

229699

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

MOTION TO WITHDRAW MOTION TO COMPEL

ENTERED
Office of Proceedings
JUN - 6 2011
Part of
Public Record

CARGILL, INCORPORATED

OF COUNSEL:

Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington D.C. 20036

Dated: June 6, 2011

By: John H. LeSeur
Peter A. Pfohl
Daniel M. Jaffe
Stephanie M. Archuleta
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170
Attorneys for Complainant

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

MOTION TO WITHDRAW MOTION TO COMPEL

Complainant Cargill, Inc. ("Cargill") hereby moves to withdraw its Motion to Compel Discovery ("Motion to Compel") without prejudice and in support hereof states as follows:

(1) In its Motion to Compel filed with the Board on March 31, 2011, Cargill requested that the Board (i) overrule BNSF Railway Company's ("BNSF") General Objection Nos. 1, 6, 10, 13, 15, 22-23 and 28; (ii) overrule BNSF's Tariff Limitation Objection as it applied to Request Nos. 3-5, 9-10, 14, 16, 21-23, 45-49, 51, and 53-54; and (iii) direct BNSF to produce responsive documents to Cargill's RFP Nos. 9, 21, 23, 45, 46, and 47. Cargill also reserved the right to file additional motions to compel, or seek other relief from the Board, after reviewing BNSF's production.

(2) Defendant BNSF filed its reply in opposition (“Reply”) to Cargill’s Motion to Compel on April 11, 2011. At the request of the Board, Cargill filed a response to BNSF’s Reply on April 15, 2011.

(3) Pursuant to the discovery rules at 49 C.F.R. § 1114.31(a)(3), Board staff held a conference with Cargill and BNSF on April 26, 2011 to explore whether the parties could resolve the issues raised without the need for the Board to rule on the Motion to Compel. At that conference, some issues raised in the Motion to Compel were resolved based on representations made by the parties, and others were left open for further discussion by the parties. Following the conference, the parties did engage in further discussions and the remaining issues in the Motion to Compel were resolved based on additional representations made by the parties.

(4) In light of these developments, Cargill respectfully moves to withdraw its Motion to Compel. Cargill further requests that this withdrawal be without prejudice. The issues raised in Cargill’s Motion to Compel have been resolved based on representations by BNSF concerning documents that will be produced. BNSF’s production remains ongoing, so Cargill has not yet had the opportunity to determine whether the documents either just recently produced, or that have yet to be produced, are sufficiently responsive.¹

¹ Cargill received BNSF’s first set of document production made after the April 26, 2011 conference on June 2, 2011. BNSF has informed Cargill that additional documents will be produced shortly. Also outstanding are two follow-up requests Cargill has submitted to BNSF related to documents BNSF produced prior to June 2, 2011.

(5) The relief Cargill requests here is consistent with the relief ordered by the Board in other recent discovery decisions. *See E.I. duPont de Nemours & Co. v. Norfolk S. Ry.*, STB Docket No. NOR 42125 (STB served May 23, 2011) at 1 (granting motions to withdraw pending motions to compel, without prejudice, because “neither party has received the requested discovery and cannot yet determine whether the documents produced are sufficiently responsive”); *Total Petrochemicals USA, Inc. v. CSX Transp., Inc.*, STB Docket No. NOR 42121 (STB served Dec. 9, 2010) at 1 (granting motion to withdraw motion to dismiss, without prejudice, where party filing motion “has not yet received the information and therefore cannot yet determine whether the information is sufficiently responsive”).

(6) BNSF has informed Cargill that BNSF does not oppose the relief requested in this Motion.

Respectfully submitted,

CARGILL, INCORPORATED

By: /s John H. LeSeur
John H. LeSeur
Peter A. Pfohl
Daniel M. Jaffe
Stephanie M. Archuleta
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170
Attorneys for Complainant

OF COUNSEL:

Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington D.C. 20036

Dated: June 6, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June, 2011, I caused copies of the foregoing Motion to be served electronically upon counsel for Defendant BNSF Railway Company, as follows:

Samuel M. Sipe, Jr.
Anthony J. LaRocca
Linda S. Stein
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036

/s Daniel M. Jaffe
Daniel M. Jaffe