filing its motion, UP discontinued its participation in those discussions.
8. It is Complainants’ collective understanding that UP and the four tank car owner/lessor companies it served subpoenas upon are working on completing discovery in accordance with the directives outlined in the decision served in this case on October 13, 2016, and the hearings held on the discovery sought from these parties by UP. Complainants are not privy to any agreed-upon end dates for such discovery from these non-parties to UP, but Complainants reiterate that this production is not germane to Complainants’ opening

¹ The parties originally agreed to produce privilege logs within 60 days after document production has been completed in this case, or within any other time period mutually agreed upon by the parties. However, given the course of discovery in this case and its unusually long duration, retaining a 60 day period to prepare privilege logs no longer makes practical sense. While Complainants are prepared to shorten the time frame for submitting privilege logs, they have been unable to obtain UP’s agreement to do so. Given that UP indicated over 90 days ago that its document production was nearly complete, Complainants question whether UP needs 60 additional days from when it finally declares its production complete to then complete its preparation of a privilege log and produce it to Complainants.

evidence, but rather UP's responses to such evidence. As such, that production from non-parties should have no bearing on the end dates for party discovery.

B. Proposed End Dates for Discovery

Complainants submit that there is ample cause for ending the discovery phase of this case and moving to the evidentiary phase. Accordingly, Complainants respectfully request that Your Honor expeditiously establish the following schedule for the completion of discovery:

February 28, 2017	Completion of Document Production
March 7, 2017	Production of Privilege Logs
March 17, 2017	Objections to Privilege Logs
March 31, 2017	Supplemental Production from Privilege Log Objections
April 14, 2017	Completion of Deposition Discovery

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February, 2017, 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 Docket No. NOR 42144 listed in the official service list prepared for this proceeding.

I also caused a copy of the foregoing document to be served by email and by hand delivery upon Administrative Law Judge John P. Dring, Federal Energy Regulatory Commission Office of Administrative Law Judges, 888 First Street, N.E., Washington DC 20426.

/s/ Thomas W. Wilcox
Thomas W. Wilcox