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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 35387  
AG PROCESSING INC, A COOPERATIVE, ET AL.  
PETITION FOR DECLARATORY ORDER

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REPLY OF PETITIONERS TO MOTION FOR PROTECTIVE ORDER OF  
NORFOLK SOUTHERN RAILWAY COMPANY AND MOTION  
FOR EXTENSION OF TIME TO FILE PETITIONERS'  
REPLY TO NORFOLK SOUTHERN'S  
MOTION TO DISMISS

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Dated: February 2, 2011

## Preface

Petitioners Ag Processing Inc, a Cooperative; Bunge North America, Inc.; Archers Daniels Midland Company; Perdue Agribusiness, Inc.; and Louis Dreyfus Corporation, hereinafter called by appropriate short titles or collectively as "Petitioners", seek a declaratory order pursuant to 5 U.S.C. § 554(e) to "terminate a controversy or remove uncertainty" regarding Tariff NS 8002, Item 5000, containing new language specifically making cars which become overweight due to snow and ice while in the possession of NS or its connections, subject to overload penalties and related charges.

Defendant Norfolk Southern Railway Company ("NS" or "Norfolk Southern") has filed a Motion to Dismiss the Petition, containing a verified statement of Rush Bailey, an NS official who discloses to the Board but not Petitioners, a "secret" protocol followed by NS in determining how much weight in excess of a car's stenciled weight limit will make a car "overloaded" and subject to NS penalties. NS seeks a Protective Order to allow outside counsel for Petitioners to review an unredacted version of Mr. Bailey's verified statement.

Petitioners do not object per se to the entry of the Protective Order proposed by NS.<sup>1</sup> However, because of the unusual and questionable step taken by NS of attaching to its Motion to Dismiss the Verified Statement, in redacted form, of Mr. Bailey, describing a secret NS protocol for determining when freight cars are overweight, Petitioners believe that basic fairness requires an opportunity for them, or their outside counsel or consultants, to review an unredacted version of Mr. Bailey's Verified Statement before Petitioners prepare a reply to Norfolk Southern's Motion to Dismiss.

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<sup>1</sup> Petitioners reserve the right to contend in a proceeding on the merits that NS should have no "overweight" rules that are secreted from its shippers.

Petitioners accordingly move that the date for their reply to the NS Motion to Dismiss be set at 20 days following the receipt by Petitioners' counsel of an unredacted version of Mr. Bailey's Verified Statement, subject to the provisions of the Protective Order proposed by NS.

#### Argument

In support of their position, Petitioners respectfully show the Board as follows.

Petitioners ship grain and grain products via Norfolk Southern and its connections in covered hopper cars and tank cars. Effective August 4, 2010, NS amended its tariff 8002-A, Item 5000 (the "Tariff"), entitled "RULES GOVERNING OVERLOADED CARS," adding to the Preamble new language stating that "an overloaded car" "includes overloaded cars attributable to weather conditions." No such language specifying "weather conditions" as an attributable cause of overloaded cars had ever before appeared in an NS "overload" tariff. The addition of this highly significant preamble language is not mentioned in the recent NS filing. At the same time, NS added Section D to the Tariff, providing certain circumstances under which charges for overloaded cars when "due, in part, to weather (rain, snow, ice, etc.)," would be waived if the shipper presented a certificate demonstrating a certified weight at origin below the stenciled load limit of the car within 24 hours of notification of overload and the owner of the shipment partially unloaded the car or the overload condition at its expense or the snow and ice melted due to natural causes within five days. Otherwise, the penalties and charges provided in the tariff for overloaded cars would apply retroactive to day 1 of the overload.<sup>2</sup>

Since this was the first time that any NS overload tariff (or the overload tariff provisions of any other major carrier) had been expressly made applicable to weather

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<sup>2</sup> See NS Motion to Dismiss, Exhibit A, page 2.

conditions, such as snow and ice, that accumulated on a car after the car was loaded and tendered to NS or one of its connections, several of the Petitioners contacted NS to discuss the new tariff provisions and to try to convince NS informally to reverse its decision. Those efforts failed. Petitioner AGP consequently filed a request for the institution of a declaratory order petition on July 20, 2010.

Upon the filing of the AGP Petition, NS amended the Tariff, changing the provisions of Item D to try to clarify that overload charges would be waived for the first five days if the shipper or owner provided proof of certified origin weights within stenciled car limits and the excess lading was removed from the car during that period.

These tariff changes by NS did not alter what Petitioners saw as the fundamental shortcoming of the Tariff; namely, placing all responsibility for excess weight due to snow and ice accumulated while the car was in the possession of NS or its connections on the shoulders of shippers such as Petitioners. Although the Board had not yet instituted a declaratory order proceeding in response to Petitioners' request, Petitioners nevertheless requested mediation under the Board's auspices, which was granted with the consent of NS. The mediation sessions took place over a course of several months, but produced no positive results. On January 27, 2011, Petitioners inquired of Defendant's counsel if they wished to continue mediation. NS replied in the negative and filed its Motion to Dismiss and Motion for Protective Order on the same day.

As indicated above, the NS Motion to Dismiss appended the Verified Statement of Mr. Rush Bailey, whose Statement contains secret NS internal tolerance limits that deviate from its stenciled weight limits on cars and control the application of the overload penalties and charges in the Tariff. NS also filed a motion for a Protective Order to con-

fine the dissemination of Mr. Bailey's testimony concerning proprietary NS weight limits that exceed those in its Tariff. Mr. Bailey's disclosure of secret internal weight limits that apparently supersede the limits in the Tariff takes on great importance in light of one of the major arguments advanced in the NS Motion to Dismiss; namely, that there is no dispute between the parties because NS has not applied overload penalties to Petitioners. Disclosure of the secret protocols is likely to establish why no penalties have been assessed and that there is even greater uncertainty regarding the Tariff than appears on its face.

Petitioners' Deadline for Replying to the Motion to Dismiss  
Should be Extended

Petitioners do not object to the proposed protective order, per se, but do believe that the clock for the timing of Petitioners' response to the NS Motion to Dismiss, normally 20 days pursuant to 49 U.S.C. 1111.4, should not begin to run until Petitioners' outside counsel has had an opportunity to review the "secret protocol" for overweight cars redacted from the public version of Mr. Bailey's Verified Statement.

It is highly unusual for a Motion to Dismiss to be accompanied by new testimony. Motions to dismiss normally are decided on the basis of the motion and a reply. Here, NS has submitted to the Board under "seal" information regarded by NS as central to its motion, but that information has not been made available to Petitioners, depriving them of a full and fair opportunity to respond to the Motion to Dismiss. Equity and due process require that Petitioners' counsel be given an opportunity to review the data submitted to the Board under seal before responding to the Motion of which that data is a crucial part.

For the foregoing reasons, Petitioners (1) do not object to the entry of the Protective Order proposed by NS, and (2) ask the Board to set the date for the filing of Petitioners' reply to the NS Motion to Dismiss at 20 days after NS serves Petitioners' counsel with an unredacted copy of Mr. Bailey's Verified Statement.<sup>3</sup>

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served this 2<sup>nd</sup> day of February 2011 by electronic mail on counsel for Norfolk Southern Railway Company.

*Andrew P. Goldstein*

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Andrew P. Goldstein

<sup>3</sup> Petitioners reiterate that they reserve the right to contend that overload rules should be available to shippers. Further, if Petitioners find it necessary to serve discovery on NS, Petitioners reserve the right to seek a further reasonable extension of time. For the time being, however, Petitioners seek only the limited time extension described above.