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**ORIGINAL**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

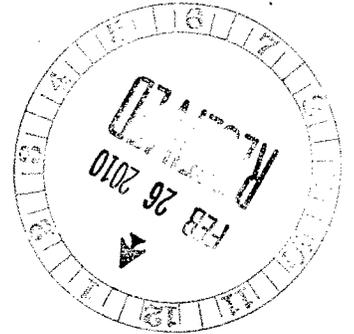
\_\_\_\_\_  
DOCKET NO. 42117

\_\_\_\_\_  
CARGILL, INC., et al.

v.

ABERDEEN AND ROCKFISH RAILROAD COMPANY, et al.

\_\_\_\_\_  
PETITION FOR INTERVENTION ON BEHALF OF  
NORTH AMERICA FREIGHT CAR ASSOCIATION



ENTERED  
Office of Proceedings

FEB 26 2010

Part of  
Public Record

\_\_\_\_\_  
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Attorneys for  
North America Freight Car Association

Dated: February 26, 2010

## I. PARTIES AND BACKGROUND

Pursuant to 49 C.F.R. 1112.4 and 49 C.F.R. 1117.1, North America Freight Car Association (“NAFCA” or “Petitioner”) hereby petitions the Board for Leave to Intervene in support of the Complainants. In support of its request, NAFCA respectfully shows the Board as follows:

1. NAFCA is an unincorporated association whose members build, are lessors of, are lessees of, own, or operate private freight cars, including tank cars. NAFCA members own, lease, or operate approximately 250,000 tank cars that circulate throughout the U.S. railway system. Tank cars operated by NAFCA members are subject to the mileage equalization requirements set forth in Freight Tariff RIC 6007-Series, Items 187 and 190 (the “Tariff”) and Ex Parte No, 328, *Investigation of Tank Car Allowance System*, served June 15, 1979, and *Investigation of Tank Car Allowance System*, 3 I.C.C. 2<sup>nd</sup> 196 (1986) (the “*Tank Car Decisions*”).

2. Defendants, who hereinafter maybe called by appropriate short titles, are each common carriers subject to the Board’s jurisdiction and are participating carriers in the Tariff.

3. Railroads handling private tank cars must compensate the owners of those cars for their use by paying a per-mile charge, or “mileage allowance.” The Board, like the Interstate Commerce Commission before it, is authorized to prescribe such mileage allowances pursuant to 49 U.S.C. 10745. In the *Tank Car Decisions*, the Interstate Commerce Commission approved an agreement between carriers and private tank car owners that defines the calculation, payment, and other terms of the mileage allowance system. The *Tank Car Decisions* place the Board’s imprimatur on a formula to determine

the mileage allowance. That formula includes provisions for determining whether private tank cars are incurring excessive empty mile movements, in which event the car owners must pay the railroads a fee for the excess miles (currently \$.65 per excess mile).

Broadly speaking, excess empty miles occur when empty miles exceed the aggregate loaded miles by more than 6%. This calculation is based on aggregate empty miles accumulated by all tank cars bearing the same reporting mark. A shipper, for example, may own certain tank cars with a reporting mark unique to the tank cars owned by that shipper, and may also lease and operate tank cars with reporting marks unique to one or more lessors of those cars. Upon information and belief, Defendant AAR, through its agent Railinc., receives from individual railroads and sorts out the “excess mileage” data and assigns debits and credits to the relevant parties.

4. Pursuant to the Tariff, carriers must either return empty cars to the preceding origin by the reverse route of the immediately preceding loaded route unless instructed prior to unload to return the car to a different origin for loading or repair. The Tariff allows carriers to depart from these reverse route rules for “railroad convenience.” The term “railroad convenience” is not defined in the *Tank Car Decisions* or the Tariff.

5. Carriers must also exclude from the mileage equalization calculation empty miles accumulated on cars moving to or from repair facilities for modification under DOT mandated retrofit programs or for inspection and repair under certain FRA orders or AAR circulars.

6. In 2008, some NAFCA members began to see increases in their empty mileage ratios versus loaded miles. Other tank car shippers reported similar increases, without apparent cause by the shippers and seemingly due to a change in policy by the

railroads. On April 1, 2009, NAFCA wrote to the AAR to question its current interpretation of the Tariff with respect to “carrier convenience.” See Appendix A. Multiple letters were exchanged between NAFCA and AAR, including a NAFCA letter of April 24, 2009, providing examples of excess mileage return routing. See Appendix B. Finally, on September 8, 2009, AAR advised NAFCA that “after an investigation AAR has determined that the increase in empty miles in 2008 appears to be largely due to alternative disposition instructions that car owners have provided for their empty cars.” See Appendix C. AAR never provided copies of any such “alternative disposition” directives.

7. On January 29, 2010, the Complainants in this proceeding filed a complaint before the Board seeking relief from practices deemed by the Complainants to be unlawful. NAFCA determined to intervene in support of the Complainants, inasmuch as neither NAFCA nor any of its members are seeking monetary damages in this proceeding from any Defendant. Cargill, Inc., a NAFCA member, is a complainant in Docket No. 42117 and accordingly is not a participant in this Petition. NAFCA’s position is as follows.

## II. SUMMARY OF NAFCA POSITION ON THE ISSUES RAISED IN THE COMPLAINT

8. The Defendants’ interpretation of the term “carrier convenience” in the Tariff appears to be contrary to the long-standing application of that term, which was meant to apply when a carrier was compelled to reroute empty cars on account of mishaps such as derailments, floods, and other matters totally beyond the control of the carrier. The Defendants, who have not provided their current interpretation of “carrier convenience,” appear to have adopted a new, unarticulated interpretation of “carrier conven-

ience,” which is an unreasonable practice and also unreasonable as car service rules in violation of 49 U.S.C. 10702, 11121, and 11122.

9. Petitioners’ statement of the issues will not broaden the proceeding as brought by Complainants.

10. The relief sought by Petitioner is an order requiring Defendants to cease and desist from the violations set forth in Paragraph 8 of this Petition, for the Board to prescribe reasonable practices by Defendants pursuant to 49 U.S.C. 10704(a)(1), and to take such other action as may be reasonable in the circumstances. This request for relief will not broaden the issues in this proceeding.

### III. MEDIATION

Intervenors take no position with respect to Complainants’ Petition for mediation by the Board. However, should such mediation be granted, Intervenors seek leave to participate therein.

11. WHEREFORE, Petitioners pray that the Board:

(A) Grant their request for intervention and permit their participation as a party with the full rights of any other party, including discovery; and

(B) Grant such other and further relief as the Board may deem just and proper under the circumstances.

Respectfully submitted,



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1825 K Street, N.W.  
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(202) 775-5560

Attorneys for  
North America Freight Car Association

#### CERTIFICATE OF SERVICE

I hereby certify that I have, this 26<sup>th</sup> day of February 2010, served a copy of the foregoing Petition for Intervention on Behalf of North America Freight Car Association on all parties of record by first-class mail, postage prepaid.



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Andrew P. Goldstein



April 1, 2009

PRESIDENT  
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Mr. Jeff Usher  
Assistant Vice President  
Business Services  
Safety and Operations  
Association of American Railroads  
50 F Street, N.W.  
Washington, DC 20001

Re: Equalization of Mileage on Tank Cars of Private Ownership

Dear Mr. Usher:

North America Freight Car Association is an unincorporated association of parties that manufacture, own, are lessors of, or lessees of, private freight cars, including tank cars. NAFCA members operate over 650,000 private railcars in the United States of which approximately 250,000 are private tank cars.

As you are well aware railroads and shippers have operated tank cars since the 1980's under the threshold of 106% of loaded miles to empty miles as per the findings of Ex. Parte 328. The application of Ex. Parte 328 can be found in the provisions of Tariff RIC 6007-N. NAFCA members are concerned about what we believe to be a misinterpretation of the provisions found in Item 187 and Item 190 of Tariff RIC 6007-N which is effecting the 106% threshold and causing tank car owners and lessees to pay more in penalties than are appropriate.

Specifically the provisions of these items state that:

Item 187 (A)(4): "Except as outlined in Item 190 Series, paragraph 2 (c), no adjustments to loaded or empty mileage will be made in the equalization account for mileage caused by error in handling of the reported railroad or of another railroad, or for mileage accumulated on cars moving on their own wheels to and from repair facilities due to railroad damage or for mileage accumulated due to longer routes for railroad convenience, detours and Surface Transportation Board Service Orders."

Item 190 (2) (C): ".....[i]f the carriers depart from the destination, junctions or carriers of the reverse route of the load any resulting excess empty miles will be excluded from the car owner's equalization account by erring carrier."

As you can see from these provisions the intent is clear that tank car owners should not be charged for excess mileage when the carriers fail to use the reverse route of the initial shipment. We would submit that today with the various carriers following directional running, various routing protocols and some circuitous routing that carriers are increasing the amount of miles traveled by private equipment. We also submit that carriers are continually routing cars back to origin via a route other than the reverse route. Departures from the reverse routes are causing substantial excess mileages to accrue against the tank car owner for which the erring railroad does not appear to be making the appropriate mileage adjustment.

Carriers have become accustomed, we believe, to interpreting a departure from the reverse route requirement as a departure for "railroad convenience" under Item 187 for which they do not have to make a mileage adjustment. We firmly believe this to be an incorrect application of the rule and in direct violation of the provisions of Item 190.

We also believe that excess miles are being charged for movements to shops for DOT, FRA or AAR mandated retrofit programs, inspections or repairs. These additional miles should also be excluded from excess mileage calculation as is clearly provided in Item 187 (3).

The misapplication of the rules found in Item 187 and Item 190 of Tariff RIC 6007-N is causing a financial burden to be placed upon tank car owners and lessees. Those tank cars owners and lessees are being asked to pay mileage equalization penalties due to the erring carriers not making the appropriate mileage adjustments.

We respectfully request that the interpretation of these tariff provisions be reviewed as quickly as possible and that an appropriate interpretation is forthcoming with the applicable adjustments made to the 2008 calculations prior to the bills being sent out in May 2009.

Your consideration of this request is greatly appreciated.

Sincerely,



Darrell R. Wallace  
President North America Freight Car Association



April 24, 2009

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Mr. Jeff Usher  
Assistant Vice President  
Business Services  
Safety and Operations  
Association of American Railroads  
50 F Street, N.W.  
Washington, DC 20001

Re: Equalization of Mileage on Tank Cars of Private Ownership

Dear Mr. Usher:

Per your request of April 16, 2009 we are listing herein several examples of recent shipments where the carriers did not follow reverse routing of tank car shipments and they did not provide credit for the excess mileage as provided in Tariff RIC 6007-N. Please note that we have sought to not identify any particular shipper as such information is considered proprietary.

<u>Car Initial &amp; Number</u>	<u>Ship Date</u>	<u>Origin</u>	<u>Destination</u>	<u>Return Location</u>	Total Loaded Miles	Total Empty Miles	Excess Mileage Charged
TEAX 2213	April-08	Delmar, DE	Chambersburg, PA	Delmar, DE	311	1,591	1,280
TEIX 3071	Aug-08	Salisbury, MD	Chambersburg, PA	Salisbury, MD	299	3,402	3,103
CRGX 5166	Jun-08	Breckenridge, MN	Modesto, CA	Breckenridge, MN	2,213	2,868	655
SHPX 201109	Feb-09	St. Joe, MO	Sgt. Bluff, IA	St. Joe, MO	262	543	281

As we previously indicated, departures from the reverse route are causing substantial excess mileage to accrue against the tank car owner for which the erring railroad does not appear to be making the appropriate mileage adjustment. The above examples clearly point out this abuse.

We believe that carriers have become accustomed to interpreting a departure from the reverse route requirement as a departure for "railroad convenience" under Item 187 for which they do not have to make a mileage adjustment. We also firmly believe this to be an incorrect application of the rule and in direct violation of the provisions of Item 190.

We also believe that excess miles are being charged for movements to shops for DOT, FRA or AAR mandated retrofit programs, inspections or repairs. These additional miles should also be excluded from excess mileage calculation as is clearly provided in Item 187 (3).

The misapplication of the rules found in Item 187 and Item 190 of Tariff RIC 6007-N is causing an improper financial burden to be placed upon tank car owners and lessees. Those tank cars owners and lessees are being asked to pay mileage equalization penalties due to the erring carriers not making the appropriate mileage adjustments.

We again respectfully request that the interpretation of these tariff provisions be reviewed as quickly as possible and that an appropriate interpretation is forthcoming with the applicable adjustments made to the 2008 calculations prior to the bills being sent out in May 2009.

Your consideration of this request is greatly appreciated.

Sincerely,

A handwritten signature in cursive script, appearing to read "Darrell R. Wallace".

Darrell R. Wallace  
President North America Freight Car Association



**Safety and Operations**

**Jeffrey J. Usher**

Assistant Vice President - Business Services

September 8, 2009

Mr. Darrell R. Wallace  
President  
North America Freight Car Association  
Vice President, Transportation  
Bunge North America, Inc.  
P.O. Box 28500  
St. Louis, MO 63146-1000

Dear Mr. Wallace:

By this letter, I will attempt to address the matters you raised in your letter to me of August 21, 2009. Your concern appears to be that because some round trip tank car moves in 2008 have generated empty miles that exceed 106 percent of loaded miles railroads are improperly charging car owners under the mileage equalization Tariff RIC-6007-M.

As I advised you in my letter of July 17, 2009, after an investigation AAR has determined that the increase in empty miles in 2008 appears to be largely due to alternate disposition instructions that car owners have provided for their empty cars. The fact that some reverse routes have resulted in excess empty miles of greater than six percent is not necessarily of particular relevance since whether a car owner is charged for excess empty miles is determined by its aggregate empty miles for the year and not on a specific lane by specific lane basis. Nor does the fact that a car owner's total empty miles exceeded its loaded miles by more than six percent mean it is the result of railroads improperly attributing empty miles accumulated on reverse routes to the owner's account: the excess empty miles may be due to alternate dispositions by the car owner, something which the 2008 evidence strongly suggests. Moreover, AAR does not have any information on whether, in a case where the empty miles exceeded the 106 percent threshold on a reverse route, the railroad(s) involved included or excluded the empty miles in the car owner's account, and would therefore not be in a position to apply the Tariff to individual moves.

Thus, AAR has no evidence that railroads have taken any actions inconsistent with the Tariff that have resulted in improper charges to car owners. Certainly, if a car owner believes that a railroad has improperly failed to exclude empty miles from the car owner's account it should contact that railroad and review the situation. (To the extent some railroads have acknowledged certain anomalies which may have resulted in excessive miles being attributed to a car owner, as I advised you in my letter of July 17, 2009, it is AAR's understanding that those

September 8, 2009  
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railroads worked with the car owners to make adjustments as appropriate prior to the closing of the 2008 Tank Car Mileage Equalization account on July 20, 2009.)

While I appreciate the efforts you undertook to develop sample car movement lanes for investigation I determined very early in the analytic process that the only valid method of performing the analysis was to interrogate 100 percent of the data. Given that we did analyze 100 percent of the 2008 Tank Car Equalization data all of the lanes that you and your membership identified was included in the analysis.

I understand that NAFCA members are not entirely satisfied with the response provided by AAR in my letter of July 17, 2009. However, based on the information AAR has received, I see no basis for taking any other action. Nonetheless, to the extent it has authority to do so, AAR would be happy to continue to work with NAFCA members to facilitate the resolution of any outstanding issues related to tank car mileage equalization.

Sincerely,



Jeffrey J. Usher

Cc: John Lanigan  
Edward Hamberger  
Louis Warchot  
Daniel Saphire  
Robert VanderClute