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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 328

**INVESTIGATION OF TANK CAR
ALLOWANCE SYSTEM**

**REPLY TO UNION PACIFIC RAILROAD COMPANY'S
PETITION TO MODIFY ORDER ADOPTING
NATIONAL TANK CAR ALLOWANCE AGREEMENT**

Pursuant to the regulations of the Surface Transportation Board (“STB” or “Board”), the North America Freight Car Association (“NAFCA”) hereby replies in opposition to the Petition filed in this docket by Union Pacific Railroad Company (“UP”) for an order from the Board that would modify the National Tank Car Allowance Agreement (“Agreement”) by terminating UP’s obligations under that agreement to comply with its provisions governing mileage equalization. For the reasons set forth below, UP’s Petition should be summarily denied or rejected because (1) it is premature in that it presumes as settled law certain matters that are very much in dispute and presently being litigated before the Board by UP and NAFCA and numerous other complainants; and (2) it is not an authorized means to amend or renegotiate the Agreement.¹

¹ The Board should also reject the Petition because it violates the Board’s regulations. It is telling that the only authority UP claims *might* allow its Petition is 49 C.F.R. §1115.4, which it relegates to a footnote. Petition at 20, note 16. However, section §1115.4 states that such petitions must meet the requirements of §1115.3(d), which states that they “must not exceed 20 pages in

A. Identity and Interest of NAFCA

NAFCA is an organization made up of rail car manufacturers, private car (non-railroad owned) owner/lessors, owner/lessees, lessees, other rail shippers and entities that support the railcar industry. Its members include some of the largest railcar manufacturers and lessors in the industry, as well as rail shippers who collectively lease and/or own and maintain hundreds of thousands of railcars that are furnished to the Class I railroads in order to receive rail transportation service.² Combined, NAFCA's members own and/or lease in excess of 700,000 railcars. NAFCA is dedicated to promoting the safe, efficient and economical ownership and use of private railcars. To achieve these goals, NAFCA and its members rely on their extensive collective knowledge of the rail car industry to investigate relevant issues and to educate public policy makers, regulators and the media regarding operational, regulatory, economic, and legal matters that affect private railcars. NAFCA also strives to ensure its members and all private car owners and operators are subject to reasonable, equitable and lawful practices and rules affecting the use, repair, and principles of compensation for private railcars.

B. The Petition is Premature

As the Petition states, the question of whether UP has the right to establish charges for the movement of empty tank cars "to and from" repair shops is currently being litigated by UP, NAFCA, and numerous other trade associations and individual complainants in Docket NOR 42144, *North America Freight Car Assn, et al v. Union Pacific Railroad Company*, and in Dockets NOR 42150, 42152, and 42153. The Board has consolidated these cases. UP's Petition was filed

length," and also that if the petition exceeds 10 pages in length then it "must" include "a separate preface and summary of argument not exceeding 3 pages." UP has blatantly ignored this procedural regulation. The Board should either reject the petition for violating this requirement, or only consider the first 20 pages as appropriately filed and disregard or strike the rest.

² <http://www.nafcahq.com/home>.

the day before its reply evidence was due in those consolidated proceedings. The issues in NOR 42144, *et al* include whether UP's empty repair move charges constitute an unlawful attempt to subvert the Agreement on mileage equalization. These issues are therefore *not* settled law and the record in those cases has not even closed. Yet UP has not only included in its Petition many of the arguments it has raised in its reply evidence in the consolidated cases, its request for relief requires the Board to presume as settled law that UP and other railroads may charge for empty tank car movements to and from repair shops and may remove the miles associated with such moves from the mileage equalization formula. *See e.g.* Petition at 2, 11-14, and 27. Such claims are obviously premature, and therefore provide no basis for the relief requested.

C. The Petition is Not Authorized by the Agreement

The Petition must be denied also because it seeks to unilaterally and materially change the mileage equalization components of the Agreement as they apply to UP. This would be a substantial modification of the Agreement, and as UP infers, allowing it to act unilaterally likely would be followed by identical petitions by other Class I railroads. However, the Agreement and the decisions of the Interstate Commerce Commission ("ICC") in this docket ratifying it do not authorize reopening and modifying the mileage equalization component of the Agreement in this manner. On the contrary, the Agreement and the ICC contemplated that substantial modifications to the Agreement such as that proposed by UP would be considered and recommended to the Board by the Joint Negotiating Committee ("JNC") that drafted the Agreement. Specifically, in the September 23, 1986 decision in this docket (*1986 Decision*) by which the ICC ratified the Agreement and concluded its terms complied with 49 U.S.C. §11122, the ICC noted that while the JNC discussed making changes to the existing mileage equalization formula during their negotiations, "no consensus was reached [by the JNC] with respect to the equalization rule matters

set forth in Section 1 of the agreement, which therefore remains unchanged. The JNC will continue to study these matters and, when and if consensus is reached, will present the agreed resolution to the Commission in a manner similar to the joint petition.” *Id.* at 199. That questions related to the mileage equalization formula and the rules for its application would be decided by the JNC is confirmed by Section 1 of Agreement, which states “. . . [t]he tank car mileage equalization ratio shall remain 106 percent until “material changes in the conditions and practices of tank car movements indicate the need for a new movement study. Appropriate changes in the ratio *and rules* may then be made to comport with its results.” *Id.* at 204, quoting Section 1 of the Agreement (emphasis added).

Finally, the *1986 Decision* refers to objections that C.F. Industries (“CF”) posed concerning the mileage equalization aspects of the Agreement in response to the petition filed by the JNC seeking the ICC’s approval of the Agreement. Specifically, CF objected to the Agreement because it did not deal with alleged defects in the mileage equalization system. *Id.* at 199. In response, the ICC said “the mileage equalization system (only limited aspects of which are addressed in the agreement) was not a subject of the present round of negotiations, but was deferred to the future. . . . In any event, CF is free to challenge the mileage equalization system *by filing a complaint under the Act, or seek renegotiation of the agreement, to the extent it is involved.*” *Id.* at 202 (emphasis added). The ICC’s reference to renegotiation refers to Section 9 of the Agreement, by which the JNC restricted the very action UP is attempting to take with its Petition (*i.e.*, substantial modification of the Agreement as it applies to UP) by requiring “three or more interested persons” to petition the ICC before it would consider permitting renegotiation of the Agreement’s terms. *Id.* at 211. Consequently, UP’s Petition is not authorized by either the Agreement or the *1986 Decision*. If UP objects to the current mileage equalization terms of the Agreement, it must either

file a formal complaint or seek the renegotiation of the Agreement by the JNC pursuant to Section 9.

D. Conclusion

UP's Petition should therefore be denied or rejected by the Board for the reasons set forth above. As such, there is no need for NAFCOA to address in this Reply in any depth the degree to which the Petition has any merit substantively, except to point out that it is fundamentally wrongly premised. The mileage equalization component of the Agreement was developed for the purpose of protecting railroads from incurring the costs of excessive empty movements of tank cars, and to permit them to recover those costs when their customers inefficiently utilized their tank cars, as defined by the mileage equalization formula. The Petition submits no actual evidence that the current system has failed because it has resulted in excessive empty tank car movements on UP's system that in turn have resulted in costs to UP that it cannot recover through the current formula or its line haul rates. UP's Petition gives lip service to "efficiencies" but its obvious goal is to give UP the freedom to charge rates for movements of empty tank cars that maximize UP's profits. Any changed behavior that is deemed more "efficient" is a byproduct of that real objective.

For all the foregoing reasons, the Petition should be denied or rejected.

Respectfully submitted,



Thomas W. Wilcox
GKG Law, P.C
1055 Thomas Jefferson St, NW
Suite 500
Washington, D.C. 20007
202-342-5248
twilcox@gkglaw.com

*Attorney for the North America Freight Car
Association*

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Certificate of Service

I hereby certify that on this 15th day of May, 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 EP 328.



Thomas W. Wilcox