

SERVICE DATE – DECEMBER 20, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34939

NORTH AMERICA FREIGHT CAR ASSOCIATION—PETITION FOR DECLARATORY
ORDER

Decided: December 18, 2007

On October 11, 2006, the North America Freight Car Association (NAFCA) and two of its members, The Andersons and Bunge North America, Inc. (Bunge), collectively, Petitioners, filed a petition for declaratory order. Petitioners ask the Board to consider issues arising from the alleged revocation and denial of OT-5 approvals by Union Pacific Railroad Company (UP) for Bunge to originate loads in private rail cars upgraded to handle 286,000 pounds gross weight on rail (GWR) at Bunge facilities served by UP.¹ Petitioners state that their private rail cars were upgraded in accordance with the mechanical standards set forth by the AAR for upgrading freight cars from 263,000 pounds GWR to 286,000 pounds GWR. Because of UP's failure to observe these mechanical standards set forth by the AAR, Petitioners request that a proceeding be instituted to resolve controversies and remove uncertainties regarding UP's actions, specifically, whether UP's denial of OT-5 authority amounts to an unreasonable practice in violation of 49 U.S.C. 10702, an unreasonable car service practice in violation of 49 U.S.C. 11121, or a failure to provide reasonable, proper, and equal facilities for the interchange of traffic within the meaning of 49 U.S.C. 10742.

In a reply filed on November 14, 2006, UP asserts that a proceeding need not be instituted because its limitations on private rail car usage authority were based on safety and mechanical concerns, and are consistent with revised AAR standards and recommended practices. On December 21, 2006, Petitioners filed a letter to UP's counsel, which Petitioners state is intended to be a supplement to its petition (supplement). The supplement requests voluntary production of certain information from UP, arising from the contents of UP's reply. On December 26, 2006, UP filed a request that the Board strike Petitioners' supplement from the record, asserting that it is a reply to UP's reply and prohibited under 49 CFR 1104.13(c).

¹ OT-5 is a regulation of the Association of American Railroads (AAR) governing the registration of private cars, other than tank cars, for the origination of shipments on individual railroads. The Board's predecessor, the Interstate Commerce Commission, held that it is an unreasonable car hire practice for carriers to deny OT-5 approvals for reasons other than safety, mechanical factors, or inadequate track storage. Shippers Committee v. Ann Arbor Railroad Co., 5 I.C.C.2d 856, 864 (1989), aff'd, Shippers Comm., OT-5 v. ICC., 968 F.2d 75 (D.C. Cir. 1992).

The Board has discretionary authority under 5 U.S.C. 554(e) to issue a declaratory order to terminate a controversy or remove uncertainty. In this case, there appears to be a controversy regarding the potential violation of 49 U.S.C. 10702, 49 U.S.C. 11121, or 49 U.S.C. 10742. However, the controversy is one that, upon consideration, involves complicated factual circumstances that, as illustrated by the extent of information sought by Petitioners, are more appropriately addressed in a formal complaint proceeding. A declaratory order proceeding is not intended to deal with the level of discovery and evidence needed to build a record upon which the Board could base a decision. Accordingly, the petition for declaratory order will be denied. Should Petitioners want a Board determination on their case that could entertain a request for damages or for an order that the rail carrier take specific actions, they may file a formal complaint, addressing their concerns and requesting relief.

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

It is ordered:

1. NAFCA's petition for declaratory order is denied.
2. This decision is effective on its service date.

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

Vernon A. Williams
Secretary