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October 9, 2012

Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

ENTERED
Office of Proceedings

OCT 9 - 2012

Part of
Public Record



Re: STB Docket No. NOR 43127

42137

North America Freight Car Association v. BNSF Railway Company, CSX
Transportation, Inc., Canadian National Railway Company, Kansas City
Southern Railway Company, Norfolk Southern Railway Company, Canadian
Pacific Railway Company, Union Pacific Railway Company and Association
Of American Railroads.

Dear Ms. Brown:

Enclosed for filing please find an original and 10 copies of a Complaint Alleging Unreasonable Practices, Unreasonable Rules for Car Service, and Failure to Provide Reasonable and Proper Facilities for the Interchange of Traffic and for the Receiving, Forwarding and Delivering of Property in the above referenced case.

Also enclosed is a check in the amount of \$350.00 as the filing fee for the same.

Sincerely,

Andrew P. Goldstein

FILED

OCT 9 - 2012

Andrew P. Goldstein

Attorney for

North America Freight Car Association

**SURFACE
TRANSPORTATION BOARD**

FEE RECEIVED

OCT 9 - 2012

**SURFACE
TRANSPORTATION BOARD**

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

_____ 42137
DOCKET NO. NOR 43127

NORTH AMERICA FREIGHT CAR ASSOCIATION



v.

BNSF RAILWAY COMPANY, CSX TRANSPORTATION, INC., CANADIAN NATIONAL RAILWAY COMPANY, KANSAS CITY SOUTHERN RAILWAY COMPANY, NORFOLK SOUTHERN RAILWAY, CANADIAN PACIFIC RAILWAY COMPANY, UNION PACIFIC RAILROAD COMPANY, and ASSOCIATION OF AMERICAN RAILROADS

COMPLAINT ALLEGING UNREASONABLE PRACTICES, UNREASONABLE RULES FOR CAR SERVICE, AND FAILURE TO PROVIDE REASONABLE AND PROPER FACILITIES FOR THE INTERCHANGE OF TRAFFIC AND FOR THE RECEIVING, FORWARDING AND DELIVERING OF PROPERTY

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SURFACE
TRANSPORTATION BOARD

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*Attorneys for
North America Freight Car Association*

Dated: October 9, 2012

This complaint is filed by the North America Freight Car Association (“Complainant” or “NAFCA”), on behalf of its members, for the purpose of seeking relief from unreasonable practices and unreasonable and unlawful rules of interchange of the Association of American Railroads (“AAR”) whereby the defendant Class I railroads, which jointly control AAR, mandate the use of an unreasonable process, unreasonably costly and/or burdensome repair and maintenance requirements on private railcar owners through the adoption of rules governing rail car service and interchange, even though there are no discernible safety benefits or interchange improvements realized by the mandated requirements, and the principal purpose and result of applying such rules and requirements is lowering the operating expenses and increasing the profits of the Class I railroads. Complainant respectfully shows the Board for, and in support of, its complaint, as follows:

Jurisdiction

The Board has jurisdiction over the matters raised in this Complaint pursuant to its exclusive jurisdiction over transportation by rail carriers, and the remedies with respect to rules and practices established by railroads. 49 U.S.C. §10501(b)(1). The Board also has jurisdiction over the matters set forth in this Complaint pursuant to statutory obligations and remedies in provisions pertaining to car service, interchange practices, operating rules, and through routes, including but not limited to 49 U.S.C. §§10702, 11121, and 10705(a)(1).¹ Provisions for

¹ See, *Kansas City Southern Railway Co. v. Louisiana & Arkansas Railway Co., et al.*, 213 I.C.C. 351, 356 (1935) (“The operation over the rails of another carrier is, or may be, a mere incident to car service, jurisdiction over which is very clearly given to us.”) Section 10705(a)(1) authorizes the Board to direct railroads to establish through routes, which of necessity requires the interchange of cars, which cannot be accomplished in an orderly manner without interchange rules. See, also, *Rules for Car-Hire Settlement*, ICC Docket 17801, 160 I.C.C. 369 (1930) and 165 I.C.C. 495 (1930) (where Interstate Commerce Commission determined that certain car-hire

complaints to resolve disputes subject to the Board's jurisdiction are contained in 49 C.F.R. Part 1111.

The Parties

1. NAFCA is an unincorporated association comprised of member companies that manufacture, own, are lessors of, or are lessees of railroad cars not owned by railroads (hereinafter referred to as "Private Railcars"). In 2011 Private Railcars comprised 53% (766,813) of the 1,446,873 railcars registered for use in the United States.² In 2011, NAFCA members owned or leased in excess of 589,000 such Private Railcars, which was approximately 77% of the entire Private Railcar fleet.

2. Defendants BNSF Railway Company, CSX Transportation, Inc., Canadian National Railway Company, Kansas City Southern Railway Company, Norfolk Southern Railway, Canadian Pacific Railway, and Union Pacific Railroad Company, are all Class I rail carriers subject to the Board's jurisdiction.³ Defendant AAR issues the Interchange Agreement and Rules described below as adopted pursuant to the votes of defendant railroads, among others.

3. On information and belief, the AAR has a Safety & Operations Management Committee ("SOMC") with over 50 subordinate committees, all of which are controlled by AAR's defendant Class I railroad members who constitute the clear majority of committee members with voting rights. SOMC controls numerous committees with jurisdiction over interchange rules, car service rules and freight car mechanical requirements. Representatives of

rules promulgated by the American Railway Association, a predecessor to the AAR, were unreasonable.)

² According to The Official Railway Equipment Register.

³ Each individual railroad defendant may hereinafter be called by an appropriate short title. Some railroads other than the individually named defendants are permanent members of AAR, but the seven Class I railroads are believed by Complainant to be in control of AAR through voting rights related to their revenues.

Private Railcar interests are allowed to join AAR as “associate members” and a limited number of associate members are permitted to sit on certain SOMC committees, but only if they first become a “Gold” Associate Member by agreeing to pay an annual fee.. The AAR Associates Advisory Board appoints Associate Members to SOMC committees. Committee votes are on a per member basis, and not on a per car basis. The Class I railroad industry, including the railroad defendants, therefore effectively controls and dictates the content of the Interchange Rules despite owning less than a majority of all United States freight railcars.

The AAR Interchange Rules

4. AAR, acting in accordance with the votes of a majority of its controlling Class I members, promulgates, interprets, and applies rules and regulations pertaining to the mechanical condition and other requirements for all freight railcars operating in interchange service in the United States.⁴ Such rules and regulations are known as, and entitled by AAR as, the “AAR Interchange Rules.”

5. Railcars may not be operated in interchange service on a United States railroad’s track unless the owner or lessor of the railcar first “subscribes” to the AAR’s Interchange Agreement, a multilateral undertaking which must be executed by railroads, private car operators, and repair facility operators. The Interchange Agreement, attached as Appendix A, obligates its subscribers to follow the Interchange Rules.⁵ The Interchange Rules cover wear limits, gauging, cause for renewal or attention, correct repairs, reconditioning requirements, welding requirements, general information, and billing repair data requirements.

⁴ Certain rules implemented by AAR with respect to the construction specifications for tank cars are subject to the jurisdiction of the U.S. Department of Transportation. Those rules are not challenged by or involved in this complaint.

⁵ AAR Field Manual, Rule A2.

6. On information and belief, proposed changes to the Interchange Rules are processed by AAR through its Arbitration and Rules Committee (“ARC”) - a committee of SOMC -with input from one or more other committees, depending on subject matter. Under AAR Rule 121, the ARC is comprised of 15 members, 11 of which must be full member railroads of the AAR and three members of which are Gold Associate Members appointed by AAR. The remaining member of the ARC may be a railroad or a non-railroad private car owner. Included among the non-railroad representatives of the ARC during the relevant time period covered by the allegations set forth below were two NAFCA members. Under Rule 121, nine members of the ARC constitute a quorum for considering and approving rule changes. The ARC’s decisions are final, subject only to veto by SOMC. Accordingly, decisions of the ARC concerning modification to the Interchange Rules essentially are dictated by the eleven railroad representatives of the ARC.

7. As shown below, Complainant and its members have, over a period of years, made efforts to convince AAR to adopt procedures and criteria, utilizing a cost-benefit analysis, that would allocate equitably the non-safety, economic benefits resulting from rules adopted by AAR for application to Private Railcars.. Complainant and its members have been unsuccessful in such efforts.

The AAR’s “Truck Hunting” Standards: the “HI”

8. Several years ago, the AAR, through the ARC, adopted Interchange Rule 46.A.1.h aimed at reducing “truck hunting” with the aid of wayside detectors.⁶ Truck hunting is

⁶ Wayside detectors are electronic instruments placed intermittently along a carrier’s selected routes and are intended to alert the carrier to certain programmed functions of passing cars. NAFCA does not assert or imply in this complaint that wayside detectors, when used appropriately, are improper. To the contrary, NAFCA believes that, properly used, wayside detectors can make a valuable contribution toward improving railroad safety.

generally defined as the rapid oscillation of a railcar truck (the assembly that includes the wheels at each end of the railcar) at high speeds where the wheel flanges tend to ride up on the head of the rail as the truck “hunts” to find a consistent roll on the rail. The movement of the truck and wheels in turn causes the lateral movement of a tank, hopper, or other type of lading container that rests on the car’s trucks. It is impossible to eliminate all truck hunting, but excessive truck hunting can cause a railcar to operate unsafely and inefficiently. The original purpose of Rule 46.h.1.h was to identify cars having unsafe levels of lateral dynamic performance. Wayside detectors identify this performance by sensing and quantifying the lateral oscillatory behavior of the wheelsets of a car while passing over a section of tangent track.

9. To quantify the extent that truck hunting might be occurring on each railcar as recorded by a wayside detector, in 2006 the railroad industry developed what it called a Hunting Index (“HI”). The initial HI value was 0.65 for a single reading or 0.50 for two readings within a 12-month period, which meant that if a reading exceeded these levels the railroad could stop the car and request disposition to a repair shop from the car owner. Car Owners would then be required to make repairs/modifications according to AAR Interchange Rule 46.B.6, consisting primarily of repairing and/or replacing various truck components, side bearings and center plates.

10. In 2007, the AAR, through the ARC, reduced the condemnable HI for a single reading within a 12-month period from 0.65 to 0.55, and the condemnable HI reading for two readings within a 12-month period to 0.40. Reductions in the HI supposedly corresponded with reductions in truck hunting activity by the railcar, which purportedly meant the railcar and the train were being operated more safely. Because of the asserted safety benefits flowing from these early reductions and estimates of the limited number of cars that would be affected, the HI

program referenced above was not initially opposed by NAFCA or private railcar interests who were members of ARC and the AAR.

11. In October 2010, the AAR Equipment Engineering Committee (“EEC”), a committee of SOMC, proposed a further reduction of the HI to from 0.55 to 0.50 for a single reading and from 0.40 to 0.35 for two values read in a 12-month period. These changes were proposed to take effect on January 1, 2011. Although these appear to be minor reductions, ratcheting the standard down to these levels was predicted and understood by AAR to cause Private Railcar owners and operators to incur significant costs. AAR’s own estimate in an October 25, 2010 “Circular Letter” announcing the proposal to all AAR members and Private Railcar owners (Circular Letter C-11325, attached as Appendix B to this Complaint), was that it would cost \$3,375 per railcar in 2011 to comply with the new standards. Further, based on AAR’s estimate of the railcars that would not meet the new standard, the cost impact of the change in 2011 was projected to be \$10,125,000. Based on the percentage of Private Railcars in service in 2011, \$5,366,250 of these estimated costs were for the account of Private Car owners. While the annual costs of compliance after 2011 are expected to decrease, NAFCA members have estimated that their costs of complying with the new standards will be approximately \$41,200,000 between 2011 and 2026.

12. AAR estimated the annual benefits from the rule change starting in 2011 would be \$3,200 per car, per year “or a total of \$9.5 million per year in all years,” which AAR further determined was a “positive NPV of \$32.8 million over 15 years.” Appendix B at 2. AAR estimated that approximately 90% of the projected benefit from the rule change would be a reduction in the railroads’ fuel cost and 10% was attributed to reduced damage to railcars. No increased safety benefits were projected. Thus, the primary purpose and intended effect of the

2011 modifications to the HI standard was to reduce the railroads' fuel consumption costs, which in turn would increase the railroads' profitability.

13. In Circular C-11325, the AAR Director of Rules and Standards solicited input on the proposed condemnable HI reduction from AAR members and railcar owners. Numerous railcar owners, including two NAFCA Private Railcar owners, submitted comments objecting to the proposal. On December 17, 2010, the ARC approved the adjustments of the condemnable HI to 0.50 (for a single reading) and 0.35 (for two values) as of January 1, 2011, over these written objections. The new HI levels in AAR Rule 46.A.1.h took effect on January 1, 2011 despite a written dissenting opinion submitted by the two NAFCA members on December 22, 2010.

14. The AAR in early 2011 informed the two NAFCA members that AAR was internally reviewing the issues raised by them and other AAR associate members in response to the change to Rule 46.A.1.h and preparing a "white paper" for eventual distribution. After numerous lengthy delays of the completion of this review NAFCA, on September 14, 2012, requested a copy of the final "white paper" and informed AAR that a complaint would be filed with the Board if no "white paper" was produced by October 5. On October 3, 2012 AAR informed NAFCA that the internal review and "white paper" process had been modified and a new "course of action" was being taken to conduct a belated "safety analysis" of the rule change, a step which complainant believes was taken only to formulate a study for use in a complainant case.

15. When a Private Railcar car is determined to have exceeded the new HI levels, the car owner or lessor is required to pay 100% of the costs of repairing or modifying the railcar to meet the new standard. According to AAR, the railroad employing the railcar in revenue service will receive at least 90% of the economic benefits of such modifications or repairs. Based on

AAR figures, NAFCA estimates that for 2011, the costs incurred by affected Private Car entities totaled approximately \$5,400,000 from this rule change. NAFCA further estimates that, applying the AAR's figures, between 2011 and 2026, the costs incurred by Private Car entities will total approximately \$41,200,000.⁷

Count I

1. The provisions of Paragraphs 1-15 hereof are incorporated herewith as if restated in full.

2. Complainant asserts that the facts as stated establish that the defendants have engaged in one or more unreasonable practices in violation of 49 U.S.C. §10702(2), by forcing on Private Railcar owners, through an unreasonable process of establishing car interchange rules, an unreasonable requirement to incur costs as a condition for maintaining such railcars in service(a) unrelated in any substantial measure to improving the safe interchange and operation of railcars and (b) primarily designed to economically enrich the Class I railroads that control AAR by reducing their operating and maintenance costs.

3. Complainant further alleges that the January 1, 2011 revision to AAR Rule 46.A.1.h is an unreasonable practice, improper, and inequitable, because it does not provide for any sharing of the costs and benefits of the proposed rule change between Private Car Owners and the Class I railroad members of the AAR.

⁷ For simplicity, these figures are based on the AAR's basic assumptions that the overall United States railcar fleet will stay the same size from 2011 to 2016, that Private Cars will retain a 53% share of the total, the costs of repair will be \$3,375 per car for the entire period, and that the fuel savings will stay at 90% of \$3,200 per car for the entire period.

Count II

1. The provisions of Paragraphs 1-15 hereof are incorporated herewith as if restated in full.

2. Complainant asserts that the facts as stated establish that the defendants have failed to establish, observe and enforce reasonable rules and practices on car service in violation of 49 U.S.C. §11121 by forcing on Private Railcar owners an unreasonable requirement to incur costs as a condition for maintaining such railcars in service(a) unrelated in any substantial measure to improving the safe interchange and operation of railcars and (b) primarily designed to economically enrich the Class I railroads that control AAR.

3. Complainant further alleges that the January 1, 2011 revision to AAR Rule 46.A.1.h is an unreasonable rule for car service because it does not provide for any sharing of the costs and benefits of the proposed rule change between Private Car Owners and the Class I railroad members of the AAR.

Count III

1. The provisions of paragraphs 1-15 hereof are incorporated herewith as if restated in full.

2. Complainant asserts that the facts as stated establish that Defendant AAR is unwilling to adopt reasonable rules and practices on car service, including with respect to cost-benefit based cost allocations for modifications of a non-safety nature to private cars and that control of the AAR process for the adoption of such measures in the hands of the Defendant Class I railroads precludes Complainant's members and Complainant from having any effective recourse where AAR is seen to adopt unreasonable rules and practices on car service.

Relief Requested

1. Complainant requests that the Board enter an order (1) finding that defendants have violated 49 U.S.C. §10702(2) and §11121, and (2) that the January 1, 2011 revision to AAR Rule 46.A.1.h. is an unreasonable practice.

2. Complainant further requests that the Board, pursuant to 49 U.S.C. 10704(a)(1), order defendants to cease and desist from enforcing AAR Rule 46.A.1.h against Private Railcar owners, lessors and lessees until such time as a reasonable and equitable cost-benefit policy governs repairs, modifications, and operating rule changes applicable to Private Railcars.

3. Complainant further requests that the Board (a) prescribe, pursuant to 49 U.S.C. §10704(a), the reasonable and appropriate rule or practice to be followed by the AAR when implementing changes to the AAR Interchange Rules and the Interchange Agreement, and (b) establish an expedited procedure for the Board to consider, upon petition, a request from an interested party to review an AAR interchange rule proposal for the purpose of determining whether the cost-benefit relationship and other aspects of the rule are fair, reasonable, and lawful for all parties required by the rule to make car alterations or to remove cars from service; and if not, then to determine the reasonable and appropriate allocation of those costs and benefits between Private Railcar owners and the Class I members of the AAR.

4. Complainant further requests the Board to take other action and award other relief it determines is appropriate and just in the circumstances.

Respectfully submitted,



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Attorneys for
North America Freight Car Association

Dated: October 9, 2012

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Complaint has been served this 9th day of October 2012 on counsel for each defendant, as named below.

Louis P. Warchot
SVP and General Counsel
Association of American Railroads
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Washington, DC 20024

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2500 Lou Menk Drive
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Andrew P. Goldstein



ASSOCIATION OF AMERICAN RAILROADS

INTERCHANGE AGREEMENT

The Subscriber here to adopts and agrees, jointly and severally, with each and all other parties (whether corporations, partnerships, or individuals) owning or possessing railroad cars used for the transportation of commodities, which parties have respectively entered into agreements in effect similar to this instrument, that the Subscriber will abide by the Code of Rules governing the condition of, repairs to and settlements for freight cars for the interchange of traffic, as formulated and promulgated by the former Master Car Builders' Association and by the Association of American Railroads (Division V – Mechanical) or by either thereof (which rules are designated on the minutes of said Association's proceedings and are commonly known as "Interchange Rules"), and by each of said rules, and as well will abide by each and all decisions and interpretations of the Arbitration Committee provided for the said Code of Rules, until this agreement on the part of the Subscriber shall be terminated by three months' notice in writing, filed with the Secretary (or such other officer as from time to time shall be acting as Secretary) or said Railroad Association, or of such body as shall at the time have succeeded thereto.

Dated, signed and sealed the _____ day of _____ year _____.

LEGAL NAME OF COMPANY:

(Please print full name as it appears on official documents.)

Officer (Please print or type) _____

Signature _____

Title _____

* _____ (Seal)

NOTE: If subscriber is a partnership, then following signatures of the respective partners should be added the words "doing business as _____" (inserting the partnership or trade name).

***MUST BE NOTARIZED OR AFFIXED WITH A COMPANY SEAL**

Thomas J. Stahura
Executive Director, Rules
and Standards



APPENDIX B
Page 1 of 2

Monday, October 25, 2010

C-11325

Circular Letter

Subject: Solicitation of Comments: Field Manual Rule 46 Hunting Index Changes

To: MEMBERS AND PRIVATE CAR OWNERS

File Number: AC-Gen (New Business

On January 5, 2007, Circular Letter C-10452 was issued to solicit comments on an Equipment Engineering Committee (EEC) proposal to define a three-year program to ratchet down the Hunting Index (HI) Values in Rule 46 on a planned basis leading to the ultimate level of 0.2. As was explained in C-10452, a 0.20 value corresponds to cars that do not meet AAR Chapter XI hunting criteria. C-10452 also addressed the issue of setting a Window of Opportunity for cars in home shop with an HI value of 0.20.

On May 7, 2007, Circular letter C-10498 was issued to solicit comments on an EEC proposal to ratchet the HI index from 0.65 for a single reading to 0.55 for a single reading. And, the HI changed from 0.50 for two readings within a 12-month period to 0.40 for two readings within a 12-month period.

These comment circulars were implemented by Circular C-10546.

After significant experience at these current levels of the HI, the EEC is proposing to take the next step in ratcheting down these indices toward the ultimate goal of 0.20. The entire text of the proposal as accepted by the Arbitration and Rules Committee is shown below:

Current Rule 46.A.1:

- h. Truck detected by a Truck Hunting Detector, request disposition from owner**
 - (1) A single Salient Systems Truck Hunting Detector Index absolute value reading above or equal to 0.55
 - (2) Two Salient Systems Truck Hunting Detector Index absolute value reading above or equal to 0.40 in a twelve-month period.

Proposed Rule 46.A.1:

- h. Truck detected by a Truck Hunting Detector, request disposition from owner**
 - (1) A single Salient Systems Truck Hunting Detector Index absolute value reading above or equal to **0.50**
 - (2) Two Salient Systems Truck Hunting Detector Index absolute value reading above or equal to **0.35** in a twelve-month period.

This proposal is expected to increase the number of cars alerted by Truck Hunting Detectors by approximately 3000 cars the first year, 1900 cars the second year and 1300 cars thereafter. The estimated cost to repair a car sent home shop due to hunting is estimated to be \$3,375, thus the cost impact of this change is in the range of \$10.1 million the first year, \$6.4 million the second year and

APPENDIX B
Page 2 of 2

\$4.4 million thereafter. The benefits of remediating these cars occur in reduced fuel consumption and reduced equipment damage. There are non-quantified benefits of reduced train derailments and train delays. The Net Present Value of the annual benefit is estimated to be \$3,200 per car or a total of \$9.5 million per year in all years. Thus this proposal has positive NPV of \$32.8 million over 15 years.

In accordance with the provisions of Rule 123, comments are herein solicited on the proposed rule changes. All comments should be sent within 30 days of this letter to the undersigned by email to tstahura@aar.org or by regular mail. All comments received will be considered by the Committee prior to the targeted implementation date of January 1, 2011.

Sincerely,
Thomas J. Stahura
Executive Director, Rules and Standards
202-639-2139 202-639-2930 <mailto:tstahura@aar.org>

Safety and Operations
Association of American Railroads
425 Third Street, SW, Suite 1000, Washington D.C. 20024