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THOMAS F MCFARLAND

October 31, 2008

By e-filing

Anne K. Quinlan, Esq.
Acting Secretary
Surface Transportation Board
395 E Street, S.W., Suite 1149
Washington, DC 20024

Re: Docket No. NOR-42102, *Railroad Salvage & Restoration, Inc.* -- *Petition For Declaratory Order -- Reasonableness Of Demurrage Charges*

Docket No. NOR-42103, *G.F. Wiedeman International, Inc.* -- *Petition For Declaratory Order -- Reasonableness Of Demurrage Charges*

223882

223883

Dear Ms. Quinlan:

Hereby transmitted is Petitioners' Rebuttal Statement for filing with the Board in the above referenced matter.

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for Petitioners

BEFORE THE
SURFACE TRANSPORTATION BOARD

RAILROAD SALVAGE &)	
RESTORATION, INC. -- PETITION)	DOCKET NO.
FOR DECLARATORY ORDER --)	NOR-42102
REASONABLENESS OF)	
DEMURRAGE CHARGES)	
)	
G.F. WIEDEMAN INTERNATIONAL,)	
INC. -- PETITION FOR)	DOCKET NO.
DECLARATORY ORDER --)	NOR-42103
REASONABLENESS OF)	
DEMURRAGE CHARGES)	

PETITIONERS' REBUTTAL STATEMENT

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

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

Petitioners

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DUE DATE: October 31, 2008

BEFORE THE
SURFACE TRANSPORTATION BOARD

RAILROAD SALVAGE &)	
RESTORATION, INC -- PETITION)	DOCKET NO.
FOR DECLARATORY ORDER --)	NOR-42102
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PETITIONERS' REBUTTAL STATEMENT

Pursuant to the Board's procedural decision served September 18, 2008, Petitioners RAILROAD SALVAGE & RESTORATION, INC. (RSR) and G.F. WIEDEMAN INTERNATIONAL, INC. (GFW) hereby file their Rebuttal Statement directed to the Response of MISSOURI & NORTHERN ARKANSAS RAILROAD, INC. (MNA) filed on October 16, 2008 (Response).

I. THERE HAS BEEN NO WAIVER OF DEFENSES

MNA's principal argument is a technical tariff argument, i e , that Petitioners waived all defenses to collection of demurrage charges by failing to comply with a tariff provision that requires timely submission of written disputes. (Response at 7-9) MNA has cited *Savannah Port Term. RR, Inc. -- Pet. for Declar. Order -- Certain Rates & Practices as Applied to Capital Cargo, Inc , ("Savannah Port Terminal" case)*, 2008 STB LEXIS 300 (Finance Docket No. 34920, decision served May 30, 2008), for the proposition that a shipper is precluded from raising defenses against

collection of demurrage charges where the shipper failed to abide by the dispute terms of the applicable tariff. (*Id.* at 9)

MNA has mischaracterized the *Savannah Port Terminal* case. The Board stated in that case that even where a carrier's tariff limits shipper defenses, the Board has discretion to grant relief beyond that provided in the tariff, citing *North American Freight Car Assn. v. BNSF Ry. Co.*, STB Docket No. 42060 (Sub-No 1), decision served January 26, 2007, at 13, n. 46, and *Cleveland Elec. Illum v. ICC*, 685 F.2d 170, 172 (6th Cir. 1982). The Board found no basis for granting such relief under the facts of the *Savannah Port Terminal* case. However, as next discussed, the facts of the case at hand warrant the grant of such relief, notwithstanding noncompliance with the dispute provision of the tariff

The dispute provision of the applicable tariff should not be enforced against Petitioners because MNA's Regional Manager and General Manager (Messrs. David Smoot and Al Satunis, respectively) actively led Petitioners to believe that there was no need for them to dispute collection of demurrage charges. (Reply VS Jackson at 1) Indeed, they stated to Petitioners that MNA was not going to seek collection of demurrage charges from them. (*Id.*) They were the highest ranking officials of MNA with whom Petitioners regularly dealt. (*Id.*) Thus, they had apparent authority to bind MNA when they told Petitioners that they did not have to dispute collection of demurrage charges. The successor of General Manager Satunis caused MNA to actively seek collection of demurrage charges from Petitioners, but by then the time for disputing demurrage charges under the applicable tariff provision had long since past. (*Id.*) It would not be reasonable to find that Petitioners waived defenses to collection of demurrage charges by failure to comply with the dispute

provision of the tariff when MNA's ranking local officials were responsible for such noncompliance.

Accordingly, the Board should find that there was no such waiver.

II. IT WOULD BE UNREASONABLE TO PERMIT MNA TO COLLECT DEMURRAGE CHARGES ON 49 CARS AS TO WHICH MNA PREVIOUSLY OFFERED TO WAIVE COLLECTION

Contrary to its own interrogatory response, MNA now claims that 47 of the 49 cars here under consideration did not contain company material. (Response at 48). That contradiction of its own prior sworn testimony undermines MNA's credibility. However, MNA has not denied that it has previously offered to waive collection of demurrage charges on those 49 cars. Having disavowed its prior explanation, MNA has not provided an explanation of the actual reason why it made that offer.

It would be unreasonable to permit MNA to collect demurrage charges on those 49 cars. MNA does not deny that on 47 of the 49 cars it received car hire relief from a Class I railroad. Indeed, MNA appears to acknowledge that such car hire relief was "in order to avoid the imposition of demurrage charges". (Response at 48). It would be an unreasonable practice for MNA to collect demurrage charges on cars as to which it has been afforded car hire relief by a Class I railroad in order to avoid the imposition of those same demurrage charges. That is true regardless of whether the cars contained company material.

As to the other two cars for which MNA now claims to have incurred car hire, one of such cars (UP 229926) is listed by MNA itself as containing "MNA Rails". (Response at 51, line 3). By definition, that is MNA company material, as to which demurrage charges are not applicable. There is no credibility to MNA's contention that on the other car (MP 951106), containing UP company

material (rails), UP did not provide car hire relief to MNA to avoid assessment of demurrage charges.

Accordingly, the Board should find that it would be an unreasonable practice in violation of 49 U.S.C. § 10702(2) for MNA to collect demurrage charges on the 49 cars under consideration.

III. IT WOULD BE UNREASONABLE TO PERMIT MNA TO COLLECT DEMURRAGE CHARGES ON PRIVATE CARS HELD ON PRIVATE TRACKS

The cars in question here are marked GNTX and GONX. MNA alleges that those cars are owned by TTX Company, and claims on that basis that they are not private cars. (Response at 52).

MNA is wrong. All railcars whose reporting marks end in "X" are classified as private cars in the railroad industry. That is true regardless of ownership of such cars by TTX. MNA's tariff exempts from application of demurrage charges "loaded or empty private cars held on private or leased storage tracks". (Response at 84, Item 310[E]). The exception is not qualified to exclude "x"-marked cars owned by TTX.

Accordingly, the Board should find that it would be an unreasonable practice in violation of 49 U.S.C. § 10702(2) for MNA to collect demurrage charges on the GNTX and GONX cars under consideration. Alternatively, the Board should find that it would be unlawful in violation of 49 U.S.C. § 11101(e) for MNA to collect such charges because such charges are not applicable under MNA's tariff.

IV. IT WOULD BE UNREASONABLE TO PERMIT MNA TO COLLECT DEMURRAGE CHARGES FOR CONSTRUCTIVE PLACEMENT OF CARS THAT COULD HAVE BEEN PLACED ON PETITIONERS' TRACKS

MNA contends that Petitioners have stated that their scrap yard has a capacity for 15 cars. (Response at 53). MNA argues that "(j)ust because a track can theoretically hold up to 15 cars at any

one time does not mean that there is always room to deliver a car because there are less than 15 on the track.” (*Id.*). MNA alleges that Mr. Jackson’s testimony merely proves that in ideal conditions there might be room for 15 cars on Petitioners’ tracks, but it does not prove the ability of such tracks to accept additional cars at any time. (*Id.* at 56).

MNA has materially mischaracterized Petitioner’s evidence of their ability to accommodate railcars. The scrap yard has a capacity of 63 cars, not 15. (Open Stat., VS Jackson at 2). When there are 15 cars or less on those tracks, there is sufficient additional track capacity to move additional cars over the tracks without being impeded, *viz.* (*Id.*):

A total of 3,817.2 track feet of RSR trackage is shown in that drawing. At a length of roughly 60 feet for an average freight car, there is enough RSR trackage at and near the yard to hold at least 63 railcars (3,817.2 divided by 60 = 63.62). However, that does not take into account the need to be able to efficiently move railcars within the yard for loading, staging, etc. Taking an extremely conservative position, RSR (and/or GFW) can easily accommodate at least 15 railcars at the metal materials yard before the ability to move those cars within the yard would be impeded. Consequently, railcars for RSR (and/or GFW) should not have been constructively placed by MNA unless there were more than 15 cars located on RSR-GFW tracks at the yard at the time of constructive placement. Railcars cannot be constructively placed by a rail carrier unless a shipper is physically unable to accept actual placement of the railcar. RSR (and/or GFW) is physically able to accept actual car placement if 15 railcars or less are located on its tracks at the time of such placement.

It follows that it was appropriate for Petitioners to eliminate demurrage charges for car-days under constructive placement when Petitioners’ evidence showed that there were less than 15 cars on the scrap yard tracks at the time when the cars were constructively placed.

Accordingly, the Board should find that it would be an unreasonable practice in violation of 49 U.S.C. § 10702(2) for MNA to collect demurrage charges for car-days under constructive placement in the circumstances described above

V. IT WOULD BE UNREASONABLE TO PERMIT MNA TO COLLECT DEMURRAGE CHARGES ON CARS PLACED ON TRACKS NOT LOCATED IN MNA'S OR PETITIONERS' YARD

MNA misunderstood Petitioners' argument in regard to three cars that were placed on Track 100 (2 cars) and Track 014 (1 car). MNA alleges that Petitioners claim that these cars were placed in the RSR Yard (Petitioners' Yard). (Response at 54). On the contrary, Petitioners' claim is based on the fact that those tracks are not located in Petitioners' yard, nor in MNA's yard. (Open. Stat., VS Grissom at 4). MNA has failed to explain the location of those tracks and the reason why railcars were placed on those tracks.

Accordingly, the Board should find that it would be an unreasonable practice in violation of 49 U.S.C. § 10702(2) to permit MNA to collect demurrage charges for freight car detention on these unidentified tracks.

VI. IT WOULD BE UNREASONABLE TO PERMIT MNA TO COLLECT DEMURRAGE CHARGES ON CARS FOR WHICH CHARGES WERE PREVIOUSLY ELIMINATED FOR INSUFFICIENT SUPPORTING RECORDS BECAUSE THE RECORDS NOW FURNISHED BY MNA SHOW THAT THE CARS WERE IMPROPERLY CONSTRUCTIVELY PLACED

Petitioners previously eliminated demurrage charges on cars for which MNA had failed to provide records supporting dates of constructive and actual placement. (Pet. Open. Statement, VS Grissom at 3). MNA has now furnished those records as part of its Response (at 101-108)

However, the records now furnished by MNA show that such cars were improperly constructively placed because in all instances there were less than 15 cars on Petitioners' tracks at the time of such constructive placement. (Compare Response at 101-108 with Pet. Open. Stat., Appdx. AG-1 at 1-12). It was improper for MNA to have constructively placed such cars when there was no

disability on the part of Petitioners that prevented actual placement of the cars. (See Section IV hereof, *supra*).

Accordingly, the Board should find that it would be an unreasonable practice in violation of 49 U.S.C. § 10702(2) for MNA to collect demurrage charges for car-days under constructive placement in the circumstances described above.

VII. IT WOULD BE UNREASONABLE TO AWARD INTEREST IN EXCESS OF THE COUPON EQUIVALENT YIELD OF MARKETABLE SECURITIES OF THE UNITED STATES GOVERNMENT HAVING A DURATION OF 91 DAYS

MNA has not provided justification for collection of a usurious 24-percent-per-year interest rate on demurrage charges here found to be due and owing. MNA simply compares that rate to “charges for credit card balances” and argues that the rate is provided for in its tariff. (Response at 14).

The 24-percent rate clearly constitutes an unreasonable penalty that should not be enforced because it substantially exceeds an interest rate that would make MNA whole. The treasury bill rate makes a rail carrier whole in a demurrage case. *Grand Trunk Western R. Co. v Bliss & Laughlin Industries*, 1990 US Dist. LEXIS 8742 (ND, Ill., E.D., 1990), at 34-35) Unreasonable provisions are not presumptively lawful merely because they may be contained in a rail carrier’s tariff. Thus, the Board should award interest at the treasury bill rate (91-day rate).

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the Board should declare and should advise the Courts as follows:

- (1) Demurrage charges in Docket No. 42102 are uncollectible as an unreasonable practice in violation of 49 U.S.C. § 10702(2) to the extent that they exceed \$69,400, plus interest calculated in accordance with 49 C.F.R. § 1141.1, and
- (2) Demurrage charges in Docket No. 42103 are uncollectible as an unreasonable practice in violation of 49 U.S.C. § 10702(2) to the extent that they exceed \$3,345, plus interest calculated in accordance with 49 C.F.R. § 1141.1

Respectfully submitted,

RAILROAD SALVAGE & RESTORATION, INC.
1710 Joplin Street
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G.F. WIEDEMAN INTERNATIONAL, INC.
1710 Joplin Street
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Petitioners

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Attorney for Petitioners

DUE DATE: October 31, 2008

REBUTTAL VERIFIED STATEMENT OF GAYLON W. JACKSON

My name is Gaylon W. Jackson. I provided a verified statement that was included in an earlier filing by the Petitioners. My background and qualifications are set forth in that earlier statement.

My rebuttal testimony is directed at the statement of MNA Witness James Tilley that Petitioners failed to dispute the demurrage charges sought to be collected, as required by MNA's tariff, and thereby waived their right to challenge MNA's collection of such charges. (Response at 47).

Pctitioners failed to dispute the charges only because MNA assured Petitioners that it was not necessary to do so. During the time when the demurrage charges allegedly accrued, MNA's General Manager was Al Satunis, and its Regional Manager was David Smoot. Messrs. Smoot and Satunis assured me verbally that as long as Petitioners continued to ship by rail over MNA, MNA would not seek to collect any billed demurrage charges. In hight of that assurance, I did not deem it necessary for Petitioners to dispute billed demurrage charges because Petitioners were led to believe that MNA would not make an effort to collect those charges.

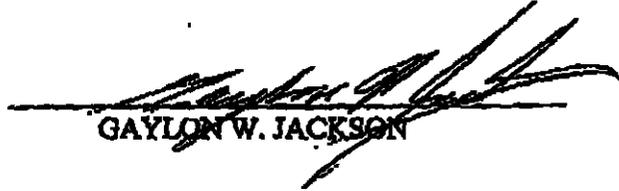
When Mr. Satunis was succeeded as MNA General Manager by Chris Corncttc, MNA began an effort to collect the demurrage charges that it had not sought to collect when Mr. Satunis was General Manager. By the time that Mr. Cornette became General Manager, the time provided in the MNA tariff for Petitioners to dispute the involved demurrage charges had long ago expired.

Petitioners should not be found to have waived defenses to collection on the involved demurrage charges by virtue of their failure to have dispute such charges on a timely basis because MNA was responsible for such failure.

STATE OF MISSOURI)
)
COUNTY OF JASPER)

VERIFICATION

**GAYLON W. JACKSON, being duly sworn, states that the facts asserted in the foregoing
Rebuttal Verified Statement are true and correct.**


GAYLON W. JACKSON

**SUBSCRIBED AND SWORN
to before me, a Notary Public
in and for the above State and County,
on this 30 day of October, 2008**


Notary Public

(SEAL)



**RENEE LISLE
My Commission Expires
March 16, 2012
Jasper County
Commission #06508909**

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2008, I served the foregoing document, Petitioners' Rebuttal Statement, on counsel for Missouri & Northern Arkansas Railroad Company, Inc., by e-mail and first-class, U.S. mail, postage prepaid as follows:

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Thomas F. McFarland

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