

BEFORE THE
SURFACE TRANSPORTATION BOARD



RAILROAD SALVAGE & RESTORATION, INC)
AND G F WIEDEMAN INTERNATIONAL, INC --)
PETITION FOR INVESTIGATION AND FOR) DOCKET NO 42107
EMERGENCY RELIEF UNDER 49 USC 721(b)(4) --)
SECURITY DEPOSIT FOR DEMURRAGE)
CHARGES, MISSOURI & NORTHERN)
ARKANSAS RAILROAD COMPANY, INC)
)
)
)
)

**PETITION FOR INVESTIGATION AND FOR
EMERGENCY RELIEF UNDER 49 USC 721(b)(4)**

Pursuant to 49 C F R § 1117.1 and 49 USC § 721(b)(4), RAILROAD SALVAGE & RESTORATION, INC (RSR) and G F WIEDEMAN INTERNATIONAL, INC (GFW) hereby petition for (1) an investigation into the lawfulness of Items 1000 and 1010 of Rail America General Tariff RA 1000, as proposed to be applied by MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC (MNA), beginning on July 1, 2008, to require RSR and GFW to pay a security deposit to ensure collection of demurrage charges that are alleged to have accrued long before such tariff provisions will become effective, and which are vehemently disputed, and (2) for an emergency order precluding MNA from requiring payment of such security deposit pending completion of the investigation

LEGAL BASIS FOR THE PETITION

It is provided in 49 USC § 721(b)(4) as follows

"The Board may -

XXX

- (4) when necessary to prevent irreparable harm, issue an appropriate order without regard to subchapter II of chapter 5 of title 5 "

That statute is essentially the replacement of the Interstate Commerce Commission's suspension and investigation power under former 49 USC § 10707. In that respect, RSR and GFW agree with and adopt Union Pacific Railroad Company's interpretation of 49 USC § 721(b)(4), set forth in DeBruce Grain, Inc. v. Union Pacific RR, 2 STB 773 (1997), at 775.

Relief under 49 USC § 721(b)(4) is governed by the judicial standards for determining requests for injunctive relief, i.e.

- (1) substantial likelihood of success on the merits,
- (2) irreparable harm in the absence of relief,
- (3) no substantial harm to other parties, and
- (4) grant of relief in the public interest.

See DeBruce Grain, Inc. v. Union Pacific RR, *supra*, 2 STB at 775, n. 4.

However, RSR and GFW would have no objection if the Board were to treat this pleading as a formal complaint, with a motion for relief under § 721(b)(4), as the pleading was cast by DeBruce Grain, Inc. in the cited case. If the Board is of that view, RSR and GFW would be willing to recast this pleading into the usual form of a complaint, if the Board were to so require.

IDENTITY OF PETITIONERS

RSR and GFW are small, closely-held corporations of limited financial means. All of the stock of GFW is owned by Mr. Gaylon W. Jackson of Joplin, Missouri. Seventy-five percent of the stock of RSR is owned by Mrs. Byrtha Lee Jackson, his wife. The other 25 percent of RSR is

owned by their son, William Ryan Jackson

RSR and GFW are engaged in the receipt, sale and distribution of metal materials. They receive salvaged rail and other track materials at a yard at Joplin that they lease from Union Pacific Railroad Company. They sort and grade those metals by quality into relay, re-roll and scrap. They retain the relay quality materials. They ship the re-roll and scrap metals primarily to receivers in Mexico and Arkansas.

RSR and GFW are entirely dependent on rail transportation for their shipments from the Joplin yard to Mexico and Arkansas. One-hundred percent of those shipments are made by rail. It is not possible to obtain trucks for that transportation. Even if it were possible to do so, truck transportation would be cost-prohibitive to those destinations.

THE TARIFF PROVISIONS AT ISSUE

Attached to this Petition as Appendix 1 is a copy of Section II of Tariff RA 1000, pages II-1 through II-6, providing for Credit Terms and Security Deposits. Item 1000 on page II-2 requires all customers to apply for credit with a Rail America subsidiary rail carrier.

Item 1010 on page II-3 is the provision requiring a security deposit. In accordance with its terms, a customer is required to pay a security deposit if (1) it is not on the rail carrier's credit list, and (2) it has failed to pay demurrage charges after a specific written demand that refers to Item 1010. When a security deposit is required, it is to be the higher of (1) \$10,000, or (2) the amount of existing past due demurrage charges accrued by that customer. The tariff provision states:

"A deposit must be paid, by wire transfer, before any freight car is delivered to such Consignor, Consignee, or agent thereof for Loading or Unloading."

THE TARIFF PROVISIONS AS PROPOSED TO BE APPLIED BY MNA

The Credit Terms and Security Deposit provisions of Tariff RA 1000 have an effective date of November 1, 2007 (See Appendix 1 hereof) However, those provisions have not been proposed to be effective as to Rail America subsidiary MNA until July 1, 2008 Attached to this Petition as Appendix 2 is a copy of a letter dated June 1, 2008 from MNA representative Ms Anita Horton to Mr & Mrs Jackson of RSR announcing MNA's application of those provisions to RSR and GFW, effective on July 1, 2008

MNA explained how it proposes to apply those tariff provisions to RSR and GFW in a conference telephone call between representatives of MNA and representatives of RSR and GFW on June 12, 2008 In response to questions, counsel for MNA stated the following

- (1) in ruling on credit applications required to be filed by RSR and GFW by virtue of Item 1000 of Tariff RA 1000, MNA will take into account unpaid demurrage charges that allegedly accrued long prior to the effectiveness of that Tariff, and which have been vigorously disputed by RSR and GFW, and
- (2) when credit is denied to RSR and GFW by reason of those prior disputed demurrage charges, RSR and GFW will be required to pay security deposits in the amounts of those charges, or suffer loss of rail service

PRIOR DISPUTED DEMURRAGE CHARGES

There is a total of approximately \$400,000 that MNA has invoiced to RSR and GFW for demurrage charges allegedly accruing during the months between January, 2005 and May, 2008, inclusive, all of which have been disputed by RSR and GFW The breakdown of those charges is as follows

- (1) \$199,265 invoiced to RSR for demurrage charges (including minimal amounts for diversion and overloading charges) allegedly accrued in the months between January, 2005 and August, 2006, inclusive (and for one car in October, 2006) These charges are disputed They are being litigated in STB Docket No 42102, Railroad Salvage & Restoration, Inc -- Petition for Declaratory Order -- Reasonableness of Demurrage Charges.
- (2) \$12,025 invoiced to GFW for demurrage charges allegedly accrued in the months between September, 2006 and January, 2007, inclusive These charges are disputed They are being litigated in STB Docket No 42103, G F Wiedeman International, Inc -- Petition for Declaratory Order -- Reasonableness of Demurrage Charges (consolidated with STB Docket No 42102),
- (3) \$140,790 invoiced to RSR for demurrage charges allegedly accrued in the months between February, 2007 and May, 2008, inclusive These charges are disputed MNA has not filed suit for collection of these charges, and
- (4) \$47,450 invoiced to GFW for demurrage charges allegedly accrued in the months between February, 2007 and May, 2008, inclusive These charges are disputed MNA has not filed suit for collection of these charges

In summary, the prior disputed demurrage charges are as follows

\$199,265
12,025
140,790
<u>47,450</u>
\$399,530

Of that amount, \$340,055 has been invoiced to RSR and \$59,475 has been invoiced to GFW

ARGUMENT

THE BOARD SHOULD ENTER AN EMERGENCY ORDER UNDER 49 USC § 721(b)(4) PRECLUDING MNA FROM APPLYING ITEMS 1000 AND 1010 OF TARIFF RA 1000 TO RSR AND GFW IN THE MANNER PROPOSED, PENDING AN INVESTIGATION

1. There Is A Substantial Likelihood That RSR And GFW Will Prevail On The Merits

It would clearly be an unreasonable practice in violation of 49 USC § 10702 (2) for a rail carrier to apply a newly-published tariff provision retroactively. For instance, if MNA were to increase one of its tariff rates from \$10 per ton to \$20 per ton, effective July 1, 2008, it would clearly be unreasonable for MNA to apply the \$20-per-ton rate to shipments made prior to July 1, 2008.

There is a substantial likelihood that RSR and GFW will prevail on the merits of their claim that MNA's proposed application of Items 1000 and 1010 of Tariff RA 1000 to RSR and GFW would constitute an unreasonable rate practice in violation of 49 USC § 10702 (2) because that tariff application would involve the same impermissible retroactivity. Surely, MNA can lawfully extend or withhold credit to RSR and/or GFW based on those shippers' compliance or failure to comply with the demurrage tariff on and after July 1, 2008. Correspondingly, MNA can lawfully require payment of a security deposit by RSR and/or GFW up to the amount of unpaid demurrage charges having accrued on and after July 1, 2008, assuming, of course, that such charges have not been reasonably disputed and credit for those shippers has been lawfully withheld.

In contrast, MNA cannot reasonably withhold credit for RSR and/or GFW based on

unpaid demurrage charges that accrued long before the tariff provision for extension of credit became effective on July 1, 2008. Correspondingly, MNA cannot reasonably require payment of a security deposit to ensure collection of demurrage charges that accrued long before the tariff provision for security deposits became effective on July 1, 2008. Thus, the retroactive tariff application proposed by MNA in regard to RSR and GFW would clearly constitute an unreasonable rate practice in violation of 49 USC § 10702 (2). The Board should find that there is a substantial likelihood that RSR and GFW will prevail on the merits on that legal basis.

Another compelling reason why the tariff application proposed by MNA in regard to RSR and GFW would be an unreasonable rate practice in violation of 49 USC § 10702 (2) is because the purpose and effect of that tariff application would be to coerce RSR and GFW into paying disputed demurrage charges under threat of withholding rail service for noncompliance with the tariff. The Interstate Commerce Commission expressed concern about that in Illinois Central Gulf R. Co. - Security Deposits - Payment of Demurrage Charges, 358 ICC 312 (1978), which was the first decision to approve the concept of a security deposit to ensure collection of demurrage charges.

The Commission there said (at 318)

“ . . . Also of concern to the Commission is the danger that the threat of a security deposit could be used to cause a shipper to pay disputed demurrage charges . . . ”

Similarly, the Commission said (at 317)

“ . . . (T)here should be no obligation to pay erroneous demurrage bills . . . If there is no obligation to pay demurrage charges, it would be unreasonable to implement the security deposit requirement for failure to pay those charges . . . ”

Here, MNA proposes to require a security deposit to coerce payment of demurrage charges

that have been vigorously disputed, including in pending litigation^{1/} That clearly constitutes an unreasonable practice in violation of 49 USC § 10702 (2) RSR and GFW are likely to prevail on the merits on that alternative ground, as well

2. RSR And GFW Would Be Irreparably Harmed In The Absence Of A Board Order Under 49 USC § 721(b)(4)

RSR and GFW are small, closely-held corporations of limited financial means They have incurred significant costs in litigating the lawfulness of the demurrage charges sought to be collected by MNA They simply cannot afford to pay a \$400,000 security deposit in addition to the continuing costs of that litigation

However, if they fail to pay that huge security deposit, MNA will terminate their rail service Being wholly rail dependent, they would then be unable to supply their customers Those customers necessarily would go to other suppliers for their needs Even if rail service were to be restored months later, there inevitably would be a permanent loss of many of those former customers to those other suppliers That permanent loss of business cannot be compensated for by payment of damages It is the essence of irreparable injury The Board should so find

3. An Order Under 49 USC § 721(b)(4) Would Not Substantially Harm MNA

MNA would not be substantially harmed if the Board were to enter an order under 49 USC § 721(b)(4) precluding MNA from applying Items 1000 and 1010 retroactively as to RSR and GFW As shown in Subsection 1 above, any such retroactive application would be unlawful as an

^{1/} The great majority of demurrage charges for which MNA has not filed suit accrued on private cars leased by RSR held in MNA's yard In February, 2007, RSR and MNA agreed on a lease of MNA track by RSR on which those cars would be held, which would have eliminated all of those demurrage charges, but MNA did not progress the lease as promised

unreasonable rate practice MNA would not be substantially harmed by an order that requires it to comply with the law

No MNA security deposit provision was in effect during the period of time prior to July 1, 2008 in which demurrage charges were allegedly incurred by RSR and GFW In the absence of such a tariff provision, MNA was and is required to institute legal action for collection of disputed charges That is and always has been the law MNA is certainly not substantially harmed by that requirement within the meaning of 49 USC § 721(b)(4)

4. Entry Of The Sought Emergency Order Would Be Very Much In The Public Interest

It is very much in the public interest to prevent rail carriers from using unlawful means to coerce payment of demurrage charges that have been disputed in good faith The application of Items 1000 and 1010 of Tariff RA 1000 to RSR and GFW that is proposed by MNA is patently such an unlawful means It follows that entry of an emergency order that would prevent such a tariff application would be very much in the public interest

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the Board should institute an investigation into the lawfulness of Items 1000 and 1010 of Tariff RA 1000, as proposed to be applied by MNA to RSR and GFW, and, the criteria for entry of an injunction having been shown, the Board should enter an order preventing such application pending the completion of such investigation

RAILROAD SALVAGE
& RESTORATION, INC
1710 Joplin Street
Joplin, MO 64804

Respectfully submitted,

G F WIEDEMAN INTERNATIONAL, INC
1710 Joplin Street
Joplin, MO 64804

Petitioners

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*Attorney for Railroad Salvage &
Restoration, Inc and G F Wiedeman
International, Inc*

DATED June 18 , 2008

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2008, I served the foregoing Petition on counsel for Missouri & Northern Arkansas Railroad Company, Inc , Louis E Gitomer, Esq , 600 Baltimore Avenue, Suite 301, Towson, MD 21204, by overnight mail

Thomas F McFarland

Thomas F McFarland



**RailAmerica
General Tariff**

**RA 1000
ORIGINAL PAGE II-1**

**CREDIT TERMS AND SECURITY DEPOSIT – SECTION II
(ORIGINAL)**

CREDIT TERMS AND SECURITY DEPOSIT

ISSUED SEPTEMBER 27, 2007

Page 1 of 6

EFFECTIVE NOVEMBER 1, 2007

**RailAmerica
Marketing Services
7411 Fullerton Street, Suite 300
Jacksonville, FL 32256**



**RailAmerica
General Tariff**

**RA 1000
ORIGINAL PAGE II-2**

**CREDIT TERMS AND SECURITY DEPOSIT – SECTION II
(ORIGINAL)**

**(ITEM - 1000) SECURITY DEPOSITS FOR PAYMENT OF DEMURRAGE AND STORAGE
CHARGES**

All Consignors, Consignees or agents thereof conducting business with a subscribing carrier, or ✓
on a subscribing carrier's property, will be required to apply for credit with the subscribing carrier

Credit will be granted solely at the discretion of the subscribing carrier ✓



**RailAmerica
General Tariff**

**RA 1000
ORIGINAL PAGE II-3**

**CREDIT TERMS AND SECURITY DEPOSIT – SECTION II
(ORIGINAL)**

(ITEM - 1010) SECURITY DEPOSITS FOR PAYMENT ACCESSORIAL CHARGES

A security deposit to insure payment of any accessorial charges that may accrue will be required from every Consignor, Consignee, or agent thereof who

- A Is not on the Subscribing Carrier's credit list, and
- B Fails to pay accessorial charges after specific written demand referring to this tariff provision

A deposit must be paid, by wire transfer, before any freight car is delivered to such Consignor, Consignee, or agent thereof for Loading or Unloading. A deposit on one unit of equipment is not transferable to another.

A deposit for each car shall be in the minimum amount of two hundred dollars (200 00) or up to the maximum amount of accessorial charges that accrued on any one car during the preceding twelve (12) months.

In the case of a Consignor, Consignee or agent thereof receiving multiple carloads for Loading or Unloading, the total amount required to be deposited shall not exceed the higher of the following:

- A \$10,000 00 (Ten thousand dollars), or
- B The amount of existing past due accessorial charges accrued by the Consignor, Consignee, or agent thereof.

The Subscribing Carrier will refund the balance of the deposit to the Consignor, Consignee, or agent thereof by the 5th day of the month following that in which the equipment is released to the Subscribing Carrier after deducting any and all unpaid accessorial charges.

Security deposits will no longer be required after the Consignor, Consignee, or agent thereof either:

- A Is placed on Subscribing Carriers' authorized credit list, or
- B Has paid all outstanding accessorial charges and has given assurance to the satisfaction of the Carrier's credit office that future accessorial charges will be paid within the credit period prescribed in applicable tariffs.



**RailAmerica
General Tariff**

**RA 1000
ORIGINAL PAGE II-4**

**CREDIT TERMS AND SECURITY DEPOSIT – SECTION II
(ORIGINAL)**

(ITEM - 1020) APPLICATION FOR CREDIT

Date ____/____/____

Company Name _____ Phone _____
(Area code & number)

D/B/A _____ For Past _____ Years

Address _____
(Street) (City) (State) (Zip)

Former Business Address (If Applicable)

Federal Tax I D Number _____

OWNERSHIP: Sole Owner Partnership Corporation

Date Started/Incorporation Date _____ Have you ever operated under a different name? Yes ___ No ___

If yes, give name and address _____

TRADE REFERENCES: (Minimum of 3)

Name _____ Address _____ Phone _____ Acct
No _____

Name _____ Address _____ Phone _____ Acct
No _____

Name _____ Address _____ Phone _____ Acct
No _____



**RailAmerica
General Tariff**

**RA 1000
ORIGINAL PAGE II-5**

**CREDIT TERMS AND SECURITY DEPOSIT - SECTION II
(ORIGINAL)**

BANK REFERENCE Checking Savings Loan

Name _____ Dept. _____ Acct No _____

Mailing Address _____ Phone No _____

City _____ State _____ Zip Code _____

Type of Business _____

Tax Exemption # _____ State Issued _____

Our terms are Net 15 from date of invoice. Applicant's signature attests financial responsibility, ability, and willingness to pay our invoices in accordance to terms. A service charge of 1 1/2% per month, which is an annual rate of 18%, will accrue 30 days after invoice date

I authorize you to contact references and to obtain information from outside resources that may be needed to obtain credit.

The application has been carefully prepared by the undersigned and is to my knowledge complete, accurate, and truthful. I also acknowledge that I understand and agree to the pricing and collection policies relating to RailAmerica and its affiliated railroads.

IF MY ACCOUNT IS ACCEPTED, I AGREE TO PAY ACCORDING TO YOUR TERMS OF SALE. I FURTHER AGREE TO PAY ALL COLLECTION COSTS AND EXPENSES, INCLUDING REASONABLE ATTORNEY'S FEES INCURRED BY YOU IN COLLECTING OR ATTEMPTING TO COLLECT SUCH ACCOUNT.

Firm Name _____

Date _____ Signature _____ Title _____



**RailAmerica
General Tariff**

**RA 1000
ORIGINAL PAGE II-6**

**CREDIT TERMS AND SECURITY DEPOSIT - SECTION II
(ORIGINAL)**

INDIVIDUAL PERSONAL GUARANTEE

Date _____
I, _____, residing at _____

For and in consideration of your extending credit at my request to _____
(Name of Company)

(herein referred to as the "Company"), of which I am _____, hereby personally guarantee to you the
(Title)

payment at _____ in the State of _____ of any obligation of the Company and hereby agree to bind myself to pay you on demand any sum which may become due to you by the Company whenever the Company shall fail to pay the same. It is understood that this guaranty shall be a continuing and irrevocable guaranty and indemnity for such indebtedness of the Company. I do waive notice of default, non-payment, and notice thereof and consent to any modification or renewal of the credit agreement hereby guaranteed.

WITNESS _____ GUARANTOR _____ DATE _____
(Signature) (Signature)
ADDRESS _____

JOINT PERSONAL GUARANTEE

Date _____
We, _____ and _____ his/her _____ residing at _____

_____ for and in consideration of your extending credit at my request to _____

_____ (herein after referred to as the "Company"), of which _____
(Name of Company) (Name)

is _____, hereby personally guarantee to you the payment at _____
(Title)

in the State of _____ of any obligation of the Company and we hereby agree to bind ourselves to pay you on demand any sum which may become due to you by the Company whenever the Company shall fail to pay the same. It is understood that this guaranty shall be a continuing and irrevocable guaranty and indemnity for such indebtedness of the Company. We do hereby waive notice of default, non-payment and notice thereof and consent to any modification or renewal of the credit agreement hereby guaranteed.

WITNESS _____ GUARANTOR _____ DATE _____
(Signature) (Signature)
WITNESS _____ GUARANTOR _____ DATE _____
(Signature) (Signature)



MISSOURI & NORTHERN ARKANSAS RAILROAD

514 N Omer • P O Box 776 • Carthage, MO • 64836 • Phone 417 358 8800 • Fax 417 358 6005

1322

Sandy Franger
561-994-6015

June 1, 2008

Railroad Salvage
Mr & Mrs Jackson
1710 Joplin St
Joplin, MO 64804

Dear Mr & Mrs Jackson

At the Missouri & Northern Arkansas Railroad, our goal is to provide customers with the best transportation solutions in the market place. This means giving top quality service including pick-up and delivery, supplying the railcars, and providing a service package that reacts quickly to our customer's dynamic transportation requirements. The MNA is proud of the enhancements we have made in the recent months such as an increase in train and engine employees, a better balance between engineers and conductors and improved track infrastructure.

To simplify and standardize our product offering, MNA is creating a Catalog of Optional Transportation Services. Eventually, that catalog will contain a comprehensive suite of *user pay* services that include all *on request* transportation services offered by MNA.

Today, MNA is announcing the release of the first component of the new catalog that is designed to manage extended asset use. From time to time, our customers may need to use railcars for a longer period of time than allowed by a traditional demurrage tariff. Our customers, at their option, can extend the use of equipment, for a small daily fee.

The new fee structure will be effective on July 1, 2008. On the same day, MNA will cancel its demurrage tariff, MNA 6001, in its entirety. Much of the "traditional" railroad tariff language and structure will be moved to a new tariff - RA 1000. The *Extended Asset Use* section of the new catalog, and all forthcoming *user pay* services, will be published separately.

These changes will help us succeed in our ongoing mission to improve service to you and achieve greater efficiency in our operations. The new *Extended Asset Use* program integrates some very powerful processes to simplify billing and increase efficiencies -

- Extended Asset Use invoices will be sent weekly
- MNA is implementing a 30/30/30-day billing guarantee
- Customers will no longer have to manage a burdensome credit/debit account

We are convinced that the new Catalog of Optional Transportation Services will be of mutual benefit to you and MNA. Within the next few days, our sales and marketing team will be contacting you to arrange a time to personally discuss the details of the new program.

We highly value your continued business with MNA and trust that these changes will ultimately make it easier to do business with us.

Sincerely,

Anita Horton



A RailAmerica Company