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February 24, 2010

**BY HAND**

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20423

ENTERED  
Office of Proceedings  
FEB 24 2010  
Pan of  
Public Record



Re: STB Docket No. 42117, Cargill, Inc., et al. v. Aberdeen & Rockfish  
Railroad Co., et al.

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket are an original and ten copies of the AAR Defendants' Reply to Petition for Mediation.

Thank you for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael L. Rosenthal".

Michael L. Rosenthal  
Counsel for Association of  
American Railroads and  
Railinc, Corp.

Enclosure

cc: Jeffrey O. Moreno, Esq. (counsel for Complainants)

226501

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

CARGILL, INC., *et al.*,

Complainants,

v.

ABERDEEN & ROCKFISH RAILROAD  
COMPANY, *et al.*,

Defendants.

Docket No. 4217



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Public Record

**AAR DEFENDANTS' REPLY TO PETITION FOR MEDIATION**

The AAR Defendants<sup>1</sup> hereby reply to Complainants' Petition for Mediation, filed January 29, 2010. As Complainants acknowledge in their Petition, the Board has no authority to require the parties to engage in mediation in this matter. However, the Board's regulations do provide for the use of alternative dispute resolution, including mediation, in cases such as this upon mutual consent of the parties, 49 C.F.R. § 1109.1, and the AAR Defendants are amenable to mediation, subject to certain conditions: the mediation must be non-binding, strictly private and confidential, and covered by an appropriate protective order; the complaint proceeding must

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<sup>1</sup> The AAR Defendants are: Association of American Railroads; Railinc, Corp.; BNSF Railway Co.; Buffalo & Pittsburgh Railroad, Inc.; Canadian National Railway Co.; Canadian Pacific Railway Co.; CSX Transportation, Inc.; Gary Railway Co.; Norfolk Southern Railway Co.; Rochester & Southern Railroad, Inc.; The Kansas City Southern Railway Co.; and Union Pacific Railroad Co.

be held in abeyance during the mediation period; and persons with authority to bind parties should be present at any mediation session at which the mediator requests their presence.<sup>2</sup>

The conditions listed above will facilitate the mediation process and are consistent with the Board's rules and precedent regarding the use of alternative dispute resolution. *See* 49 C.F.R. Part 1109; *Ameropan Oil Corp. – Petition for Declaratory Order – Reasonableness of Demurrage Charges*, STB Docket No. 42106 (served July 22, 2008); *Williams Olefins, L.L.C. v. Grand Trunk Corp.*, STB Docket No. 42098 (served Dec. 11, 2006). The Board's rules and precedent recognize that mediation is a non-binding dispute resolution process. *See* 49 C.F.R. §§ 1109.1, 1109.4(a). They recognize that confidentiality is necessary to encourage open and productive discussions and exchanges of information. *See id.* §§ 1109.3, 1109.4(d).<sup>3</sup> They also recognize that holding proceedings in abeyance during the mediation period is appropriate and can facilitate a mediated solution. *See id.* § 1109.1.<sup>4</sup> Finally, they recognize that the mediator should be able to request the participation of persons with authority to bind the parties at appropriate points in the mediation. *See Ameropan Oil* at 1; *Williams Olefins* at 1-2.<sup>5</sup>

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<sup>2</sup> In a First Amended Complaint filed after the Petition for Mediation, E.I. du Pont de Nemours and Company and Taminco Methylanmines, Inc., appear as additional complainants. Although neither of those parties was included in the Petition for Mediation, the AAR Defendants would have no objection to their participating in any mediation.

<sup>3</sup> The AAR Defendants expect that the parties will be able to work together to develop an appropriate confidentiality agreement and protective order.

<sup>4</sup> The Board has not issued a procedural schedule for this matter, so the only deadline that the Board would need to hold in abeyance is the date for answering the Complaint.

<sup>5</sup> In light of the complex and multi-party nature of these proceedings, it may be most efficient to structure the mediation so that the presence of persons with authority to bind the parties is not required at certain sessions with the mediator, but the AAR Defendants would expect to discuss such issues with the mediator. *See, e.g., Ameropan Oil* at 1 (“[T]he mediator shall contact the parties to discuss ground rules and the time and location of any meetings.”).

The AAR Defendants welcome the opportunity to participate in a voluntary mediation process and consent to that process under the conditions outlined above.<sup>6</sup>

Respectfully submitted,



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February 24, 2010

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<sup>6</sup> In giving their conditional assent to mediation, the AAR Defendants reserve all of their rights, including their rights individually or collectively, with respect to the positions they may take with regard to the merits of, or the proper disposition, of the Complaint.

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, hereby certify that, on this 24th day of February, 2010, I caused a copy of the AAR Defendants' Reply to Petition for Mediation to be served by first class mail, postage prepaid, on all parties of record in Docket No. 42117.

  
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Michael L. Rosenthal