

227677

**MCCARTHY, SWEENEY & HARKAWAY, P.C.**

**SUITE 700**

**1825 K STREET, N.W.**

**WASHINGTON, D.C. 20006**

**(202) 775-5560**

**FAX (202)-775-5574**

**ANDREW P. GOLDSTEIN**  
apg@mshpc.com

[www.mshpc.com](http://www.mshpc.com)

August 23, 2010

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AUG 23 2010

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Public Record

Cynthia T. Brown  
Chief of the Section of Administration  
Surface Transportation Board  
395 E. Street, S.W.  
Washington, DC 20423-0001

Re Finance Docket No. 35387  
Ag Processing Inc A Cooperative – Amended Petition for  
Declaratory Order

Dear Ms. Brown:

Attached for electronic filing is an Amended Petition for Declaratory Order in the above-captioned case.

Sincerely,

*Andrew P. Goldstein*  
Andrew P. Goldstein  
Attorney for Petitioners

cc: Counsel for  
Norfolk Southern Railway Company  
(electronically)

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 35387

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AG PROCESSING INC A COOPERATIVE –  
AMENDED PETITION FOR DECLARATORY ORDER

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Andrew P. Goldstein  
John M. Cutler, Jr.  
McCarthy, Sweeney & Harkaway, PC  
Suite 700  
1825 K Street, N.W.  
Washington, DC 20006  
(202) 775-5560

Attorneys for Petitioner

Dated: August 23, 2010

## Preface

Ag Processing Inc A Cooperative (“Ag Processing”) files this Amended Petition (a) to demonstrate that a revised tariff published by Norfolk Southern Railway Company (“NS”) after Ag Processing’s initial Petition was filed has not removed the controversies arising from NS’ original tariff, and (b) to add Bunge North America, Inc. (“Bunge”) as a petitioner. Bunge and Ag Processing may collectively be referred to herein as “Petitioners.”

1. Ag Processing is a cooperative corporation owned by grain producers and grain elevators. It is headquartered in Omaha, NE.

2. Bunge is a grain merchandising and processing company with headquarters in St. Louis, MO.

3. Norfolk Southern Railway Company (“NS” or “Defendant”) is a Class I railroad subject to the jurisdiction of the Board, with headquarters in Norfolk, VA.

4. Ag Processing and Bunge make shipments that move over the lines of NS in private and carrier cars.

5. On July 20, 2010, pursuant to 5 U.S.C. 554(e) and 49 U.S.C. 721, Ag Processing sought a declaratory order from the Board to terminate the controversies and resolve the uncertainties arising from NS Tariff 8002-A, Item 5000, effective July 14, 2010 (the “Initial Tariff”), attached as Appendix A hereto.

6. On August 3, 2010, NS filed a request with the Board to extend the date for answering the Petition to August 23, 2010. Ag Processing did not oppose the request. On August 5, 2010, the Board issued a decision approving the request.

7. On August 4, 2010, NS issued a revised Item 5000, effective August 4, 2010 (the "Amended Tariff"), attached as Appendix B hereto.

8. The principal difference between the Initial Tariff and the Amended Tariff occurs in subsection D of the Amended Tariff, which now provides:

"Where an overloaded condition is due, in part, to weather (rain, snow, ice, etc.), applicable railroad charges (including but not limited to demurrage storage, switching, and reweighing) will be waived if:

1. The consignor or owner of the shipment provides a certified weight certificate showing the weight of the shipment was below the stenciled load limit of the car and such certificate is provided within 24 hours of notification of overload (excluding Saturdays, Sundays and Holidays); and

2. The consignor or owner of the shipment partially unloads the car or otherwise eliminates the overload condition at its expense within five days."

9. Language following the above-quoted subsections (1) and (2) of revised paragraph D makes clear that, "If the overload condition is not remedied by the consignor or owner of the shipment within the five days, all applicable railroad charges shall apply and will be assessed after the end of the fifth day;" The five day exclusion appears to be the main difference between the Initial Tariff and the Amended Tariff.

10. The Amended Tariff addresses overloaded cars (except, for some unknown reason, cars loaded with coal, coke, or iron ore) and imposes penalties of \$578 per car for certain cars determined by NS to have been overloaded, in addition to demurrage, switching charges, reweighing charges, and other charges which apply to the overloaded car.<sup>1</sup>

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<sup>1</sup> Although penalties for overloads vary according to commodity, the less-than-trainload shipments of Petitioners could all be subject to the \$578 per car charge, plus demurrage, switching and additional charges.

11. The Amended Tariff applies to shipments originated on NS or received by NS from a connecting carrier. Ag Processing originates grain shipments from its facility served by NS at Pleasant Hill, Iowa and also tenders to NS at Chicago and Kansas City substantial quantities of cars loaded with grain or grain products that originate elsewhere for delivery to points in the Midwest and Northeast. Bunge originates shipments of grain and grain products at 11 facilities served by NS directly or via switching, including eight in Ohio, Illinois and Indiana, and interchanges traffic to NS at nine eastern gateways, eight of which are in Ohio, Illinois, Indiana, New York, and Michigan. All of these shipments move on a year-round basis.

12. The controversy and uncertainty which Petitioners request the Board to address and resolve arises because NS has made overload penalties and costs applicable due to "weather conditions" pursuant to the Amended Tariff preamble and Paragraph D of the Amended Tariff, which defines "weather conditions" as including "rain, snow, ice, etc."<sup>2</sup>

13. Paragraph D of the Initial Tariff provided that NS "will hold overloaded car up to 5 days if the certified weight certificate is provided within 24 hours of notification of overload. This is to allow time for the weather condition to be alleviated naturally." The Amended Tariff provides that "applicable railroad charges ... will be waived if: *"(2) the consignor or owner of the shipment partially unloads the car or otherwise eliminates the overload condition at its expense within 5 days."* In other words, if natural

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Also, demurrage charges of \$5,775 per train apply per each 12 hours that a train is held until sufficient lading has been removed from any car in the train to make that car weight-compliant.

<sup>2</sup> The Amended Tariff preamble in Item 5000 defines an overloaded car as "a car for which either the net weight is in excess of the car's load limit or the gross weight is in excess of the track weight limit at any point along the route of movement." If Ag Processing consigns a car to a destination on light-weighted rail, Ag Processing light-loads the car to meet rail weight restrictions, but cannot control when NS, for its own operating convenience, may choose to use tracks that are subject to railroad light weight limits for movement of cars that have been loaded to stenciled car limit.

weather conditions melt snow or ice to make the car weight-compliant, the car no longer qualifies for waiver of railroad charges. It qualifies only if the "consignor or owner of the shipment partially unloads the car or otherwise eliminates the overload conditions at its expense within 5 days." This is an irrational provision and an unreasonable practice in violation of 49 U.S.C. 10702, since shippers cannot manipulate weather conditions to make sure that "natural weather conditions" do not eliminate the overload.

14. All shipments originated by Ag Processing are subjected to origin weighing on scales certified by local authorities. Bunge's shipments are either weighed by certified scale or the weight of each carload is otherwise measured. Petitioners do not know if NS scales are certified or where they are located, but believe that NS scales are located only or mainly at NS freight yards, which can be separated by hundreds of miles of track.

15. If a car leaves one of Petitioners' facilities for pickup by NS directly or by any other carrier that delivers cars to NS at its gateways, the car is weighed at origin and the approximate weight of any snow or ice that may be on the car at the time of loading is deducted from the loading capacity of the car. Thus, when a loaded car is tendered by Petitioners for transportation, its gross vehicle weight will be at or below the loaded stenciled gross vehicle weight maximum, including the weight of any accumulated snow, ice, sleet, or rain on the car at the time it is loaded. NS freight rates are stated on a per car basis and this adjustment by Petitioners unfortunately results at times in the payment of freight rates for the movement of snow and ice.

16. If a car is loaded and shipped with or without ice or precipitation the car is loaded by Petitioners at or below its full permissible weight on rail capacity for the route designated by the shipper.

17. During winter months, it is not uncommon for snow or sleet to fall or rain to freeze in NS regions traversed by Petitioners' cars. Those cars not only move along the NS system, exposed to changing weather conditions along the route, but are also stopped and held by NS or its connecting lines at various points for railroad operating reasons. The amount of snow, ice, or other weather related additional weight which may accumulate on a car during a journey across NS or its connections is not within the control of Petitioners.

18. According to the 18<sup>th</sup> Edition of the *Civil Engineers Pocket-Book*, the weight of ice is 57.2 pounds per cubic foot. The area comprising the top of a covered hopper car of the type normally shipped by Ag Processing or Bunge is 632.2 square feet. A mere 2 inches of snow and ice on top of the car would add 6,190 lbs. to the car's gross weight. An even lesser amount of snow or ice would require Petitioners to undergo at their sole expense the cost of partially unloading the car plus paying for demurrage, storage, reweighing, and all other applicable NS charges. This is likely to require the retention of contractors suitable to NS to remove lading from the car, liability by Petitioners for a shortfall in their sales commitments, demurrage at a cost of \$105.00 per car per day or \$5,775 per 12 hours per train, approximately \$469.00 in NS switching charges, and reweighing charges of \$130.00 per car. Further, because unloaded lading, if reloaded and moved by NS, is subject to its full carload line-haul charges, the only practical way to dispose of excess lading is to truck it to a dump and dispose of it at a loss that may amount to several hundred dollars per car, plus replacement value.

19. It is axiomatic that shippers should not be required to pay freight charges except upon the freight they actually load in a car. *Coal, Grain and Computation of*

*Freight Charges*, 326 I.C.C. 382, 385 (1966); *Anaconda Copper Mining Company, Terminal Service*, 266 I.C.C. 387, 391 (1948). If a shipper loads a car to its stated weight limits, and not in excess of those limits, it is abiding by NS tariffs, which permit loads up to the maximum stated weight for the trackage designated by the shipper, then that is the shipment for which the shipper should be charged at the NS per car rate. To charge more for that shipment because of weather conditions is an unreasonable practice in violation of 49 U.S.C. 10702.

20. Ag Processing and Bunge cannot anticipate weather conditions that will prevail between the time they tender a car to NS or one of its connections and the time the car is delivered by NS. If Petitioners were to assume that all winter month carloads on NS would be subject to post-shipment accumulations of snow, ice, or other weather products, they would have to deliberately underload cars and pay NS to in effect move air, snow or ice, since the NS rates are based on carloads. The less product loaded in a car, the higher the price per ton to ship the product. To place shippers in that predicament likewise is an unreasonable practice in violation of 49 U.S.C. 10702.

21. The amount of time or location that NS or its connections choose to intermittently hold cars between origin and destination for operating convenience is not within the control of Petitioners. Nor is any choice that NS may make to utilize light-weight tracks when Petitioners' routing instructions do not necessitate the use of such tracks. If a car is loaded with a clean exterior and later is in a snow or ice storm while on NS or its connections, accumulates additional weight as a result, and stays in the same place for days at a time within carrier control, there is no way to know whether the accumulated snow or ice will melt within 5 days. Indeed, there is no stated rationale for setting 5 days

as the weight-reduction limit or to provide that the overload must be removed by the shipper during the five day "holding" period rather than eliminated by warm weather. These provisions of the Amended Tariff also constitute unreasonable practices.

22. In an analogous situation, where demurrage penalties are imposed when a shipper or consignee holds cars beyond specified "free time," there is an entrenched rule stating that no demurrage can be assessed where the proximate cause of the detention is not within control of the shipper and due diligence was used to avoid such detention. *Ormet Corp. v. Illinois Central R. Co.*, 337 I.C.C. 653, 659 (1970). To avoid culpability, the shipper is not called upon to do "everything in its power" to mitigate, but only what is "reasonable under the circumstances." *Prince Manufacturing v. Norfolk & Western*, 356 I.C.C. 702, 706 (1978).

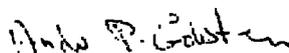
23. Where a car in the possession of NS or its connections is tendered within tariff weight limits but accumulates enough ice, snow, or other weather products while in the possession of a carrier to make it overweight and subject it to the penalties and related charges arising from the Amended Tariff, there is nothing that a shipper can do to alleviate those circumstances unless it is either deemed reasonable for the shipper to forego part of its payload, by partially unloading the car as the Amended Tariff requires, or to pay for the removal of snow and ice on railroad property far distant from the shipper's facilities, as well as demurrage and other consequential costs. The Amended Tariff makes no provision for shippers or their agents to enter upon railroad property to remove snow or lading from a car nor allows a shipper to simply push snow and ice from the car onto the ground. These shortcomings of the Amended Tariff likewise constitute an unreasonable practice.

24. Ag Processing attempted to resolve its differences over the Initial Tariff with NS, but to no avail. After the discussions, the Paragraph D in the Initial Tariff was added. As amended, it continues to penalize the shipper for weather-related overweight cars that have been made overweight by natural conditions beyond the shipper's control. These conditions may not be limited to snow or ice on the roof of the car, but may well include ice that accumulates on the undercarriage or sides of the car to an extent that is not possible to calculate in terms of exact weight. The Amended Tariff unreasonably continues to penalize shippers for the full costs of events over which they have no control.

25. Petitioners' recognize that severely overweight cars may pose a safety hazard. But there are alternatives to the penalties and costs imposed by the Amended Tariff on shippers whose cars are exposed to weather-induced excess weights. One such solution would be for NS to itself remove the snow and ice just as it no doubt removes other impediments to train movements during snow storms.

26. WHEREFORE, Petitioners request the Board to institute a declaratory order proceeding; to establish a schedule for the submission of any such additional comments as it deems appropriate; and to resolve the controversy arising from the Amended Tariff regarding the imposition of penalties and costs on shippers due to weather conditions for which shippers are not responsible.

Respectfully submitted,

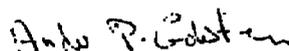


Andrew P. Goldstein  
John M. Cutler, Jr.  
McCarthy, Sweeney & Harkaway, P.C.  
1825 K Street, N.W., Suite 700  
Washington, DC 20006  
(202) 775-5560

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition has been served this 23<sup>rd</sup> day of August, 2010, electronically on counsel for Norfolk Southern Railway Company.



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Andrew P. Goldstein

NS 8002-A

5TH REVISED PAGE 39

**SECTION 5  
RULES AND CHARGES GOVERNING OVERLOADED CARS**

ITEM 5000

**RULES GOVERNING OVERLOADED CARS**  
(Not applicable on cars loaded with Coal, Coke or Iron Ore)

- ▲ A car for which either the net weight is in excess of the car's load limit or the gross weight is in excess of the track weight limit at any point along the route of movement is defined as an overloaded car; this includes overloaded cars attributable to weather conditions.
- A. NS may elect to stop an overloaded car enroute and hold it on a track where partial unloading may be accomplished. It will be the responsibility of the consignor or owner of the shipment to partially unload the car at its expense. Removal of lading must be sufficient to eliminate the overload condition as defined above. NS will not furnish any personnel, equipment or machinery that may be necessary to partially unload the overloaded car.
- Charges for each such car will be assessed as follows:
1. \$469 per car switching charges.
  2. \$130 per car reweighing charge.
  3. Demurrage of \$105 per car per 24-hour day or fraction thereof, beginning from the time of notification by NS until NS has been advised that lading has been adjusted and the car is ready to move on to destination. No free time will be allowed and charges will apply for all days held, including holidays.
  4. Freight charges pursuant to Item 5010 or Item 5020.
  5. \$578 per car overload charge for each such car that has been determined by NS to have been overloaded by more than 5000 pounds, on all commodities except those listed in 6.
  6. \$1,156 per car overload charge if shipment contains Scrap Iron/Steel (STCC 40211), Pig Iron (STCC 33111), Mill Scale (STCC 33119) Metalizing Plant Products (STCC 33115), or Construction and Demolition Debris (STCC 4029154).
- B. NS may elect to stop a trainload shipment that includes one or more overloaded cars enroute and hold the entire train on a track or tracks where partial unloading may be accomplished. It will be the responsibility of the consignor or owner of the shipment to partially unload each overloaded car at its expense. Removal of lading must be sufficient to eliminate the overload condition as defined above. NS will not furnish any personnel, equipment or machinery that may be necessary to partially unload the overloaded car or cars.

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- ▲ - Change in wording which results in neither increase nor reduction in charges.

ISSUED JUNE 24, 2010

EFFECTIVE JULY 14, 2010

ISSUED BY  
C. J. Orndorff, Director-Marketing Services  
NORFOLK SOUTHERN RAILWAY COMPANY, 110 Franklin Road, S. E., Roanoke, VA 24042-0047

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**SECTION 5**  
**RULES AND CHARGES GOVERNING OVERLOADED CARS**

ITEM 5000 (Continued)

**RULES GOVERNING OVERLOADED CARS**  
(Not applicable on cars loaded with Coal, Coke or Iron Ore)

Charges for each such car will be assessed as follows:

1. \$ 130 per car reweighing charge.
  2. Demurrage of \$5,775 per train for each 12-hour period or fraction thereof, beginning from the time of notification by NS until NS has been advised that lading has been adjusted and the train is ready to move on to destination. No free time will be allowed and charges will apply for all days held, including holidays.
  3. Freight charges pursuant to Item 5010 or Item 5020.
  4. For each such car that has been determined by NS to have been overloaded by more than 5,000 pounds, \$578 per car overload charge.
- C. In the event that overloaded car is delivered to destination without being stopped enroute for partial unloading (whether the overloaded condition is discovered prior to delivery or not), charges for each such car determined by NS to have been overloaded by more than 5,000 pounds will be assessed as follows:
1. \$578 per car overload charge on all commodities except those listed in 2.
  2. \$1,156 per car overload charge if shipment contains Scrap Iron/Steel (STCC 40211), Pig Iron (STCC 33111), Mill Scale (STCC 33119) or Metalizing plant products (STCC 33115), or Construction and Demolition Debris (STCC 4029154).

Freight charges will be assessed pursuant to Item 5030

- ◆D. Where overloaded condition is due to weather (rain, snow, ice, etc), charges will be waived if the shipper provides a certified weight certificate showing that the weight of the shipment was at or below the stenciled load limit for the car. Such certificate must be provided within 24 hours of notification of overload (excluding Saturdays, Sundays, and Holidays). At consignor or owner of the shipment's request, NS will hold overloaded car up to 5 days if the certified weight certificate is provided within 24 hours of notification of overload. This is to allow time for the weather condition to be alleviated naturally. If at the end of the 5 day period the weight of the car remains above the stenciled limit for gross weight on rail, it will be the responsibility of the consignor or owner of the shipment to partially unload the car at its expense; removal of lading must be sufficient to eliminate the overload condition and all applicable charges for demurrage, storage, and reweighing will be assessed. NS will not furnish any personnel, equipment or machinery that may be necessary to partially unload the overloaded car.

◆ - Reduction.

ISSUED JUNE 24, 2010

EFFECTIVE JULY 14, 2010

ISSUED BY  
C. J. Omdorff, Director-Marketing Services  
NORFOLK SOUTHERN RAILWAY COMPANY, 110 Franklin Road, S. E, Roanoke, VA 24042-0047

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ORIGINAL PAGE 40.1

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**SECTION 5**  
**RULES AND CHARGES GOVERNING OVERLOADED CARS**

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ITEM 5010

**FREIGHT CHARGES APPLICABLE ON LADING**

**A. WHEN FORWARDED TO ORIGINAL DESTINATION**

When a car is loaded beyond its maximum carrying capacity, the lading will, when practicable, be transferred to a car of sufficient capacity. When a car of sufficient capacity is not available or if car is loaded beyond track weight limitation, so much of the lading as may be necessary to reduce lading weight below the weight restrictions of the car and/or weight restriction on rail will be transferred to another car, the entire shipment to be charged at actual weight and carload rate from point of origin to destination.

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ITEM 5020

**REMOVED FROM OVERLOADED CARS**

**A. WHEN DISPOSED OF AT POINT OF UNLOADING.**

When the excess from an overloaded car(s) is disposed of at point of unloading, freight charges on the excess tonnage will be based on the applicable carload rate and actual weight from original point of origin to unloading point or original destination, whichever results in the lower freight charges.

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ISSUED JUNE 24, 2010

EFFECTIVE JULY 14, 2010

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ISSUED BY  
C. J. Orndorff, Director-Marketing Services  
NORFOLK SOUTHERN RAILWAY COMPANY, 110 Franklin Road, S. F., Roanoke, VA 24042-0047

NS 8002-A

5TH REVISED PAGE 39

**SECTION 5**  
**RULES AND CHARGES GOVERNING OVERLOADED CARS**

ITEM 5000

**RULES GOVERNING OVERLOADED CARS**  
(Not applicable on cars loaded with Coal, Coke or Iron Ore)

- A. A car for which either the net weight is in excess of the car's load limit or the gross weight is in excess of the track weight limit at any point along the route of movement is defined as an overloaded car, this includes overloaded cars attributable to weather conditions.
- A. NS may elect to stop an overloaded car enroute and hold it on a track where partial unloading may be accomplished. It will be the responsibility of the consignor or owner of the shipment to partially unload the car at its expense. Removal of lading must be sufficient to eliminate the overload condition as defined above. NS will not furnish any personnel, equipment or machinery that may be necessary to partially unload the overloaded car.

Charges for each such car will be assessed as follows:

1. \$469 per car switching charges.
  2. \$130 per car reweighing charge.
  3. Demurrage of \$105 per car per 24-hour day or fraction thereof, beginning from the time of notification by NS until NS has been advised that lading has been adjusted and the car is ready to move on to destination. No free time will be allowed and charges will apply for all days held, including holidays.
  4. Freight charges pursuant to Item 5010 or Item 5020.
  5. \$578 per car overload charge for each such car that has been determined by NS to have been overloaded by more than 5000 pounds, on all commodities except those listed in 6.
  6. \$1,156 per car overload charge if shipment contains Scrap Iron/Steel (STCC 40211), Pig Iron (STCC 33111), Mill Scale (STCC 33119) Metallizing Plant Products (STCC 33115), or Construction and Demolition Debris (STCC 4029154).
- B. NS may elect to stop a trainload shipment that includes one or more overloaded cars enroute and hold the entire train on a track or tracks where partial unloading may be accomplished. It will be the responsibility of the consignor or owner of the shipment to partially unload each overloaded car at its expense. Removal of lading must be sufficient to eliminate the overload condition as defined above. NS will not furnish any personnel, equipment or machinery that may be necessary to partially unload the overloaded car or cars.

(Continued on next page)

- A - Change in wording which results in neither increase nor reduction in charges.

ISSUED JUNE 24, 2010

EFFECTIVE JULY 14, 2010

ISSUED BY  
C. J. Omdorff, Director-Marketing Services  
NORFOLK SOUTHERN RAILWAY COMPANY, 110 Franklin Road, S. E., Roanoke, VA 24042-0047

NS 8002-A

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**SECTION 5**  
**RULES AND CHARGES GOVERNING OVERLOADED CARS**

ITEM 5000 (Continued)

**RULES GOVERNING OVERLOADED CARS**  
(Not applicable on cars loaded with Coal, Coke or Iron Ore)

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  3. Freight charges pursuant to Item 5010 or Item 5020.
  4. For each such car that has been determined by NS to have been overloaded by more than 5,000 pounds, \$578 per car overload charge.
- C. In the event that overloaded car is delivered to destination without being stopped enroute for partial unloading (whether the overloaded condition is discovered prior to delivery or not), charges for each such car determined by NS to have been overloaded by more than 5,000 pounds will be assessed as follows:
1. \$578 per car overload charge on all commodities except those listed in 2.
  2. \$1,156 per car overload charge if shipment contains Scrap Iron/Steel (STCC 40211), Pig Iron (STCC 33111), Mill Scale (STCC 33119) or Metallizing plant products (STCC 33115), or Construction and Demolition Debris (STCC 4029154).

Freight charges will be assessed pursuant to Item 5030

- ◆D. Where an overloaded condition is due, in part, to weather (rain, snow, ice, etc), applicable railroad charges (including but not limited to demurrage, storage, switching, and reweighing) will be waived if:
1. The consignor or owner of the shipment provides a certified weight certificate showing the weight of the shipment was below the specified load limit of the car and such certificate is provided within 24 hours of notification of overload (excluding Saturdays, Sundays, and Holidays); and
  2. The consignor or owner of the shipment partially unloads the car or otherwise eliminates the overload condition at its expense within five days.

Absent the timely presentation of such a certified weight certificate all railroad charges shall apply. If the overload condition is not remedied by the consignor or owner of the shipment within the five days, all applicable railroad charges shall apply and will be assessed after the end of the fifth day; railroad charges that would have been assessed during the five days shall not apply and will not be assessed. NS will not furnish any personnel, equipment or machinery that may be necessary to partially unload or otherwise remedy the overloaded rail car.

◆ - Reduction.

ISSUED AUGUST 4, 2010

EFFECTIVE AUGUST 4, 2010

ISSUED BY  
C. J. Omdorff, Director-Marketing Services  
NORFOLK SOUTHERN RAILWAY COMPANY, 110 Franklin Road, S. E., Roanoke, VA 24042-0047