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SERVICE DATE – JUNE 8, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42117

CARGILL, INC.; E.I. DU PONT DE NEMOURS AND COMPANY; EXXON MOBIL CORPORATION; JONES-HAMILTON CO.; PPG INDUSTRIES, INC.; REAGENT CHEMICAL AND RESEARCH, INC.; TAMINCO METHYLAMINES, INC.

v.

ABERDEEN AND ROCKFISH RAILROAD COMPANY; BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY; BNSF RAILWAY COMPANY; BOSTON AND MAINE CORPORATION; BUFFALO AND PITTSBURGH RAILROAD, INC.; CANADIAN NATIONAL RAILWAY; CANADIAN PACIFIC RAILWAY; CEDAR RAPIDS AND IOWA CITY RAILWAY COMPANY; CENTRAL WASHINGTON RAILROAD COMPANY; CSX TRANSPORTATION INC.; ELGIN, JOLIET AND EASTERN RAILWAY COMPANY; GARY RAILWAY COMPANY; INDIANA & OHIO RAILWAY COMPANY; IOWA, CHICAGO & EASTERN RAILROAD CORPORATION; IOWA NORTHERN RAILWAY COMPANY; KANSAS CITY SOUTHERN RAILWAY COMPANY; MAINE CENTRAL RAILROAD COMPANY; MONTANA RAIL LINK, INC.; NEW YORK, SUSQUEHANNA AND WESTERN RAILWAY CORP.; NORFOLK SOUTHERN RAILWAY COMPANY; PAN AM RAILWAYS INC.; PORTLAND TERMINAL COMPANY; ROCHESTER AND SOUTHERN RAILROAD, INC.; SANDERSVILLE RAILROAD COMPANY; SPRINGFIELD TERMINAL RAILWAY CO.; UNION PACIFIC RAILROAD COMPANY; ASSOCIATION OF AMERICAN RAILROADS; RAILINC

Decided: June 7, 2010

On January 29, 2010, Cargill, Inc., Exxon Mobil Corporation, Jones-Hamilton Co., PPG Industries, Inc., and Reagent Chemical and Research, Inc. (collectively, complainants<sup>1</sup>), filed a complaint against the above-named parties (collectively, defendants). Complainants request that, pursuant to 49 U.S.C. §§ 10702, 10704, 11121, 11122, 11701, and 11704, the Board determine the reasonableness of certain rail practices and prescribe reasonable rail practices for the future. Specifically, complainants allege that, with respect to the calculation of “mileage equalization” charges set forth in Freight Tariff RIC 6007-Series (Tariff), Item 187 and Item 190, defendants have charged complainants unreasonable amounts due to interpretations and applications of the Tariff that were not justified either by the Tariff or decisions of the Board’s predecessor, the Interstate Commerce Commission, and that are thus unlawful. Complainants also filed a petition for mediation simultaneously with their complaint.

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<sup>1</sup> Complainants filed an amended complaint on February 17, 2010, in order to add E.I. du Pont de Nemours and Company and Taminco Methylamines, Inc., as complainants.

In this decision, the Board will address the following matters: complainants' petition for mediation; complainants' motion to stay the proceeding as to Class II and III rail carrier defendants; the petition of North America Freight Car Association (NAFCA) to intervene; and complainants' motion to dismiss the complaint against Sandersville Railroad Company (Sandersville).

*Petition for Mediation.* On February 24, 2010, the Association of American Railroads (AAR), on behalf of 12 of the named defendants (AAR defendants),<sup>2</sup> filed a reply to complainants' petition for mediation. The AAR defendants stated that they consent to mediation, provided that: (1) mediation is non-binding; (2) mediation is private, confidential, and covered by an appropriate protective order; (3) the proceeding is held in abeyance during the mediation; and (4) persons with authority to bind the parties are present at any mediation session at which the mediator requests their presence. AAR defendants state that, because the Board has not issued a procedural schedule, the only deadline that would be held in abeyance would be the date for filing answers to the complaint. The following additional defendants concur with AAR defendants' reply and are amenable to mediation: Baltimore and Ohio Chicago Terminal Railroad Company (B&O); Elgin, Joliet and Eastern Railway Company (EJ&E); Maine Central Railroad Company (MCR); Pan Am Railways Inc. (Pan Am); Boston and Maine Corporation (BMC); Portland Terminal Company (Portland Terminal); and Springfield Terminal Railway Co. (Springfield Terminal).

Montana Rail Link, Inc. (MRL), a defendant to the complaint, does not oppose the petition for mediation, subject to the conditions set forth by AAR defendants, as well as the following additional conditions: (1) absent a settlement or stipulation agreed to by MRL in connection with the mediation, the mediation will not limit or restrict MRL's ability to exercise fully all the rights and defenses that would have been available to it if no mediation had occurred; and (2) if some but not all defendants in the proceeding enter into a settlement agreement in connection with the mediation, the terms of such settlement will have no precedential or evidentiary effect in subsequent proceedings in this docket (absent any agreement to the contrary by MRL).

Defendant Central Washington Railroad Company (CWA) does not oppose the request for mediation, and, with respect to AAR defendants' fourth condition, requests that the mediator not require a defendant to be present if that defendant received *de minimis* mileage equalization payments for the years at issue in the complaint.

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<sup>2</sup> The AAR defendants are: AAR; Railinc; BNSF Railway Company; Buffalo & Pittsburgh Railroad, Inc.; Canadian National Railway; Canadian Pacific Railway; CSX Transportation, Inc.; Gary Railway Company; Norfolk Southern Railway Company; Rochester & Southern Railroad, Inc.; Kansas City Southern Railway Company; and Union Pacific Railroad Company.

The following defendants have stated that they do not intend to participate in mediation and do not oppose mediation without their participation: Aberdeen and Rockfish Railroad Company; Cedar Rapids and Iowa City Railway Company (CRANDIC); Indiana & Ohio Railway Company (IORY); New York, Susquehanna and Western Railway Corp.; and Sandersville.

Iowa, Chicago & Eastern Railroad Corporation and Iowa Northern Railway Company did not reply to the petition for mediation. Absent any statement to the contrary, the Board will assume that these defendants do not intend to participate in mediation and do not oppose mediation without their participation.

Complainants filed a reply to the AAR defendants' reply. Complainants state that they agree to the conditions put forth by the AAR defendants. However, complainants state that all defendants, including the AAR defendants, should file an answer to the complaint before the proceeding is held in abeyance during mediation. Complainants argue that the filing of answers would help to facilitate the mediation process and inform complainants as to who is representing each defendant for the purposes of service.

The Board finds it appropriate here to hold in abeyance the procedural schedule in the complaint proceeding, including the deadline for answers to the complaint, pending the conclusion of mediation. As the parties may define the scope of the dispute during the course of mediation, the Board finds no need to impose the burden of filing answers prior to the conclusion of mediation. The case will be held in abeyance as to all parties, whether or not a party is participating in mediation.

Complainants' petition for mediation requests an initial mediation period no longer than 30 days. The Board's regulations at 49 C.F.R. § 1109.1 allow for any proceeding to be held in abeyance for up to 90 days while alternative dispute resolution procedures are pursued. The Board, therefore, will provide for an initial 30-day mediation period that will commence upon appointment by the Chairman of a mediator. The Chairman will appoint the mediator no later than 5 business days after service of this decision. The mediation period may be extended based upon the consent of the parties and the recommendation of the mediator.

Once appointed, the mediator will contact the parties to discuss ground rules and the time and location of any meetings. At least one principal of each party, who has authority to commit that party, shall participate in the mediation and be present at any session at which the mediator requests that the principal be present. CWA's request that defendants who received *de minimis* payments not be present at mediation is a preliminary matter to be determined by the mediator. The mediator is instructed to inform the Board when mediation has ended, with or without a resolution. Absent a settlement or stipulation agreed to by a party, a party will have the ability to exercise fully all the rights and defenses that would have been available to it if no mediation had

occurred. The terms of a settlement agreement will not have any precedential or evidentiary value in subsequent proceedings for parties not bound to the agreement.<sup>3</sup>

In summary, the terms of this decision recognize several categories of parties: parties who are amenable to mediation; parties who have stated their intent not to partake in mediation; parties who have not replied to the petition for mediation (and assumedly do not intend to partake in mediation); and parties dismissed from the proceeding, as discussed below. The Board clarifies that, at this time, it anticipates that the following parties will partake in mediation: AAR defendants; B&O; CWA; EJ&E; MCR; MRL; Pan Am; BMC; Portland Terminal; and Springfield Terminal. As stated above, absent a settlement or stipulation agreed to by a party, a party will have the ability to exercise fully all the rights and defenses that would have been available to it if no mediation had occurred. The terms of any settlement agreement reached in mediation will have no binding effect on those not participating in mediation, including the parties who have not replied to the petition for mediation.

*Motion to Stay the Proceeding as to Class II and III Carrier Defendants.* As a way to proceed without imposing disproportionate burden and cost upon Class II and III rail carriers relative to their stake in the case, and noting that their principal dispute is with Class I railroads, complainants ask, by motion filed on March 16, 2010, that the Board stay this proceeding only as to Class II and III carriers, subject to the following conditions:

1. For the stay to apply, a Class II or III carrier must execute with the Board the Undertaking agreement attached to complainants' motion and serve other parties. The Undertaking, which may be filed in lieu of an answer to the complaint, shall identify a representative of the carrier, an address, and telephone number for service of pleadings and Board decisions;
2. Except as provided in Clauses 3 and 4, upon filing the Undertaking, a Class II or III carrier will have no further obligation to participate in the proceeding and shall suffer no penalty for failure to do so. By filing the Undertaking, the carrier agrees to be bound by all decisions of the Board and by any settlement of this proceeding entered into between complainants and remaining defendants, provided that the Class II or III carrier not be required to pay any monetary reparations by a settlement;
3. Any party may ask the Board to revoke the stay as to any Class II or III carrier upon showing that participation of that carrier is necessary to protect the requesting party's rights, interests, and ability to present defenses (Clause 3); and
4. A Class II or III carrier may revoke its Undertaking at any time by notifying the Board in writing and serving notice to all other parties that have not filed an Undertaking. A carrier may not revoke its Undertaking in order to submit evidence and argument or partake in discovery after the due dates for such matters in the

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<sup>3</sup> These provisions address the concerns raised by MRL.

procedural schedule. The Board may also restrict the scope of the carrier's participation after revoking its Undertaking, if such participation would be unduly prejudicial to a party in the proceeding due to the carrier's failure to participate earlier in the case (e.g., carrier's failure to participate in discovery) (Clause 4).

AAR defendants do not object to the stay, but state that the stay should be conditioned on the stipulation that it would affect only the rights of complainants and consenting Class II and III carriers but would not, in any way, restrict or otherwise prejudice AAR defendants' abilities to protect their own rights and interests through seeking discovery or taking any other action that would require participation by defendants subject to the stay. For example, should AAR defendants seek discovery from Class II and III carriers, they should be able to do so under the Board's rules, which do not require prior approval (49 C.F.R. § 1114.21(b)); nor should AAR defendants have to make a special showing to convince the Board to revoke the stay, as proposed in complainants' Clause 3.

With a *de minimis* financial stake in the proceeding,<sup>4</sup> CRANDIC, a Class III carrier, requests that it be dismissed from this proceeding; in the alternative, it supports the motion to stay, noting that the adopted procedure should place a heavy burden of proof upon any party seeking to terminate the stay (under Clause 3).

CWA and IORY support the motion to stay. IORY also states that it intends to execute the Undertaking. As for discovery, IORY states that all necessary information is available from Railinc and that IORY is willing to direct Railinc to provide the required information. It is also willing to consider requests for information on an individual basis. IORY states that it reserves the rights to participate in any process of changing the provisions adopted in the Investigation of Tank Car Allowance System,<sup>5</sup> should a settlement be reached. IORY states that it would consider revoking the Undertaking to the extent there is not a settlement and complainants seek an order from the Board ordering monetary reparations from IORY.

Complainants' motion for stay will be denied. The Board supports and encourages the efforts of parties to limit the scope of litigation and ease the burden of parties for whom participation in the proceeding would be costly and overly burdensome given their financial

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<sup>4</sup> CRANDIC states that, during the period of January 1, 2006, to June 30, 2008, it received only \$847.34 in revenue of mileage equalization payments under the Tariff from all shippers located on its line.

<sup>5</sup> In Investigation of Tank Car Allowance System, 3 I.C.C.2d 196 (1986), supplemented 7 I.C.C.2d 645 (1991), the Interstate Commerce Commission approved an agreement between carriers and private tank owners to establish a new national tank car mileage allowance system. The agreement defines the calculation, payment, and other terms of the mileage allowance system. As Complainants note in their complaint, this decision and prior related decisions provide a guiding framework for the Tariff that governs payment calculation and procedures, including a formula used to determine the mileage allowance.

stakes, particularly for Class II and III rail carriers. However, in order to preserve the integrity of the Board's processes, the Board cannot approve the terms and conditions proposed by complainants. Specifically, the Board is concerned that the requested conditions could limit the rights of those not a party to an Undertaking agreement with complainants. For example, as AAR defendants note, Clause 3 could impede parties' access to discovery, which, under 49 C.F.R. § 1114.21, may be obtained on relevant matters without Board approval.

The terms proposed by complainants would also restrict the Board's own ability to act fairly and equitably, in the best interests of all parties involved in the proceeding. For example, Clause 3 would prescribe the standards under which the Board would revoke the stay. Parties may enter private agreements that limit or define their rights, but an agreement may not dictate standards that limit the Board's discretion in granting or denying such revocations. Under Clause 4, a party could freely revoke its Undertaking with no Board approval. Such a provision would undermine the Board's ability to oversee a proceeding and manage its own docket by delegating control over the proceeding to individual parties.

The Board's processes are intended to protect the interests and rights of all parties in a proceeding, as well as to protect the Board's ability to ensure that such rights are not infringed upon. The Board strongly encourages the Class II and III rail carrier defendants and complainants to reach private agreements that provide similar relief as the terms proposed in complainants' motion. Should parties reach an agreement, the Board will consider motions to dismiss a complaint against a party to the proceeding, even during the mediation period. The Board could dismiss the party without prejudice, and accordingly, the party would maintain the right to file a petition to intervene under 49 C.F.R. § 1112.4. The Board notes, however, that all parties may still be subject to third-party discovery.

The Board will not grant CRANDIC's request to be dismissed from the proceeding merely due to its small potential liability. As discussed above, parties are encouraged to reach private agreements in the interest of relieving the burden of parties with little or no financial stake in the proceeding.

*Petition to Intervene.* On February 26, 2010, NAFCA filed a petition to intervene in this proceeding in support of complainants. NAFCA seeks to participate in any mediation process and to participate as a full party to this proceeding. NAFCA argues that its participation will not broaden the issues in this proceeding. AAR defendants have stated that they do not object to NAFCA's intervention in the proceeding or to its participation in Board-sponsored mediation. No other parties filed comments. Because intervention will not unduly disrupt the procedural schedule, nor unduly broaden the issues raised in the proceeding, the Board will grant NAFCA's petition to intervene.

*Motion to Dismiss Complaint Against Sandersville.* On March 18, 2010, Sandersville filed a comment, stating that it has neither assessed nor collected any mileage equalization payments from the complainants or any other party during the years in question. Complainants

subsequently verified those facts and now request that the Board dismiss the complaint against Sandersville. The Board will do so accordingly.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This case will be held in abeyance for a period of 30 days from the appointment of a mediator, and may be extended as set forth above. Motions to dismiss the complaint against a defendant, as discussed above, will be accepted throughout the mediation period.
2. Complainants' motion to stay the proceeding as to Class II and III carrier defendants is denied.
3. CRANDIC's request to be dismissed from this proceeding is denied.
4. NAFCA's petition to intervene is granted.
5. Complainants' motion to dismiss Sandersville as a defendant in this proceeding is granted.
6. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.