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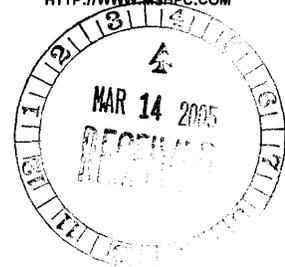
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March 14, 2005



Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, DC 20423

ENTERED  
Office of Proceedings

MAR 14 2005

Part of  
Public Record

Re: Docket No. 42060 (Sub-No. 1)  
North America Freight Car Association, et al. v. BNSF Railway Company

Dear Secretary Williams:

We are filing herewith an Amended Complaint pursuant to 49 C.F.R. § 1111.2. The primary purpose of the amendment is to clarify that each named Complainant's affiliates and subsidiaries are parties to the Complaint. This filing is necessary because of issues raised by Defendant BNSF Railway Company ("BNSF") in its discovery Objections served on February 15, 2005, and in discussions between the parties' counsel since then.<sup>1</sup>

The Board's rules contain no time limitation for amendment of complaints. Nevertheless, even though this case has been before the Board for approximately 3½ years, amendment of the Complaint for the limited purpose stated above will not cause any delay in the case, broaden the issues, or cause any discernable harm to BNSF.

The Complaint in this case was filed with the Board on August 29, 2001. On October 5, 2001, BNSF filed a motion to dismiss. Not until August 13, 2004 did the Board deny that motion.

<sup>1</sup> The Complaint was filed on behalf of North America Freight Car Association ("NAFCA") and 11 individually-named members of NAFCA (collectively "Complainants"). Initially, 11 members of NAFCA were named as individual Complainants, but one (the David Joseph Company) no longer is participating in that capacity. The Amended Complaint also reflects name changes of two of the original Complainants. A. E. Staley Manufacturing Company is now Tate & Lyle Ingredients Americas, Inc., and ConAgra Trade Group is now ConAgra Food Ingredients Company. These alterations have been discussed with BNSF, which has no objections.

On January 6, 2005, the Board issued a procedural order. Pursuant to that order, Complainants and Defendant jointly submitted a proposed confidentiality agreement which was adopted, as modified, by the Board on January 28, 2005. The parties exchanged written interrogatories and document requests on February 7, 2005 and exchanged objections to those discovery requests on February 15, 2005, also pursuant to the Board's procedural order.

The Board's procedural order provides that the parties may notify the Board of a discovery "impasse." The date for doing so originally was February 25, 2005, but that date was extended by the Board to March 4, 2005. On March 4, BNSF, with the concurrence of Complainants' and Intervenor (the National Industrial Transportation League and the American Chemistry Council) notified the Board that there is an "impasse" regarding discovery. The Board has been requested to contact the parties in order to help resolve that impasse, possibly through mediation.

Meanwhile, Complainants and BNSF have continued to discuss discovery issues and have continued to make progress toward resolving and narrowing areas of dispute or uncertainty. Because BNSF and Complainants recognize that it is in their mutual interests to continue those efforts, and because of the volume and complexity of information requested in discovery, Complainants and BNSF are today filing a joint request for adjustment of the procedural schedule. Under that request, the date for responding to discovery would be postponed from March 22, 2005 to April 15, 2005.

The Amended Complaint filed herewith arises as a result of positions expressed by BNSF in its Objections to Complainants' written discovery requests and since. In its written interrogatories and document requests to BNSF, each of the Complainants is defined to include all of its corporate subsidiaries and affiliates. BNSF objected to this definitional statement, although it apparently proceeded to set forth its objections regarding Complainants' discovery, including offers to make reasonable inquiries for responsive data, as if no such objection had been made. Complainants since have been in detailed discovery negotiations with BNSF, as indicated above, but this issue has not been resolved.

BNSF's positions regarding the standing of affiliates and subsidiaries of named Complainants to participate in this proceeding has resulted in some uncertainty regarding the standing of the parties and their discovery obligations. In a conference on February 25, counsel for BNSF informed counsel for Complainants that BNSF did not regard discovery obligations as attaching to any subsidiary or affiliate of a named Complainant. In a memorandum dated March 2, 2005, from BNSF's counsel to Complainants' counsel, BNSF stated that "[a]dding corporate affiliates, parents, and subsidiaries of the named Complainants to the Complaint at this late date, even if you stipulated that they would not seek damages, could substantially enlarge not only your discovery burden but also BNSF's. BNSF wishes to see this case litigated as expeditiously as possible. Adding new parties at this point would only encourage delay – for no apparent reason."

However, Complainants pointed out to BNSF that it had taken the position that it nevertheless expected subsidiaries and affiliates of named Complainants to respond to BNSF's discovery if the named Complainants expected to introduce any evidence pertaining to their subsidiaries and affiliates. BNSF then replied in a March 10

memorandum to Complainants' counsel: "Where you have asked for relevant information about BNSF's storage charge program, we have not objected on the grounds that you are only entitled to information concerning BNSF's dealings with the named Complainants. We have been willing to provide, and have been working hard to gather, information about BNSF's dealings with the entire shipping community...."

That being the case, if monetary damage questions are put aside for the moment, this most recent statement of BNSF suggests that treating the Complaint as applicable to all subsidiaries and affiliates of the named Complainants will not increase or delay BNSF's discovery burdens.

Nor will the Amended Complaint itself cause Complainants to seek a delay in the completion of discovery. Each Complainant that has corporate affiliates and subsidiaries will, subject to stated objections, make reasonable efforts to provide responsive answers and documents from those subsidiaries pursuant to existing discovery requests of BNSF. If any subsequent adjustment of the procedural schedule is sought by Complainants, or if BNSF considers Complainants' discovery responses to be incomplete, it will not be on account of the amendment to the Complaint because, as indicated in Complainants' Discovery Requests to BNSF, Complainants have always considered their subsidiaries and affiliates to be within the scope of each party's discovery requests and obligations.

That leaves only the question of whether, assuming Complainants establish unlawful activities on the part of BNSF, the amendment would improperly increase BNSF's exposure to claims for damages.<sup>2</sup>

Under decisions of the Board's predecessor, where the operation of affiliated companies is not separate and distinct from the parent and where the initial party complainant was not "an entire stranger" to the party technically in possession of a claim for damages, equity allows the Board to treat the complaint of a parent or subsidiary as embracing the claims of the affiliate for purpose of calculating entitlement to damages. See, e.g., International Agricultural Corporation v. Louisville & Nashville Railroad Company, 29 I.C.C. 391, 393 (1914); Werner v. Director General, 107 I.C.C. 363, 365 (1926) (authority of one person to bring complaint as agent of another for damages may be implied from the facts).

BNSF has been dealing with Complainants' corporate "families" on an integrated basis for years as an ordinary and routine business matter, basically treating the corporate parents, their affiliates and their subsidiaries as one company for many transportation purposes. For example, BNSF recently served a demand letter on "Craig Huss, President, ADM Transportation Division, ADM Company," asserting an indebtedness by "ADM Company" to BNSF for ADM's corporate subsidiaries. Indeed, the claim asserted by BNSF was for the very types of private car storage charges at issue in this proceeding.

As another example, BNSF routinely negotiates and discusses transportation issues pertaining to both Cargill, Incorporated and its subsidiaries on a unified corporate

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<sup>2</sup> BNSF's discovery requests to Complainants contain both interrogatories and document requests that seek facts supporting any claim advanced for monetary damages. Complainants intend to respond to those discovery requests on behalf of any entity seeking damages.

basis. Cargill, Incorporated, a presently named Complainant, in fact pays BNSF's freight bills for transportation services rendered to Cargill's subsidiaries, including bills for empty private car storage and demurrage charges of the type at issue in this case.

Whether viewed as agents of their subsidiaries and affiliates, or under the type of fact test suggested in International Agricultural Corporation, Complainants would be entitled to recover damages on behalf of corporate subsidiaries and affiliates to the same extent as Complainants themselves, and Complainants will, if necessary, assert that position at an appropriate time in this proceeding

The Amended Complaint obviates any need for the Board to decide at this juncture which parties, if any, are entitled to recover monetary damages or the period for which such damages are recoverable. However, without any waiver of Complainants' argument, and merely from an abundance of caution resulting from BNSF's positions regarding the identities of the parties in this case, the Amended Complaint is appropriate to establish that, at a minimum, corporate subsidiaries and affiliates of named Complainants, who might not otherwise be entitled under BNSF's theory to recover damages, can press claims for damages commencing no later than a period beginning two years prior to the filing of the Amended Complaint. See 49 U.S.C. 11705(c).

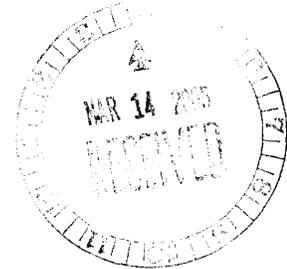
Sincerely,



Andrew P. Goldstein  
Attorney for Complainants

cc: All Parties

ORIGINAL



**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**DOCKET NO. 42060 (Sub-No. 1)**

**NORTH AMERICA FREIGHT CAR ASSOCIATION, ET AL.**

**v.**

**BNSF RAILWAY COMPANY**

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**AMENDED COMPLAINT**

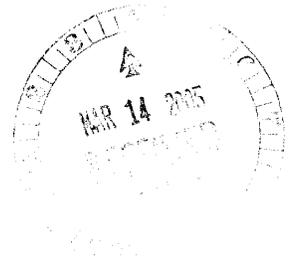
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**Attorneys for Complainants**

**Dated: March 14, 2005**

BEFORE THE  
SURFACE TRANSPORTATION BOARD



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DOCKET NO. 42060 (Sub-No. 1)  
NORTH AMERICA FREIGHT CAR ASSOCIATION, ET AL.

v.

BNSF RAILWAY COMPANY

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AMENDED COMPLAINT

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1. This Amended Complaint is filed pursuant to 49 U.S.C. § 11701 and 49 C.F.R. Part 1111 by North America Freight Car Association (“NAFCA”), an unincorporated association of entities that manufacture, lease, own, or operate private freight cars, on behalf of itself and 10 of its members (“Complainants”) listed in Appendix A hereto, including their subsidiaries and affiliates, who may seek affirmative relief including damages, if appropriate.<sup>1</sup>

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<sup>1</sup> Those NAFCA members whose names are not listed in Appendix A have determined, for reasons of policy or lack of impact from the described events, not to join in this pleading.

2. Defendant is BNSF Railway Company (“BNSF”), a Class I railroad subject to the jurisdiction of the Board.<sup>2</sup>

3. Effective July 1, 2001, BNSF instituted, through tariff publications, certain new provisions applicable to empty privately-owned freight cars while on the property of BNSF (“July 1 changes”). Insofar as the July 1 changes apply to tank cars, Complainants filed a Protest and Petition for Investigation on June 26, 2001, pursuant to the provisions of Ex Parte No. 328, Investigation of Tank Car Allowance System, 3 I.C.C. 2<sup>nd</sup> 196 (1986) (“Ex Parte 328”). See Docket No. 42060, North America Freight Car Association – Protest and Petition for Investigation. That petition has been denied by the Board. This Complaint has been filed to challenge the July 1 changes as applied to tank cars and other types of equipment.

4. BNSF declines to furnish any tank cars to its customers and declines to furnish other car types as necessary to meet the timely transportation requirements of customers for such cars.<sup>3</sup> To overcome these shortages, BNSF customers, with the inducement, acquiescence, and permission of BNSF, have had to acquire private cars for use on BNSF. Currently, some 54 percent of all freight cars operated on the Nation’s railroads are furnished by private car interests. Class I railroads own fewer than 30 percent of the fleet.

5. Private car use is largely subject to the control of the originating carrier and its connections, rather than to shipper control. A private car use cycle begins with

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<sup>2</sup> Complainants also seek relief against any other railroad that participates in the tariff publications herein alleged to be unlawful.

<sup>3</sup> Complainant anticipates that its proof will focus on those BNSF rules and charges impacting cars originated by shippers participating in this proceeding.

the loading and billing of the car, functions which the shipper largely does control. Movement to destination is controlled by the originating carrier and its connections. At destination, the frequency of switching is controlled by the terminating carrier, as are the rules, if any, under which the car is held for unloading. The consignee, and not the owner of the car, controls the unloading process. Once empty, the return of the car to the next loading point is again within carrier control, as is the frequency of switching when the car arrives at its next loading point. Of the four basic elements in the car cycle, the carrier directly and exclusively controls the two movement segments and is positioned to exert influence over the destination segment. The only element of the car cycle directly within the shipper's control is the time necessary to actually load and bill the car.

6. Holding tracks for empty cars at origin, whether private cars or railroad cars, are a necessary component of railroad service and freight car supply. BNSF historically has furnished, without additional charge, all track space on its own lines necessary for holding empty cars, whether private or railroad controlled, prior to loading. The July 1 changes, as partially modified by BNSF on August 1, 2001, imposed new charges of from \$25.00 to \$75.00 per car per day on private car operators if empty private cars are held on BNSF tracks prior to placement for loading. No such charges apply to cars operated by BNSF unless they have been expressly ordered.

7. The charges described in paragraph 6, except those applicable to cars to be loaded with grain or grain products, have been classified by BNSF as "storage" charges. BNSF does not define "storage" or explain what distinguishes storage from the routine holding of empty private cars for loading, historically and traditionally undertaken by BNSF as part of its normal common carrier service. The storage rules and charges are to

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be found in BNSF's Private Car Storage Book 6005, including Item 1300 (cars held for loading on railroad controlled or public delivery tracks). Storage charges under Item 1300 begin on the second 12:01 a.m. after actual or constructive placement and apply until the car is released (Saturdays, Sundays and holidays within the calculation to the second 12:01 a.m. will be excluded). The charge is \$25.00 per chargeable day, or fraction thereof. There are limited provisions for adjustment of storage charges due to bunching, acts of God, or strike interference.

8. Those charges described in paragraph 6 that are applicable to covered hopper cars intended to transport grain or grain products are classified as "demurrage." The relevant demurrage rules and charges are set forth in BNSF's Demurrage Book 6004-A. The computation of these demurrage charges commences with the first 12:01 a.m. after constructive placement of a car on railroad tracks and continues until BNSF receives a request for placement of the car on private track. Thereafter, each car is given two "credit," or free, days. Following the two credit days, demurrage charges were applied at \$25.00 per day between July 1 and July 31, 2001 and increased to \$75.00 per day starting August 1. Limited relief from these charges is provided due to acts of God or strike interference, but not due to bunching. Upon information and belief, BNSF has stated that it may revert to the \$25.00 per day level at those times when there is less demand for cars.

9. Because BNSF declines to furnish tank cars, shippers of liquid bulk products must supply their own tank cars or risk significant economic harm. Because BNSF declines to furnish a timely supply of cars for other forms of transportation, such as grain

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products, shippers of such commodities must supply such cars or risk significant economic harm.

10. At the time Complainants acquired private cars for use on BNSF, Complainants relied on BNSF to provide track space, at no additional charge, to hold such cars prior to loading, and BNSF was aware of such reliance. Complainants have invested hundreds of millions of dollars in acquisition costs and lease commitments for private cars for use on BNSF under these circumstances.

11. BNSF has acquired substantial market power over Complainants by virtue of their private car investments described in paragraph 10 hereof.

12. If Complainants are unwilling or unable to pay the new BNSF storage and demurrage charges described in paragraphs 7 and 8 hereof, Complainants must either find alternate track space or reduce their private car fleets.

13. Reductions in private car fleets would have an adverse impact on Complainants and on the shipping public for several reasons. First, most of Complainants' private cars operated on BNSF are owned or under multi-year leases. Removing such cars from service prior to the end of the lease or the end of their operational life would result in economic injury to Complainants. Second, BNSF does not have an adequate supplemental supply of cars that it is willing to make available to Complainants when additional cars prove necessary as a result of erratic rail service, market fluctuations, acts of God, or other matters. Third, a reduction in the number of private cars operated may adversely impact car supply, and lead to reductions in service to shippers and receivers.

14. Complainants whose loading facilities lack sufficient land capacity to add trackage to hold empty cars prior to loading cannot avoid the new charges by constructing holding tracks.

15. In some instances, BNSF does not have any nearby tracks that it is willing to lease to shippers to hold empty private cars prior to loading. In other instances, BNSF has quoted lease charges for such tracks that are exorbitant and commercially damaging.

16. Although BNSF in effect demands, through the July 1 changes, that Complainants assume responsibility for furnishing and maintaining holding tracks for empty private cars prior to loading, such tracks heretofore have been provided by BNSF without additional charge as part of its normal and routine service. BNSF has offered to pay Complainants no allowance if they furnish the holding tracks formerly furnished by BNSF, with one partial exception: BNSF has offered to refund calendar year 2001 storage bills incurred as a result of the July 1 changes to those customers who build or expand tracks at their facilities this year, but there is no provision for full cost reimbursement or for track maintenance reimbursement.

17. BNSF retains all of the charges collected by it pursuant to the tariff publications described in paragraphs 7 and 8 hereof, including such portion of those charges representing the costs of car ownership, even though BNSF has no car ownership costs for empty private cars on holding tracks awaiting loading.

#### **COUNT I**

18. Complainants hereby incorporate paragraphs 1-17 as if repeated in their entirety.

19. The refusal of BNSF to continue to furnish holding tracks without additional charges for empty private cars awaiting loading, and BNSF's imposition of the rules and charges described in paragraph 7 and 8 hereof, have been, since July 1, 2001, (a) unreasonable practices in violation of 49 U.S.C. § 10702, and (b) a failure to furnish adequate car service and to establish, observe, and enforce reasonable rules and practices on car service in violation of 49 U.S.C. § 11121(a).

### **COUNT II**

20. The provisions of paragraphs 1-17 are incorporated herein as if repeated in their entirety.

21. The demurrage provisions of BNSF as described herein have been, since July 1, 2001 (a) in violation of 49 U.S.C. § 10746, (b) unreasonable practices in violation of 49 U.S.C. § 10702, and (c) a failure to furnish adequate car service and to establish, observe, and enforce reasonable rules and practices on car service in violation of 49 U.S.C. § 11121(a).

### **COUNT III**

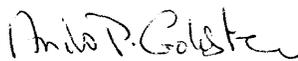
22. The provisions of paragraphs 1-17 are incorporated herein as if repeated in their entirety.

23. It has been since July 1, 2001, and is, a violation of 49 U.S.C. § 10745 for BNSF to transfer from itself to Complainants the obligation to furnish holding tracks for empty private cars awaiting loading without payment of an adequate allowance.

24. WHEREFORE, Complainants urge the Board (1) to institute a proceeding to address the issues raised by this Complaint, (2) to enter an order requiring BNSF to cease and desist from its unlawful practices, (3) to prescribe reasonable rules and prac-

tices pursuant to 49 U.S.C. § 10704, (4) to order the payment of damages, with interest, by BNSF to such of the Complainants as may, upon proof, establish a basis for the payment of such damages, including, without limitation, reimbursement of the filing fee for this Complaint, and (5) to take such other actions as may be reasonable and necessary in the premises.

Respectfully submitted,



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John M. Cutler, Jr.  
McCarthy, Sweeney & Harkaway, P.C.  
Suite 600  
2175 K Street, N.W.  
Washington, DC 20007  
(202) 393-5710

Attorneys for Complainants

Dated: March 14, 2005

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Amended Complaint has been served on all parties of record electronically and by first-class mail this 14th day of March 2001.

  
\_\_\_\_\_  
Andrew P. Goldstein

s:\mcd\Amended NAFTA Complaint

Appendix A  
Amended Complaint  
Docket No. 42060 (Sub-No. 1)

**APPENDIX A**

**Complainants**  
**(Including Subsidiaries and Affiliates)**

North America Freight Car Association  
c/o Andrew P. Goldstein  
McCarthy, Sweeney & Harkaway, P.C.  
2175 K Street, N.W., Suite 600  
Washington, DC 20037

GLNX Corporation  
10077 Grogan's Mill Road  
The Woodlands, TX 77380

Ag Processing Inc  
P. O. Box 2047  
Omaha, NE 68103-2047

Tate & Lyle Ingredients Americas, Inc.  
f/k/a A. E. Staley Manufacturing Company  
2200 East Eldorado Street  
Decatur, IL 62525

Archer Daniels Midland Company  
P. O. Box 1470  
Decatur, IL 62525

Bunge North America, Inc.  
P. O. Box 28500  
St. Louis, MO 63146-1000

Cargill, Incorporated  
P. O. Box 9300  
Minneapolis, MN 55440

CHS, Inc., f/k/a  
Cenex Harvest States Cooperative  
P. O. Box 64796  
St. Paul, MN 55164

Chicago Freight Car Leasing Company  
One O'Hare Centre  
6250 North River Road  
Rosemont, IL 60018

ConAgra Food Ingredients Company  
11 ConAgra Drive  
Omaha, NE 68102

First Union Rail  
6250 N. River Road  
Rosemont, IL 60018