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November 6, 2012

**EXPEDITED CONSIDERATION REQUESTED**

Ms. Cynthia Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423

Re: Docket NOR 42137, *North America Freight Car Association v. BNSF Railway Company, et al.*

Dear Ms. Brown

On October 31, 2011, the Defendants in the captioned case filed a Petition to Hold Proceeding in Abeyance instead of timely filing answers to the Complaint filed on October 9, 2012, by Complainant, North America Freight Car Association ("NAFCA"). The Petition, which cites no legal authority or agency precedent to support it, is without merit and grossly misstates the facts underlying the dispute giving rise to the Complaint.

It is evident that Defendants actually are making two requests: the first is that they be given until January 11, 2013 to answer the Complaint, and the second is that the proceeding be held "in abeyance for such time as to allow the completion of [an analysis by AAR of the AAR rule discussed in the Complaint] and to allow the parties to meet, after completion of the analysis, and attempt to resolve the technical and safety issues that form the basis of the Complaint, including determining whether to seek Board mediation" (Petition at 5).<sup>1</sup> While Defendants "expect" their new analysis to be completed by the end of November, they make no firm commitment to any completion date.

In this letter, Complainant opposes Defendants' request that the due date for their answers be postponed to January 11, 2013. In a later pleading, which Complainant will file shortly, Complainant will address Defendants' request for what amounts to an indefi-

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<sup>1</sup> Defendants did not seek the concurrence of Complainant in either of Defendants' requests.

nite delay in the processing of this case. Complainant intends to vigorously oppose the Petition, and will promptly file a reply in opposition to it.

However, one aspect of the Petition requires immediate attention. In footnote 2 of the Petition, the Defendants state that the reason none of them filed an answer to the Complaint on October 31, 2012<sup>2</sup> is “as of the date of this Petition, not all Defendants have yet been served.” Petition at 1, note 2. Defendants observe that, under 49 C.F.R. § 1111.3, “service is not complete until all defendants have been served.” However, *all* of the defendants were properly served, arguably on October 9, and definitely prior to October 31, the date on which Defendants jointly filed the instant Petition, which they could not have done absent actual knowledge of the Complaint. Service was made on October 9 by hand delivery to the Association of American Railroads (“AAR”) and to the other Defendants by first-class mail. On the same day, the Complaint was posted on the Board’s website. All Defendants therefore had actual knowledge of the Complaint the day it was filed; the AAR was hand-delivered a copy; all Defendants were served by first class mail the next day; and all Defendants joined in a Petition on October 31 to hold the case in abeyance and to postpone the Complaint answer date until January 11, 2013.

Nevertheless, Defendants suggest that service of the Complaint was not fully made because “some of the individuals named [in the Certificate of Service attached to the Complaint] are not employees of the railroads they purportedly represent.” The Petition does not identify the “individuals” who allegedly are not employees of the railroads they are shown as representing, and does not identify any Defendants who had allegedly not yet been served as of October 31, 2012. The reason why Complainant did not in some cases serve the “Chief Legal Officer” of the Defendants is because many of the Defendants do not list a “Chief Legal Officer” on their U.S. websites. The fact is that only one Defendant, Canadian National Railway, returned its service copy of the Complaint to Complainant’s counsel asserting a failure to serve CN’s “Chief Legal Officer.” The individual designated as Canadian National’s Chief Legal Officer was then re-served by overnight mail on October 24, 2012, with Federal Express reporting that delivery of the service package had been made on October 25, 2012. CN is now represented by Theodore K. Kalick, who is not CN’s Chief Legal Officer.

On November 5, counsel for Complainant received a first-class mail letter, dated November 1, 2012, from R. Bruce Rider, General Solicitor for NS, claiming that the Chief Legal Officer of NS had not been served with the Complaint. Mr. Rider does not claim that NS lacked knowledge of the Complaint until November 1, 2012, as indeed he cannot, since NS joined in the instant Petition dated October 31, 2012. Mr. Rider does not assert that the Complaint was rejected, returned to sender, or otherwise failed to come to the attention of the NS legal department shortly after it was served, albeit on a person that was not the Chief Legal Officer of NS. What is evident is that NS waited until after the Petition was filed to assert, by regular mail no less, lack of proper service and to contend that NS refuses to participate in this proceeding until such service is made. Were not the

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<sup>2</sup> Under the Board’s rules, the 20 day period to answer the Complaint expired on October 29, 2012. However, the Surface Transportation Board and other federal government offices were closed on October 29 and 30.

primary purpose of NS to delay this case, it could and should have raised technical service claims at a much earlier date. Further, NS, like CN, has elected to participate actively in the instant Petition and can claim no injury from the service error that it emphasizes.

That all Defendants' received service of the Complaint is evidenced by the participation of all Defendants in the Petition. The Defendants' recognition of the weakness of their position is also evidenced by the fact that the Petition was filed on the October 31 due date for their respective answers, and Defendants have advanced a fallback position authorized by no Board regulation of asking the Board to consider their Petition as a quasi-answer to the complaint in the form of "a general denial of all allegations in the Complaint."<sup>3</sup>

The Defendants' hypertechnical arguments concerning service must be rejected and Defendants should be directed to immediately answer the Complaint with the specificity required by Rule 1111.4(a) (an "answer should be responsive to the complaint and should fully advise the Board and the parties of the nature of the defense"), failing which the Board should deem the allegations in the Complaint to be admitted pursuant to 49 C.F.R. 1111.4(e). In the alternative, the Board should direct the defendants to file their answers no later than November 19, 2012, which is 20 days from October 31, 2012, the date by which each Defendant incontestably had received a copy of the Complaint. No Defendant has suggested that it suffered any injury where service was not made to the letter of the Board's rules, and there is no reason to reward any Defendant's reliance on a hypertechnicality to delay this case.

Respectfully submitted,



Andrew P. Goldstein  
Attorney for Complainant

cc: Rachel Campbell  
Office of Proceedings

James A. Hixon  
Executive Vice President and Chief Legal Officer, NS

Thomas W. Wilcox  
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<sup>3</sup> The Defendants' "general denial of all allegations" is nonsensical. Indeed, this "answer" means that Defendants deny that they are carriers subject to the Board's jurisdiction and that AAR does not issue the Interchange Rules pursuant to which railroads and others operate. See Complaint, ¶2. Indeed, Defendants "answer" even denies that there are AAR Interchange Rules. Complaint, ¶4.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has, this 6<sup>th</sup> day of November, 2012  
been served by first class mail, postage prepaid, on counsel as follows:

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