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SERVICE DATE – JANUARY 15, 2025

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42144[1]

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

Digest:[2] This decision partially grants complaints filed by the North America Freight Car Association, other associations, and individual complainants. The Board clarifies what Union Pacific Railroad Company must do to comply with its statutory duties to furnish safe and adequate car service and to establish, observe, and enforce reasonable rules and practices on car service.

Decided: January 14, 2025

These cases involve disputes between private (non-railroad) providers of tank cars and Union Pacific Railroad Company (UP).[3] The private tank car providers claim that UP has

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[1] This decision embraces Valero Marketing & Supply Co. v. Union Pacific Railroad, Docket No. NOR 42150, Tesoro Refining & Marketing Co. v. Union Pacific Railroad, Docket No. NOR 42152, Arkema Inc. v. Union Pacific Railroad, Docket No. NOR 42153, and Union Pacific Railroad—Petition to Exit Mileage Equalization System, Docket No. EP 328 (Sub-No. 2).

[2] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

[3] The complainants in Docket No. NOR 42144 are the North America Freight Car Association (NAFCA), American Fuel & Petrochemicals Manufacturers, The Chlorine Institute, Inc., The Fertilizer Institute, American Chemistry Council (ACC), Ethanol Products, LLC d/b/a POET Ethanol Products (POET Ethanol), POET Nutrition, Inc. (POET Nutrition), and Cargill Incorporated (Cargill) (collectively, NAFCA Complainants). The complainants in Docket No. NOR 42150 are Valero Marketing and Supply Company and Valero Rail Partners, LLC (collectively, Valero). The complainants 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 in Docket No. NOR 42153 is Arkema Inc. (Arkema). NAFCA Complainants, Valero, Tesoro, and Arkema are referred to collectively

violated its car service obligations under 49 U.S.C. §§ 11121 and 11122, engaged in an unreasonable practice under 49 U.S.C. § 10702, and violated its common carrier obligation under 49 U.S.C. § 11101 by (1) imposing a charge for moving their tank cars when empty to repair facilities and (2) failing to pay them for UP's use of their tank cars when providing rail service.[4]

Complainants have not shown that UP acted unlawfully. UP reasonably relied on agency precedent authorizing empty repair move charges. Regarding the allegation that UP failed to pay for its use of private tank cars, there is no persuasive evidence that UP failed to reimburse the Complainants for those charges or that Complainants have availed themselves of existing processes to ensure they are compensated. The Board, therefore, will not award damages. However, due to changes in circumstances since empty repair move charges were authorized, the Board will modify its prior treatment of this issue and prohibit UP from charging for empty repair moves going forward unless it can demonstrate that car providers are reimbursed for these costs.

BACKGROUND

I. Legal Background

Although railroads are generally responsible for furnishing the rail cars necessary to provide their rail service, shippers sometimes prefer to furnish their own rail cars. Indeed, this is true of tank car shippers to such an extent that virtually the entire fleet of tank cars in the United States is privately owned. This overwhelming shipper preference for private tank cars, despite the railroads' obligation to furnish them, implicates issues about how to address excess mileage of private cars while empty, how railroads share responsibility for the movement of empty private cars, and whether railroads can charge separately for the movement of empty tank cars to repair facilities.

A. Compensation for the Use of Private Cars

In the early 20th Century, Congress required rail carriers to "provide and furnish . . . transportation," which was defined to include certain equipment such as "cars and other vehicles," upon reasonable request. Hepburn Act, Pub. L. No. 59-337, 34 Stat. 584, 584 (1906). Congress later codified this requirement at § 1(11) of the Interstate Commerce Act, establishing "the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service." Transportation Act of 1920, Pub. L. No. 66-152, § 402, 41 Stat. 456, 476 (1920). This statutory

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as Complainants. POET Ethanol, POET Nutrition, Cargill, Valero, Tesoro, and Arkema are referred to collectively as Individual Complainants. Docket Nos. NOR 42144, NOR 42150, NOR 42152, and NOR 42153 are referred to collectively in this decision as the NAFCA Proceedings.

[4] The parties designated certain information in their pleadings as confidential or highly confidential. While attempting to avoid references to confidential or highly confidential information in Board decisions, the Board reserves the right to rely upon and disclose such information in decisions when necessary. In this case, the Board determined that it could not present its findings with respect to the issues without disclosing certain information.

duty remains today, substantially unchanged, at 49 U.S.C. § 11121 ("A rail carrier providing transportation subject to the jurisdiction of the Board under this part shall furnish safe and adequate car service.").[5]

In 1917, Congress imposed on rail carriers the duty "to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service" and declared that "every unjust and unreasonable rule, regulation, and practice with respect to car service" is prohibited and unlawful. Esch Car Service Act (Esch Act), Pub. L. No. 65-19, 40 Stat. 101 (1917). This provision was also codified in § 1(11) of the Interstate Commerce Act, Transportation Act of 1920, 41 Stat. at 476, and the same requirements exist today in 49 U.S.C. § 11121.[6] The term "car service" was defined to include "the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property." Interstate Commerce Act § 1(10); Transportation Act of 1920, 41 Stat. at 476.

To enforce the requirements of § 1(11), Congress authorized the Board's predecessor, the Interstate Commerce Commission (ICC), on complaint or on its own initiative, to "establish reasonable rules, regulations, and practices with respect to car service, including the . . . compensation to be paid for the use of any car not owned by any such common carrier and the penalties or other sanctions for nonobservance of such rules." Esch Act, 40 Stat. 101. This enforcement provision was codified as § 1(14) of the Interstate Commerce Act. Transportation Act of 1920, 41 Stat. at 476.

Despite the requirement for rail carriers to provide cars, it was sometimes more advantageous for shippers to provide the specialized rail cars needed for their particular commodities. In Re. Private Cars, 50 I.C.C. 652, 657 (1918). In these situations, by mutual agreement, shippers began to provide their own cars, either owned or leased, to transport their own commodities, and the railroads became the hirers of these cars, paying for their use based on a certain amount per mile on the loaded, or loaded and empty, movements. Id.

These payments are referred to as "mileage allowances." A mileage allowance is a direct payment from a railroad to a private car provider for the railroad's use of its cars for loaded

[5] In a footnote in its reply, UP contends that railroads do not have a common carrier obligation to provide tank cars. (See UP Reply 35 n.43, Apr. 26, 2019.) The Board has previously rejected this argument. N. Am. Freight Car Ass'n v. Union Pac. R.R. (Supplemental Briefing Decision), NOR 42144 et al., slip op. at 4 n.5 (STB served Mar. 22, 2021).

[6] Section 11121 requires carriers to "establish, observe, and enforce reasonable rules and practices on car service" without expressly making the converse statement about the unlawfulness of unreasonable rules and practices. The meaning of this requirement remains the same: because the statute requires carriers' car service rules and practices to be reasonable, unreasonable rules and practices must violate that requirement. Even if § 11121 could be interpreted otherwise, however, the change in language occurred in the 1978 recodification addressed below, which (by Congress's express direction in that recodification) may not be construed as making a substantive change in the statute.

movements,[7] "determined by applying a unit per-mile charge appropriate for a particular car to the *loaded* miles operated by that car." Charges for Movement of Empty Cars, Buffalo & Pittsburgh R.R. (Buffalo & Pittsburgh), 7 I.C.C.2d 18, 20 (1990). For tank cars, the calculation of mileage allowances currently relies on a formula developed through lengthy negotiations among industry participants and approved by the ICC in 1986, known as the National Tank Car Allowance Agreement. See Investigation of Tank Car Allowance Sys. (EP 328), 3 I.C.C.2d 196 (1986), modified 7 I.C.C.2d 645 (1991). When the tariff establishing a rate provides for a mileage allowance, the rate is called a "full-mileage" rate. (See, e.g., Complainants Opening 34.)

But full-mileage rates, with mileage allowances as compensation, are now rarely used in tank car movements. Over the last few decades, both railroads and shippers have found it administratively convenient to move instead to a system of so-called "zero-mileage" rates,[8] whereby the applicable tariff does not provide for a mileage allowance.[9] Instead, a zero-mileage rate may include compensation based on the level of the rate, as discussed below.

B. Mileage Equalization

By virtue of the commodities they carry, "[t]ank cars invariably return empty, and in the past the carriers absorbed the cost of empty return movements." Buffalo & Pittsburgh, 7 I.C.C.2d at 22. Sometimes, instead of returning directly to the next loading point, private tank cars are moved empty to repair facilities, which are selected by the car providers. To encourage private tank car owners to handle their fleets more efficiently and reduce excess empty mileage, the ICC adopted a system of so-called "mileage equalization"—essentially, an accounting among tank car providers and railroads—that was intended to allocate responsibility for empty repair moves more equitably. Gen. Am. Transp. Corp. v. Ind. Harbor Belt R.R. (IHB I), 357 I.C.C. 102, 128-29 (1977), aff'd, 577 F.2d 394 (7th Cir. 1978). Under the mileage equalization program negotiated by railroads and tank car companies and prescribed by the ICC, if a car

[7] Pursuant to the applicable tariff, mileage allowances may be paid to the lessee rather than the car's owner depending on how the car's reporting marks are assigned. (See Complainants Opening, Ex. 7 at 9 (Tariff RIC 6007-N, Item 180); Engelhard Corp.—Pet. for Declaratory Ord.—Springfield Terminal Ry., NOR 42075, slip op. at 6 (STB served Sept. 27, 2004).

[8] See Complainants Rebuttal 17 ("[A]fter 1987 the rail industry eventually gravitated from the payment of mileage allowances to the establishment of zero-mileage rates."); UP Reply 82-83, Apr. 26, 2019 ("[UP]'s nearly universal use of zero-mileage rates for movements in tank cars is consistent with the practices of all other railroads."), V.S. Douglas Craven 1 ("In 2017, approximately 0.13% of loaded tank car movements involved mileage allowance payments."), V.S. Robert Hirst 4 (UP has used zero-mileage rates in tank car contracts since the 1990s and in tank car tariffs since the early 2000s).

[9] Zero-mileage rates may be included in some rail transportation contracts, which are not subject to challenge before the Board, see 49 U.S.C. § 10709. (See UP Reply 87-88, Apr. 26, 2019.) Accordingly, the Board's decision today applies only to transportation pursuant to common carrier tariffs. See N. Am. Freight Car Ass'n v. Union Pac. R.R., NOR 42144, slip op. at 4 (STB served Dec. 21, 2015).

provider's aggregate empty mileage exceeds its aggregate loaded mileage by more than 6% in a year, the car provider pays based on a formula into a general fund, which is distributed annually among railroads in accordance with each carrier's excess mileage burden. See Gen. Am. Transp. Corp. v. Ind. Harbor Belt R.R. (IHB II), 3 I.C.C.2d 599, 601 n.5 (1987); Gen. Am. Transp. Corp. v. ICC (IHB Appeal), 872 F.2d 1048, 1054 n.12 (D.C. Cir. 1989) ("The 106% figure was designed to account for both empty-return mileage (100% of revenue mileage) and reasonable empty-repair mileage (an additional 6% of revenue mileage).").

C. Empty Repair Moves

In 1947, the ICC initially ruled that railroads could not charge for the movement of private tank cars to repair facilities. The ICC reasoned that private tank cars used by railroads in carrying out their common carrier duties were "instrumentalities of transportation" and that "when they are temporarily withdrawn from transportation service to undergo repairs . . . they do not become property subject to transportation charges within the meaning of section 6 (7) of the act." Union Tank Car Co., 268 I.C.C. 338, 342 (1947). In 1977, the ICC reaffirmed this holding, concluding that the railroad industry benefitted from private cars and thus bore collective responsibility for the costs of such movements. IHB I, 357 I.C.C. at 127. The ICC therefore barred a railroad from separately charging for such moves if it received more than *de minimis* revenue from the loaded movement of such cars. Id.

In 1987, however, the ICC reversed its free empty repair move rule. In IHB II, the agency held that prohibiting separate charges for empty repair moves and relying on mileage equalization alone was problematic: it led to misallocation and cross-subsidization of empty repair move costs among railroads; it promoted inefficiency by giving private car providers little or no incentive to consider transportation costs in selecting repair facilities; and it directly conflicted with congressional direction. See IHB II, 3 I.C.C.2d at 606, 611. Accordingly, the ICC overruled IHB I and permitted separate charges for empty repair moves. See id. at 599, 613-16.

II. UP's Conduct and the Complainants' Challenges

Pursuant to its tariffs, UP has moved privately supplied tank cars under zero-mileage rates almost exclusively over the last two decades.[10] Before 2015, under Tariff 6004, Item 55-C, UP generally did not charge separately for the movement of empty private tank cars to or from repair facilities. It did so only in limited circumstances: when new cars left shops to enter into commercial service; when cars left shops after being re-stenciled to reflect a change in ownership; and when cars moved to shops for dismantling, sale, or scrap. (UP Reply 12, Apr. 26, 2019.) In 2014, the Pipeline and Hazardous Materials Safety Administration (PHMSA) proposed a rule requiring tank cars used to transport crude oil and other highly flammable commodities to be phased out or retrofitted to meet new, stricter safety requirements. (Id.) According to UP, it determined that it would be disproportionately responsible for the empty retrofit moves because it serves a large number of repair facilities where retrofits would occur

[10] UP Reply 82-83, Apr. 26, 2019 (referring to UP's "nearly universal use of zero-mileage rates for movements in tank cars"), V.S. Hirst 4 (explaining that UP has used zero-mileage rates in tank car contracts since the 1990s and in tank car tariffs since the early 2000s).

and yet participates in crude oil transportation markets to a lesser extent than some of its railroad competitors. (Id. at 12-13.) UP adopted a separate empty repair move charge in tariff Item 55-C, effective January 1, 2015. (See id.)[11]

On March 31, 2015, as amended June 2, 2015, NAFCA Complainants filed a complaint in Docket No. NOR 42144 against UP. In Count I, NAFCA Complainants allege that "UP's implementation of the January 1, 2015 modification to Tariff 6004, Item 55-C, namely the adoption of separate tariff charges for the movement of empty tank cars to 'Repair Facilities' as defined by UP, is (a) an unreasonable practice in violation of 49 U.S.C. § 10702, and (b) a violation of UP's statutory obligations to compensate private car owners for the use of their tank cars set forth in 49 U.S.C. § 11122(b)." (NAFCA Am. Compl. 8.) In Count II, NAFCA Complainants allege that "UP's refusal to compensate [NAFCA Complainants] for [the use of their tank cars], whether through mileage allowances or reduced line haul rates, constitutes an unreasonable practice under 49 U.S.C. § 10702, and a violation of 49 U.S.C. §§ 11101, 11121, and 11122." (Id. at 9.) For relief, NAFCA Complainants ask that the Board: (1) find that UP's implementation of Item 55-C is unlawful; (2) order UP to immediately rescind Item 55-C; (3) order UP to pay reparations for unlawful Item 55-C charges; (4) find that UP's failure to compensate NAFCA Complainants (or their members) was unlawful; (5) order UP to immediately begin paying mileage allowances, in accordance with EP 328, on all shipments in private tank cars; (6) order UP to pay damages to the individual complainants for all mileage allowances not paid in accordance with EP 328; and (7) grant to Complainants such other and further relief as the Board may deem proper based on the record. (See id. at 10.)

On June 22, 2015, UP filed its answer in Docket No. NOR 42144 and moved to dismiss the amended complaint or make that complaint more definite. By decision served on December 21, 2015, the Board denied UP's motion and established a procedural schedule, including a period for discovery. N. Am. Freight Car Ass'n v. Union Pac. R.R., NOR 42144, slip op. at 3, 5 (STB served Dec. 21, 2015). On June 10, 2016, the Board granted UP's motion to hold the procedural schedule in abeyance pending the resolution of discovery disputes and further order of the Board.

On December 19 and 30, 2016, respectively, Valero and Tesoro filed complaints against UP in Docket Nos. NOR 42150 and NOR 42152, raising allegations substantially similar to those of NAFCA Complainants and asking for substantially similar relief as to Item 55-C. On January 26, 2017, UP filed a motion to consolidate the NAFCA, Valero, and Tesoro complaint proceedings, which the Board granted on March 31, 2017.

On August 1, 2017, Arkema filed a complaint against UP in Docket No. NOR 42153, raising substantially similar allegations to those of NAFCA Complainants, Valero, and Tesoro

[11] Specifically, the charge applies to empty tank cars moving to and from repair facilities except that (i) empty movements that are immediately preceded by a loaded line-haul revenue movement on UP will move free of charge to repair facilities, (ii) empty tank cars taken out of service by UP inspection and waybilled by UP's Mechanical Department under Rule 1 of the Association of American Railroads' Interchange Rules will move free of charge to and from repair facilities, and (iii) empty tank cars damaged by UP will move free of charge to and from repair facilities. (See UP Reply, Ex. 1, Apr. 26, 2019.)

and asking for substantially similar relief as to Item 55-C. On August 9, 2017, UP filed a motion to consolidate Arkema's complaint with the existing NAFCA, Valero, and Tesoro proceeding, which the Board granted on October 5, 2017. On July 8, 2019, Olin Corporation (Olin) filed a substantially similar complaint in Docket No. NOR 42164. By decision served on September 30, 2019, the Board denied UP's motion to dismiss Olin's complaint and granted Olin's motion to hold the proceeding in abeyance pending the outcome of the NAFCA Proceedings.

Pursuant to a Memorandum of Understanding with the Federal Energy Regulatory Commission, the Board issued a decision referring all discovery issues to Administrative Law Judge John P. Dring. Judge Dring held several discovery conferences in 2016 and 2017 and issued two discovery orders following oral arguments in 2016. The parties submitted status reports on discovery matters until January 28, 2019, when the parties jointly advised the Board that discovery was complete.

Complainants jointly submitted opening evidence and argument on February 22, 2019. On the same day, Arkema, POET Ethanol, POET Nutrition, Cargill, Valero, and Tesoro each submitted supplemental opening evidence and argument as to their individual circumstances (e.g., factual background, damages, and communications with UP). UP submitted reply evidence and argument on April 26, 2019. Complainants jointly submitted rebuttal evidence and argument on May 31, 2019.

On April 25, 2019, UP submitted a petition in Docket No. EP 328 (Sub-No. 2), to terminate its obligation to comply with the mileage equalization provisions of the National Tank Car Allowance Agreement. In that proceeding, arguments have been raised that UP's petition is premature because the NAFCA Proceedings address closely related matters. See NAFCA Reply 2-3, May 15, 2019, EP 328 (Sub-No. 2). Because the litigation in the NAFCA Proceedings may affect the issues to be addressed in UP's petition, the Board expects to act on the petition after the conclusion of the NAFCA Proceedings, including any judicial review.

In March 2021, the Board directed the parties to submit supplemental briefing regarding issues of statutory interpretation and application. N. Am. Freight Car Ass'n v Union Pac. R.R. (Supplemental Briefing Decision), NOR 42144 et al. (STB served Mar. 22, 2021). In particular, the Board directed the parties to address (1) the applicability to this proceeding of language in § 11122(a) regarding "encourag[ing] the purchase, acquisition, and efficient use of freight cars," and (2) whether the Board's statutory authority to establish the "terms of any arrangement" for car service permit it to prescribe the amount of an empty repair move charge by a rail carrier. The parties submitted supplemental briefs on April 21, 2021, and supplemental reply briefs on May 21, 2021.

DISCUSSION AND CONCLUSIONS

As discussed above, Complainants claim that UP has acted unlawfully by imposing a charge for moving their tank cars to and from repair facilities and by charging allegedly non-compensatory zero-mileage rates rather than paying mileage allowances. Complainants base these claims primarily on the car service provisions of 49 U.S.C. § 11121 and § 11122. Before addressing the merits of these claims, the Board in Part I below considers issues arising from the parties' supplemental briefing, including whether the Board has the authority to adjudicate

individual car-service compensation claims, and, if so, whether it should "encourage the purchase, acquisition, and efficient use of freight cars" when doing so. In Part II, the Board addresses the claims that UP has failed to provide compensation for the use of Complainants' tank cars. In Part III, the Board addresses the Complainants' challenges to Item 55-C.

I. Statutory Authority

The Board begins by addressing certain issues on which it sought supplemental briefing from the parties, as those issues frame the analysis of the merits. Specifically, the Board will address (1) whether, in a complaint proceeding brought under § 11122, the Board must be guided by the policy of "encourag[ing] the purchase, acquisition, and efficient use of freight cars," and (2) whether under § 11122 the Board has the authority to adjudicate a car-service compensation claim.

A. Construction of the Applicable Statutory Language

Before reaching the merits, it is necessary to determine the applicable statutory language. In their complaint, Complainants relied on, among other provisions, 49 U.S.C. § 11122. Following initial briefing, the Board directed the parties to submit supplemental briefing on the applicability to this adjudicatory proceeding of the language in § 11122(a) that "[t]he regulations of the Board on car service shall encourage the purchase, acquisition, and efficient use of freight cars." The Board noted that the history of the statute seemed to indicate that the requirement to "encourage the purchase, acquisition, and efficient use of freight cars" applied equally to rulemakings and individual adjudications. The Board directed the parties to address whether "the agency's discretion to prescribe car service terms, including compensation, must be guided by the policy 'to encourage the purchase, acquisition, and efficient utilization of freight cars' when the case arises 'upon complaint of an interested party.'" Supplemental Briefing Decision, NOR 42144 et al., slip op. at 5-6.

In its supplemental submission, UP agrees that the pre-recodification "purchase, acquisition, and efficient utilization" language governs. (UP Suppl. Br. 13 ("[T]he difference [between the language of § 1(14)(a) and § 11122] must be resolved in favor of the pre-1978 language.").) Complainants are less definitive, but they do not dispute that the pre-recodification language prevails here. (Joint Supplemental Opening 4 ("Thus, to the extent that the term 'regulations' encompasses 'complaints' for the reasons the Board sets forth in the [Supplemental Briefing Decision], Complainants agree that the 'purchase, acquisition, and efficient utilization' standard in subpart (a) is a relevant consideration in this complaint proceeding.").

The Board concludes that the best reading of the statute is that the "purchase, acquisition, and efficient utilization" langauge of § 11122(a) applies to both rulemakings and complaint proceedings. In 1978, Congress recodified the Interstate Commerce Act, enacting it as Title 49 of the U.S. Code. Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337 (1978 Recodification). Section 3(a) of the 1978 Recodification states:

> Sections 1 and 2 of this Act restate, without substantive change, laws enacted before May 16, 1978, that were replaced by those sections. Those sections may not be construed as making a substantive change in the laws replaced. Laws enacted after

> May 15, 1978, that are inconsistent with this Act are considered as superseding it to the extent of the inconsistency.

92 Stat. at 1466. As the U.S. Supreme Court held in considering another section of the Interstate Commerce Act, this language of the 1978 Recodification requires that substantive differences between the pre-1978 and post-1978 statutes be resolved in favor of the pre-1978 language.[12] UP, in its response to the Supplemental Briefing Decision, agrees that "difference[s] must be resolved in favor of the pre-1978 language, as the Board recognizes." (See UP Suppl. Br. 13.)

Prior to the enactment of the 1978 Recodification, the predecessor to § 11122(a) set forth Congress's goals in regulating car service and made clear that the ICC had the authority to promote these goals through either adjudication or regulation. The predecessor provision stated, in relevant part:

> It is the intent of the Congress to encourage the purchase, acquisition, and efficient utilization of freight cars. In order to carry out such intent, the [ICC] may, upon complaint of an interested party or upon its own initiative without complaint, and after notice and an opportunity for a hearing, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including (i) the compensation to be paid for the use of any locomotive, freight car, or other vehicle, (ii) the other terms of any contract, agreement, or arrangement for the use of any locomotive or other vehicle not owned by the carrier by which it is used (and whether or not owned by another carrier, shipper, or third party), and (iii) the penalties or other sanctions for nonobservance of such rules, regulations, or practices.

49 U.S.C. § 1(14)(a) (1976). Accordingly, even though the current language of § 11122(a) directs the Board to "encourage the purchase, acquisiton, and efficient utlization of freight cars" only when enacting regulations, the language of § 1(14)(a), combined with Section 3(a) of the 1978 Recodification, means that that directive applies equally to Board complaint proceedings under § 11122.

B. The Board's Authority to Adjudicate a Failure-to-Compensate Claim

In its supplemental filing, UP disputes that the Board has the authority to adjudicate individual claims that a carrier failed to compensate for its use of private cars. (See UP Suppl. Opening 10 (Section 11122's predecessor "did not authorize the ICC to adjudicate whether an

[12] See Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp., 561 U.S. 89, 107-09 (2010); see also United States v. Alky Enters., Inc., 969 F.2d 1309, 1312-13 (1st Cir. 1992); Atchison, Topeka & Santa Fe Ry. v. United States, 617 F.2d 485, 490 (7th Cir. 1980); Trailer Marine Transp. Corp. v. FMC, 602 F.2d 379, 383 n.18 (D.C. Cir. 1979). As explained in section 3(a), this requirement does not apply to laws enacted *after* the 1978 Recodification that differ from the pre-1978 language; such laws supersede the previous language to the extent of the inconsistency. 1978 Recodification, § 3(a), 92 Stat. at 1466. While the text of § 11122 has been modified since the 1978 Recodification, no subsequently enacted law has modified the language addressed in this decision.

individual rail carrier's conduct was lawful."); id. at 11 (referring to "Congress's limitation of [section 11122's predecessor] to industry-wide rulemaking").) UP notes that section 1(14)(a) gave the agency the authority to entertain complaints to "establish reasonable rules, regulations, and practices," which, it says, did not extend to adjudicating individual car-service compensation claims, (see id. at 12 ("Section 1(14)(a) never authorized adjudication of complaint proceedings against individual rail carriers.").)

The Board disagrees.[13] UP appears to interpret the "upon complaint" language in § 1(14)(a) as referring to an interested party's complaint "prompt[ing] the agency" to institute a rulemaking proceeding. (See UP Suppl. Br. 12.) But UP's construction strains to avoid the natural reading of the text, which encompasses individual adjudications as well as rulemaking proceedings.

UP's interpretation fails to account for the way in which § 1(14)(a) parallels other parts of the Board's governing statute where "on complaint" clearly indicates a challenge to an individual carrier's actions. See 49 U.S.C. § 10701(a) (authorizing Board to compel rail carrier to comply with statute "upon . . . complaint"); § 10704(a)(1), (b) (authorizing Board to order carrier to stop violation "on complaint"). Similar parallels can be found in the pre-recodification version of the Interstate Commerce Act. See, e.g., 49 U.S.C. § 5(8) (1976) (authorizing the ICC "upon complaint" to investigate certain violations, and if it finds them, to order the person investigated to stop them). By contrast, statute, regulation, and common practice all refer to requests for rulemaking as petitions, not complaints. See, e.g., 5 U.S.C. § 553(e); 49 C.F.R. § 1110.2; Pet. of UP et al., July 31, 2020, Joint Petition for Rulemaking to Establish a Voluntary Arb. Program for Small Rate Disputes, EP 765.

In addition, to accept UP's position would require a determination that the phrase "rules, regulations, and practices" in § 1(14)(a) means only "general rules applicable to all rail carriers." (See UP Suppl. Br. 10.) To the extent UP is suggesting that the "rules, regulations, and practices" addressed in the statute are only the agency's "general rules" (i.e., the Board's regulations), it is patently mistaken. Again, § 11121 requires "*rail carrier[s]*" subject to the Board's jurisdiction to "establish, observe, and enforce reasonable rules and practices on car service" (emphasis added).[14] But more importantly, UP's interpretation violates the principle of

[13] Among other issues, the Supplemental Briefing Decision directed the parties to brief the question of whether the Board can prescribe the amount of an empty repair move charge pursuant to section 1(14)(a). See Suppl. Briefing Decision, NOR 42144 et al., slip op. at 6. Complainants and UP both objected to this idea, including arguments that the Board lacks authority to do so, (see Complainants Suppl. Br. 1-2, 15-17; UP Suppl. Br. 1, 6-9, 12-22), and the Board declines to pursue it here.

[14] See also Esch Act, 40 Stat. 101 (in which Congress first enacted the requirement that carriers "establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service" and authorized the ICC to require carriers to file "their rules and regulations with respect to car service"); Gen. Am. Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422, 431 (1940) ("It seems clear that no rule or regulation *of the carrier* may provide for the payment of such allowance to any other person.") (emphasis added); Ass'n of Am. R.R.s

statutory construction that every word should be given meaning. See, e.g., Hibbs v. Winn, 542 U.S. 88, 101 (2004). Congress could have fully conveyed the concept of "general rules applicable to all rail carriers" had it simply used the phrase "rules and regulations." UP's interpretation thus fails to give effect to the word "practices," which must refer to something not generally applicable to all rail carriers, i.e., an individual adjudication.

UP also cites several cases under § 1(14)(a) in which the ICC acted by rulemaking or where courts recognized the ICC's authority to act by rulemaking; UP implies that this is the limit of the agency's authority under § 1(14)(a). (See UP Suppl. Br. 10).[15] But the fact that the agency has the authority to engage in rulemaking does not mean it lacks the authority to engage in adjudication. See, e.g., SEC v. Chenery, 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."). The plain language of § 1(14)(a)—authorizing the agency to establish car service rules, regulations, and practices "upon complaint"—confirms that the Board has discretion to make this choice, as do numerous cases.[16]

Freight Tariff RIC 6007O, at 5, 10-19 (Feb. 1, 2024) (*available at* https://public.railinc.com/resources/national-tariffs/ric-6007-o) (establishing railroad "Rules and Regulations").

[15] See United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 757 (1972) (noting that the ICC's action in that case was "an exercise of legislative rulemaking power"); United States v. Fla. E. Coast Ry., 410 U.S. 224, 239 (1973) (observing that, under § 1(14)(a), the ICC had authority "to make rules and regulations of a prospective nature"); Bos. & Me. R.R. v. United States, 358 U.S. 68, 70 (1958) (referring to the ICC's "recognized rule-making power over car-hire rates conferred by § 1(14)(a)"); Ann Arbor R.R. v. United States, 358 F. Supp. 933, 934, 937 (E.D. Pa. 1973) (referring to the ICC's "rule making authority embodied in Section 1(14)(a)" and noting that the ICC's rulemaking proceeding was governed by standard notice requirements for such proceedings).

[16] See, e.g., Mileage Allowances, Tank Cars, 337 I.C.C. 23, 24-26 (1970) (adjudicating individual carriers' conduct under § 1(14)(a) in a protest and suspension case); Paragon Refin. Co. v. Alton & S. R.R., 118 I.C.C. 166, 167-68 (1926) (finding individual defendant's refusal to pay mileage allowance on private tank cars moving over its line—in response to complainant's requests—to be unreasonable, prescribing reasonable allowance, and awarding reparations); Armour & Co. v. El Paso & S.W. Co., 52 I.C.C. 240, 244-45 (1919) (concluding that the "clear, plain, and unambiguous" language later numbered § 1(14)(a) authorized the agency in a complaint case to prescribe compensation for individual carriers' use of privately supplied cars); Shippers Comm., OT-5 v. ICC, 968 F.2d 75, 79, 81 (D.C. Cir. 1992) (affirming the ICC's use of adjudication even under the language of § 11122—which, unlike its predecessor, § 1(14)(a), does not expressly refer to adjudication in complaint proceedings); LO Shippers Action Comm. v. ICC, 857 F.2d 802, 808 (D.C. Cir. 1989) (affirming ICC's adjudication of challenge to market-based allowances under § 11122); Bud Antle, Inc. v. United States, 593 F.2d 865, 875-76 (9th Cir. 1979) (holding that § 1(14) gave the ICC authority to order carrier-specific relief—publishing an allowance—in a complaint proceeding).

As part of its argument, UP cites 49 U.S.C. § 10745, which authorizes the Board to prescribe the maximum charge or allowance paid by a carrier for use of a shipper's instrumentality (such as a freight car).[17] According to UP, "[i]f Congress intended § 1(14)(a) to authorize the adjudication of complaints and establishment of maximum charges in proceedings involving individual rail carriers, it would not have needed to grant the ICC authority under different statutes to address complaints seeking to prescribe maximum charges." (UP Suppl. Br. 11.) UP's proposed construction defies logic. It requires a conclusion that, because § 10745 authorizes the agency to adjudicate maximum allowances (a narrow subset of car service issues), § 1(14)(a) cannot authorize adjudication of car service issues in general. This interpretation is compatible with neither the plain language of the statute nor any rational understanding of the relationship between the two sections. See, e.g., Mileage Allowances, Tank Cars, 337 I.C.C. at 24-26 (rejecting an analogous argument that § 10745's predecessor restricted the general car service authorization in § 1(14)(a)).[18]

Accordingly, the Board determines that it may adjudicate Complainants' individual car service claims under § 1(14)(a), now § 11122.

C. Other Statutory Issues

Although Complainants base their claims primarily on 49 U.S.C. §§ 11121 and 11122, Complainants also claim that UP's conduct constitutes an unreasonable practice under 49 U.S.C. § 10702 and a violation of its common carrier obligation under § 11101. (NAFCA Am. Compl. 9; see generally Arkema Compl., Tesoro Compl., & Valero Compl.) To the extent that Complainants' claims relate to conduct specifically governed by § 11122 (or, as discussed above, its predecessor § 1(14)(a)) and § 11121, it is unnecessary to address them under the more general

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[17] Section 10745 provides:

> A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part may establish a charge or allowance for transportation or service for property when the owner of the property, directly or indirectly, furnishes a service related to or an instrumentality used in the transportation or service. The Board may prescribe the maximum reasonable charge or allowance a rail carrier subject to its jurisdiction may pay for a service or instrumentality furnished under this section. The Board may begin a proceeding under this section on its own initiative or on application.

[18] UP notes references in the Supplemental Briefing Decision to § 1(14)(a)(ii)'s language regarding "terms of any . . . arrangement" for car service. (UP Suppl. Br. 12-13); see Suppl. Briefing Decision, NOR 42144 et al., slip op. at 5-6. The Supplemental Briefing Decision referred to this language primarily in directing the parties to brief the question of whether the Board can prescribe the amount of an empty repair move charge—a matter that, as discussed in supra note 13, the Board declines to pursue here. See Suppl. Briefing Decision, NOR 42144 et al., slip op. at 6. And as UP correctly observes, (see UP Suppl. Br. 12-13), the terms of contracts, agreements, and arrangements are merely an example of one topic that the Board can address in prescribing reasonable rules, regulations, and practices with respect to car service. See § 1(14)(a).

statutory provisions of §§ 10702 and 11101.[19] See, e.g., Entergy Ark., Inc. v. Union Pac. R.R., NOR 42104 et al., slip op. at 10 (STB served June 26, 2009) (rejecting a challenge under § 10702 where another statutory provision specifically governed the lawfulness of the conduct in question); Schlicher v. Dir. Gen., 62 I.C.C. 181, 186-87 (1921) (treating a challenge under what is now § 11101 as if it were brought under an applicable, more specific statutory provision). Therefore, the Board will address Complainants' tank car compensation claims under the framework of § 1(14)(a), now § 11122.

II. UP's Cessation of Mileage Allowances

Complainants allege that UP is unlawfully using their tank cars in revenue service without compensating them. (NAFCA Am. Compl. 9; Complainants Opening 20-23.) Complainants argue that agency precedent precludes UP from using zero-mileage rates to compensate tank car providers in lieu of paying mileage allowances, and, even if that were not the case, UP cannot demonstrate that its zero-mileage rates are actually discounted. (Complainants Opening 29-39.) As explained below, the Board finds Complainants' arguments unpersuasive.

A. Zero-Mileage Rates for Tank Cars

Complainants argue that agency precedent allows a railroad to compensate car providers for the use of their cars through zero-mileage rates *only* when there is a dual-rate scale "that includes **both** a full service rate (i.e. for service in railroad-supplied cars) and a reduced service rate (i.e. for service in private cars)." (Complainants Opening 30.) Complainants state that

> [t]he zero-mileage rates at issue in [LO Shippers Action Comm. v. Aberdeen & Rockfish Ry., 4 I.C.C.2d 1, 18 (1987)] were an acceptable means of compensating hopper car providers because "[a] railroad escapes no legal obligation concerning car compensation **by publishing zero allowance rates in dual rate scales**. The adequacy of the differential is subject to the same tests as the adequacy of the allowance."

(Complainants Opening 30-31 (quoting LO Shippers, 4 I.C.C.2d at 18).)

LO Shippers is distinguishable, as it involved a type of car, covered hopper cars, a substantial portion of which at the time were railroad-supplied. See LO Shippers, 4 I.C.C.2d at 7 n.17 (noting that "[t]he surplus of railroad-owned covered hopper cars has decreased"). Thus, a dual-rate scale for covered hopper cars existed. In contrast, for various reasons, shippers do not want to use railroad-supplied tank cars, and, thus, tank cars have long been almost exclusively privately owned. (See Complainants Opening 31; Complainants Suppl. Opening 2.) This, combined with the fact that railroads need not publish their tariffs, means that a dual-rate scale

[19] There are three arguments—alleging misrepresentation, lack of reasonable business or policy purpose, and non-compliance with mileage equalization—that do fall under § 10702 rather than the more specific provisions of §§ 11122 and 1(14)(a). Those arguments are addressed below.

for transportation in tank cars will not exist unless either a railroad chooses to publish a rate for transportation in a railroad-supplied tank car or a shipper asks a railroad to quote such a rate. Railroads cannot be faulted for not maintaining a menu of rates for a service—transportation in a railroad-supplied tank car—that no one requests. Given that shippers strongly prefer to provide for their own tank cars and to use zero-mileage rates over full-mileage rates with mileage allowances, see supra note 8, it would be unreasonable to condition the lawfulness of zero-mileage rates for tank cars on the existence of a dual-rate scale.

Complainants argue that the presence of a dual-rate scale is a necessary prerequisite to the use of a zero-mileage rate because it is only by measuring the differential that the Board can determine whether the railroad's zero-mileage rate affords adequate compensation. (Complainants Opening 30, 32.) This argument is unpersuasive. Under 49 U.S.C. § 11101(b), "[a] rail carrier shall . . . provide to any person, on request, the carrier's rates and other service terms." If Complainants had wished to determine whether they were receiving adequate compensation through zero-mileage rates, they could have asked UP to quote rates for transportation in railroad-supplied tank cars, and UP would have been legally required to provide such a quote. The "adequacy of the differential" then could have been assessed.

B. UP's Compensation of Complainants for Its Use of their Tank Cars

Despite the possibility of obtaining a rate for transportation in a railroad-supplied car, and thus a dual-rate scale, Complainants argue that the burden of proving compensation rests with UP. (Complainants Opening 32.) This, however, is contrary to the typical allocation of the burden of proof in Board proceedings on the party seeking Board relief. See, e.g., Union Pac. R.R.—Pet. for Dec. Ord., FD 35504, slip op. at 2 (STB served Oct. 10, 2014); N. Am. Freight Car Ass'n v. BNSF Ry., NOR 42060 (Sub-No. 1), slip op. at 5 (STB served Jan. 24, 2007). More importantly, it is contrary to the ICC's decision on reconsideration of IHB II, affirming that a private car provider bears the burden of showing inadequate compensation. See Gen. Am. Transp. Corp. v. Ind. Harbor Belt R.R. (IHB III), NOR 35404, slip op. at 4 (ICC served Feb. 29, 1988) ("Moreover, even if the initial allowance schedule does not fully reflect repair move costs, the overall level of such allowances [is] based upon many cost and non-cost factors, and we cannot say that (*nor have petitioners shown* that) car owners will not be adequately compensated, even during the first year.") (emphasis added).

Nevertheless, Complainants maintain that, in the context of zero-mileage rates unaccompanied by rates for a railroad-supplied car, a burden-shifting framework should apply, and that they have met their initial burden. Specifically, they say, they have made a *prima facie* showing of inadequate compensation by establishing that:

> (1) shippers have provided tank cars for which they have not received mileage allowance payments; (2) there is no dual rate scale by which to validate UP's discounting claims in accordance with [*LO Shippers*]; (3) UP unabashedly intended to profit from Item 55-C and had no intent or expectation of compensating tank car providers through any means for the charges they incurred pursuant to Item 55-C; and (4) UP has not produced any evidence in discovery to support its zero-mileage rate discounting claims.

(Complainants Opening 38.) According to Complainants, "having made these *prima facie* showings, the burden must shift to UP to demonstrate the existence and sufficiency of its alleged discounting." (Id. at 38-39.) The burden must shift, they say, because any information relating to discounting is "entirely within the purview" of UP. (Id. at 37.)

The Board disagrees. The information relating to discounting was not beyond Complainants' grasp. Although railroads are no longer required to publish their tariffs, Complainants could have asked UP for rates in UP-supplied tank cars, and UP would have been obligated to quote them. 49 U.S.C. § 11101(b) ("A rail carrier shall . . . provide to any person, on request, the carrier's rates and other service terms."). In that case, Complainants would have had information relating to any discounting. Moreover, in the absence of quoted rates in UP-supplied tank cars, the Board believes that adequate compensation for the use of private tank cars can reasonably be presumed where the parties agree on zero-mileage rates. This is because a full mileage rate with a mileage allowance that complies with EP 328 reflects adequate compensation, so a shipper that chooses a zero-mileage rate over a full-mileage rate does so presumably because the zero-mileage rate leaves the shipper at least as well off.[20]

This presumption may be rebutted, but Complainants have not done so here. Complainants point to evidence regarding UP's development and implementation of Item 55-C empty repair move charges, which, they say, indicates the absence of rate discounts. (Complainants Opening 35.) In particular, they point to the deposition testimony of two UP marketing officials, Kenny Rocker and Douglas Craven. Rocker testified that UP "did not believe that line-haul rates would be impacted [by the modification to Item 55-C]" because "those were mutually exclusive." (Rocker Tr. 60-61.) Craven testified that no one at UP considered the need to compensate tank car providers for the introduction of Item 55-C. (Craven Tr. 111.) According to Complainants, however, some adjustment to the line haul rate would have been warranted if UP was discounting its zero-mileage rates to compensate tank car providers for car ownership costs, which include the cost of transportation to and from repair facilities pursuant to Item 55-C.

Neither Rocker's nor Craven's testimony rebuts the presumption that UP's zero-mileage rates are discounted. First, their testimony concerned the impact of Item 55-C on existing zero-mileage rates, and not, more broadly, whether zero-mileage rates are discounted over rates for transportation in railroad-supplied cars. Second, their testimony was hardly definitive. When asked if he expected line-haul rates on tank cars to change as a result of the decision to charge

[20] UP argues that railroads need not compensate private car providers at all for the costs of car ownership unless the railroads choose to "establish and charge rates obligating them" to provide cars. (See UP Reply 29-30, 91-92 & n.103, Apr. 26, 2019.) But § 11121 obligates railroads to "furnish safe and adequate car service." When railroads do not fulfill this obligation, they must provide adequate compensation, as UP itself acknowledged earlier in this proceeding. (See UP Mot. to Dismiss 5, 13, Apr. 20, 2015 (stating that "[s]hippers are entitled to compensation in some form for furnishing private tank cars used to provide transportation" and that a railroad may compensate car providers through mileage allowances or zero-mileage rates).)

for empty repair moves, Rocker, who was not responsible for pricing tank car movements, (Rocker Tr. 8), said, "Potentially, although we thought those were mutually exclusive." (Rocker Tr. 60). In other words, Rocker did not think the introduction of an empty repair move charge to Item 55-C would change line haul rates, but he acknowledged that it might. When asked whether, in fact, UP had reduced line-haul rates to tank car customers to offset revenue received from Item 55-C, Rocker said, "Not that I am aware of, *but I don't know*." (Rocker Tr. 63 (emphasis added).) And Craven, Rocker's subordinate, testified only that no one *in his presence* raised the issue of compensating car providers as a result of the introduction of Item 55-C. (Craven Tr. 111.)

The record in this proceeding establishes that car providers and carriers have reached a mutually acceptable market solution regarding the provision of private tank cars, i.e., zero-mileage rates, which has avoided the complexity and administrative cost of the mileage allowance formula. The approach adopted here of presuming adequate compensation under these circumstances furthers congressional intent that "marketplace decisions govern the railroad industry and its relationship with shippers." H.R. Conf. Rep. No. 96-1430, at 118 (1980); see also 49 U.S.C. § 10101(2) (establishing congressional goal of "minimiz[ing] the need for Federal regulatory control over the rail transportation system").

Accordingly, there is no basis to hold that UP acted unlawfully by using zero-mileage rates rather than full-mileage rates with mileage allowances.

III. UP's Empty Repair Move Charge

Complainants argue that Item 55-C violates the statutory car-service provisions, §§ 11121 and 11122, and § 10702's prohibition on unreasonable practices. As explained below in Part III.A, Complainants have not shown that UP's collection of Item 55-C charges was unlawful; but, going forward, the burden will be on UP to demonstrate that it is adequately compensating car providers if it chooses to continue to impose such charges. And as explained in Part III.B, the Board rejects Complainants' arguments that UP's imposition of Item 55-C is an unreasonable practice.

A. Lawfulness of Item 55-C Under § 11122

For 40 years, as discussed above, the ICC prohibited railroads from charging for empty tank car repair movements. See Union Tank Car Co., 268 I.C.C. at 342; IHB I, 357 I.C.C. at 127. The agency changed course in IHB II, concluding that the prohibition had promoted cross-subsidization among railroads and inefficient selection of repair facilities, and that it conflicted with congressional direction. See IHB II, 3 I.C.C.2d at 606, 611. The ICC therefore

overruled IHB I and permitted railroads to charge separately for empty tank car repair moves. See id. at 599, 613-16, 620.[21]

In the IHB II proceeding, private tank car providers argued that railroads must bear empty repair move costs as part of their statutory duty to furnish car service. (See, e.g., Chem. Mfrs. Ass'n Comments 5-6, 9-10 Nov. 13, 1984, Gen. Am. Transp. Corp. v. Ind. Harbor Belt R.R., NOR 35404.) The ICC held in response that this statutory requirement would not be violated "if private car owners initially pay repair move costs and then are reimbursed for those expenses through the allowance system." IHB II, 3 I.C.C.2d at 608.[22]

Thus, when the ICC authorized railroads to charge separately for empty repair movements, it assumed that compliance with this statutory requirement would be accomplished by reimbursement of car providers through mileage allowances. See, e.g., IHB II, 3 I.C.C.2d at 608, 613-16; IHB III, slip op. at 2; IHB Appeal, 872 F.2d at 1051-52, 1055, 1057-58. Indeed, less than seven months earlier, in EP 328, the agency had adopted an allowance agreement that was the result of years of negotiations among industry participants; mileage allowances were apparently a universal practice at the time. See EP 328, 3 I.C.C.2d at 196-97; Investigation of Tank Car Allowance Sys., 367 I.C.C. 48, 49-52 (1982) (describing history of negotiations).

But while reaffirming that private car providers were entitled to be adequately compensated for empty repair move charges, IHB II, 3 I.C.C.2d at 614, the ICC did not obligate the railroads to affirmatively ensure that such compensation occurred. Instead, the ICC assumed that private car owners would avail themselves of an approved method of securing adequate compensation, presumably mileage allowances. For example, in IHB II, the ICC explained that "[u]nder a method that would let the railroads charge for repair moves, *the car owners may recover* those expenses through the mileage allowance system in the same way that they recover other car repair costs." Id. at 610 (emphasis added). Similarly, summarizing its new approach,

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[21] Contrary to Complainants' arguments, the ICC did not condition its authorization on a railroad's "underlying motivation" in charging for an empty repair movement. (Cf., e.g., Complainants Opening 21, 24-29 (arguing that a carrier should not be permitted to charge separately for empty repair movements unless its motivation aligns with the ICC's reasoning in IHB II).) The ICC's authorization contains no such restriction. See IHB II, 3 I.C.C.2d at 620. Moreover, the ICC did not even suggest that whenever a railroad charges for an empty repair movement, the lawfulness of the charge depends on whether the railroad's intent matches the legal and policy reasoning stated in IHB II. See id. at 606, 611. The Board declines to add an element of intent to the authorization of empty repair move charges; restricting the authorization in that way would inject excessive uncertainty into regulated entities' evaluation of the lawfulness of their conduct.

[22] See also § 11121 (requiring carriers to furnish safe and adequate car service); Cap on Mileage Allowances for Use of Privately Owned Tank Cars, SP (Cap on Mileage Allowances), NOR 39909, slip op. at 4 n.8 (ICC served Feb. 9, 1987) (as part of this requirement, when railroads rely on private cars, they must compensate the car provider for the use of those cars); IHB II, 3 I.C.C.2d at 614; IHB III, NOR 35404, slip op. at 2 (emphasizing "[t]he railroads' obligation to compensate car owners for costs of ownership including repair movements"); IHB Appeal, 872 F.2d at 1057-58.

the ICC said: "We conclude that allowing carriers initially to charge for repair movement services and permitting carriers and private car owners to treat those expenses just like other repair expenses *recoverable* through the mileage allowance system appears the most appropriate solution suggested in this proceeding. *While we do not require it, we commend it to the parties for consideration*." Id. at 616 (emphasis added). On reconsideration, the ICC explained that, in IHB II, "[w]e suggested, but did not require, that *private car owners could use the mileage allowance system to obtain appropriate compensation* for the repair movement costs they incur, just as they do to recover other private car repair and car supply costs." IHB III, slip op. at 1-2; see also id. at 2 (explaining that in IHB II, "we commended, rather than required, *car owners to seek recompense* through mileage allowances. However, this was simply an acknowledgement that the primary issue in this proceeding is the lawfulness of tariff charges for repair moves, rather than the suitability of alternatives *open to car owners* for recouping those costs.") (emphasis added). The ICC thus repeatedly indicated that it was the responsibility of private car providers to use the methods available to them to seek compensation for empty repair move costs.

Here, it is undisputed that Complainants have not sought compensation through the agency-approved mileage allowance system. (See UP Reply 99-103, Ex. 59 at 3, Apr. 26, 2019 (stipulation that "[t]here is no evidence that [UP] has refused a request to establish rates for movements in cars that provide for payment of a mileage allowance").) Despite asking the Board to order UP to resume paying mileage allowances on shipments in private tank cars,[23] 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. (See Complainants Rebuttal 18-19.) That, however, is an argument for the revision of the mileage allowance system, not for ignoring it. The existing mileage allowance system was negotiated by the railroads and virtually all tank car providers and was adopted and prescribed by the ICC. Investigation of Tank Car Allowance Sys., 3 I.C.C.2d 196, 197, 200 (1986). Accordingly, mileage allowances that result from that system indicate adequate compensation. Under IHB II, it was incumbent on Complainants either to pursue adequate compensation for Item 55-C charges by "seek[ing] recompense through mileage allowances," or to ensure that they were being adequately compensated through zero-mileage rates by requesting rates in railroad-supplied cars. Having failed to pursue either option, Complainants are not entitled to reparations for the payment of past empty repair move charges.

With respect to *future* empty repair move charges, however, a different result is appropriate. As Complainants note, there have been significant changes since the ICC adopted the current mileage allowance system in EP 328. Railroads and shippers have collectively "gravitated from the payment of mileage allowances," to the extent that mileage allowances are essentially no longer used in connection with tank car movements. (See Complainants Rebuttal 17; UP Reply 82-83 & V.S. Robert Hirst 4, Apr. 26, 2019.) As a result, private tank car providers are no longer "reimbursed for those expenses through the allowance system" as the ICC assumed they would be when it issued IHB II. IHB II, 3 I.C.C.2d at 608. And the prevalence of zero-mileage rates without corresponding rates for transportation in railroad-

[23] (See, e.g., NAFCA Am. Compl. 10 (Request for Relief (5), (6)); Complainants Opening 7, 32.)

supplied tank cars creates an environment of diminished transparency with respect to car ownership costs. In light of these changes, the Board will modify its treatment of this issue so that, going forward, it will be the responsibility of railroads to ensure that they provide adequate compensation for empty tank car repair move costs.[24]

This modification is also more consistent with congressional intent to encourage the purchase, acquisition, and efficient utilization of freight cars, which, as explained in Part I.A, is a goal set forth in former § 1(14)(a) that continues to apply here. As legislative history and case law demonstrate, in enacting § 1(14)(a), Congress empowered the agency to promote an appropriately sized fleet of freight cars—assessing potential shortages or surpluses of cars. When Congress enacted the Esch Act in 1917, it did so "[b]ecause of critical freight-car shortages experienced during World War I." Allegheny-Ludlum Steel Corp., 406 U.S. at 744; see also H.R. Rep. No. 65-18, at 1 (1917) (Esch Act was meant to address car shortage); S. Rep. No. 65-43, at 3 (1917) (citing, as support for enactment of the Esch Act, railroads' inability to meet demand for grain transportation due to lack of cars). Today's decision better encourages an appropriately sized fleet of tank cars because it ensures that, going forward, car providers will be adequately compensated for their investments if UP decides to continue charging separately for empty tank car repair moves.[25]

The Board will not specify what method of compensation UP must use should it continue to charge for empty tank car repair moves. UP may satisfy this obligation either by charging full-mileage rates with mileage allowances or by charging zero-mileage rates that are properly discounted for use of private tank cars. The Board does not rule out the possibility of some other approach.

Whatever method UP chooses, in any subsequent litigation addressing the existence or adequacy of that compensation, UP will carry the burden of proving that it has provided adequate compensation for empty tank car repair moves. Meeting this burden may require use of a dual-

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[24] The parties present alternative ways of modifying IHB II. Complainants urge the Board to adjust the holding of IHB II by limiting it to terminal and switching railroads that serve repair facilities and otherwise do not participate in significant loaded tank-car movements like the IHB II defendants. (See Complainants Rebuttal 26-28.) The Board declines this suggestion, as Complainants have not shown that cross-subsidization is necessarily limited to terminal and switching railroads. For its part, UP suggests that the passback assumed in IHB II should not be required because it does not "make[] any sense to treat charges for empty repair moves differently than the charges for actually repairing tank cars (which are paid by shippers, not railroads)." (UP Suppl. Reply Br. 3-4.) But UP, unlike the entities "actually repairing tank cars," has a statutory responsibility to furnish car service, and is therefore situated differently than those entities with regard to charging for services.

[25] The Board's approach is also consistent with the national rail transportation policy set forth in 49 U.S.C. § 10101. Requiring UP to ensure that it adequately compensates car providers for the cost of tank car empty repair movements, as part of its statutory duty to furnish car service, will ensure the development and continuation of a sound rail transportation system (§ 10101(4)), foster sound economic conditions in transportation (§ 10101(5)), and encourage honest and efficient management of railroads (§ 10101(9)).

rate scale (i.e., UP furnishing both a zero-mileage rate and a rate in a railroad supplied tank car) so that the differential can be compared and compensation for use of the private car can be readily evaluated. Given the likelihood that car providers would initiate such litigation, this allocation of the burden to UP could be a departure from the Board's usual practice of placing the burden on the party who initiates a case and seeks relief from the Board. See, e.g., Union Pac. R.R.—Pet. for Declaratory Ord., FD 35504, slip op. at 2; N. Am. Freight Car Ass'n v. BNSF Ry., NOR 42060 (Sub-No. 1), slip op. at 5.

Allocating the burden of proof in this way is both lawful and appropriate. Outside of formal "trial-type" hearings, Congress has afforded agencies greater procedural leeway, including with respect to burden allocation. See, e.g., Am. Trucking Ass'ns v. United States, 344 U.S. 298, 318-20 (1953) (the burden allocation language of 5 U.S.C. § 556(d) does not apply outside formal "trial-type" hearings); Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 644 (1990) ("informal adjudication[s]" do not require the "elements" of § 556(d)); Sea-Land Serv., Inc. v. United States, 683 F.2d 491, 495 (D.C. Cir. 1982). A car-service compensation claim is brought under § 11122, which does not require a hearing or otherwise specify the procedures for bringing and establishing such a claim. The resolution of such claims, then, is governed by 49 U.S.C. § 11701, the general provision governing the handling of complaints alleging that a carrier has violated Part IV of the Interstate Commerce Act. Section 11701 does not require a hearing at all, much less provide for formal "trial-type" hearings. Thus, placing this burden on UP is within the Board's procedural discretion.[26] Moreover, doing so is appropriate in this instance. When the ICC decided IHB II, it assumed the then-nearly universal practice of mileage allowances would continue. Indeed, the ICC had adopted the allowance formula less than seven months earlier in EP 328. Today, by mutual agreement of shippers and railroads, mileage allowances are all but extinct. With mileage allowances effectively gone and with the absence of railroad-supplied tank cars—and accompanying rates—it is appropriate to place the burden on UP to ensure that it is affording car providers adequate compensation for empty tank car repair moves. In this way, adequate

[26] While § 11121 does provide for a "hearing on the record," that is a hearing to determine whether the Board "may require a rail carrier to provide facilities and equipment that are reasonably necessary to furnish safe and adequate car service," which the Board may do only if it makes three specific findings, none of which are relevant to a request for compensation. See 49 U.S.C. § 11121(a)(1)(A)-(C) ("The Board may act only after a hearing on the record and an affirmative finding, based on the evidence presented, that--(A) *providing the facilities or equipment* will not materially and adversely affect the ability of the rail carrier to provide safe and adequate transportation; (B) *the amount spent for the facilities or equipment*, including a return equal to the rail carrier's current cost of capital, will be recovered; and (C) *providing the facilities or equipment* will not impair the ability of the rail carrier to attract adequate capital.") (emphasis added). The claim in this proceeding is not that UP failed to provide tank cars or should be ordered to do so. Rather, Complainants argue that UP improperly charged for empty tank car repair moves, coupled with a request that UP be ordered to compensate the Complainants for those charges and to rescind such charges going forward. Thus, although Complainants alleged compensation claims under § 11121, they are more properly made under § 11122.

compensation for empty repair move costs will be akin to an affirmative defense, which UP can assert in response to claims that its empty repair move charge violates § 11122.

The Board declines to give retroactive effect to either the change from IHB II's approach of holding car providers responsible for seeking available compensation or the change from IHB III's approach of placing the burden on car providers to show a lack of compensation. UP had no reason to believe that either of these changes were on the table. Under these circumstances, it would be unfair to apply either of these changes retroactively. See Chenery, 332 U.S. at 203 (agencies may consider equitable principles in determining retroactivity); see also, e.g., Anita S. Krishnakumar, Longstanding Agency Interpretations, 83 Fordham L. Rev. 1823, 1854-55 (2015) (observing that, under some circumstances, giving retroactive effect to a departure from longstanding agency precedent can implicate reliance concerns); Christopher J. Walker, Melissa Wasserman & Matthew Lee Wiener, Precedential Decision Making in Agency Adjudication 21 (Dec. 6, 2022) (report to the Admin. Conf. of the U.S.), available at https://www.acus.gov/document/precedential-decision-making-agency-adjudication-final-report (noting "fairness concerns . . . about the ability of regulated individuals to rely on prior decisions"); cf. NLRB v. Bell Aerospace Co., 416 U.S. 267, 295 (1974) (reliance interests were not a concern because "this is not a case in which some new liability is sought to be imposed on individuals for past actions which were taken in good-faith reliance on Board pronouncements").

UP makes various contentions regarding the meaning and effect of IHB II and other decisions. (See, e.g., UP Reply 19, 29-34, 90-92, Apr. 26, 2019); see also N. Am. Freight Car Ass'n—Protest & Pet. for Investigation—Tariff Publ'ns of the Burlington N. & Santa Fe Ry., NOR 42060, slip op. at 3-4, 6 (STB served Aug. 13, 2004); LO Shippers, 4 I.C.C.2d at 17. Some of UP's claims align with the Board's interpretations, set forth above, while others may not. However, to the extent the Board's current analysis and conclusions could be construed as inconsistent with prior decisions, the Board departs from precedent here. As discussed above, circumstances have changed substantially since the issuance of those decisions, including the industry's effective abandonment of the mileage allowance system and diminished transparency regarding compensation for the use of private tank cars. Departure from precedent, to the extent this decision does so, is necessary to ensure furtherance of the Congressional objectives underlying § 11122 in light of the current record.

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. Going forward, however, UP will not be allowed to charge for moving private tank cars to and from repair shops unless it can demonstrate that car providers are appropriately compensated for those expenses. See IHB II, 3 I.C.C.2d at 608. This directive will become effective 30 days from the service date of this decision, to allow UP time to implement it.

B. Lawfulness of Item 55-C Under § 10702

Complainants allege that UP's implementation of Item 55-C is an unreasonable practice in violation of 49 U.S.C. § 10702. (NAFCA Am. Compl. 8; Valero Compl. 5-6; Tesoro Compl. 6; Arkema Compl. 7.) Complainants argue that Item 55-C is unreasonable because (1) UP misrepresented the true purpose of Item 55-C; (2) UP had no reasonable purpose in

adopting it; and (3) Item 55-C circumvents the constraints of the mileage equalization system adopted in EP 328. (Complainants Opening 39-50.) In addition, Complainants Cargill and POET Ethanol argue that UP engages in an unreasonable practice by double charging on multi-leg repair moves in violation of its own tariff.[27]

1. Mislabeling

Citing Rail Fuel Surcharges, EP 661 (STB served Jan. 26, 2007), Complainants argue that UP's adoption of Item 55-C was an unreasonable practice because it "misrepresented the true purpose of Item 55-C to its customers." (See Complainants Opening 39-44.) According to Complainants, UP claimed that Item 55-C was adopted to encourage efficient fleet management, reduce empty miles, and align tank car repair moves with repair moves for other types of railcars, but in fact, UP's primary purpose was to capture significant additional revenue. Complainants state that UP also intended to align the treatment of tank cars with the treatment of other car types and exit the mileage equalization system, but additional revenue was the "overarching objective." (See id. at 41-42.)

Complainants' arguments do not support an unreasonable practice finding under § 10702 based on mislabeling. In Rail Fuel Surcharges, EP 661, slip op. at 1, 6-10, the Board found, among other things, that computing rail fuel surcharges as a percentage of a base transportation rate was an unreasonable practice. More specifically, the unreasonable practice found in Rail Fuel Surcharges consisted of mislabeling by carriers—describing a practice or charge as one thing when it is actually something different. See Rail Fuel Surcharges, EP 661, slip op. at 7 (finding that a charge labeled as a "fuel surcharge" did not actually recover increased fuel costs associated with the movement to which it was applied). Here, as UP points out, Item 55-C is labeled as a charge for empty repair moves, and that is what it is. (See UP Reply 77-78, Apr. 26, 2019.) Whatever Item 55-C's "true purpose" may have been, there is no doubt that it was accurately labeled as a type of "charge" to UP's customers.

2. Business or Policy Purpose

Complainants imply a separate unreasonable practice claim under § 10702 based on their allegation that UP had no reasonable business or policy purpose in adopting Item 55-C. (See Complainants Opening 40-41.) According to Complainants, UP's primary objective was "[e]xtracting additional profit" from an expected increase in empty repair moves, when § 11122 makes the cost of empty repair moves UP's responsibility. (See id. at 41.) UP argues that it had a reasonable business purpose for instituting Item 55-C: to obtain compensation for providing empty repair moves, (see UP Reply 72-74, Apr. 26, 2019), and that, in any event, the Board "does not try to determine a railroad's internal motives" when evaluating whether practices are reasonable, (id. at 77).

[27] As discussed above, several of Complainants' other arguments do not fall under § 10702 because they are subject to more specific statutory provisions. That is not the case with respect to the arguments addressed in this section.

On rebuttal, Complainants argue that agency and federal court decisions routinely look to the purpose of a railroad's practice to determine whether it is reasonable. (Complainants Rebuttal 33 & n.100.)

None of the decisions cited by Complainants involved a rule or practice with a reasonable purpose previously established by the agency.[28] Unlike those cases, reasonable business or policy purposes for empty repair move charges had already been established long before UP adopted Item 55-C. In ending its prohibition on separate empty repair move charges, the ICC supplied the policy purposes for adopting these charges: preventing the cross-subsidization, misallocation, and inefficiency that prevailed under the prohibition. See IHB II, 3 I.C.C.2d at 606, 611.

Moreover, notwithstanding Complainants' reliance on discovery materials suggesting that UP meant to increase its revenue, (see Complainants Opening 40-41), they do not dispute that UP began the internal analysis that led to Item 55-C in response to PHMSA's retrofit mandate. Indeed, the record demonstrates that UP decided to reassess its business practices based on PHMSA's proposal of regulations. (See UP Reply, Apr. 26, 2019, V.S. Kenny Rocker at 1-4.)

Accordingly, Complainants have not demonstrated that UP lacked a reasonable business or policy purpose when it adopted Item 55-C.

3. Mileage Equalization

Complainants assert that UP's adoption of Item 55-C was an unreasonable practice because it "circumvent[ed] the constraints" of the mileage equalization system adopted in EP 328. (See Complainants Opening 39-40, 44-50.) By adopting a separate empty repair move charge, Complainants contend, UP undermined the mileage equalization program, because UP "could not simultaneously charge for tank car repair moves and also receive mileage equalization payments based upon those same movements." (See id. at 45, 47.) Complainants imply that, if UP wanted to adopt a separate empty repair move charge, it would have had to seek renegotiation of the EP 328 agreement. (See id. at 49.)

Complainants' position disregards the findings and determination of IHB II. That decision expressly permits railroads to establish empty repair move charges notwithstanding the mileage equalization system. In fact, the inadequacy of mileage equalization with respect to empty repair move costs was a primary reason for the ICC's decision. See IHB II, 3 I.C.C.2d at 606 ("[T]here is no necessary relationship between each carrier's share of repair move responsibility in terms of loaded revenue miles and its participation in repair move operations.

[28] See Granite State Concrete Co. v. STB, 417 F.3d 85, 95 (1st Cir. 2005) (denying petition for review of Board determination that one railroad acted reasonably in light of safety concerns when imposing conditions on another railroad operating on its lines); Consol. Rail Corp. v. ICC, 646 F.2d 642, 648 (D.C. Cir. 1981) (affirming ICC's cancellation of tariffs, which were based on unnecessary and wasteful special train service for hazardous radioactive material); Ark. Elec. Coop.—Pet. for Declaratory Ord., FD 35305, slip op. at 6 (STB served Mar. 3, 2011) (considering reasonableness of rule intended to limit loss of coal dust from rail cars in transit).

Since the equalization rule does not deal with that problem, then *a fortiori* it cannot prevent misallocation and cross subsidization. Some other solution is therefore needed."). Accordingly, the ICC has already permitted railroads to exit the mileage equalization tariff as it applies to repair movements.

In Buffalo & Pittsburgh, car providers advanced an argument very similar to Complainants' current position. They contended that the EP 328 agreement, unless it is renegotiated, requires that an empty repair move charge be treated as a "departure tariff," which is subject to automatic investigation by the agency, with the railroad bearing a burden to justify the tariff based on evidence of "special circumstances." See Buffalo & Pittsburgh, 7 I.C.C.2d at 18, 24. The ICC disagreed, holding that neither the "departure tariff" procedures nor renegotiation were required of a railroad establishing an empty repair move charge. Id. at 25, 27-28. Likewise, the mileage equalization rule established in EP 328 does not prevent a railroad from establishing an empty repair move charge. Complainants' argument is contrary to precedent.

Complainants further assert that the ICC, in IHB II, "indicated that changes to equalization through the process that produced the [EP 328] Agreement would be required to avoid" undermining the mileage equalization system. (See Complainants Rebuttal 48-49 (citing IHB II, 3 I.C.C.2d at 619).) But the ICC revisited that issue three years later in Buffalo & Pittsburgh, holding that:

> [a]lso unconvincing is the car providers' claim that the [EP 328] agreement was somehow inconsistent with any repeal of the free repair moves rule, and would have to be renegotiated before any decision reversing that rule could be implemented. It is true that in [IHB II], we stated that the equalization rule might require refinement for the changeover to be fully effective. We did not require negotiations, however.

Buffalo & Pittsburgh, 7 I.C.C.2d at 27-28 (citation and emphasis omitted). Complainants claim that the Buffalo & Pittsburgh decision was "based upon an assumption" that the effect of IHB II on equalization would be adverse to railroads, and therefore "the ICC assumed that the major line-haul carriers would not implement separate charges for empty repair moves" until they negotiated changes to the agreement. (See Complainants Rebuttal 49-51 (footnote omitted) (citing Buffalo & Pittsburgh, 7 I.C.C.2d at 28).)

However, the ICC did not predict that railroads would refrain from adopting separate empty repair move charges absent renegotiation. Rather, having suggested that the effect of IHB II on equalization appeared adverse to the railroads, the ICC stated: "[t]hus *if* anyone would seek modification of the equalization rule it would be the railroads. They have not done so." Buffalo & Pittsburgh, 7 I.C.C.2d at 28 & n.14 (emphasis added). The prediction, in other words, addressed renegotiation alone, without linking it to the adoption of separate empty repair move charges. Moreover, this was a supporting rationale, and it has no effect on the ICC's primary conclusions that renegotiation was not required before implementing IHB II and that the ICC did not require renegotiation. See Buffalo & Pittsburgh, 7 I.C.C.2d at 27-28.

4. Multi-Leg Empty Repair Moves

UP's tariff states that Item 55-C charges will not apply to an empty move to a repair facility that is immediately preceded by a loaded line-haul move. (Complainants Opening, Ex. 1 at ¶ D.) Complainant Cargill states that, when one of its tank cars 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. (See Cargill Suppl. Opening 23; see also POET Ethanol Suppl. Opening 22-23 n.16.) Cargill argues that the move from the cleaning facility to the repair shop should be treated as a loaded line-haul revenue move—since UP is imposing a freight charge for moving the tank car—where the car itself is the commodity. Thus, according to Cargill, it is an unreasonable practice for UP to charge for the third move, from the repair shop to Cargill's facility. (Id. at 23-24.)

Cargill does not point to case law or statutory authority that would require an additional free move. It is true that "[c]arriers are required to abide by their published rules just as they are required to charge their published rates." E.g., APL Land Transp. Servs. v. Burlington N. & Santa Fe Ry., NOR 42003, slip op. at 10 (STB served July 14, 1999). But Cargill has not shown that UP's practice departs from its tariff. Item 55-C provides that "empty movements that are immediately preceded by a *loaded* line-haul revenue movement on Union Pacific will move free of charge *to Repair Facilities*." (Complainants Opening, Ex. 1 at ¶ D (emphasis added).) As UP points out, the cleaning-facility-to-repair-shop movement (movement (b), as labeled above) is not loaded, and the repair-shop-to-Cargill movement (movement (c)) is not a movement to a repair facility. (See UP Reply 81, Apr. 26, 2019.) Accordingly, Cargill's argument is contradicted by the tariff.

To the extent Cargill is arguing that UP should be required to change this aspect of its tariff, the argument is foreclosed by IHB II. That decision permitted railroads to charge for empty repair moves, and—although today's decision introduces a prerequisite to that authorization—it does not become unlawful to charge for an empty movement merely because UP decided to perform another empty movement for free.[29]

SUMMARY

Congress has required rail carriers to furnish safe and adequate car service and to establish, observe, and enforce reasonable rules and practices on car service. The relief ordered here furthers this mandate by helping to ensure that the cost of owning tank cars, and specifically of empty repair moves, is appropriately allocated to UP. Consequently, UP will be directed not

[29] Because the Board rejects Complainants' unreasonable practice claims, today's decision does not run afoul of the prohibition on using the agency's authority over unreasonable practices to regulate the level of rates charged. See Union Pac. R.R. v. ICC, 867 F.2d 646, 649 (D.C. Cir. 1989). No part of this decision depends on the *level* of rates. This decision establishes that UP will not be permitted to impose the costs of empty repair moves—at any level—on tank car shippers absent a showing that these costs are being adequately passed back to the car provider.

to charge for moving private tank cars to and from repair shops unless it can demonstrate that car providers are reimbursed for those expenses.

However, because UP reasonably relied on the ICC's decision authorizing separate empty repair move charges, which expressly declined to require mileage allowances or any other compensation mechanism, and because evidence regarding UP's zero-mileage rates is inconclusive, the Board will not make this change retroactively and will not award damages.

It is ordered:

1. UP is directed not to charge for moving private tank cars to and from repair shops unless it can demonstrate that car providers are reimbursed for those expenses.

2. In all other respects, the complaints are denied.

3. This decision is effective on February 14, 2025.

By the Board, Board Members Fuchs, Hedlund, Primus, and Schultz. Board Members Hedlund and Schultz concurred with separate expressions. Board Member Fuchs concurred in part and dissented in part with a separate expression.

BOARD MEMBER HEDLUND, concurring:

I wish to commend my colleagues and our hard-working Staff for finally bringing this matter to resolution. Beyond what is apparent from the record, I have no personal insight into why the proceeding, originally filed in 2015, lingered for as long as it did prior to my joining the Board in early 2022. Since then, the Board has dealt with a very heavy agenda, including Amtrak's petition to access the Gulf Coast line between New Orleans and Mobile (FD 36496), a nation-wide service emergency that prompted the Board to hold a two-day hearing in April 2022 (EP 770), and proceedings to consider the first Class I rail merger in over 20 years (FD 36500). In addition, we finalized a number of rulemakings that had been pending for some time, including the final rules on Reciprocal Switching (EP 711 (Sub-No. 2)), Service Emergencies (EP 762), Small Dispute Arbitration (EP 765), and Final Offer Rate Review (EP 755).

Naturally, over this period these critical matters took up much of the Board's attention. That is certainly no excuse, and Petitioners in this case pointed out the institutional costs of this kind of prolonged delay in a December 12, 2023, letter to the Board:

> Multiple Board Members, over the past few years, have asked why shippers do not file complaints with the Board when they believe that railroads are engaged in unreasonable practices. One prominent reason shippers have pointed to is the considerable time and expense of pursuing such cases. These cases are emblematic of that response. The individual and association complainants who have invested considerable resources to litigate these consolidated cases have waited for the

> Board to resolve their complaints for nearly a decade. Meanwhile, other injured shippers have viewed these cases as vindication of their decision not to file complaints with the Board, and reinforcement of their general belief that rail carrier practices disputes will not be resolved in a timely and effective manner by presenting them to the Board in a formal case. We urge the Board to be cognizant of this perception and reality and act to rectify it.

It also bears noting that the delay in this case is especially distasteful given that the Decision imposes relief only prospectively, and that Union Pacific up to this point has maintained what the Board ultimately determined to be an unearned financial windfall for an exasperating period of time.

As noted above, the Board has had a busy docket over these last few years. Nevertheless, going forward I expect that, together with our very diligent Staff, we will endeavor to find new and better ways to resolve all matters in a timely fashion.

BOARD MEMBER SCHULTZ, concurring:

I agree with and join the decision issued by the Board in this case. In preserving the ability of tank car owners and railroads to use zero-mileage rates, the Board continues to respect and protect the ability of stakeholders to create their own solutions without the need for government intervention. Private solutions by industry participants often achieve better outcomes than those created by the Board because industry participants are closer to the issues and are in the best position to know how to meet their needs.

I write separately only to acknowledge the amount of time this decision took. Parties should be able to expect that matters brought before the Board will be decided within a reasonable amount of time, and that did not occur here. I do not think that fault for the delay in this case rests at the feet of any one person, but the Board as a whole. The delay in issuing this decision is inexcusable, and the Board must endeavor to act more quickly in issuing its decisions.

BOARD MEMBER FUCHS, concurring in part and dissenting in part:

I concur with today's decision (Decision) that the Board has authority to adjudicate a car-service compensation claim and that UP's imposition of the Item 55-C empty repair move charge is not an unreasonable practice under 49 U.S.C. § 10702. However, I respectfully dissent in part because I find that Complainants have met their burden to show that UP has failed to compensate Complainants for the use of their tank cars in violation of the carrier's car-service obligations and thus that UP did not meet the compensation-prerequisite in imposing Item 55-C. I also disagree with the prospective burden-shifting and directive in the Decision because, among other things, the Board's merits findings ought to have been sufficient to guide parties. Any industry-

wide change intended by the Decision is better considered through a broader public process in which the Board could benefit from the views of additional affected entities.

Standard. As the Decision outlines, the car-service statute at issue here dates back more than 100 years to an economic regulatory framework much different from today, and the statute applies to a wide range of relationships between carriers and shippers, covering the movement of different commodities in varied car types.[1] From 1966 to 1980, Congress enacted significant changes to the statute to deal with shifting car supply problems—first, amending the statute multiple times during a push for incentive payments and increased compensation amidst a car shortage and then again during an oversupply of certain cars.[2] The net effect of these amendments and subsequent precedent was not to completely deregulate car service but instead to permit carriers additional flexibility to address misallocation, cross-subsidization, and inefficiency in car supply. See Gen. Am. Transp. Corp. v. Ind. Harbor Belt R.R. (IHB II), 3 I.C.C.2d 599, 606, 611 (1987). The current iteration of the car-service statute is neither the zenith of clarity nor my preferred framework. Nonetheless, in carrying out the statute, agency decisions affirm and advance three regulatory principles especially relevant to this case.

First, carriers "have the basic responsibility of supplying equipment. Accordingly, they must compensate private car owners for supplying the private cars used." Cap on Mileage Allowances for Use of Privately Owned Tank Cars, SP (Cap on Mileage Allowances 1987), NOR 39909, slip op. at 4 n.8 (ICC served Feb. 9, 1987) (citations omitted). Under section 11121(a)(1), "[a] rail carrier providing transportation subject to the jurisdiction of the Board . . . shall furnish safe and adequate car service . . . ." Section 11122 addresses compensation to be paid by carriers when they do not provide cars themselves but instead use cars supplied by third parties. The compensation requirement of section 11122 includes the cost of moving empty cars to and from repair facilities. E.g., Gen. Am. Transp. Corp. v. Ind. Harbor Belt R.R. (IHB III), NOR 35404, slip op. at 2 (ICC served Feb. 29, 1988) (emphasizing "[t]he railroads' obligation to compensate car owners for costs of ownership including repair movements").

Second, carriers can satisfy the compensation requirement via zero-mileage rates—that is, without mileage allowances[3]—if they discount the rate for transportation relative to the rate in

[1] See Hepburn Act, Pub. L. No. 59-337, 34 Stat. 584, 584 (1906); Esch Car Service Act, Pub. L. No. 65-19, 40 Stat. 101, 101 (1917); Transportation Act of 1920, Pub. L. No. 66-152, § 402, 41 Stat. 456, 476 (1920).

[2] See An Act to amend section 1 (14) (a) of the Interstate Commerce Act to insure the adequacy of the national railroad freight car supply, and for other purposes, Pub. L. No. 89-430, 80 Stat. 168 (1966); 49 U.S.C. § 1(14)(a) (1976); Staggers Rail Act of 1980 (Staggers Act), Pub. L. No. 96-448, § 224, 94 Stat. 1895, 1929-30. In between policy changes, Congress recodified the statute, rewording various phrases in the process. See Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337, 1421-22.

[3] As the Decision states, a mileage allowance is a direct payment from a carrier to a private car provider for the carrier's use of the provider's cars for loaded movements, "determined by applying a unit per-mile charge appropriate for a particular car to the loaded miles operated by that car." Charges for Movement of Empty Cars, Buffalo & Pittsburgh R.R., 7 I.C.C.2d 18, 20 (1990).

carrier-supplied cars. See LO Shippers Action Comm. v. Aberdeen & Rockfish Ry., 4 I.C.C.2d 1, 17-18 (1987). However, when the agency made this determination, it emphasized the importance of a dual-rate scale (i.e., a zero-mileage rate compared to a rate with a carrier-supplied car). LO Shippers, 4 I.C.C.2d at 18 ("A railroad escapes no legal obligation concerning car compensation by publishing zero allowance rates in dual rate scales. The adequacy of the differential is subject to the same tests as the adequacy of an allowance."); see also UP Mot. to Dismiss 5, 13-16, Apr. 20, 2015 (expressly acknowledging the compensation requirement and recognizing that LO Shippers provides two alternative methods of satisfying it—using mileage allowances *or* lower, zero-mileage rates). The dual-rate scale provides a basis for agency assessment of the adequacy of compensation. See LO Shippers, 4 I.C.C.2d 11-14, 18; see also LO Shippers Action Comm. v. ICC, 857 F.2d 802, 808 (D.C. Cir. 1988).

Third, carriers must compensate car providers as a prerequisite for separately charging for an empty repair move. IHB II, 3 I.C.C.2d at 608, 613-16, IHB III, NOR 35404, slip op. at 2; Gen. Am. Transp. Corp. v. ICC (IHB Appeal), 872 F.2d 1048, 1051-52, 1055, 1057-58 (D.C. Cir. 1989). When the agency removed the prohibition on separate empty repair move charges, it relied on commitments by carriers, including UP, to compensate car providers for the new empty repair move charges. See IHB II, 3 I.C.C.2d at 614 ("[I]f charges for repair moves are made, the car owners may pass them back to the railroads as repair expense elements in mileage allowance computations. [UP] suggested the use of that method to remedy the problems cause[d] by the existing situation."); see also IHB III, NOR 35404, slip op. at 2. At the time, the predominant compensation method for a tank car was a mileage allowance. On appeal, the court understood the agency's intent—in the context of mileage allowances—to "resolve the intercarrier-allocation problem without doing violence to the principle of carrier responsibility for the costs of owning railroad cars . . . ." IHB Appeal, 872 F.2d at 1055. Compensation in some form—that is, the pass-back of ownership costs, including empty repair move charges—was critical to the court's analysis of the agency's action. Id. at 1057 ("Petitioners' argument, it seems to us, runs aground on section 11122 of the Act, which plainly contemplates initial railroad charges for freight movements *with a 'pass-back' of ownership costs to carriers* through allowances.") (emphasis added) (footnote omitted).

Discussion. Complainants have shown that UP fell short of its legal obligations under the car-service statute when it imposed Item 55-C. Unlike the situation in LO Shippers—the governing and primary precedent concerning zero-mileage rates—the record does not show any dual-rate scale that would enable the agency to assess compensation under section 11122. The record also does not support any other form of compensation, such as mileage allowances or any consideration by UP of the requisite discount to current rates. On this record, Complainants have met their burden to show that UP violated section 11122, and therefore—when the carrier imposed Item 55-C—it did not satisfy the compensation prerequisite underlying IHB II. See IHB II, 3 I.C.C.2d at 608, 613-16.

In addition to the absence of a dual-rate scale and mileage allowance payments, Complainants provide evidence that UP did not view the new car ownership costs as tied to any rate discount or ongoing compensation effort. As the Decision notes, a UP employee with direct knowledge of the imposition of Item 55-C stated on the record that the carrier viewed line-haul rates and the empty repair move charge as "mutually exclusive." (Rocker Tr. 60.) In other words, UP's new imposition of car ownership costs (i.e., the empty repair move charge) resulted

in no change to the line-haul rate that—if like LO Shippers—would have been discounted for similar costs. This dynamic casts doubt about whether the requisite compensation existed at the time UP imposed Item 55-C and supports the view that UP was pricing the relevant line-haul rates to what the market would bear (or, alternatively, the maximum reasonable rate limit) regardless of car ownership considerations.[4] Complainants also present evidence that another UP employee involved in the practice was not aware of any contemporaneous effort at UP to compensate for these new costs, and the employee did not point to any specific concurrent effort to compensate Complainants for ownership costs generally. (See Craven Tr. 110-11.) Though both employees could only speak to their direct knowledge, both were well-positioned to know company compensation efforts.[5] Beyond not identifying any specific compensation effort, the UP testimony advanced a company view that a new car ownership cost would not affect a rate, much less that UP endeavored to discount or otherwise compensate consistent with section 11122. (See Rocker Tr. 60 ("We did not believe line-haul rates would be impacted . . . .").)

The Decision emphasizes the limited uncertainty in the UP witnesses' testimony, essentially suggesting there may have been some form of compensation for some unnamed car providers. However, the other evidence introduced by Complainants—particularly internal UP slideshow presentations and other documents showing the reasons for the tariff, revenue projections, and considerations for shippers—demonstrates no systemic effort to compensate car providers for the charge or to square the additional ownership costs with any specific effort (if it existed) to compensate car providers for ownership costs generally. At the time, Complainants

[4] See Rocker Tr. 35 (explaining that, for individual movements, UP "prices to the market"); Craven Tr. 51-52 (discussing the "market price" and other relevant pricing factors, such as the number of lanes at issue, without specifically mentioning car ownership). That is not to say UP did not provide evidence that cuts in the other direction (e.g., UP Reply, V.S. Murphy, Apr. 26, 2019; Craven Tr. 50-53; UP Reply 64-66, Apr. 26, 2019), but none of that evidence carries the weight of the direct evidence of the specific actions taken (and not taken), including the imposition of the charge without a dual-rate scale or mileage allowance, and the related statements and documents introduced by Complainants. I certainly recognize the possibility that if UP provided transportation in railroad-supplied cars, the associated costs could affect rates. However, the agency has essentially no specific, concrete information on this record to assess compensation under section 11122(b). See LO Shippers, 4 I.C.C.2d 11-14, 18; see also LO Shippers Action Comm. v. ICC, 857 F.2d 802, 808 (D.C. Cir. 1988) (finding the ICC's application of the § 11122(b) factors insufficiently rigorous). Moreover, just as higher rates for railroad-supplied cars would be grounded in theory in this case, Complainants provide competition-related reasons—also largely grounded in theory here—that UP may be able to execute its pricing strategy without requisite compensation. (Complainants Rebuttal, Caves R.V.S. at ¶ 31 (explaining UP's incentive to compensate).) I also note the significant practical difficulties for car providers seeking massive shifts in their fleets in an industry where carriers rarely supply tank cars. (See, e.g., Decision 2 (observing that tank cars are generally provided by non-carriers); Complainants Rebuttal 37 (noting that tank car providers have invested millions of dollars in fleet acquisition and related costs).)

[5] As discussed further below, I recognize the potential benefits of the empty repair move charge described by the UP employees. To be clear, I am evaluating the witnesses' testimony in the context of the applicable legal requirements.

faced the prospect of regulatory deadlines from a new, potentially multi-billion-dollar government mandate to retrofit their tank cars, and they had limited options (especially outside of the UP network) to satisfy this new mandate by the deadlines. (See Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains, 79 Fed. Reg. 45,016 (proposed Aug. 1, 2014); UP Reply 52-53, Apr. 26, 2019 (discussing UP's disproportionate share of empty repair moves); id. Ex. 7 at 72 (discussing backlogs for repairs).) UP explicitly states in its arguments to the Board that its objectives included obtaining compensation for providing empty repair moves related to this rulemaking and more generally. (UP Reply 72, Apr. 26, 2019.) And neither the UP internal documents nor any other aspect of the record show that the carrier executed any refund or discount approach generally, or for Complainants specifically, let alone that any such action would satisfy the statute. Considering the absence of a dual-rate scale and mileage allowance payments, as well as the statements and documents presented,[6] I find that, on this record, Complainants have shown that UP's practices do not accord with section 11122 and the IHB II compensation prerequisite for empty repair move charges. See IHB II, 3 I.C.C.2d at 608, 613-16.

My finding on the legality of the empty repair move charge at issue is limited to the evidence and arguments on this record. If my view were adopted by the Board, it would not necessarily result in the widespread reintroduction of mileage allowances. Zero-mileage rates have value, including reducing administrative expenses. I am open to the view that a carrier could satisfy, or has satisfied, the statute with a dual-rate scale *or* other evidence of adequate compensation. This expression does not broadly imply that a carrier, on a different record, necessarily has liability for an empty repair move charge with a zero-mileage rate.

I make this finding while fully acknowledging that empty repair move charges have benefits, as the agency has stated. See IHB II, 3 I.C.C.2d at 606, 611. Indeed, UP explained—publicly at the time and in litigation—that the imposition of Item 55-C aligns tank cars with its treatment of other car types, provides feedback to encourage more efficient transportation choices, and reduces empty miles on its network to help protect fluidity. (See UP Reply, Ex. 3, Apr. 26, 2019.) As the retrofit mandate imposed substantial new costs on car providers, the resulting repair moves had effects on UP, especially considering the number of repair facilities on its network. (See UP Reply 52-53, Apr. 26, 2019.) My view does not suggest that empty repair move charges should be eliminated permanently; rather, it concerns the way or conditions in which a carrier can impose such a tariff.

[6] In addition, both UP and Complainants also provide economic submissions, heavy on theory, that seem to assume varying degrees of competition, with implications for compensation, and these submissions have limited direct or specific evidence. (See UP Reply 90-92 & V.S. Murphy 22, Apr. 26, 2019; Complainants Rebuttal 53 & Caves R.V.S. at ¶ 34.) Separately, the Decision appears to presume adequate compensation because shippers previously accepted zero-mileage rates *before* UP introduced the new charge. (Decision 14-16.) Shipper acceptance of a zero-mileage rate decades ago does little to show that whatever compensation UP may have provided at that time remains to this day, especially considering that shipper acceptance predated an entirely new ownership cost imposed by UP. These submissions and the Decision's presumption carry less weight than the manifest absence of a dual-rate scale and mileage allowances combined with the testimony and documents discussed above.

The Decision cogently states that Complainants could have requested full mileage rates (i.e., rates with mileage allowances), particularly considering the existence of the National Tank Car Allowance Agreement,[7] which shippers did not seek to reform. I recognize that—given the existence of that agreement—the Decision's reasoning touches a critical legal principle: avoiding retroactive regulation. Across Board proceedings, I seek to protect and promote this principle. Here, it is not clear to me that, when shippers request transportation service, the current regulatory framework legally obligates them to ask for newly designed tariffs when the subject tariff becomes unlawful due to a new carrier-imposed practice. In my view, the fact that a shipper did not request a full mileage rate goes more to whether and the extent to which the Board should award damages, rather than to the lawfulness of UP's actions concerning Item 55-C with its zero-mileage rates. See, e.g., Cap on Mileage Allowances 1987, NOR 39909, slip op. at 6 (discussing agency's "considerable discretion" in awarding damages). And, if the Board had found a violation and considered damages, the Board would have been right also to consider Complainants' salient arguments concerning the practicality of alternative efforts, especially arguments and evidence concerning UP's past actions concerning full-mileage rates,[8] the apparent changes to tank car leases,[9] and any associated transaction costs (including potential interline difficulties).[10]

Notwithstanding my view of UP's conduct, I do not join the Decision's prospective requirement shifting the burden to UP to prove that it has provided adequate compensation for empty tank car repair moves.[11] The Board provides a short time for compliance (30 days) and directs UP "not to charge for moving private tank cars to and from repair shops unless it can demonstrate that car providers are reimbursed for those expenses." (Decision 25-26.) If the

[7] Approved by the ICC in Investigation of Tank Car Allowance Sys. (EP 328), 3 I.C.C.2d 196 (1986), modified 7 I.C.C.2d 645 (1991).

[8] See Complainants Rebuttal 53 (citing UP Reply 95 n.107, Apr. 26, 2019).

[9] See id. at 18.

[10] See id. at 18, 52; UP Reply 34 n.40, Apr. 26, 2019.

[11] The Decision justifies its prospective treatment of ownership costs by, among other things, pointing to the statutory language regarding "the intent of the Congress to encourage the purchase, acquisition, and efficient utilization of freight cars." 49 U.S.C. § 1(14)(a) (1976). I agree with the Decision that the language applies to both rulemaking and complaint proceedings. However, it is not clear to me how this language supports the Decision's merits finding. Indeed, the Decision only applies this language to support its approach to compensation *prospectively*. (Decision 19 ("Today's decision better encourages an appropriately sized fleet of tank cars because it ensures that, *going forward*, car providers will be adequately compensated . . . .") (emphasis added).) This seemingly differential treatment suggests that this language more readily supports my views on the merits. Applying the statute, I find that Complainants' evidence that they have not been adequately compensated is persuasive. See Steadman v. SEC, 450 U.S. 91, 101 n.21 (1981) ("The use of the 'preponderance of evidence' standard is the traditional standard in civil and administrative proceedings.") (citation omitted); N. Am. Freight Car Ass'n v. BNSF R.R. Co., NOR 42060 (Sub-No. 1), slip op. at 5 (STB served Jan. 26, 2007) (declining argument that "compelling" evidence was required for unreasonable practice claim, and stating that "there is no extraordinary standard of persuasion that must be met").

Board had adopted my view of the merits, it would have provided relevant guidance to serve as a precedent in future cases; in contrast, the burden-shifting requirement here undercuts much of the Decision's presumptions regarding zero-mileage rates (among other aspects of its reasoning) in arriving at its merits findings. More globally, I do not think it is appropriate for the Board to affirmatively, prospectively shift the burden of proof, especially without elaborating on how, in practice, the burden-shifting will work in a case (for example, what showing a complainant and carrier must make at the pleading stage and at the conclusion of evidence). Here, the Decision imposes a burden on UP specifically yet does not elaborate on the extent to which this shift applies to any carrier subject to a claim under section 11122. This is of particular concern because some of the Decision's reasoning relies on changed circumstances across the industry. If the Board is going to consider an action that looks like prospective rulemaking with intended industry-wide effects, the better practice would have been to engage in a broader public process where the Board could benefit from additional views of affected entities.

Finally, notwithstanding the above disagreement, I strongly agree with my colleagues that this proceeding took far too long. (See Complainants Letter, Sept. 28, 2020.) Reflecting on ways the Board can improve its practices in the future, I find aspects of the demurrage and embargo proceedings instructive. In 2019, when carriers started to change their demurrage and accessorial charge policies from their traditional approaches, Chairman Begeman led a two-day hearing that promptly resulted in four separate Board actions helping shippers and carriers privately resolve related disputes.[12] Similarly, in 2022, following a change to UP's embargo practices and a general increase in the number of the carrier's embargoes, Chairman Oberman led a two-day hearing that was followed by voluntary actions by the carrier to suspend its controversial "Private Car Pipeline Management" program and make other positive refinements to its embargo practices.[13] Today, though I dissent in part, I appreciate Chairman Primus's efforts to conclude this case. With the benefit of hindsight, I surmise that, in 2014, when UP imposed Item 55-C, a transparent and public examination of this new practice may have helped provide needed guidance to industry participants and facilitate private sector solutions, potentially mitigating the need for litigation.

[12] See Oversight Hearing on Demurrage and Accessorial Charges, EP 754; Policy Statement on Demurrage and Accessorial Rules and Charges, EP 757; Demurrage Billing Requirements, EP 759; Exclusion of Demurrage Regulation from Certain Class Exemptions, EP 760.

[13] See Oversight Hearing Pertaining to Union Pacific Railroad Company's Embargoes, EP 772 (STB served Apr. 17, 2024).