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

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

Dear Secretary Williams:

On April 1, 2005, BNSF Railway Company ("BNSF") filed a letter with the Board purporting to be a reply to a "motion" filed by North America Freight Car Association, et al. ("NAFCA" or "Complainants") on March 14, 2005. In plain fact, NAFCA filed no "motion" with the Board. On March 14, NAFCA filed with the Board an Amended Complaint which, under 49 C.F.R. 1111.2, can be tendered as of right and without prior leave of the Board, accompanied by a letter of the same date explaining the reasons for the complaint amendment.

A tendered amended complaint arguably is subject to objection. BNSF's April 1 "reply" to the Board is, in fact, BNSF's affirmative effort to convince the Board to "deny" Complainants the right to amend the Complaint. The moving party before the Board therefore is BNSF, and Complainants are entitled to make this reply by the provisions of Rule 1104.13(a).

BNSF has taken great pains to obscure the purpose of the Amended Complaint. The Amended Complaint adds "subsidiaries and affiliates" to the named complainants and was filed because BNSF took the position during discovery exchanges that each of the individual companies named as Complainants could not be defined to include their affiliates and subsidiaries despite the fact that BNSF, as explained in more detail below, was on notice through commercial relationships with the named Complainants that they represented their affiliates and subsidiaries. BNSF stated, during the course of discovery exchanges, that, although it expected subsidiaries and affiliates of named Complainants to respond to BNSF's discovery requests if the named Complainants expected to intro-

duce any evidence pertaining to their subsidiaries and affiliates, BNSF would resist the recovery of monetary damages by any entity other than a named Complainant.

From the moment BNSF first objected to an inclusive definition of a named Complainant to include subsidiaries and affiliates, BNSF has offered inconsistent explanations for its position. As noted in Complainants' March 14 letter to the Board, on March 2, 2005, counsel for 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." After 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, on March 10 BNSF changed its position, stating in a 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...."

At a conference held with members of the Board's staff to resolve discovery "impasses" on March 28, 2005, BNSF agreed with Complainants that the Amended Complaint would have no practical impact on discovery inasmuch as Complainants had always taken the position that their discovery obligations were inclusive of subsidiaries and affiliates, including discovery related to monetary damages. But in its April 1 filing, BNSF attempts to contradict these earlier positions by asserting that an inclusive definition of the named Complainants "will expand – exponentially – the scope of this case." This vacuous assertion is unsubstantiated and is contrary to BNSF's earlier acknowledgements that its discovery requests are broad enough in scope to require Complainants to set forth all of their damage claims, including those on behalf of subsidiaries and affiliates.¹ In truth, treating the named Complainants as inclusive of their subsidiaries and affiliates will not expand, exponentially or otherwise, the scope of this case, and BNSF certainly has not shown that any such expansion would occur.

The BNSF April 1 filing takes great pains to obfuscate the very plain purposes of the amended complaint and its accompanying March 14 letter. Those purposes are:

1. Case law makes clear that an agent has standing to recover damages on behalf of a principal, and that one member of a corporate family has standing to recover damages on behalf of another. The facts in each in-

¹ BNSF claims in its April 1 filing that it "had no notice of the potential claims of the Complainants' affiliates and subsidiaries [until] Complainants broached the subject with BNSF during discovery," even though BNSF does not deny that it had been dealing with Complainants' corporate families on an integrated basis for years. April 1 filing, p. 4. BNSF cites paragraph 1, n. 1 of the Complaint as evidence that "NAFCA explicitly disclaimed that it was representing any entity other than those parties listed in Appendix A to the Complaint." However, all that Appendix A to the complaint contains is a list of the named complainants. Footnote 1 to paragraph 1 of the Complaint is not a disclaimer of an inclusive definition of the named Complainants, but simply a statement that those NAFCA members not named in the complaint did not elect to join in the Complaint. Subsidiaries and affiliates of NAFCA members are not separately listed in the NAFCA membership list.

stance will determine if these principles apply. Those Complainants whose subsidiaries and affiliates intend to seek monetary damages will introduce relevant facts as part of their proof in this case. Where the facts show that these subsidiaries and affiliates of a named Complainant have standing to recover monetary damages, the standing of subsidiaries and affiliates would be no different than that of a named Complainant. However, it is not necessary for the Board to resolve these issues at this time.

2. Amendment of the Complaint was necessitated by BNSF's disagreement with Complainants' view of standing issues with respect to damage claims. As indicated, if the Board resolves the question of whether any damage claims of the named complainants' subsidiaries and affiliates can be entertained under the original complaint, issues involving the Amended Complaint may be mooted. In any event, the Amended Complaint is entirely proper, contrary to BNSF's arguments which rest upon a misinterpretation of 49 C.F.R. 1111.2 and a tortured view of case law. If the Amended Complaint becomes a relevant issue later in this case, the Board can then determine the period of time for which monetary damages are available to the "amended in" Complainants.

Barely any part of BNSF's April 1 letter addresses the first of the above issues; and, to the extent BNSF does so, its argument discloses agreement with Complainants that the question of whether an agent can assert damage claims on behalf of the principal, or a parent on behalf of a corporate subsidiary or affiliate, is a question of fact. See fn. 3 to the BNSF filing, acknowledging that an agency relationship suffices to allow damage claims to be asserted on behalf of a principal, but alleging that "NAFCA has presented no evidence that such an agency relationship exists here." Indeed, NAFCA has presented no evidence whatsoever, since the evidentiary phase of this case has not yet been reached. When it is reached, those individual Complainants seeking recovery of damages on behalf of subsidiaries or affiliates will address that issue.

Nor is there any merit to BSNF's claims that it had no notice whatsoever that allegations in the Complaint made by the named Complainants applied to any of their affiliates or subsidiaries. In the first place, that assertion is contradicted by BNSF's own actions.² This is not a case which will turn on proof of individual shipments, but one which challenges the reasonableness and lawfulness of an ongoing tariff provision. BNSF has taken steps to defend not only against challenges to those tariff provisions, but also against claims for damages asserted by the named Complainants and their corporate

² See NAFCA's letter of March 14, 2005, pointing out that BNSF made a demand against Archer Daniels Midland Company ("ADM"), a named Complainant, for payment of empty private car storage charges alleged to have become accrued and owing by ADM's subsidiaries and affiliates, and pointing out that Cargill Incorporated ("Cargill"), another named Complainant, routinely pays private car storage and demurrage to BNSF on behalf of Cargill's subsidiaries and affiliates.

family members by posing broad discovery requests that, by BNSF's own admission, were aimed at any entity intending to offer evidence, including evidence of monetary damages. No specific demonstration has been made by BNSF of how it has been harmed by "lack of notice," and it is glaringly apparent that it has not been harmed due to the breadth of its discovery and Complainants' agreements to substantiate all damage claims.

BNSF attempts to resist amendment to the Complaint on the grounds that 49 C.F.R. 1111.2 "does not permit a complaint to be amended to add additional parties." April 1 letter at 2. Rule 1111.2 states: "[A]n amended ... complaint may be tendered for filing by a complainant against a defendant or defendants in the original complaint, stating a cause of action alleged to have accrued within the statutory period immediately preceding the date of such tender, in favor of complainant and against the defendant or defendants." BNSF would read this rule to mean that the phrase "named in the original complaint" applies to "a complainant" rather than modifying the phrase "defendant or defendants" that immediately precedes "named in the original complaint." This construction would rewrite the rule to in effect read: "An amended ... complaint may be tendered for filing by a complainant named in the original complaint against a defendant or defendants named in the original complaint" But that is not how the rule reads.

Nor is BNSF's position consistent with practices regarding amendment of complaints under federal court case law, including the very cases cited by BNSF. For example, in Fleck v. Cablevision VII, Inc., 799 F. Supp 187 (D.D.C. 1992) and Leachman v. Beech Aircraft Corp. 694 F.2d 1301 (DC Cir. 1983), additional plaintiffs were added by amendment. As BNSF notes, the "touchstone ... is whether the defendant knew or should have known of the existence and involvement of the new plaintiff." Leachman, 694 F.2d at 1309. BNSF has not denied that it knew or should have known that corporate subsidiaries and affiliates of named Complainants, including Archer Daniels Midland Company and Cargill Incorporated, were incurring, were being billed by BNSF, and were either refusing to pay or paying, the charges at issue in this case; nor does BNSF deny that it treated these corporate affiliates on a unified basis. BNSF has no valid claim of surprise arising from the inclusion of subsidiaries and affiliates.

The violations of law set forth in the Amended Complaint are alleged to have commenced on July 1, 2001 and to have continued since then, meeting the requirement of Rule 1111.2 that an amended complaint state a "cause of action alleged to have accrued within the statutory period immediately preceding the date" on which the amended complaint is tendered. The only genuine question that may arise in connection with the amended complaint (assuming, arguendo, that the initial complaint does not encompass claims of the subsidiaries and affiliates), is whether the amendment relates back to the filing of the initial complaint or relates back only for two years prior to the Amended Complaint. BNSF asserts that NAFCA is trying an "end run" to evade a prohibition against complaint amendment that relate back to the original complaint. But there is no such blanket prohibition; the facts determine how far back a complaint amendment relates. See, e.g., Williams v. the United States, 405 F.2d 234 (5th Cir. 1968) and other cases cited by BNSF. This, too, is a matter to be resolved through evidence at an appropriate time. It is not, however, a question which requires resolution at this point.

The Board should not grant BNSF's motion to deny the amendments to the Complaint.

Respectfully submitted,

Andrew P. Goldstein
Attorney for Complainants

cc: All Parties