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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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CARGILL, INCORPORATED)
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Complainant,)
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v.)
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BNSF RAILWAY COMPANY)
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Defendant.)
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Docket No. 42120

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**COMPLAINANT'S REPLY IN OPPOSITION TO
DEFENDANT'S MOTION TO COMPEL DISCOVERY**

CARGILL, INCORPORATED

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Dated: March 14, 2011

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**COMPLAINANT’S REPLY IN OPPOSITION TO
DEFENDANT’S MOTION TO COMPEL DISCOVERY**

Complainant Cargill, Incorporated (“Cargill”) opposes Defendant BNSF Railway Company’s (“BNSF’s”) Motion to Compel Discovery (“Motion” or “Motion to Compel”) and respectfully requests that the Board deny it. In support hereof, Cargill appends the Verified Statement (“V.S.”) of Randy Brown, Vice President of Cargill Transportation Logistics, and states as follows:

PREFACE

BNSF’s Motion assumes that Cargill will demonstrate that BNSF has engaged in unreasonable fuel surcharge practices by using the assailed fuel surcharge as a profit center, and that Cargill has been overcharged as a result of these unreasonable practices. BNSF argues that even if Cargill makes these showings, Cargill cannot recover monetary damages if BNSF can show that Cargill has not suffered any pecuniary loss due to competitive circumstances, cost pass-through arrangements, or fuel hedging

strategies. BNSF now seeks to compel massive discovery to prove that Cargill suffered no pecuniary loss on some or all of the 50,000 Cargill shipments potentially subject to Cargill's damages claims.

The Supreme Court in a series of landmark opinions authored by Justices Holmes and Brandeis long ago rejected the pecuniary loss defense in unreasonable rate cases and in unreasonable practice cases involving the collection of rail charges. *See, e.g., S. Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918) (Holmes, J.) (rejecting pecuniary loss defense in a maximum rate case); *Adams v. Mills*, 286 U.S. 397 (1932) (Brandeis, J.) (rejecting pecuniary loss defense in an unreasonable practice case). The Court premised these holdings on the bedrock principle that a wrongdoer should compensate the wronged party. *See Adams v. Mills*, 286 U.S. at 407 (“If the defendants exacted . . . an unlawful charge . . . the plaintiffs were entitled . . . to compensation from the wrongdoer”).

The Supreme Court later relied on these seminal transportation law decisions in rejecting the use of the pass-through pecuniary loss defense in most damage cases arising under the antitrust laws. *See Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) (White, J). The Court also emphasized in *Hanover Shoe* that the pass-through defense is predicated on esoteric economic theories and, if permitted to be raised in antitrust cases, would substantially and unnecessarily force antitrust plaintiffs to engage in monumentally complex damages discovery and to respond to monumentally complex damages evidence. The result, the Court concluded, would be to add huge costs

to already very costly proceedings, discourage plaintiffs from enforcing their legal rights, and, if the defense was successful, allow defendants to keep their unlawfully collected monies since the pass through daisy chain would eventually lead to individual consumers that do not have the financial stake, nor the resources, to file antitrust cases.

These same policy concerns apply with equal force in this case. The complex issues arising in an antitrust case concerning pass-through issues would be equally complex in a case arising under the transportation laws, particularly a case like the instant one that involves thousands of different customer arrangements. Similarly, BNSF's competition-based pecuniary loss defenses, as applied to thousands of movements, give rise to the very same problems that led the Board to ban the "product and geographic competition" defense in maximum rate cases – the complex nature of the defense overwhelms the parties and the Board and discourages parties from litigating meritorious claims.

The Board does not permit discovery into irrelevant case issues or ones where the burden of production outweighs the benefits. Since BNSF's pecuniary loss defense is not – for good reason – permitted in this case, the massively burdensome discovery BNSF seeks to support this defense is also not permitted. The Motion to Compel must be denied.

BACKGROUND

BNSF's Motion to Compel is the latest in what appears to be a never-ending campaign by BNSF, and other large railroads, to prevent shippers from obtaining regulatory relief, and damages, if the shipper demonstrates a rail carrier is collecting fuel surcharges in an unlawful manner.

As the Board knows, starting around 2003, BNSF and other large railroads began publishing fuel surcharge tariffs for application to most or all of their shippers. The railroads maintained that the purpose of these surcharges was solely to recoup incremental fuel cost increases. However, shippers soon became concerned that the tariffs were not limited to recovery of incremental fuel cost increases, but instead were being used by the carriers to substantially over-recover incremental fuel cost increases, in effect misleadingly turning a mechanism the carriers had represented was a cost recovery mechanism into a profit center.

In 2006, the Board instituted an investigation into railroad fuel surcharge practices.¹ BNSF, and other large carriers, appeared in the proceeding and took the position that the STB had no statutory authority to regulate the reasonableness of rail carrier fuel surcharge practices. Their shared position was that they were free to misrepresent that their fuel surcharges were limited to incremental fuel cost recovery –

¹ *Rail Fuel Surcharges*, STB Ex Parte No. 661 (“*Fuel Surcharges*”) (STB served Mar. 14, 2006) (“*Fuel Surcharges I*”); (STB served Aug. 3, 2006) (“*Fuel Surcharges II*”); (STB served Jan. 26, 2007) (“*Fuel Surcharges III*”).

even if that was not the case – so long as their overall price (base rate + fuel surcharge) did not exceed a reasonable maximum.

The Board rejected the railroad industry’s position, holding that the Board’s authority over reasonable rail practices included the authority to regulate the reasonableness of rail fuel surcharge practices. As the Board explained, the purpose of fuel surcharges was to recoup “the actual increase in fuel costs for handling the particular traffic to which the surcharge is applied” and, if a carrier was using a fuel surcharge “as a broader revenue enhancement measure,” it was engaged in a “misleading and ultimately unreasonable practice.” *Fuel Surcharges III* at 6-7. The Board concluded that it could exercise its regulatory authority over rail practices to stop these deceptive carrier actions because its “authority to proscribe unreasonable practices embraces misrepresentations or misleading conduct by the carriers.” *Id.* at 7.

In *Fuel Surcharges*, the Board exercised its authority over unreasonable rail practices to ban two such practices: the use of percent-of-base rate fuel surcharges and the collection of the same incremental fuel cost increase twice. *Rail Fuel Surcharges III* at 6, 10-11. The Board also ruled shippers could bring individual fuel surcharge complaints to obtain additional relief, including damages. *Id.* at 10. The Board later informed Congress that “[t]he Board will aggressively use the authority granted to us by statute to stop unreasonable [fuel surcharge] practices, thereby protecting shippers and

advancing the public interest” and that the Board “will remain vigilant on this issue and will expeditiously review any formal complaints related to fuel surcharges.”²

Dairyland Power Cooperative, Inc., a small utility, was the first shipper to bring a fuel surcharge complaint.³ Dairyland alleged that UP was collecting fuel surcharges on its traffic that exceeded UP’s incremental fuel cost increases in providing service to Dairyland, and that UP’s use of its fuel surcharge as profit center on its traffic constituted an unreasonable practice.⁴ The defendant carrier in that case, Union Pacific Railway Company (“UP”), immediately put on a full court press to stop the complainant from going forward, arguing, *inter alia*, that Dairyland’s complaint should be dismissed because the Board had no authority to regulate mileage-based fuel surcharge tariffs, and that the Board could not exercise its reasonable practice authority to prevent UP from using its fuel surcharge tariff as a profit center.⁵ The STB rejected both arguments, but ruled that to prevail on its profit center allegation, Dairyland would have to show that UP’s collection of fuel surcharges on the UP system traffic to which the surcharge was

² *Rail Competition and Service: Hearing Before the H. Comm. on Transp. and Infrastructure*, H.R. Rep. No. 110-70, at 23 (2007) (testimony of the Hon. Charles Nottingham, Chairman).

³ *Dairyland Power Coop. v. Union Pac. R.R.*, STB Docket No. 42105 (complaint filed Mar. 5, 2008) (“*Dairyland*”).

⁴ *Id.* at 4.

⁵ *Id.* (STB served July 29, 2008) at 4.

applied exceeded UP's incremental fuel cost increases on that system traffic.⁶ The case settled a few months later.

Cargill is the second shipper to file an individual fuel surcharge complaint case. Cargill's Complaint alleges, *inter alia*, that BNSF is using the assailed fuel surcharge tariff as an unlawful profit center (Complaint ¶ 7), and Cargill seeks, *inter alia*, damages arising from BNSF's unreasonable fuel surcharge practices. Like UP in *Dairyland*, BNSF filed a motion to dismiss Cargill's profit center claim. BNSF also moved to dismiss a second Cargill claim (Complaint ¶ 8) alleging that BNSF unlawfully double recovered the same incremental fuel cost increases. The Board, relying on its July 2009 decision in *Dairyland*, denied BNSF's motion to dismiss Cargill's profit center claim, but granted BNSF's motion to dismiss Cargill's double recovery claim. That decision was served on January 4, 2010. Cargill's Petition for Reconsideration of the later ruling remains pending before the Board.

Following its failed effort to dismiss Cargill's profit center claim, BNSF served its discovery requests, Cargill served its responses, and the parties' counsel have had two meet and confer sessions on BNSF's discovery.⁷ In its Motion, BNSF moves to compel answers, or document production, in response to its Interrogatory Nos. 2, 3, 5, 8, 9, 10, 11, 15 and 16, and its Document Production Request Nos. 1, 2, 3, 4, 5, 6, 13, 16,

⁶ *Id.* at 5-6.

⁷ Cargill also served discovery requests on BNSF and has engaged in meet/confers with BNSF concerning these requests.

and 17. BNSF characterized these requests in the meet and confer sessions as relating to “damages” issues and repeats that characterization in its Motion to Compel. *Id* at 1. BNSF’s discovery on damages appears to be a thinly disguised attempt to make a fuel surcharge unreasonable practice case so onerous that no shipper would ever attempt to bring one.⁸

As BNSF presented it to Cargill in the meet and confer sessions, Cargill is required at this early stage of the case to specifically identify all shipments for which Cargill will be seeking damages (Interrogatory No. 2, hereinafter referred to as “Shipment Request”). Cargill told BNSF at the meet and confer sessions that Cargill expected that its damages claim would cover the entirety of its common carrier traffic moving under the assailed fuel surcharge tariff for the two-year limitations period prior to the date of the filing of its Complaint,⁹ as well as shipments moving *pendente lite*. Cargill estimated that the total number of shipments subject to its damages claim would approximate 16,000 annual shipments or a total of approximately 50,000 shipments over the last three years now subject to its damages claim (April 19, 2008 to date) and that these shipments involved hundreds of different origin-to-destination pairs annually.

⁸ BNSF has also opposed Cargill’s routine supplementation of its Complaint to include new tariff items published after the Complaint was filed. *See* BNSF Letter to the Board, dated Feb. 22, 2011.

⁹ Cargill filed its Complaint on April 19, 2010, so the damages period starts on April 19, 2008.

Cargill also informed BNSF that it planned on calculating damages on these shipments as “the dollar difference between the fuel surcharges Cargill paid on each shipment subject to a damages claim and the fuel surcharges that would have applied if BNSF had not engaged in the unreasonable practices alleged in Cargill’s Complaint, plus applicable interest.” Cargill’s Responses and Objections to Defendant’s First Set of Discovery Requests (served Feb. 4, 2011), at 4 (“Cargill’s Discovery Responses”).

At the meet and confer sessions, and in its Motion, BNSF deemed these responses insufficient. BNSF informed Cargill that it believes that even if Cargill proves that BNSF is using the assailed fuel surcharge as a profit center or otherwise engaged in unlawful fuel surcharge practices that result in overcharges to Cargill, Cargill’s measure of damages is not the amount that Cargill was overcharged, but some lesser amount if BNSF can show that Cargill suffered no pecuniary loss, a showing BNSF claimed involved the competitive status of the involved shipments, whether any fuel surcharges Cargill paid were passed-through to others, and whether Cargill benefited from fuel hedging strategies. BNSF then opined that it had the right to seek what can only be described as the most oppressive discovery requests ever tendered to a shipper in a complaint case before the Board:

- **Competition Requests:** BNSF’s Interrogatory Nos. 3, 5, 8 and 9 seek, *for each individual shipment, or commodity shipped, that Cargill claims is subject to a damages claim*, the following information:

- 3a. whether the shipment could have been transported in whole or in part on a rail carrier other than BNSF and the identity of the carrier or carriers;
- 3b. whether the shipment could have been transported in whole or in part by a mode other than rail, the available alternative mode of transportation, and the identity of any carrier or carriers;
- 5a. how the commodity is typically transported;
- 5b. whether and why (or why not) transportation by barge or truck is an alternative to transportation by rail;
- 5c. how Cargill decides what mode of transportation to use, including the factors that influence Cargill's decision;
- 5d. the percentage of [commodity] shipments that travel entirely by rail;
- 5e. the percentage of [commodity] shipments that travel entirely by vessel;
- 5f. the percentage of [commodity] shipments that travel entirely by truck;
- 5g. the percentage of [commodity] shipments that travel using multiple modes of transportation (*e.g.* rail to barge);
- 8a. [identify each employee responsible for] determining how (*e.g.*, by what mode, by what route) a shipment of that commodity will be made;
- 8b. [identify each employee responsible for] analyzing alternative transportation options;
- 8c. [identify each employee responsible for] negotiating or arranging for transportation;
- 8d. [identify each employee responsible for] approving purchases of transportation;

- 8e. [identify each employee responsible for] negotiating the purchase or sale of the commodity;
- 8f. [identify each employee responsible for] hedging against fuel surcharges, including changes in fuel surcharges, imposed by transportation providers;
- 9a. state whether the [Cargill origin or destination] facility is directly served by rail;
- 9b. identify the rail carriers that serve the [Cargill origin or destination] facility;
- 9c. state the distance to the nearest rail carriers other than BNSF that could serve the [Cargill origin or destination] facility;
- 9d. state whether the [Cargill origin or destination] facility is directly served by vessel;
- 9e. state the distance to the nearest vessel terminal that could serve the [Cargill origin or destination] facility; and
- 9f. state whether the [Cargill origin or destination] facility is directly served by truck.

BNSF's Document Production Request Nos. 1, 3, 4, 5 and 13 request *for any commodity shipped by Cargill that is subject to the BNSF fuel surcharge:*

- 1. All documents that discuss or analyze the impact of a fuel surcharge (not limited to the BNSF fuel surcharge) on the total price paid
- 3. All documents that discuss or analyze the factors that determine the level of rail rates for transportation
- 4. All documents that discuss or analyze rail, truck, or vessel alternatives to transportation by BNSF
- 5. All documents that compare rail transportation rates or rail fuel surcharges to transportation rates or fuel surcharges for alternative modes of transportation

13. All documents relating to negotiation of transportation rates or fuel surcharges

BNSF's Document Production Request Nos. 2 and 6 request:

2. All documents that discuss or analyze the effect of rail fuel Surcharges (not limited to the BNSF fuel surcharge) on Cargill costs, Cargill profits, the volume of Cargill shipments, or the volume and/or price of Cargill sales.
6. All documents that discuss or analyze fuel surcharges charged by any transportation provider other than BNSF.

Hereinafter, Interrogatory Nos. 3, 5, 8, and 9 and Document Production Request Nos. 1, 2, 3, 4, 5, 6, and 13 will be collectively referred to as BNSF's "Competition Requests").

● **Pass-Through Requests:** BNSF's Interrogatory Nos. 10, 11 and 15 ask *for each shipment subject to a damages claim:*

10. state whether Cargill was directly or indirectly compensated by any other person for any portion of the transportation charges incurred.
10. For each such shipment, specify the amount of any such compensation, describe in detail the mechanism by which the compensation was calculated, and identify any contract or other document that sets forth the terms of such compensation.
10. This interrogatory embraces, but is not limited to, the following types of compensation arrangements: cost-plus arrangements; transportation charges assessed by Cargill to any person; charges identified as relating to transportation assessed by Cargill to any person; separate fuel or other surcharges assessed by Cargill to any person; surcharges assessed by Cargill to any person based on delivery location.
11. state whether Cargill was directly or indirectly compensated by

any other person for any portion of the BNSF fuel surcharge incurred.

11. For each such shipment, specify the amount of any such compensation, describe in detail the mechanism by which the compensation was calculated, and identify any contract or other document that sets forth the terms of such compensation.
11. This interrogatory embraces, but is not limited to, the following types of compensation arrangements: cost-plus arrangements; transportation charges assessed by Cargill to any person; charges identified as relating to transportation assessed by Cargill to any person; separate fuel or other surcharges assessed by Cargill to any person; surcharges assessed by Cargill to any person based on delivery location.
15. State whether Cargill charges a fuel surcharge to any of its customers and identify all documents that set forth the terms and conditions of any such fuel surcharge.

BNSF's Interrogatory Nos. 10, 11 and 15 will hereinafter be referred to as BNSF's "Pass-Through Requests".

- **Hedging Requests:** BNSF's Interrogatory No. 16, and its Document

Production Request Nos. 16 and 17 ask Cargill to:

- I.16. Describe in detail any actions Cargill has taken to hedge against fuel costs, including changes in fuel surcharges, imposed by transportation providers.
- D.16. [Produce]All documents relating to any actions Cargill has taken to hedge against fuel surcharges, including changes in fuel surcharges, imposed by transportation providers.
- D.17. [Produce]All forecasts or projections made or commissioned by Cargill relating to U.S. petroleum prices, including diesel fuel and crude oil prices.

BNSF's Interrogatory No. 16 and its Document Production Request Nos. 16 and 17 will hereinafter be referred to as BNSF's "Hedging Requests."

- **Time Period:** BNSF's Competition, Pass-Through and Hedging Requests unless otherwise specified, *cover the time period from January 1, 2005 to the present – i.e., six plus years. See Instruction A.*

Cargill has objected to responding to BNSF's Competition, Pass-Through and Hedging Requests on two grounds – the requests were directed at irrelevant defenses, and they are impossibly burdensome. Cargill provided detailed explanations of the grounds supporting both objections at the parties' meet and confer sessions.¹⁰

ARGUMENT

The Board should deny BNSF's Motion to Compel responses to its Competition,¹¹ Pass-Through¹² and Hedging Requests¹³ because these Requests seek information that is not "relevant to the subject matter involved" in this case and is not

¹⁰ In its Motion, BNSF mischaracterizes the parties' discussions concerning burden. Motion at 4-5. Cargill explained to BNSF that it would not withdraw its relevance objection; that the draconian requests did not lend themselves to any form of agreement that would practically reduce Cargill's burden in responding to them; but if BNSF had any specific proposals, Cargill would consider them. BNSF took the position that since Cargill would not withdraw its relevance objection, BNSF would not be offering any proposals.

¹¹ Interrogatory Nos. 3, 5, 8 and 9 and Document Production Request Nos. 1, 2, 3, 4, 5, 6 and 13.

¹² Interrogatory Nos. 10, 11 and 15.

¹³ Interrogatory No. 16 and Document Production Request Nos. 16 and 17.

“reasonably calculated to lead to the discovery of admissible evidence.” 49 C.F.R. § 1114.21(a)(1) and (2); *Potomac Elec. Power Co. v. CSX Transp., Inc.*, 2 S.T.B. 290, 292 (1997) (“we require more than a minimal showing of potential relevancy before we will grant a motion to compel discovery”).

Even if these Requests sought relevant information, which they do not, the Board should deny BNSF’s Motion to Compel because the Requests are the most outrageously burdensome questions ever tendered to a shipper in a complaint case. *See* 49 C.F.R. § 1114.21(c) (discovery may not cause “undue burden or expense”); *CSX Transp. Inc. and Delaware and Hudson Ry. Co. – Joint Use Agreement*, STB Docket No. 35348 (STB served Aug. 16, 2010) at 3 (“discovery may be denied if it would be unduly burdensome”).

The Board should also deny BNSF’s Motion to Compel Cargill to provide additional information responsive to BNSF’s Shipment Request (Interrogatory No. 2). Cargill has provided all information it can at this time in response to this Request; BNSF already possesses the requested information; and BNSF can readily retrieve it, whereas Cargill cannot.

I.
**BNSF’S MOTION TO COMPEL DOCUMENTS AND RESPONSES
TO ITS COMPETITION, PASS-THOUGH, AND HEDGING REQUESTS
SHOULD BE DENIED**

49 U.S.C. § 11704(b) provides that “[a] rail carrier . . . is liable for damages sustained by a person as a result of an act or omission of that carrier in violation

of [49 U.S.C. § 10101 *et seq.*].” Cargill has informed BNSF that it plans to calculate damages under 49 U.S.C. § 11704(b) as the difference between the fuel surcharges it paid on shipments subject to a damages claim and the amounts that Cargill would have paid if BNSF had not engaged in the unreasonable fuel surcharge practices alleged in Cargill’s Complaint, plus applicable interest. *See* Cargill’s Discovery Responses at 4.¹⁴ Cargill has also informed BNSF that the information BNSF seeks in response to its Competition, Pass-Through and Hedging Requests is not relevant because the law does not permit BNSF, in this unreasonable practice case, a damages defense based on Cargill’s competitive status, its relations with its customers, or its hedging activities. BNSF argues that the damages formulation Cargill has articulated is acceptable in a rate reasonableness case, but not in an unreasonable practice case. Motion at 7-8. BNSF has it half right.

¹⁴ BNSF repeatedly claims that “BNSF does not know what evidence of injury and damages Cargill might present.” Motion at 5. However, Cargill has informed BNSF how it plans to calculate damages, while reserving judgment at the early stages of this case on the specific method it will use to do so. *See* Cargill’s Discovery Responses at 4. BNSF also repeatedly claims that “Cargill’s challenge to BNSF’s fuel surcharge as an unreasonable practice must be based on a misrepresentation theory.” Motion at 4. To obtain relief, Cargill must prove its unreasonable practice claims as pleaded, *i.e.*, BNSF’s fuel surcharge formula “bears no reasonable nexus to, and overstates” the fuel consumption (Complaint ¶ 6) and/or BNSF is collecting “substantial profits over and above its incremental fuel cost increases” (Complaint ¶ 7). The Board has already determined that both forms of practice, if they are shown to exist, reflect “misleading” conduct that “embraces misrepresentations” because the purpose of a fuel surcharge is to recoup “the actual increase in fuel costs for handling the particular traffic to which the surcharge is applied.” *Fuel Surcharges III* at 6-7; *accord Dairyland*, (STB served July 29, 2008) at 5-6; *Cargill, Inc. v. BNSF Ry.*, STB Docket No. 42120 (STB served Jan. 4, 2011) at 4-5.

In two decisions involving the calculation of damages under the statutory predecessors of Section 11704(b), the Supreme Court authoritatively held that a shipper is entitled to reparations if it paid a rate that exceeded a reasonable maximum during the limitations period. *See Louisville & N. R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 235 (1925) (Brandeis, J.) (“the measure of damages is the amount of the excess exacted”). The Court also held in these cases that a defendant carrier cannot raise defenses of the type BNSF is attempting to raise here because, as Justice Holmes aptly put it, “[t]he carrier ought not to be allowed to retain his illegal profit.” *Darnell-Taenzer*, 245 U.S. at 534 (1918) (Holmes, J); *Sloss-Sheffield*, 269 U.S. at 235 (“recovery for excessive freight charges can be had [in a maximum rate case] without specific proof of pecuniary loss”).

The same rules apply in unreasonable practice cases involving the collection of charges. The leading case here is *Adams v. Mills*, 286 U.S. 397 (1932). The Court’s opinion in *Adams v. Mills* was written by Justice Brandeis, the author of the Court’s opinion in *Sloss-Sheffield*. In *Adams v. Mills*, the ICC had determined that the imposition of an extra 25-cent per car unloading charge “had been exacted under an unlawful practice” and the agency had ordered reparations to “the plaintiffs, who as consignees, had paid the charge found unlawful.” 286 U.S. at 405.

The defendants appealed and argued that even if their collection of the charges was an unlawful practice, the plaintiffs were entitled to no damages because they allegedly “suffered no pecuniary loss”:

The defendants contend that, even if the exaction of the extra 25-cent charge was unlawful, the plaintiffs are not entitled to recover. The argument is that under section 8 of the Interstate Commerce Act the liability of the common carrier is ‘to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation’; that before any party can recover under the act he must show, not merely the wrong of the carrier, but that the wrong has in fact operated to the plaintiff’s injury; that here the award is to the plaintiffs individually; not as agents for the shippers; and that individually they suffered no pecuniary loss

Id. at 406. The Supreme Court, relying on its opinions in *Sloss-Sheffield* and *Darnell-Taenzer*, rejected this argument. The Court held that “[i]f the defendants exacted from [the plaintiffs] an unlawful charge, the exaction was a tort, for which the plaintiffs were entitled, as for other torts, to compensation from the wrongdoer”:

We think the argument unsound, for the reasons, among others, stated in [*Darnell-Taenzer and Sloss-Sheffield*]

The plaintiffs were the consignees of the shipments, and entitled to possession of them upon payment of the unlawful charges. If the defendants exacted from them an unlawful charge, the exaction was a tort, for which plaintiffs were entitled, as for other torts, to compensation from the wrongdoer In contemplation of the law the claim for damages arose at the time the extra charge was paid Neither the fact of subsequent reimbursement by the plaintiffs . . . nor the disposition which may hereafter be made of the damages recovered is of any concern to the wrongdoers. . . . The plaintiffs have suffered injury within the meaning of section 8 of the Interstate Commerce Act (49 USCA § 8); and the purpose of that section would be defeated if the tortfeasors were permitted to escape reparation by a plea that the ultimate incidence of the injury was not upon those who were compelled in the first instance to pay the unlawful charge.

Id. at 407-08. In so holding, the Court also made it abundantly clear that “[t]he question at issue is not the reasonableness of the charge, but the lawfulness of the practice . . . of collecting the extra charge from the shipper.” *Id.* at 415.

BNSF does not cite *Adams v. Mills* in its Motion, but the decision is clearly controlling and dispositive here. Under *Adams v. Mills*, Cargill is entitled to damages equal to the amount it overpaid, plus interest, as a result of BNSF’s engaging in unreasonable fuel surcharge practices and BNSF cannot defend on grounds that Cargill did not suffer any “pecuniary loss.” *Id.*, 286 U.S. at 406. Since BNSF cannot defend on these grounds, its Competition, Pass-Through, and Hedging Requests do not seek information “relevant to the subject matter involved” in this case. *See* 49 C.F.R. § 1114.21(a).

The cases cited by BNSF in support of its contrary view are inapposite. *Pa. R.R. Co. v. Int’l Coal Mining Co.*, 230 U.S. 184 (1913) and *ICC v. United States ex rel. Campbell*, 289 U.S. 385 (1933) involved rate discrimination claims, not unreasonable practice claims. Different damage standards apply in rate discrimination cases because “the damage depends on remoter considerations.” *Darnell-Taenzer*, 245 U.S. at 534 (distinguishing *Pa. R.R.*). Similarly, *La. Railcar, Inc. v. Mo. Pac. R.R. Co.*, 7 I.C.C.2d 30 (1990) did not involve a claim that a carrier practice was unreasonable, but a claim that a shipper was damaged due to a carrier’s “fail[ure] to provide transportation on reasonable request . . . in violation of 49 U.S.C. § 11101(a).” *Id. Insulating Materials, Between Points in Official Territory*, 364 I.C.C. 599 (1981), *aff’d sub nom. Nat’l Insulation Trans.*

Comm. v. ICC, 683 F.2d 533 (D.C. Cir. 1982), involved a refund claim made under 49 U.S.C. § 10707(d) (1981) (repealed) in an investigation case, not a damages claim made under 49 U.S.C. § 11704(b) in a complaint case,¹⁵ and *Union Pac. R.R. Co. v. ICC*, 867 F.2d 646 (D.C. Cir. 1989) did not address the proper measure of damages in an unreasonable practice case.

BNSF also cites, and endeavors to distinguish *Hanover Shoe*. *Hanover Shoe* is a landmark antitrust law decision. In that case, the Supreme Court held that “an antitrust defendant could not relieve itself of its obligation to pay damages [under Section 4 of the Clayton Act] resulting from overcharges to a direct-purchaser plaintiff by showing that the plaintiff had passed the amount of the overcharge to its own customers.”¹⁶ In so holding, the Court, in an opinion authored by Justice White, emphasized that “those who violate the antitrust laws by price fixing or monopolizing [should not] retain the fruits of their illegality” and noted that due to the “wide range of factors [that] influence a company’s pricing policies,” determining whether a particular

¹⁵ In an investigation case under 49 U.S.C. § 10707 (repealed), the defendant carrier bore the burden of proving the lawfulness of the assailed rate or practice (§ 10707(e)), the statute contained an investigation-specific refund standard (§ 10707(d)), and refunds in investigation cases were not governed by the § 11704(b) damages standards that apply in complaint cases initiated under § 11701. *See Nat’l Insulation*, 683 F.2d at 540 (“Congress has provided an alternative procedure [to § 10707] for challenging unreasonable practices which result in excess charges. [A shipper] can seek damages by filing a complaint pursuant to 49 U.S.C. Secs. 11701 *et seq.*”).

¹⁶ *See Blue Shield of Va. v. McCready*, 457 U.S. 465, 474 (1982) (describing holding in *Hanover Shoe*).

business cost has been passed on would “require additional long and complicated proceedings involving massive evidence and complicated theories” and impose “insurmountable” proof burdens on defendants raising the defense in most cases. *Hanover Shoe*, 392 U.S. at 492-93. The Court also held that acceptance of the pass-through defense would defeat enforcement of the antitrust laws because the defense would create a daisy chain of pass-throughs where, in the end, the only “injured” party would be the ultimate consumer and “[t]hese ultimate consumers, in today’s case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action.” *Id.* at 494.

BNSF maintains that the principles laid out in *Hanover Shoe* are relevant only in STB maximum rate cases, not unreasonable practice cases. Motion at 11 n.5. The short answer to this argument is that in *Hanover Shoe* the Supreme Court cited *Adams v. Mills* – an unreasonable practice case – in support of its holding rejecting a pass-through defense in antitrust cases. *See Hanover Shoe*, 392 U.S. at 490 (“with respect to overcharge cases arising under the transportation laws, similar views were expressed by Justice Holmes in [*Darnell-Taenzer*] and by Justice Brandeis in [*Adams v. Mills*] . . . [that] the possibility that plaintiffs had recouped the overcharges from their customers was held irrelevant in assessing damages”).

Moreover, even if one assumed that governing case law did not exclude BNSF’s proposed pecuniary loss defenses – which it does – the Board should, for the

policy reasons articulated in *Hanover Shoe* and *Market Dominance Determinations*,¹⁷ not permit BNSF to raise these defenses in this case. BNSF’s pass-through and hedging defenses will saddle both Cargill and the Board with the same “additional long and complicated proceedings involving massive evidence and complicated theories” that led the Supreme Court to reject this defense in *Hanover Shoe*. *Id.*, 392 U.S. at 493.¹⁸ Nor is the Board well-equipped to deal these issues. The Board’s expertise is rail economics, not the economics of agricultural, food and industrial product sales, or the economics of complex commodity hedges. *See Market Dominance Determinations II*, at 9 (“with enough time and resources, we can educate ourselves on the nuances surrounding a particular shipper’s business, but such analyses are seldom simple . . . and they severely tax our limited resources”).

¹⁷ *See Market Dominance Determinations, Prod. and Geographic Competition*, 3 S.T.B. 937 (1998) (“*Market Dominance Determinations I*”), *on reconsideration*, 4 S.T.B. 269 (1999) (“*Market Dominance Determinations II*”), *aff’d on remand*, 5 S.T.B. 492 (2001) (STB rejects product and geographic competition defense in *Market Dominance Determinations I* (at 947-49) because of the need for “extensive discovery;” the “need [for the Board] to delve deeply into industrial operations that are far removed from the transportation industries that we regulate;” the “substantial burdens” development and consideration of the evidence placed on the parties; and the fact that consideration of this evidence “is an overwhelming obstacle that dissuades shippers from bringing valid . . . complaints to the Board”).

¹⁸ *See generally* IIA P. Areeda, H. Hovenkamp, R. Blair, C. Durrance, *Antitrust Law* ¶ 396 at pp. 406-411 (3rd ed. 2007) (discussing the “complexity” and “difficulties” encountered in attempting to calculate pass-through damages “that cannot be denied or ignored”).

BNSF's competition-based pecuniary loss defenses may be even more complicated and convoluted. The Board knows first-hand how complicated it is to apply a detailed competitive analysis to the transportation of a single commodity moving between a single origin and a single destination. *See Market Dominance Determinations I*, 3 S.T.B. at 947; *Oral Argument*, STB Docket No. EP 693 (STB served May 19, 2010) (STB schedules oral argument on market dominance issues in a maximum rate case involving a single utility plant destination). These complications led the Board to ban the "product and geographic competition" defense in rail rate cases, and consideration of the remaining direct transportation competition issues continues to be the subject of extensive discovery, and complex expert testimony, in cases involving only one transportation destination. *See Oral Argument, supra*. BNSF's competition defense multiplies these complications and burdens by a factor of 1,000 since Cargill's damages claim is likely to involve over a 1,000 distinct origin and destination pairs. *Brown V.S.* at 7.

Finally, the discovery BNSF seeks is beyond the pale. The Board simply needs to review the excerpted text of the questions set forth at pp. 11-13, above to see that the scope of BNSF's discovery requests exceeds anything seen before in a complaint case before this Board – including the "inordinate" product and geographic competition discovery the Board banned. *See Market Dominance Determinations II*, 4 S.T.B. at 275. Some of BNSF's requests seek detailed information on each shipment Cargill made over three year period – which Cargill estimates approximates 50,000 shipments. *Brown V.S.*

at 3. Others seek equally detailed information on shipments or commodities moving over the last six years on BNSF and other carriers. While it is self-evident that Cargill would have to devote massive amounts of time, effort, and resources to even begin to try to provide the requested information, Mr. Brown, confirms that it would be a “massive” undertaking for Cargill to try respond to these requests and that this massive exercise would be “highly disruptive and nearly impossible to do, even if [Cargill] had a large group of employees devoted full time to the matter, and without a time limitation.”

Brown V.S. at 7.

BNSF argues that it is “premature” to address burden because the parties “should be given the opportunity to try to work out any burden issues once the Board has ruled that the discovery BNSF seeks is relevant.” Motion at 12. During the parties’ meet and confer sessions, Cargill informed BNSF that it would not drop its relevance objections, but would listen to any proposals BNSF had to make on burden. None were forthcoming. More importantly, as Cargill also emphasized during the meet and confer sessions, BNSF’s questions do not lend themselves to any form of meaningful limitation given the complex nature of the defense BNSF is seeking to invoke, and the comprehensive evidence the parties will need to develop to present and rebut this defense.

The presentation of a pecuniary loss defense based on competition, pass-through and hedging evidence in a case involving a few moves would be extraordinarily complex. In a case involving thousands of moves, the complexity becomes monumental.

Cargill submits that BNSF knows all of this – it is a sophisticated litigant – and it is clear that BNSF hopes that if the Board permits its pecuniary loss defense, the defensive discovery and evidentiary process will become so overwhelmingly costly and convoluted, that no shipper will ever again file an unreasonable fuel surcharge practice case at the Board.

Moreover, the end result would be perverse if BNSF were to prevail on its pecuniary loss defense: BNSF would be found to have engaged in a “misleading and ultimately unreasonable practice”¹⁹ by using its fuel surcharge, not for cost recovery, but as a profit center, yet BNSF will be able to keep its ill-gotten gains. Justice Holmes and Justice Brandeis saw through this type of ruse in *Darnell-Taenzer*, *Sloss-Sheffield*, and *Adams v. Mills*, as did Justice White in *Hanover Shoe*. The Board should not resurrect the failed pecuniary loss defense here, nor permit BNSF to engage in the oppressive discovery it needs to pursue this illegitimate defense.

II.
**BNSF’S MOTION TO COMPEL A FURTHER RESPONSE TO ITS SHIPMENT
REQUEST SHOULD BE DENIED**

BNSF’s Shipment Request (Interrogatory No. 2) asks that Cargill “[i]dentify each shipment with respect to which Cargill contends that it incurred damages under the claims asserted in paragraphs 6 and/or 7 of the Complaint.” Interrogatory No.

¹⁹ *Fuel Surcharges III*, at 6-7.

2 also asks that for each such shipment, Cargill provide in a “computer-readable file” thirteen shipment items (*e.g.*, waybill number) typically found on railroad waybills. The Board should deny Interrogatory No. 2 because it is clearly premature and because Cargill has provided BNSF the best answer it can to this Interrogatory at this early stage of the case.

Cargill cannot “identify each shipment” that will be subject to its damage claim because Cargill has not obtained any discovery yet from BNSF, nor has Cargill submitted its case for relief. Furthermore, Cargill’s complaint covers shipments moving *pendente lite*, so some shipments have not even moved yet. Thus, the question is impossible to answer at this time.

Moreover, at the parties’ meet and confer sessions, Cargill has informed BNSF that based on information that it has developed to date, Cargill expects that all common carrier shipments it made two years prior to the date of the filing of its Complaint, as well as all *pendent lite* common carrier shipments, subject to the assailed fuel surcharge tariff items will be covered by its claim for damages, but, for the reasons set forth above, that was the best answer Cargill could provide BNSF at this early stage of the case.

Cargill also informed BNSF that, based on its review to date, the challenged tariff item applies to approximately 16,000 annual Cargill common carrier shipments moving between hundreds of distinct origin/destination pairs, so it was likely, based on current information, that its damage claim for the two year period prior to the

filing of its Complaint through the present time would involve approximately 50,000 shipments transported between hundreds of different origin/destination pairs. Mr. Brown confirms these estimates in his Verified Statement. *See* Brown V.S. at 3.

Additionally, Cargill informed BNSF that it did not maintain waybill data in a single, central computer data base, and that for Cargill to provide the requested information for all shipments that Cargill believed at this time would be subject to a claim for damages, and had already been transported, would require Cargill to undertake a complex search in multiple locations, including in warehouses where hard copies of some of the waybills may be stored. Mr. Brown confirms these facts in his Verified Statement. Brown V.S. at 3.

Finally, Cargill informed BNSF that it appeared to Cargill that BNSF had all of the information BNSF requests in response to its shipment requests for the universe of shipments likely to be included in Cargill's damage claim, in BNSF's computerized waybill records, so it was far easier for BNSF to retrieve this information in the first instance than for Cargill to do so.²⁰ BNSF did not dispute that it had this information in a computerized data base, and that the relative burden of producing the data was less for

²⁰ Cargill has requested BNSF to produce waybill information for Cargill traffic, and all other BNSF traffic, subject to the challenged fuel surcharge tariff. BNSF has not yet produced this information, but it is Cargill's understanding that BNSF plans to do so. If, upon receipt of that information, it appears incomplete, or otherwise problematic, for the Cargill traffic subject to the assailed fuel surcharge tariff, Cargill reserves the right to undertake a search of its own records to find pertinent shipment data, in which case it will provide this information to BNSF.

BNSF than for Cargill. Since Cargill has provided BNSF with the best answer it can give to BNSF's Shipment Request at this stage of the case, BNSF's motion to compel a further response to this Request should be denied.

CONCLUSION

For the foregoing reasons, Cargill respectfully requests that the Board deny BNSF's Motion to Compel.

Respectfully submitted,
CARGILL, INCORPORATED

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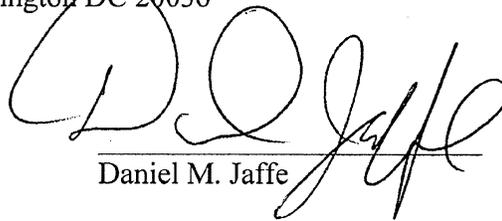
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Dated: March 14, 2011

CERTIFICATE OF SERVICE

Pursuant to 49 C.F.R. § 1111.3, I hereby certify that I have this 14th day of March 2011 caused to be served copies of the foregoing Complainant's Reply in Opposition to Defendant's Motion to Compel Discovery on the following by hand delivery:

Samuel M. Sipe, Jr.
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Daniel M. Jaffe

VERIFIED STATEMENT OF
RANDY BROWN

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CARGILL, INCORPORATED)	
)	
Complainant,)	
)	
v.)	Docket No. 42120
)	
BNSF RAILWAY COMPANY)	
)	
Defendant.)	
)	

**VERIFIED STATEMENT OF
RANDY BROWN**

My name is Randy Brown. I am Vice President of Cargill Transportation Logistics (“CTL”), for Cargill, Incorporated (“Cargill”), a position that I have held since 2003. In this capacity, I manage and coordinate logistics and transportation programs for Cargill in support of its business units (“BUs”) and its major commodity and product market segments (*i.e.*, agriculture, food and industrial).

The purpose of this statement is to address the burden that Cargill would encounter if it were required to respond to the requests set forth in BNSF Railway Company’s (“BNSF’s”) March 3, 2011 Motion to Compel discovery responses. In my capacity as Vice President of CTL, I have a close working knowledge of the areas covered by BNSF’s requests at issue, and I can speak with personal knowledge of the unmanageable, virtually impossible burden that would be imposed on Cargill were

Cargill ordered to produce materials and answer questions responsive to the discovery requests covered in BNSF's Motion.

I.

**Identification of Shipments with Respect to Which Cargill Incurred Damages
(BNSF Interrogatory No. 2)**

BNSF is seeking detailed information from Cargill on each shipment with respect to which Cargill contends that it incurred damages under its claims (in a computer readable format), including the following information:

- a. waybill number;
- b. shipment date;
- c. origin city and state;
- d. destination city and state;
- e. seven-digit STCC;
- f. shipment tons (net);
- g. number of carloads;
- h. pricing authority or contract under which the shipment moved;
- i. total charges paid for the shipment under the pricing authority or contract, including the fuel surcharge;
- j. the fuel surcharge paid;
- k. the identity of any rail carrier in addition to BNSF that participated in transportation of the shipment;
- l. the consignor of the shipment;
- m. the consignee of the shipment.

I understand that counsel for Cargill has informed counsel for BNSF that Cargill's damages claim is likely to include all of our common carrier shipments subject to the challenged fuel surcharge tariff, starting in April of 2008.

It is also my understanding that the requested information is readily available electronically to BNSF from BNSF's own waybill database, which Cargill's counsel has informed me that BNSF has agreed to produce to Cargill in discovery. In

contrast, gathering and assembling all of the information that BNSF seeks for the past three years would be burdensome and difficult for Cargill to complete, even if we had a large group of employees devoted to this matter.

Cargill does not maintain a central electronic database of rail traffic. Instead, responsive information must be gathered from multiple sources including electronic databases maintained in at least eight individual BUs, which are situated at separate locations, and from hard-copy waybill records located in at least three separate storage locations, including Wichita, KS; Minneapolis, MN; and Cleveland, OH.

Based on records I have reviewed, I estimate that the number of shipments subject to BNSF's Request No. 2 will approximate 16,000 shipments annually or approximately 50,000 shipments for the three years covered by BNSF's request. Cargill would have to expend hundreds of man-hours to retrieve all of the information responsive to Interrogatory No. 2 since we would have to conduct a search down to the warehouse level to get all of the requested information.

II.

Information and Documents on Cargill Possible Competitive Alternatives; Cargill Pass-Throughs, and Cargill Hedging Activities

BNSF has requested an extraordinarily wide-range of information from Cargill that it contends is pertinent to this proceeding. BNSF's interrogatories and requests generally pertain to three broad areas and cover a three to six year time period:

- 1) Competition: Documents and information relating to possible inter- and intramodal competition alternatives (Interrogatories 3, 5, 8, 9; Document Requests 1, 2, 3, 4, 5, 6, 13);

- 2) Pass-Through: Documents and information relating to Cargill's customers of commodities and products shipped on BNSF, and compensation arrangements for the commodities and products Cargill sells to its customers relating to the BNSF fuel surcharge costs incurred by Cargill (Interrogatories 10, 11 and 15); and
- 3) Hedging: Documents and information relating to actions Cargill has taken to hedge against fuel costs, including fuel surcharge costs provided by all transportation providers, and all Cargill forecasts/projections relating to U.S. petroleum prices (Interrogatory 16, Document Requests 16, 17).

I respectfully submit, for the reasons discussed below, that the burden of producing materials responsive to these expansive requests would be virtually impossible for Cargill.

A. Competition

BNSF's competition requests ask Cargill to research and explore each and every BNSF common carrier origin-to-destination shipment over a three-to-six year period, and for each of these shipments provide the following information:

- whether the shipment could have been transported in whole or in part on a rail carrier other than BNSF and the identity of the carrier or carriers (Interrogatory 3(a));
- whether the shipment could have been transported in whole or in part by a mode other than rail, the available alternative mode of transportation, and the identity of any carrier or carriers (Interrogatory 3(b));
- how the commodity is typically transported (Interrogatory 5(a));
- whether and why (or why not) transportation by barge or truck is an alternative to transportation by rail (Interrogatory 5(b));
- how Cargill decides what mode of transportation to use, including the factors that influence Cargill's decision (Interrogatory 5(c));
- the percentage of [commodity] shipments that travel entirely by rail (Interrogatory 5(d));

- the percentage of [commodity] shipments that travel entirely by vessel (Interrogatory 5(e));
- the percentage of [commodity] shipments that travel entirely by truck (Interrogatory 5(f));
- the percentage of [commodity] shipments that travel using multiple modes of transportation (*e.g.* rail to barge) (Interrogatory 5(g));
- [identify each employee responsible for] determining how (*e.g.*, by what mode, by what route) a shipment of that commodity will be made (Interrogatory 8(a));
- [identify each employee responsible for] analyzing alternative transportation options (Interrogatory 8(b));
- [identify each employee responsible for] negotiating or arranging for transportation (Interrogatory 8(c));
- [identify each employee responsible for] approving purchases of transportation (Interrogatory 8(d));
- [identify each employee responsible for] negotiating the purchase or sale of the commodity (Interrogatory 8(e));
- [identify each employee responsible for] hedging against fuel surcharges, including changes in fuel surcharges, imposed by transportation providers (Interrogatory 8(f));
- state whether the [Cargill origin or destination] facility is directly served by rail (Interrogatory 9(a));
- identify the rail carriers that serve the [Cargill origin or destination] facility (Interrogatory 9(b));
- state the distance to the nearest rail carriers other than BNSF that could serve the [Cargill origin or destination] facility (Interrogatory 9(c));
- state whether the [Cargill origin or destination] facility is directly served by vessel (Interrogatory 9(d));

- state the distance to the nearest vessel terminal that could serve the [Cargill origin or destination] facility (Interrogatory 9(e));
- state whether the [Cargill origin or destination] facility is directly served by truck (Interrogatory 9(f));

BNSF's competition requests also seek, for any commodity shipped by Cargill that is subject to the BNSF fuel surcharge, the following information:

- all documents that discuss or analyze the impact of a fuel surcharge (not limited to BNSF fuel surcharge) on the total price paid for transportation of any commodity shipped by Cargill (Document Request 1);
- all documents that discuss or analyze the factors that determine the level of rail rates for transportation of any commodity shipped by Cargill that is subject to the BNSF fuel surcharge. (Document Request 3);
- all documents that discuss or analyze rail, truck, or vessel alternatives to transportation by BNSF (Document Request 4);
- all documents that compare rail transportation rates or rail fuel surcharges to transportation rates or fuel surcharges for alternative modes of transportation (Document Request 5); and
- all documents relating to negotiation of transportation rates or fuel surcharges (Document Request 13).

Finally, BNSF's competition requests seek the following:

- all documents that discuss or analyze the effect of rail fuel Surcharges (not limited to the BNSF fuel surcharge) on Cargill costs, Cargill profits, the volume of Cargill shipments, or the volume and/or price of Cargill sales (Document Request 2); and
- All documents that discuss or analyze fuel surcharges charged by any transportation provider other than BNSF (Document Request 6).

As discussed above, Cargill has identified that the challenged tariff items apply to approximately 16,000 annual Cargill common carrier shipments moving on BNSF between hundreds of distinct origin-destination pairs, involving at least eight

individual BU's. There are well over 1,000 origin and destination pairs implicated by these interrogatories and requests. BNSF's competition requests would require Cargill to research and explore each and every BNSF common carrier origin-to-destination shipment for a three-to-six year period involving approximately 100,000 total shipments.

Even determining the universe of what is available and what is not in response to these requests, would itself require a massive undertaking by Cargill, across multiple departments. It is impossible to estimate with any degree of certainty exactly how much time and resources responding to these requests would entail – largely because of the broad scope of the requests, and the difficulties Cargill would face in locating/evaluating information that might be responsive to the numerous individual items. However, to compile and produce the massive group of information and materials addressing all of the myriad possible inter- and intramodal competition alternatives for the BNSF movements, to review the negotiation files, etc. would be highly disruptive and nearly impossible to do, even if we had a large group of employees devoted full time to the matter, and without a time limitation.

B. Pass-Through

BNSF's pass-through requests seek detailed end customer information covering a three to six year period. For example, for each and every BNSF common carrier origin-to-destination shipment made for Cargill, BNSF asks Cargill to provide the following information:

- State whether Cargill was directly or indirectly compensated by any other person for any portion of the transportation charges incurred, or the BNSF fuel surcharges incurred (Interrogatory 10, 11); and

- Specify the amount of any such compensation, describe in detail the mechanism by which the compensation was calculated, and identify any contract or other document that sets forth the terms of such compensation, including, but not limited to: cost-plus arrangements, transportation charges assessed by Cargill to any person, charges identified as relating to transportation assessed by Cargill to any person, and separate fuel or other surcharges assessed by Cargill to any person, surcharges assessed by Cargill to any person based on delivery location (Interrogatory 10, 11).
- State whether Cargill charges a fuel surcharge to any of its customers and identify all documents that set forth the terms and conditions of any such fuel surcharge (Interrogatory 15).

Cargill has thousands of customers across three major market segments (a fourth major market segment, risk management and financial, is discussed below):

- *Agriculture*: Cargill buys, processes, and distributes grain, oilseeds, and other commodities to makers of food and animal nutrition products. We also provide crop and livestock producers with products and services.
- *Food*: Cargill provides food and beverage manufacturers, food service companies, and retailers with high-quality ingredients, meat and poultry products, and health-promoting ingredients and ingredient systems; and
- *Industrial*: Cargill serves industrial users of energy, salt, starch, and steel products. We also develop and market sustainable products made from agricultural feedstocks.

Cargill owns and leases over 2,500 facilities in the US to meet the needs of these major market segments, and rail transportation is a critical part of these segments. These segments involve dozens of commodities and products shipped by railroad and/or other transportation mode.

BNSF's pass-through requests would require Cargill to research and explore each and every BNSF common carrier origin-to-destination shipment for a three-to-six year period involving approximately 100,000 total shipments, identify the end

customer(s) of the commodity and product shipped, and explore in detail all revenue and compensation arrangements received by those customers. Even determining the universe of what is available and what is not in response to these requests, would itself require a massive undertaking by Cargill, across multiple departments. Just as with BNSF's competition requests, it is impossible to estimate with any degree of certainty exactly how much time and resources responding to these requests would entail – largely because of the broad scope of the requests, and the difficulties Cargill would face in locating/evaluating the numerous individual items that might be responsive. However, to compile and produce the massive group of information and materials relating to these customer pass-through interrogatories and requests, just as with the competition requests, would be highly disruptive and nearly impossible to do, even if we had a large group of employees devoted full time to the matter, and without a time limitation.

C. Hedging

BNSF's hedging requests ask Cargill to provide documents and information relating actions Cargill has taken to hedge against fuel costs, including fuel surcharge costs provided by all transportation providers; and all Cargill forecasts/ projections relating to U.S. petroleum prices, over a six year period (from January 1, 2005 to the present). Responding to these hedging requests would involve a massive undertaking by Cargill. One of Cargill's four major market segments is risk management and financial. In this segment, Cargill provides our customers and our own businesses with risk management solutions in a number of markets domestically and abroad, including fuel. Cargill's risk management group consists of hundreds of employees devoted to energy

markets, and involves commodity traders and analysts that develop and support the hedging of options and other financial derivatives. This is an expansive enterprise that reviews, analyzes, and assembles an enormous amount of data.

There are numerous individuals across multiple departments in Cargill's risk management and financial group that could be involved in these hedging activities. Responding to these requests would require Cargill to conduct a large-scale search through its offices to locate responsive information. Additionally, a responsive search would likely expand well beyond Cargill's hedging products and financial groups, and across Cargill's expanded organization, including multiple BUs within Cargill's agriculture, food, and industrial segments.

It is impossible to estimate with any degree of certainty exactly how much time and resources responding to these requests would entail – largely because of the broad scope of the requests, and the difficulties Cargill would face in locating/evaluating the thousands of individual items that might be responsive. However, I can state with confidence that locating all of the Cargill personnel involved in these hedging activities over the past six years, determining whether any of them have any responsive documents and information, and compiling that information, would require a massive and highly disruptive effort on behalf of Cargill, and would be nearly impossible to complete, even if we had a large group of employees devoted full time to the matter, and without a time limitation.

VERIFICATION

MINNESOTA)
) ss:
COUNTY OF HENNEPIN)

I, Randy Brown, verify that I have read the foregoing Statement, know the contents thereof, and that the same are true as stated to the best of my knowledge, information and belief.



Subscribed and Sworn to before me

this 8 day of March, 2011.



Notary Public

My Commission expires: 1-31-2015

