BEFORE THE
SURFACE TRANSPORTATION BOARD

309501

ENTERED
Office of Proceedings
April 25, 2025
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.	STB Docket No. NOR 42144 Consolidated with: Docket No. NOR 42150 Docket No. NOR 42152 Docket No. NOR 42153

UNION PACIFIC'S REPLY TO PETITION FOR RECONSIDERATION

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April 25, 2025

UNION PACIFIC'S REPLY TO PETITION FOR RECONSIDERATION

The Board should deny Complainants' Petition for Reconsideration of the Board's decision served January 15, 2025 ("Decision").[1] The Board correctly concluded that "Complainants are not entitled to reparations for the payment of past empty repair move charges."[2] In reaching that conclusion, the Board should have rejected outright Complainants' claims that railroads must bear the costs of empty repair moves.[3] However, the Board did not commit the errors alleged by Complainants in their Petition for Reconsideration.

I. The Board Had Ample Grounds To Reject Complainants' Claims.

Complainants brought this case primarily to challenge Union Pacific's adoption of charges for empty movements to repair facilities in Item 55-C of UP Tariff 6004-C ("Item 55-C"). In their joint opening statement, Complainants raised two specific challenges to Item 55-C. They claimed:

- "Item 55-C violates the compensation requirements of 49 U.S.C. §§ 11121 and 11122 because UP does not pay mileage allowances, or any alternative form of compensation, to ensure that railroads rather than tank car providers ultimately bear this cost of transporting tank cars to and from repair facilities;"[4] and

[1] The complainants seeking reconsideration in Docket No. NOR 42144 are North America Freight Car Association, The Chlorine Institute, Inc., The Fertilizer Institute, American Chemistry Council, Ethanol Products, LLC d/b/a POET Ethanol Products, POET Nutrition, Inc., and Cargill Incorporated (collectively, "NAFCA Complainants"). The complainants seeking reconsideration in Docket No. NOR 42150 are Valero Marketing and Supply Company and Valero Rail Partners, LLC (collectively, "Valero"). The complainants seeking reconsideration in Docket No. NOR 42152 are Tesoro Refining & Marketing Company, LLC, Tesoro Great Plains Gathering & Marketing, LLC, and Dakota Prairie Refining, LLC (collectively, "Tesoro"). The complainant seeking reconsideration in Docket No. NOR 42153 is Arkema, Inc. ("Arkema").

[2] Decision at 18.

[3] Union Pacific has filed a petition for review of the Decision because the Decision is in excess of the Board's authority; is arbitrary, capricious, and an abuse of discretion and otherwise contrary to law; and is not supported by substantial evidence insofar as it prohibits Union Pacific "from charging for empty repair moves going forward unless it can demonstrate that car providers are reimbursed for these costs." Decision at 2.

[4] Complainants' Joint Opening Evidence and Argument (Jt. Op.) at 20.

- "UP's implementation of Item 55-C is manifestly unreasonable in violation of § 10702(2).[5]

Most Complainants also challenged Union Pacific's practice of using zero-mileage rates, claiming Union Pacific unlawfully refused to compensate tank car owners by either paying mileage allowances or offering reduced line-haul rates.[6]

Union Pacific's reply showed railroads may charge shippers for empty repair moves regardless of whether they ultimately bear the costs of such moves by paying mileage allowances or some other form of compensation to shippers. The Interstate Commerce Commission formally abandoned the prior "free repair move" rule in *IHB-II*,[7] recognizing the rule "require[d] carriers to establish rates or free movements which do not contribute to going concern value, prohibit[ed] individual pricing for distinct services, encourage[d] cross-subsidization, and promote[d] inefficiency by giving private car owners little or no incentive to consider transportation costs in selecting repair facilities."[8] When shippers paying zero-mileage rates sought reconsideration, the ICC rejected their arguments in *IHB-III*,[9] explaining: "repair move costs should be treated just like other repair expenses the private car owners initially pay"—that is, shippers could be required to pay empty repair move costs even when using zero-mileage rates.[10] On appeal, the D.C. Circuit agreed with the ICC: "what is appropriate for ownership costs generally is perfectly appropriate

[5] *Id.* at 40.

[6] *Id.* at 1 (acknowledging the complainants in Docket Nos. 42150, 42152, and 52153 asserted only challenges to Item 55-C).

[7] *Gen. Am. Transp. Corp. v. Indiana Harbor Belt R.R.*, 3 I.C.C.2d 599 (1987).

[8] *Id.* at 611 (citations omitted).

[9] *Gen. Am. Transp. Corp. v. Indiana Harbor Belt R.R.*, ICC Docket No. 35404 (ICC served Feb. 29, 1988).

[10] *Id*., slip op. at 5.

for the discrete ownership costs at issue in this case."[11] In *NAFCA-I*,[12] the Board confirmed the ICC's decision allowing railroads to establish empty repair move charges "did not turn on whether a portion of the empty repair move charges might be recovered through [mileage] allowances."[13] After all, if shippers were entitled to recover the empty repair move charges, no purpose would be served by imposing the charges in the first place.[14]

Union Pacific also showed adopting empty repair move charges for tank cars was manifestly reasonable. Union Pacific adopted Item 55-C for the same reasons the ICC abandoned the free repair move rule: to prevent cross-subsidization and inefficiency. All other types of privately owned cars were already subject to empty repair moves charges. Union Pacific extended the charges to tank cars after recognizing it faced the prospect of providing a significant number of inefficient, free empty repair moves for cars likely to make disproportionately few loaded moves on Union Pacific as a result of a new rule proposed by the Pipeline and Hazardous Materials Safety Administration.[15] Complainants' own witnesses confirmed that shippers had not been considering

[11] *Gen. Am. Transp. Corp. v. ICC*, 872 F.2d 1048, 1057 (D.C. Cir. 1989).

[12] *N. Am. Freight Car Ass'n—Protest & Petition for Investigation—Tariff Publications of the Burlington N. & Santa Fe Ry.* ("*NAFCA-I*"), NOR 42060 (Sub-No. 1) (STB served Aug. 13, 2004).

[13] *Id.*, slip. op at 6; *see also, e.g.*, *LO Shippers Action Comm. v. Aberdeen & Rockfish Ry.*, 4 IC.C.2d 1, 17 (1987) ("Where a carrier publishes a rate specifically applicable only to movements in private cars, the carrier is not obligated to provide a car and has no obligation to publish an allowance."), *aff'd sub nom. LO Shippers Action Comm. v. ICC*, 857 F.2d 802 (D.C. Cir. 1988).

[14] The ICC also recognized railroads were not expected to repay the shippers when it observed "[s]ubstantial use of the *IHB-II* ruling is economically inevitable, since any railroad with a potential for repair move traffic will have everything to gain and nothing to lose by publishing such tariffs." *Charges for Movement of Empty Cars, Buffalo & Pittsburgh R.R.*, 7 I.C.C.2d 18, 23 n.9(1990).

[15] *See* Union Pacific's Reply Evidence and Argument (UP Reply) at 11–14 & Verified Statement of Kenny Rocker (Rocker VS) at 1–4.

efficiency or costs imposed on railroads in managing their empty repair moves for tank cars until Union Pacific adopted Item 55-C.[16]

Finally, Union Pacific showed Board precedent has long permitted railroads to use zero-mileage rates. The ICC correctly described the state of the law in *LO Shippers*: "Where a carrier publishes a rate specifically applicable only to movements in private cars, the carrier is not obligated to provide a car and has no obligation to publish an allowance."[17] As Union Pacific explained, the nearly universal use of zero-mileage rates for tank cars is a pro-competitive, efficient practice embraced by railroads and shippers alike that reflects economic reality: there is no sense in requiring railroads to set rates as though they provide cars, and they pay refunds to the shipper actually providing the cars.[18]

Board precedent and the evidence presented in this proceeding established Union Pacific's adoption of Item 55-C and use of zero-mileage rates, whether evaluated separately or together, were lawful and advanced important policy interests.

II. The Board Should Not Reconsider Its Decision Denying Complainants Reparations For Past Empty Repair Moves.

A. The Board's treatment of Complainants' arguments regarding obstacles to recovering repair move costs through mileage allowances and zero-mileage rates did not involve the type of material error claimed by Complainants.

The Decision rests in large part on the Board's arbitrary and capricious conclusion that railroads may not charge shippers for empty repair moves unless they also compensate shippers for those costs. However, even within that flawed construct, Complainants are wrong when they

[16] *See* UP Reply at 56–71 (citing deposition testimony).

[17] *LO Shippers Action Comm.*, 4 I.C.C.2d at 17.

[18] *See* UP Reply at 82–98.

claim the Board committed material error by failing to address "two specific obstacles" they identified "to the recovery of repair move charges through the mileage allowance system."[19]

First, Complainants raised their attack on the mileage allowance system for the first time on rebuttal, and the attack is entirely inconsistent with their complaints and opening submission. In their complaints and opening submission, Complainants argued Union Pacific could not charge for empty repair moves ***unless*** shippers were compensated through payment of mileage allowances (or an alternative form of compensation). Complainants began the "Argument" section of their opening brief with that exact argument:

> Item 55-C violates the compensation requirement of 49 U.S.C. §§ 1121 and 11122 ***because UP does not pay mileage allowances***, or any alternative form of compensation . . . . As discussed in subpart 1 below, ***UP does not pay the mileage allowance compensation that the ICC required in IHB-II as a prerequisite to permit tank car repair move charges*** . . . .[20]

Even if the Board had failed to address Complainants' belated argument that payment of mileage allowances would be insufficient to permit repair move charges, the Board would not have committed material error by disregarding Complainants' untimely attempt to change their claim.[21]

Second, before filing their Petition for Reconsideration, Complainants had identified only one alleged obstacle to recovering repair move charges through the mileage allowance system: they claimed, in their rebuttal, that the mileage allowance formula does not capture repair move charges.[22] Complainants had never previously suggested the second alleged "obstacle" discussed

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[19] Petition at 5.

[20] Jt. Op. at 20 (emphasis added).

[21] *Cf. Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.*, NOR 42121, slip op. at 10 (STB served May 31, 2013) (striking party's theory advanced on rebuttal that was inconsistent with positions it adopted on opening); *M&G Polymers USA, LLC v. CSX Transp., Inc.*, NOR 42123, slip op. at 10 (STB served Sept. 27, 2012) (same).

[22] *See* Petition at 5 (citing Complainants' Joint Rebuttal Evidence and Argument (Jt. Reb.) at 18).

in their Petition for Reconsideration—*i.e.*, repair move charges are a cost paid to railroads, not repair facilities—was an obstacle to using mileage allowances to recover repair move charges.[23] On opening, Complainants said payment of repair move charges to railroads rather than repair facilities "merits a narrow application of *IHB-II*," namely, the "Board should permit repair move charges only by rail carriers that can demonstrate a clear misallocation of repair move costs to them if they are not allowed to assess such charges."[24] On rebuttal, Complainants said the issue was a reason the Board "must be especially vigilant when it comes to ensuring tank-car providers are compensated for repair-move costs."[25] In their Petition for Reconsideration, Complainants say payment of repair move charges to railroads allows railroads to increase charges in a way that is not possible when other charges are paid to repair facilities,[26] but they still never explain why paying costs to railroads rather than repair facilities creates an obstacle to recovery of the costs through the mileage allowance system.[27] The Board did not commit material error by not addressing an argument Complainants never made.[28]

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[23] *See id.* (citing Jt. Op. at 28–29; Jt. Reb. at 14–15, 26).

[24] Jt. Op. at 29.

[25] Jt. Reb. at 15.

[26] *See* Petition at 8. Complainants' claims rely on the erroneous premise that empty repair moves are tied to loaded moves. *See* Jt. Reb., Verified Statement of Kevin W. Caves at 16–17. The evidence shows Union Pacific adopted Item 55-C to address the opposite problem—*i.e.*, shippers who did not use Union Pacific for loaded moves could nonetheless move their empty cars for free to repair facilities on Union Pacific. *See* UP Reply at 12–14 & Rocker VS at 1–4.

[27] The ICC and D.C. Circuit have correctly rejected claims that repair move costs should be treated differently than other repair costs. *See IHB-III*, slip op. at 5 ("repair move costs should be treated just like other repair expenses the private car owners initially pay"); *Gen. Am. Transp.*, 872 F.2d at 1057 ("It seems reasonable, we think, for the Commission to conclude that what is appropriate for ownership costs generally is perfectly appropriate for the discrete ownership costs at issue in this case.").

[28] *See, e.g.*, *Market Dominance Streamlined Approach*, EP 756, slip op. at 5 (Jan. 25, 2023) (rejecting argument "improperly raised for the first time on reconsideration").

Third, the Board ***did*** address the one alleged "obstacle" Complainants identified in their rebuttal. On page 18 of the Decision, the Board recognized it was "undisputed that Complainants have not sought compensation through the agency-approved mileage allowance system." The Board then referenced Complainants' argument about the mileage allowance system's deficiencies and expressly rejected it as "an argument for the revision of the mileage allowance system, not for ignoring it."[29] Complainants' disagreement with the Board's conclusion does not demonstrate material error.[30]

Recognizing the Board actually addressed the alleged "obstacle," Complainants say the D.C. Circuit's decision upholding *IHB-II* required the Board to give "immediate attention" to their claims about obstacles to recovering repair move costs from carriers.[31] However, as discussed above, the Board subsequently confirmed the agency's decision in *IHB-II* "did not turn on whether a portion of the empty repair move charges might be recovered through allowances."[32] Further, the D.C. Circuit did not require the agency to revisit the mileage allowance system absent a timely

[29] Decision at 18. Contrary to Complainants' claim (Petition at 5), Union Pacific never said the mileage allowance formula would not capture repair move charges. Union Pacific observed that allowances would not reflect such charges unless they were incurred by the tank car leasing companies whose costs are used to update the allowances. Whether the leasing companies or lessees incur those costs depends on the contractual arrangement between lessors and lessees—an issue squarely within control of the lessors and lessees. *See* UP Reply at 43 n.52; *cf. IHB-III* at 3 (shippers could have negotiated agreements providing for the contingency that they would be subject to empty repair move charges).

[30] *See, e.g.*, *Townline Rail Terminal, LLC—Constr. & Operation Exemption—In Suffolk Cnty., N.Y.*, FD 36575, slip op. at 3 (STB served Dec. 3, 2024) ("[W]hile the Association may disagree with the Board's conclusions on these issues, the Association has not demonstrated material error."); *Reasonableness of BNSF Ry. Coal Dust Mitigation Tariff Provisions*, FD 35557, slip op. at 4 (STB served May 15, 2015) ("A party must do more than simply make a general allegation of material error and repeat its previous arguments; it must substantiate its claim of material error.").

[31] Petition at 6.

[32] *NAFCA-I*, slip op. at 6.

request,[33] and Complainants were not asking the Board to revisit the mileage allowance system.[34] To the contrary, as the Board recognized, Complainants were expressly asking the Board to order Union Pacific to pay mileage allowances.[35] The Board did not commit material error by rejecting Complainants' untimely, inconsistent, collateral attack on the mileage allowance system.[36]

Complainants are also incorrect when they claim the Board committed material error by not considering their arguments and evidence regarding railroad-supplied cars before concluding they were not entitled to refunds because they failed to request rates in railroad-supplied cars.[37] *First*, Complainants are misreading the Decision. The Board did not say Complainants could not pursue refunds because they never requested rates in railroad-supplied cars. Rather, the Board said *IHB-II* allowed Union Pacific to charge for empty repair moves while using zero-mileage rates, and shippers who were concerned about cost recovery could have asked Union Pacific to provide mileage allowances (to recover the costs) or rates in railroad-supplied cars (to determine whether to accept zero-mileage rates or request mileage allowances).[38] In other words, the Board ruled that Complainants cannot now seek damages to recover for past empty repair charges regardless of

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[33] *See Gen. Am. Transp.*, 872 F.2d at 1058.

[34] If Complainants had asked, the proper response would have been for the Board to conclude that cost recovery is irrelevant. *See NAFCA-I*, slip op. at 6. But in that scenario, the Board would have at least concluded that Complainants' arguments do not involve the type of regulatory obstacle to cost recovery that the D.C. Circuit noted as a potential concern; rather, to the extent any issue exists, it is a contractual issue between tank car lessors and lessees. *See supra* note 29; *see also Gen. Am. Transp.*, 872 F.2d at 1057 ("Petitioners do not complain of any *regulatory* obstacle to recover of empty-repair-move costs from carriers, a concern that might warrant immediate Commission attention." (emphasis in original)).

[35] *See* Decision at 18 ("Despite asking the Board to order UP to resume paying mileage allowances on shipments in private tank cars, Complainants argue that the mileage allowance system is deficient in various ways and would not have compensated them even if they had made such a request." (footnote omitted)).

[36] *See, e.g.*, *Reasonableness of BNSF Ry. Coal Dust Mitigation Tariff Provisions*, slip op. at 4.

[37] *See* Petition at 9–10 (discussing Decision at 18).

[38] *See* Decision at 18.

whether or how they exercised their options,[39] so any error in considering their arguments about those options would not constitute material error.[40]

Second, the Board ***did*** consider Complainants' arguments and evidence regarding railroad-supplied cars—*i.e.*, that railroads generally do not own tank cars and shippers would not agree to use railroad-supplied cars.[41] The Board discussed those issues in concluding "it would be unreasonable to condition the lawfulness of zero-mileage rates for tank cars on the existence of a dual-rate scale."[42] Complainants may disagree with the Board's additional conclusion that they could have determined the adequacy of compensation through zero-mileage rates by asking Union Pacific to quote rates in railroad-supplied tank cars,[43] but the Board considered their evidence and arguments in reaching its conclusions.[44]

B. The Board's consideration of whether Complainants' "evidence" satisfied their burden of proof with respect to recovery of Item 55-C charges did not involve the type of material error claimed by Complainants.

As discussed above, the Decision rests in large part on the Board's erroneous conclusion that railroads may not charge shippers for empty repair moves unless they also compensate

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[39] *See also* Decision at 21 ("In sum, UP is not required to repay past empty tank car repair move charges because *IHB II* required Complainants to seek authorized compensation through the mileage-allowance system, but they failed to do so.").

[40] *See, e.g.*, *Petition of the Western Coal Traffic League to Institute a Rulemaking Proceeding to Abolish the Use of the Multi-Stage Discounted Cash Flow Model in Determining the Railroad Industry's Cost of Equity Capital*, EP 664 (Sub-No. 2), slip op. at 2 (STB served Apr. 28, 2017) (a material error is "one that 'would mandate a different result'") (*quoting Montezuma Grain Co. v. STB*, 339 F.3d 535, 542 (7th Cir. 2003)).

[41] *See* Petition at 9–10.

[42] Decision at 14.

[43] Union Pacific does not necessarily agree with the Board's implicit conclusion that such a request would constitute a reasonable request for service. However, whether the Board's conclusion was correct or incorrect has no bearing on Complainants' right to relief in this case.

[44] *Cf. Petition of the Western Coal Traffic League*, slip op. at 2 (the Board's disagreement with party's position "does not mean the Board failed to consider relevant evidence").

shippers for those costs. However, even within that flawed construct, Complainants are incorrect when they claim the Board committed material error by failing to consider whether their "evidence satisfied Complainants' burden of proof under Count I."[45] Although Complainants claim they "presented a *prima facie* case that Item 55-C charges cannot be recovered through mileage allowances, are not recovered through zero-mileage rates, and that UP never intended for such recovery,"[46] the Board's resolution of Complainants' claim for reparations under Count I did not require consideration of such evidence. As discussed in Section II.A, the Board concluded *IHB-II* allowed Union Pacific to charge for empty repair moves when using zero-mileage rates, and while shippers were entitled to compensation for the costs of empty repair moves, their options were to (i) request mileage allowances, or (ii) negotiate zero-mileage rates they found satisfactory.[47] Contrary to Complainants' implicit claim, the Board never said Complainants would be entitled to damages if they could prove flaws in the mileage allowance system, insufficient cost recovery through zero-mileage rates, or anything regarding Union Pacific's intent to compensate shippers for Item 55-C charges. In sum, the "evidence" Complainants say the Board failed to consider was not relevant to whether they were entitled to reparations under Count I, so failure to consider that evidence cannot constitute material error.[48]

[45] Petition at 11.

[46] *Id.*

[47] *See* Decision at 18; *see also id.* at 21 ("In sum, UP is not required to repay past empty tank car repair move charges because *IHB II* required Complainants to seek authorized compensation through the mileage-allowance system, but they failed to do so.").

[48] *See Petition of the Western Coal Traffic League*, slip op. at 2 (a material error is "one that 'would mandate a different result'") (*quoting Montezuma Grain Co.*, 339 F.3d at 542).

C. The Board's conclusion that Union Pacific had a reliance interest in *IHB-II* was not material error.

Union Pacific agrees with Complainants that the Board should not have applied different rules to past and future empty repair moves. Union Pacific has filed a petition seeking review of the Decision insofar as it prohibits Union Pacific from charging for empty repair moves going forward unless it can demonstrate that car providers are reimbursed for these costs.[49] However, contrary to Complainants' claim, the Board's decision not to impose its new rule for future empty repair moves retroactively was not material error.

Union Pacific relied on *IHB-II*, *IHB-III*, *NAFCA-I*, among other decisions when adopting Item 55-C.[50] Union Pacific's reliance was reasonable. Other railroads adopted empty repair move charges before Union Pacific, and still others adopted empty repair move charges after Union Pacific adopted Item 55-C.[51] Moreover, the Board did not conclude that Union Pacific's past conduct was unlawful or that the same conduct would be unlawful in the future. The Board concluded Union Pacific's past conduct was lawful, but adopted a new rule under which railroads could be penalized for engaging in lawful conduct by allocating the burden of proof in a way the Board recognized "is contrary to the typical allocation of the burden of proof in Board proceedings on the party seeking Board relief."[52] Retroactive application of the new rule to potentially subject Union Pacific to liability for its past lawful conduct would work a "manifest injustice"[53] by subjecting Union Pacific to liability "for past actions which were taken in good-faith reliance on

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[49] *See supra* n.3.

[50] *See* UP Reply at 109 & n.120.

[51] *See id.* at 110.

[52] Decision at 14.

[53] *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (*quoting Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972)).

Board pronouncements."[54] The Board's decision not to subject Union Pacific to potential damages under such circumstances was well within its discretion and consistent with its precedent.[55]

Complainants incorrectly claim *IHB-II* and *IHB-III* support retroactive application of the Decision.[56] In *IHB-II* and *IHB-III*, the ICC allowed railroads that recognized *IHB-I*[57] had been undermined by subsequent statutory developments to retain charges the ICC concluded were lawful and advanced important policy interests.[58] The ICC specifically rejected shippers' claims that they had relied on *IHB-I*, stating the agency had clearly signaled the regulatory landscape was changing:

> Post *IHB-I* decisions began clearly to regard *IHB-I* as "bad law and policy" signaling that a change was imminent. Private car owners therefore had sufficient notice that the regulatory environment was in transition.[59]

By contrast, the Board gave Union Pacific and other railroads no warning that it would depart from *IHB-II* and subsequent decisions affirming *IHB-II* by adopting a new rule under which they might be penalized for engaging lawful conduct.[60] The Board should not have adopted a rule subjecting railroads to potential liability unless they revert to a free repair move policy that "resulted in serious

[54] *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974).

[55] *See, e.g.*, *Rail Fuel Surcharges*, STB EP No. 661, slip op. at 10 (STB served Jan. 26, 2007) (applying findings prospectively only because "we do not believe that railroads can be faulted for assuming [the challenged practice] was permissible").

[56] Petition at 13–14.

[57] *Gen. Am. Transp. Corp. v. Indiana Harbor Belt R.R.*, 357 I.C.C.102 (1977).

[58] *See* UP Reply at 21–25 (discussing widespread recognition that the free repair move rule was bad law and bad policy long before *IHB-II*).

[59] *IHB-III*, slip op. at 3 (citations omitted).

[60] *See* Decision at 21 ("UP had no reason to believe that either of these changes were on the table.").

misallocation of economic burdens among carriers and conflicted with Congressional mandates."[61] However, having adopted such a rule, the Board appropriately declined to apply it retroactively.

III. The Board did not commit material error by declining to initiate a proceeding to develop a new, industry-wide cost-sharing arrangement for repair move costs.

Complainants conclude their Petition for Reconsideration by asking the Board to "initiat[e] a proceeding to develop an inter-carrier solution to the misallocation and cross-subsidy problems identified in *IHB-II*."[62] Complainants say they presented the concept of such an "inter-carrier solution" in their Joint Opening Supplemental Brief but the Board did not discuss it in the Decision.[63] However, Complainants never asked the Board to initiate the proceeding they now request, do not claim the Board committed material error by not discussing their "inter-carrier solution" in the Decision, and do not provide any other basis for addressing the issue in their Petition for Reconsideration. The Board should reject Complainants' proposal because it was "improperly raised for the first time on reconsideration."[64]

CONCLUSION

For the foregoing reasons, the Board should deny Complainants' Petition for Reconsideration.

[61] *IHB-III*, slip op. at 1.

[62] Petition at 17.

[63] *See id.* at 15.

[64] *Market Dominance Streamlined Approach*, slip op. at 5.

Respectfully submitted,

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April 25, 2025

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of April, 2025, I caused a copy of the foregoing document to be served by first class mail, postage prepaid, or a more expeditious method of service on all parties of record in Docket Nos. NOR 42144, NOR 42150, NOR 42152, and NOR 42153.

/s/ Michael L. Rosenthal
Michael L. Rosenthal