

Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, Virginia 23510-9241

Greg E. Summy
General Solicitor

Writer's Direct Dial Number
Phone (757) 533-4890
Fax (757) 533-4872
E-mail Greg.Summy@nscorp.com

January 27, 2011

BY ELECTRONIC FILING

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

Re. STB Finance Docket No. 35387, Ag Processing Inc A Cooperative—Petition for Declaratory Order

Dear Ms. Brown:

228685

Enclosed for filing please find the Motion to Dismiss of Norfolk Southern Railway Company.

Thank you for your prompt assistance. If you have any questions, please feel free to contact me.

ENTERED
Office of Proceedings

JAN 27 2011

Part of
Public Record

Sincerely,

Greg E. Summy

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35387

**AG PROCESSING INC A COOPERATIVE –
PETITION FOR DECLARATORY ORDER**

**MOTION TO DISMISS OF
NORFOLK SOUTHERN RAILWAY COMPANY**

James A. Hixon
John M. Scheib
Greg E. Summy
Christine I. Friedman
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

*Counsel for Norfolk Southern Railway
Company*

Dated: January 27, 2011

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35387

**AG PROCESSING INC A COOPERATIVE –
PETITION FOR DECLARATORY ORDER**

**MOTION TO DISMISS OF
NORFOLK SOUTHERN RAILWAY COMPANY**

Pursuant to 49 C.F.R. § 1111.5, Respondent Norfolk Southern Railway Company (“Norfolk Southern”) moves the Board to dismiss the *Second Amended Petition for Declaratory Order* (“Second Amended Petition”), which was filed on behalf of Ag Processing Inc A Cooperative (“Ag Processing”), Bunge North America, Inc. (“Bunge”), Archer Daniels Midland Company (“ADM”), Louis Dreyfus Corporation (“LDC”), and Perdue Agribusiness, Inc. (“Perdue”) (collectively, “Petitioners”), and respectfully requests that the Board discontinue this proceeding.

The Second Amended Petition is without merit. Norfolk Southern’s tariff is a reasonable practice. The tariff provision at issue here, NS Tariff 8002-A, Item 5000, Part D, which was effective August 4, 2010, is a change that is actually more favorable to shippers than Norfolk Southern’s longstanding tariff provision regarding liability for overloaded railcars. It is also more favorable to shippers than the public tariff provisions regarding overloaded railcars of Norfolk Southern’s competitors. Part D, which creates a five-day safe harbor for shipments that exceed weight limits due in part to weather, is reasonable. Norfolk Southern has not charged *any* Petitioner for an overloaded railcar due in part to weather since at least January 2008, which is as far back as Norfolk

Southern's records on overloads currently extend. Because there is no controversy between Norfolk Southern and Petitioners to resolve and because Part D is clear on its face and is more favorable to customers than the longstanding provisions regarding liability for overloaded railcars, the Board should decline to institute a declaratory order proceeding.

LEGAL STANDARD

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. There is no controversy at the present time. Although Norfolk Southern has published NS Tariff 8002-A, Item 5000, Part D, which was effective August 4, 2010, it has not been applied to Petitioners. Bailey Decl. ¶ 9. In addition, Norfolk Southern has not charged a Petitioner for or had any dispute with any Petitioner from at least 2008 until the present about a car that was overloaded in part due to weather. *Id.* ¶ 7. Indeed, after two major winter storm systems this winter, no Petitioner has had an overloaded railcar due in part to weather on Norfolk Southern. *See id.*

Nor is there any uncertainty to resolve. Part D is (1) clear on its face and (2) creates an exception that is more favorable to the customer than the longstanding general rule that customers, because they control the loading process, are responsible for overloaded railcars. Accordingly, there is no need for a declaratory order proceeding.¹

¹ To the extent that the Board decides to pursue this matter through a declaratory order action, Congress did not set a standard for determining what constitutes an "unreasonable" practice, and instead left that question to the Board's discretion. *WTL Rail Corp.—Pet. for Declaratory Order & Interim Relief*, STB Docket No. 42092 (served Feb. 17, 2006). "Whether a particular practice is unreasonable typically turns on the

FACTS

Railcars have weight restrictions. The restrictions set the limit for how much the car may weigh when loaded. The weight restriction for each car is stenciled on the car. *Id.* ¶ 3. Norfolk Southern has internal weight restrictions for cars that are sometimes higher than the stenciled amounts, which give customers some leeway in loading railcars. *Id.* Norfolk Southern does not make publicly available these internal tolerances because it does not want to encourage customers to push the envelope any further than some customers already do. *Id.* Nevertheless, Norfolk Southern has provided those tolerances to the Board under seal in the Declaration of Rush Bailey. *Id.* Ex. B.

Overweight cars are a safety risk to the railroad, its employees, the goods in the car, and the goods of other customers that ride on the same train. *See* Second Amended Petition ¶ 30. Overloaded railcars must be removed from the rail system whenever possible and wherever located to avoid damage to the track, bridges, or cars that would be costly and impede rail service. Bailey Decl. ¶ 4. Whenever an overloaded railcar causes a derailment or other damage to the rail system it is costly.

Dealing with overloaded railcars is inefficient. The train must be stopped. The overweight car itself must be removed from the train and set aside until it can be brought back into compliance. *Id.* Moreover, stopping a train to remove a single overweight car delays *all* the cars on the train. Thus, overweight cars result in the inefficient use of railcars, locomotives, and crews.

particular facts.” *Capitol Materials Inc.—Pet. for Declaratory Order—Certain Rates & Practices of Norfolk S. Ry. Co.*, STB Docket No. 42068, slip op. at 6 (served Apr. 12, 2004). The burden would be on the complainants to prove the merits of an unreasonable practice claim. *See N. Am. Freight Car Ass’n v. BNSF Ry.*, STB Docket No. 42060 (Sub-No. 1) (served Jan. 26, 2007).

Petitioners each load their product on railcars or are individually responsible for having their product loaded on railcars. Second Amended Petition ¶ 20. Norfolk Southern does not load Petitioners' product on railcars and does not have any control over such loading.

Norfolk Southern, like the other railroads, has long sought to deter customers from having railcars exceed the stenciled maximum weight. Accordingly, Norfolk Southern has long had a tariff that makes the customer responsible for overloaded railcars. Bailey Decl. ¶ 5. The tariff in question is NS Tariff 8002-A, Item 5000 ("Tariff"), which is applicable to commodities other than coal, coke and iron ore.² Pursuant to that Tariff, customers have been responsible for overloaded railcars, regardless of the cause of the overload. *Id.*

The core elements of NS Tariff 8002-A, Item 5000 are generally not at issue here, namely:

- A car that exceeds the net weight of the car's load limit "at any point along the route of movement" is an "overloaded car."
- NS may stop an overloaded car or train en route and hold it until a partial unloading is accomplished.
- The consignor or owner of the shipment is responsible to partially unload the car at its expense to return the car to compliance with the weight restriction.
- Removal of lading must eliminate the overload condition.
- NS will not furnish personnel, equipment, or machinery necessary to partially unload the overloaded car.

² Petitioners allude to the fact that NS Tariff 8002-A does not apply to coal, coke, and iron ore "for some unknown reason." The reason is that overloading of coal, coke and iron ore is addressed by a separate tariff, NS Tariff 9219B, which contains a regime tailored to those commodities.

- Certain charges apply for car switching, reweighing a car, and demurrage for the time an overloaded car is out of service because of the overload condition.³

Pursuant to Item 5000 and its predecessors, the longstanding general rule has been that the customer is liable for the overloaded railcar in all instances and whatever the cause. Bailey Decl. ¶ 5. In this respect, Norfolk Southern's Tariff is similar to the public tariffs of other Class I railroads.⁴ *See, e.g.,* Appendix A (Other Railroads' Tariffs). Under the plain language of other railroads' public tariffs—and under Norfolk Southern's Tariff prior to Part D—a car that is or becomes overweight would be pulled out of the train and held until the customer remedies the overweight problem at its own expense while incurring charges such as demurrage.⁵

Thus, prior to Part D, Norfolk Southern's Tariff held the customer responsible for all overweight railcars regardless of the cause of the overweight situation. And that is how Norfolk Southern has long applied its Tariff.

³ The reasonableness of those charges is also not at issue in this declaratory order proceeding.

⁴ Norfolk Southern has no knowledge about how other railroads apply the language of their tariffs, but the plain language of those tariffs creates the same general rule regarding overloaded cars that existed in Norfolk Southern tariffs prior to the addition of Part D.

⁵ Norfolk Southern has examined the provisions of BNSF, CSX, and UP's tariffs that address overloads, which are provided at Appendix A. None of those tariffs provide on their face a safe harbor like the one that Norfolk Southern has created in Part D and that is the subject of this challenge. UP Tariff 6004C, Item 8000-D simply says that "[w]hen an overloaded car is identified, the shipper will be notified . . . and required to unload the excess at the operating convenience of the Union Pacific." It also provides that if the customer does not do so, Union Pacific will at the customer's expense. It further states that demurrage charges, switch charges, and other charges will be billed to the customer. Unlike Part D of the Tariff, there is no exception for overloads caused in part by weather. BNSF and CSX tariffs are similar in that they do not provide a safe harbor from the various charges associated with overloads when the overload is caused in part by weather. *See* Appendix A (BNSF Weighing Book 9300-A, Item 1200B; CSX Tariff CSXT 8100, Item 11000).

After the winter storms early last year and interaction with customers regarding cars that exceeded weight restrictions in part due to weather, Norfolk Southern decided to amend its Tariff to create an exception to the general rule in Item 5000. Petitioners, however, were not among Norfolk Southern's customers dealing with overweight railcars. Bailey Decl. ¶¶ 6-7. In fact, none of the Petitioners has had a car stopped on Norfolk Southern for being overweight in part due to weather since at least 2008. *Id.* ¶ 7.

Norfolk Southern adopted Part D to Item 5000 on July 14, 2010. That version of Part D was never applied to any customer. *Id.* ¶ 8. In response to the original Petition in this case, Norfolk Southern amended Part D, and such amended provision became effective August 4, 2010. *Id.* Part D of the Tariff establishes the rules for cars that exceed weight limits in transit due to the combination of the weight of the lading in the car and weather conditions. Part D provides as follows:

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.

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 railcar.

This Part D of the Tariff is the only Part of Norfolk Southern's Tariff at issue in the Second Amended Petition. To date, the Petitioners have not had a car to which Part D of the Tariff was applicable, even after two winter storms in December 2010. Bailey Decl. ¶ 9.

Part D provides an exception to the widely-accepted and longstanding general rule that—as the only party that can control the weight of a railcar—customers are liable for overweight railcars. It creates for the customer a safe harbor from these expenses when the car was not overweight at origin and the overweight condition is alleviated naturally or by the customer within five days.⁶ And, importantly, even if the condition is not alleviated naturally or by the customer in the five days, all charges that otherwise would have accrued during the five days are foregone by Norfolk Southern; Norfolk Southern will only apply charges starting after the five-day grace period. Norfolk Southern is the only railroad that provides such an express exception from the general rule regarding overweight cars.

ARGUMENT

The facts in this case clearly establish that there is no controversy and there is no uncertainty to be resolved. Norfolk Southern's Tariff provision, Part D, is clear and unambiguous on its face and has *never* been applied to Petitioners; no Petitioner has had

⁶ Paragraph 18 of the Second Amended Petition is simply incorrect in stating that Part D required the shipper to “partially unload cars that are no longer overweight,” as the tariff charge also does not apply if the shipper “otherwise eliminates” the overload condition, which would include waiting for the condition to alleviate naturally.

an overloaded car caused in part by weather on Norfolk Southern in at least the last three years.

Further, Part D is carefully-tailored to create a safe harbor to relieve the customer of responsibility for an overloaded railcar in situations in which (1) the car was not overweight when weighed at the origin and (2) the overweight condition is—naturally or by the customer’s actions—corrected within five days. It makes clear Norfolk Southern will not assess charges related to overloaded railcars, such as switching and demurrage, during the five-day period. In fact, the challenged portion of Norfolk Southern’s Tariff is more accommodating to the customer in situations where weather may be a contributing cause to the car exceeding the weight restriction than in situations where weather is not a contributing cause. It is also more accommodating to customers than the express language of other Class I railroads’ public tariffs addressing overloaded railcars.⁷

I. THERE IS NO CONTROVERSY

There is no controversy between Norfolk Southern and the Petitioners. In the last three years at least, none of the Petitioners has had a car removed from service on Norfolk Southern because it was overloaded in part due to weather. Moreover, Part D has never been applied to any Petitioner, including after two major winter storms in December 2010. Bailey Decl. ¶ 9. In fact, it is very unlikely that Part D would ever apply to the Petitioners because weather overloads are typically not experienced by tank

⁷ Petitioners imply that solutions different from that adopted by Norfolk Southern in Part D of the Tariff might exist. Second Amended Petition ¶ 30. That there are other possible solutions, however, is irrelevant to whether the solution at issue is reasonable. The test is not whether Norfolk Southern’s tariff is perfect or even if it provides for the best solution to the problem addressed. Norfolk Southern’s tariff must only be reasonable. And it is.

cars and covered hopper cars. *See id.* ¶ 7; Second Amended Petition ¶ 7. Accordingly, there is no live controversy for the Board to resolve, and the Board should dismiss the Petition. *See Chelsea Prop. Owners—Pet. for Declaratory Order—Highline*, STB FD 34259 (served Nov. 27, 2002) (“There is no reason to institute a declaratory order proceeding to resolve issues that may never arise.”); *see also Pet. of Nebkota Ry., Inc., and West Plains Co. for Declaratory Order*, FD 35352 (Apr. 28, 2010).

II. PART D IS CLEAR ON ITS FACE AND IS EMINENTLY REASONABLE

A. WEIGHT RESTRICTIONS EXIST FOR SAFETY, AND PULLING CARS OUT OF SERVICE BECAUSE THEY ARE OVERWEIGHT MAKES THE RAIL SYSTEM LESS EFFICIENT

Petitioners in no way challenge the fact that overloaded cars are a safety risk to a railroad, its employees, and its customers’ goods. It is beyond question that railcars that exceed the stenciled weight limit result in safety concerns. For example, overloaded cars are susceptible to failing parts, such as wheels, bearings, and axles. Such failures may result in derailment, which delays the movement of other customers’ cars on the train, impairs the ability of the railroad to transport traffic over a line for some period of time, damages track, damages goods, or some combination of these. Thus, Petitioners concede (as they must) “that severely overweight cars may pose a safety hazard.” Second Amended Petition ¶ 30.

In addition to the safety risk, there is a cost to Norfolk Southern and to the rail system as a whole whenever a car loaded by Petitioners becomes overweight. Trains must be stopped. Cars must be switched to remove the overloaded car. All the cars on the train are affected, not just the overloaded car. Bailey Decl. ¶ 4. Charges for overloaded cars are analogous to demurrage charges because both serve: “(1) to

compensate the railroad for added costs (e.g., for the car-hire charges it pays to the carrier owning the equipment being held) or loss of the use of assets” and (2) to encourage shippers to load cars in a manner that avoids the need to stop the train to remove the overloaded car, “thereby making the entire system more efficient.” *N. Am. Freight Car Ass’n, v. BNSF Ry.*, STB Docket No. 42060 (Sub-No. 1) (served Jan. 26, 2007) (describing purposes of demurrage charges).

This safety risk and these increased costs to Norfolk Southern and the rail system are caused by something that is largely in the control of the Petitioners and not at all in the control of Norfolk Southern.

B. THE LOADING OF RAILCARS IS NOT WITHIN THE CONTROL OF NORFOLK SOUTHERN; IT IS WITHIN PETITIONERS’ CONTROL

Petitioners and Norfolk Southern are equally able or unable to forecast the weather. Petitioners complain that they “cannot anticipate weather conditions that will prevail between the time they tender a car to Norfolk Southern or one of its connections and the time the car is delivered by NS.” Second Amended Petition ¶ 25. But neither can Norfolk Southern. So the inability to forecast the weather cannot be dispositive.

The question is who can exercise foresight and control the loading of the car to ensure that it stays in compliance. Norfolk Southern does not load railcars with Petitioners’ products; Petitioners do. Norfolk Southern cannot control how close to the weight restriction those cars are loaded; Petitioners can. Petitioners do not dispute these facts.

In addition, Petitioners know their commodities and the commodities’ properties for absorbing moisture. Petitioners therefore know how close to the stenciled weight

restriction they can load the car and avoid risking the car becoming overweight due in part to weather that might be encountered on the route. All of these factors are in the Petitioners' control; none are in Norfolk Southern's control. Because the customer controls the weight of the car, placing the burden for overweight railcars on the customers has been customary in the industry.⁸ See Appendix A (Other Railroads' Tariffs).

Only Petitioners can control whether the car will be at risk for exceeding the weight restriction en route on account of weather. Petitioners can control the weight by not loading as closely as possible to the weight limit when there is a risk that snow, ice, or other weather will put the car over the weight restriction. Thus, no matter when the car becomes overweight—whether at the origin during loading or en route due to weather—the only parties that can control the weight of the car are the Petitioners.⁹

Because Petitioners control the weight of the car, have knowledge of the properties of the products they ship, and are in an equal position to predict the weather, it would be eminently reasonable to place all responsibility for the safety risks and inefficiencies created from dealing with overloaded cars on the Petitioners.¹⁰ Part D does much less.

⁸ The public tariffs of other railroads make the customer responsible for overweight railcars and, unlike Part D, provide no exception for overweight conditions that result in part from weather.

⁹ Even if Petitioners ignore potential weather concerns and load the car all the way to the stenciled limit, it is unlikely that a car loaded to the stenciled limit would exceed Norfolk Southern's internal tolerances due to weather because Norfolk Southern's tolerances before declaring a car overloaded are sometimes higher than the stenciled weight on the car. Bailey Decl. ¶ 3 & Ex. B.

¹⁰ Placing the burden on Petitioners and other customers is reasonable and supported by precedent. In *Prince Manufacturing Co. v. Norfolk and Western Railway Co.*, 356 I.C.C. 702 (1978), the Interstate Commerce Commission reconciled numerous of its

C. NORFOLK SOUTHERN'S TARIFF PROVISION REASONABLY ALLOCATES RESPONSIBILITY FOR CARS THAT ARE OVERLOADED DUE TO THE COMBINATION OF THE WEIGHT OF THE LADING AND WEATHER

Part D addresses the possibility that a railcar may exceed its stenciled weight, and thereby become an overloaded car, because of weather conditions encountered en route.

It is clear and carefully calibrated.

If the customer can timely demonstrate that the railcar was within the weight restriction at origin, it is relieved of charges related to the overload for five days. If the overload condition is either remedied by the customer or remedied naturally within five days, Norfolk Southern will waive all railroad charges provided for in NS Tariff 8002-A, Item 5000. If it is not remedied within five days, Norfolk Southern will assess applicable charges incurred after the fifth day. Only in instances in which the customer cannot show that the car was properly loaded at origin will the applicable charges be assessed immediately.

decisions (including *Ormet Corp. v. Illinois Central*, which Petitioners cite for a different purpose) regarding the lengths to which rail customers must go to avoid demurrage charges. The Commission determined that the proper standard was what "was reasonable under the circumstances." *Prince Manufacturing*, 356 I.C.C. at 706. Putting some parameters around that standard, the Commission held that it included the customer exercising "prudent foresight in the particular circumstances." *Id.*

Part D does not even ask Petitioners and other customers to exercise prudent foresight and take into account potential weather conditions (given Petitioners' knowledge of its commodity and the commodity's moisture absorption) when determining how close to the stenciled weight restriction to load a car—although that too would be reasonable. It says that even if a customer fails to exercise prudent foresight, Norfolk Southern will still give the customer a pass if (1) the car was properly loaded at origin and (2) the overload condition is remedied by the customer or naturally within five days. It further says that even if the condition is not remedied in the five-day period, for that five-day period Norfolk Southern will not assess the charges that would otherwise apply.

To remove any doubt, charges for overloaded railcars are not about collecting money. Norfolk Southern would rather never have an overloaded railcar (because of the safety risks and the decrease in efficiency that results from having to deal with such cars). But Norfolk Southern is entitled to establish reasonable rules and practices. 49 U.S.C. § 10702(2). Importantly, here, Part D is clear on its face and is an eminently reasonable allocation of responsibility given that neither party controls the weather and the shipper exclusively controls the loading of the railcar.

D. THIS IS NOT A CASE ABOUT FREIGHT CHARGES

Petitioners would prefer that they never be responsible for railcars that exceed the weight restriction due to the combined weight of the lading and weather so that Petitioners can load the cars as close to the restricted weight as possible. Second Amended Petition ¶¶ 19-20. More specifically, Petitioners complain that because Norfolk Southern's freight rates for their traffic is on a per car basis, Petitioners might have to pay for an additional car if they cannot load as much in each car without risking the car becoming overweight en route.¹¹ *See id.* ¶ 25. Norfolk Southern understands the

¹¹ Petitioners state that "it is axiomatic that shippers should not be required to pay freight charges except upon the freight they actually load in a car." Although this statement has little to do with this case (except to the extent that Petitioners seek to load the car as close to the stenciled load limit as possible notwithstanding any externalities such as weather), the two cases cited are not relevant—if they are at all applicable after the Staggers Rail Act of 1980.

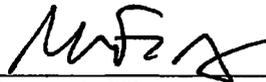
First, *Coal, Weighing and Computation of Freight Charges* involved the question of whether a railroad rule to restrict the weighing of coal cars only to certain, specified scales was unjust or unreasonable. The Interstate Commerce Commission found that "[a] shipper should only be required to pay freight charges assessed on correct weights" in an instance where freight charges were assessed based on weight (coal), and therefore the limitation imposed was unreasonable to the extent it prevented the shipper from checking the weights determined by the railroad. *Coal Weighing*, 326 I.C.C. 382, 385 (1966). Petitioners do not pay freight charges based on weight.

theoretical complaint that is rooted in a desire to pay for the freight rate on as few railcars as possible. But that desire does not make Part D unreasonable.

III. CONCLUSION

There is no controversy and there is no uncertainty to be resolved here. Norfolk Southern's Tariff provision, Part D, has not been applied to any Petitioner, and no Petitioner has had an overloaded car due in part to weather in at least the last three years. Further, Part D is both clear and unambiguous on its face and a reasonable allocation of responsibility. Accordingly, the Board should dismiss the Second Amended Petition.

Respectfully submitted,



James A. Hixon
John M. Scheib
Greg E. Summy
Christine I. Friedman
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

*Counsel for Norfolk Southern Railway
Company*

Dated: January 27, 2011

In *Anaconda Copper Mining Company, Practices of Carriers Affecting Operating Revenues and Expenses, Part II: Terminal Services*, 266 I.C.C. 387 (1946), a railroad charge to move an empty car to a weighing facility was at issue. The shipper wanted the railroad to move empty cars to scales so that the shipper could use the weights of the empty cars to determine whether the consignor was charging it for the right amount of concentrate (which could be determined by comparing the loaded weight to the empty car weight). The agency determined that the railroad could separately charge for that service. Thus, the case has no relevance here.

CERTIFICATE OF SERVICE

I, Greg E. Summy, certify that on this date a copy of the Motion to Dismiss of Norfolk Southern Railway Company, filed on January 27, 2011, was served by email or by first-class mail, postage prepaid, on all parties of record, specifically:

Andrew P. Goldstein
McCarthy Sweeney & Harkaway, PC
Suite 700
1825 K Street, N.W.
Washington, D.C. 20006
(202) 775-5560



Greg E. Summy

Dated: January 27, 2011

BNSF WEIGHING BOOK 9300-A

Item 1200B – Excessively Loaded Cars, Issued March 8, 2002 – Effective April 1, 2002

- A. An excessively loaded car is defined as a rail car for which either the net weight (actual weight of freight including all other materials incidental to the movement of the goods) is in excess of the car's authorized load limit (as listed in Universal Machine Language Equipment Register- UMLER), or the gross weight (combined weight of railcar and freight including all other material incidental to the movement of the goods) is in excess of the track weight limitations at any point along the route of movement.
- B. Shipper is responsible for the removal and disposal of the excess portion of the lading of the car. BNSF will not be responsible for damaged goods or loss of lading resulting from the process of removing excess portion and BNSF does not assume responsibility for the proper loading or unloading of any lading into or out of a car containing excessive lading. All charges referred to are published as a deterrent to the unsafe practice of overloading rail cars and are not connected in any way with the line-haul transportation charges. These charges are NOT freight or "or other lawful charges" within the meaning of Section 7 of the bill of lading, and the execution of Section 7 will not in any way relieve the shipper from the responsibility for the charges referred to.
- C. If Shipper does not produce a certified weight document, in a form acceptable to BNSF, indicating that the excess tonnage has been removed from each car, charges for weighing each excessively loaded car, as found in item 900 of this book, including applicable switch charges as found in BNSF Switch Book 8005-Series, will be assessed against the shipper in addition to all other charges named in this book.
- D. CARS FOUND TO BE OVERLOADED
1. AT POINT OF ORIGIN: If found at origin after having been removed from industry or railroad tracks where loaded, car will not be permitted to go forward. Shipper will be notified and required to transfer the excess weight from the car. Shipper will be assessed the applicable switch charges as found in BNSF Switching Book 8005-Series. Cars found to contain excess lading at origin will remain on continuous demurrage under the provisions found in BNSF Demurrage Book 6004-Series or BNSF Private Car Storage Book 6005.
 2. WHILE IN TRANSIT: A car that is found to be overloaded in excess of 5,000 pounds will not be allowed to go forward until the condition is rectified. Shipper will be notified via telephone, fax or by an electronic means and required to unload the excess lading at the operating convenience of the BNSF.
 - a. Cars containing lading in excess of 2,000 pounds above the load limit as listed in UMLER (except cars containing hazardous material or grain and grain products) will be subject to a surcharge of \$500 per car for each weighed overloaded car in addition to applicable freight charges.
 1. Cars containing hazardous material in excess of 1,000 pounds will not be allowed to move en route without reduction.
(Item continued on next page)

BNSF WEIGHING BOOK 9300-A

Item 1200B – Excessively Loaded Cars (Continued)

2. Overloaded cars of grain and grain products will be handled pursuant to paragraphs E and F below.
 - b. If the shipper fails or refuses to arrange to have the excess lading removed from each car within 120 hours from the date and time of notification, BNSF may, at its discretion, arrange for removal and disposal of the excess portion to allow the car to continue safely to the destination. The shipper will pay actual cost of removal and disposal to the party reducing the car.
 - c. If Shipper/consignor has not commenced reducing the excess portion from each car after 240 hours from the date and time of notification, the lading in the car will have been deemed abandoned and BNSF may, at its discretion, reserve the right to confiscate the lading. At the option of BNSF Freight Claims Department, private sale of the lading will commence and all charges accrued (switching, weighing, demurrage, reduction and disposal expenses) resulting from an excessively loaded car, will be deducted before submitting any proceeds of sale to the consignee/consignor of record.
- E. With regards to Grain and Grain Products, as defined in BNSF 4022 and 4023, if cars are found to contain excessive lading en route and are part of a permitted unit grain train, at the option of BNSF, the entire grain train will be held for reduction of overloaded car(s). The excessive lading car(s) will be placed on demurrage for the account of the shipper/consignor from the first 12:01 A.M. after notification of the excessive weight in car(s) until the excessive weight has been reduced to the authorized gross weight on rail. This is in addition to switching and weighing charges that may be applicable.
- F. With regards to Grain and Grain Products, as defined in BNSF 4022 and 4023, BNSF reserves the right to request origin weights from origin loaders or unloading weights from destination unloaders for the purpose of determining whether cars were loaded in excess of the authorized load limit. Actual individual certified car weights or batch weights (using the formula set forth below in the next paragraph) would be used. Freight rates will be surcharged in the amount of \$500 per car loaded in excess of the authorized load limit and moved from origin to destination.

When the weight of individual cars is not available due to batch weighing, the following formula will apply. The load limits of all the cars in a batch will be added together, in addition to an allowance of 2,000 pounds per car, for each car in the batch. The load limit of the involved cars plus the allowance will be subtracted from the batch weight. If the result is greater than zero, the \$500 per car surcharge will apply to each car in the batch.

(Item continued on next page)

BNSF WEIGHING BOOK 9300-A

Item 1200B – Excessively Loaded Cars (Concluded)

Where there is a disagreement as to the weight of the lading, only weights from a scale currently certified by the Federal Grain Inspection Service or certified according to the National Bureau of Standards Handbook No. 44 will be considered. Weights subject to supervision will govern over other scale weights where applicable. In no case will claims involving a weight disparity of less than 1,000 pounds from the original ascertained weights be entertained.

END



CSXT 8100

(A) ORIGINAL PAGE XI-A-1

OVERLOADS
SECTION XI-A

SECTION XI-A
OVERLOADS

(Not Applicable on Coal (STCC 11) or Coke, the Direct Product of Coal (STCC 29 914). For Applicable Provisions on these Commodities, see Tariff CSXT 8200.)

(A) - Increase

ISSUED MARCH 16, 2000

EFFECTIVE APRIL 15, 2000

CSX TRANSPORTATION
Marketing Services – Price Management
500 Water Street
Jacksonville, FL 32202



CSXT 8100

1st REVISED PAGE XI-A-2
Cancels ORIGINAL PAGE XI-A-2

OVERLOADS
SECTION XI-A

GENERAL APPLICATION – ITEM 11000

- A. When a car is found to be overloaded (car or rail limits), shipper will be notified and given an opportunity to take corrective action, subject to a charge of (A) \$750.00.
- B. The charges named in paragraph A includes the service of weighing.
- C. Following corrective action, cars will be handled as follows (if requested, CSXT may make the necessary adjustments – this service is not a common carrier obligation and will be charged for at prevailing rates, separate and apart from the transportation charges):

- 1. The excess lading may be removed, with the remaining lading forwarded to the original billed destination, at the price from the original billed origin, on the remaining weight.
- 2. The excess lading may be placed in another car and both cars forwarded to the original billed destination. Charges to be assessed are as follows:

As to shipments rated on other than per-car charges:

At the price from the original billed origin, on the combined weight of both cars, with the excess car subject to a 10,000 pound minimum weight.

As to shipments rated on per-car charges:

The original car will be charged the per-car price from the billed origin.

The car carrying the excess will be charged at 28% of the per-car price on the original car, with charges being rounded to the nearest whole dollar.

- 3. The entire lading may be transferred to another car if such transferal results in the car being accepted for further movement. Freight charges will be those on the weight of the reloaded car, from original billed origin, to the original billed destination.
- 4. The excess lading may be placed in another car and returned to the original billed origin. The remaining lading in the original car may be forwarded to the original billed destination, at the price from the original billed origin, the charge will be\$424.00

(A) - Increase

ISSUED OCTOBER 20, 2004

EFFECTIVE JANUARY 1, 2005

CSX TRANSPORTATION
Commercial Administration
500 Water Street
Jacksonville, FL 32202



CSXT 8100

(A) ORIGINAL PAGE XI-A-3

OVERLOADS
SECTION XI-A

SPECIFIC APPLICATION – ITEM 11010

MONTIGUE, MI

- A. Applicable to cars from Montigue, MI, that are weighed at Muskegon, MI.
- B. Shipper will be notified and given the opportunity to take corrective action in the following situations:
 - 1. When a car is found to be overloaded (car or rail limits),
Or
 - 2. When a car is found to be outside the minimum or maximum weights for a shipment as prescribed by the customer on the bill of lading.
- C. Charges for this service will be:
 - 1. If no further movement of the car is necessary in order to take corrective action after discovery of the overload, and after it has initially been set out and shipper has been notified \$211.00
 - 2. If further movement of the car is necessary in order to take corrective action after discovery of the overload, and after it has been set out and shipper has been notified \$510.00
- D. The charges named in Paragraphs C1 and C2 include the service of weighing.

(A) - Increase

ISSUED MARCH 16, 2000

EFFECTIVE APRIL 15, 2000

CSX TRANSPORTATION
Marketing Services – Price Management
500 Water Street
Jacksonville, FL 32202

 <p>UP 6004-C</p>	<p>Item: 8000-D OVERLOADED CARS</p>
<p>CHANGE KEY: A-Add; C-Change; D-Decrease; I-Increase; and X-Expire</p>	
<p>For billing purposes use the following rate schedule: UP 6004-C-8000-D</p>	
<p>STCC Rate Description</p>	
<p>ALL STCCS 01-99 All Commodities</p>	
<p>GENERAL RULE ITEM 8000</p> <p style="text-align: center;">Section 6 - OVERLOADED CARS</p> <ol style="list-style-type: none"> 1. The charges in this item are published as a deterrent to the unsafe practice of overloading rail cars and are not connected in any way with the line-haul transportation charges. These charges are NOT freight or "or other lawful charges" within the meaning of Section 7 of the bill of lading, and the execution of Section 7 will not in any way relieve the shipper from the responsibility for the charges in this item. 2. [c] <ol style="list-style-type: none"> A. Carload freight must be loaded in conformity with railroad rules and must not be loaded in excess of the load limit stenciled on the cars. Overloaded cars exceeding the stenciled load limit by 2,000 pounds or more will be assessed charges herein. Cars overloaded by less than 2,000 pounds also will be assessed charges herein if required by other railroads' weight restrictions. B. Cars with a stenciled gross rail load of 263,000 pounds are allowed to operate with a tolerance up to 268,000 pounds to account for scale variance. Cars exceeding 268,000 pounds will be Bad Ordered and the load must be reduced to 268,000 pound gross rail load limit. Cars exceeding the 268,000 tolerance limit will be assessed the charges herein. 3. When an overloaded car is identified, the shipper will be notified via telephone or fax or by an electronic means and required to unload the excess at the operating convenience of the Union Pacific. If the shipper fails or refuses to reduce the weight within 48 hours of notification, Union Pacific may, at its discretion, remove and dispose of the excess to allow the car to continue safely to the destination. The shipper will pay actual cost of removal and disposal. 4. Demurrage charges as provided in this tariff (UP 6004) will be assessed for each day a car is held for weight reduction, beginning with the first 12:00 midnight after the car is placed into a hold for overload status. No free time will be allowed. 5. If a connecting line switch is required to place the car in a position for unloading, the shipper will pay switching charges assessed by the connecting line. 6. The shipper will pay all excess line-haul and switching charges incurred by the Union Pacific in order to move the overloaded car to a spot for reduction. 7. After the Overloaded car is reduced and the Union Pacific is notified of the reduction, Union 	
<p>Issued: August 5, 2009 Effective: August 7, 2009</p>	<p style="text-align: center;">UP 6004-C</p> <p style="text-align: right;">Page: 1 of 2 Item: 8000-D Continued on next page</p>

APPENDIX A
ORIGIN AND DESTINATION GROUPS

GROUP NAME
LOCATIONS

ALL UP POINTS GROUP

ARKANSAS
ARIZONA
CALIFORNIA
COLORADO
IOWA
IDAHO
ILLINOIS
KANSAS
LOUISIANA
MINNESOTA
MISSOURI
MONTANA
NEBRASKA
NEW MEXICO
NEVADA
OKLAHOMA
OREGON
TENNESSEE
TEXAS
UTAH
WASHINGTON
WISCONSIN
WYOMING

Issued: August 5, 2009
Effective: August 7, 2009

UP 6004-C

Appendix A Page: 1 of 1
Item: 8000-D



UP 6004-C

Item: 2190
CARS OVERLOADED OR IMPROPERLY LOADED

Section 1 - CARS FOUND TO BE OVERLOADED OR IMPROPERLY LOADED

When cars are found to be overloaded or improperly loaded and not in conformity with railroad loading and clearance rules, the following will apply unless otherwise provided in individual railroad tariff's lawfully on file:

1. If found while still on industry or railroad tracks where loaded, car will be considered to be under continuous loading transaction until adjustment of the load has been made, if necessary, and final clearance is received for further movement (see Note 1).
2. If found at origin after having been removed from industry or railroad tracks where loaded, car will not be considered released until load has been adjusted, if necessary, and final clearance is received for further movement. The time between furnishing of forwarding directions and making of car available to consignor for adjustment will not be computed against car (see Note 1).
3. If, after having left origin station, a car found to be overloaded is held in transit, twenty-four (24) hours will be allowed to adjust the load. Time will be computed from the first 12:00 midnight following notice that car is being held (see Note 1).

NOTE 1. Adjustment of load must include advice to authorized personnel of this railroad that shipment now conforms to railroad loading and/or clearance rules, and is now ready for inspection and/or measurements to permit final clearance for further movement.

VERIFIED STATEMENT

OF

RUSH BAILEY

1. My name is Rush Bailey. I am Assistant Vice President of Customer Service for Norfolk Southern Railway Company ("NS").
2. As a result of my job responsibilities, I am familiar with NS Tariff 8002-A, Item 5000, which governs overloaded cars. This Item has been in effect since August 4, 2010 and is attached hereto as Exhibit A. As a result of my job responsibilities, I am also familiar with prior versions of the tariff.
3. Weight limits are stenciled on each railcar that indicate the maximum weight for the car when loaded. Customers generally want to load cars as efficiently as possible, and therefore many tend to cut it close to the stenciled amount. Based on review by its Mechanical and Engineering Departments, NS has, in some cases, set tolerances over and above the stenciled weight limits of the car. The difference between the stenciled amount and NS internal limits provides some leeway to customers and decreases the chances of a car being stopped for an overload condition, if the car's weight is within NS's internal limits, based on the car and route. This system depends on the privacy of NS's internal weight restrictions, as customers would tend to cut it even closer or load in excess of the stenciled weight limit of the car if they were aware of these internal weight tolerances. For the Board's reference, NS has filed separately, along with a motion for protective order, its internal weight tolerances, which are incorporated herein as Exhibit B to this verified statement.
4. Overweight cars are costly to NS. Whenever an overweight car is identified, NS must stop the *entire* train to remove the overweight car. Otherwise, the overweight car can cause damage to track, bridges or other cars and risk the safety of NS's employees, customers, and the communities along its routes.
5. NS has historically assessed a charge through its tariff to cover the additional cost of dealing with an overloaded car and to discourage overloading by its customers. Until recently, NS Tariff 8002-A, Item 5000 made the customer responsible for overloaded railcars regardless of the cause of the overload. Under that general rule, NS customers were responsible for overloads due to weather conditions.

6. From time to time, customers have requested consideration of reduced charges when, in their opinion, the overload condition was due in part to weather. In early 2010, strong winter storms in the Eastern United States increased customer concerns over the possibility of cars becoming overloaded due to weather. In response to those concerns, on July 14, 2010, NS adopted Part D to Item 5000. Part D creates an exception to the general rule that customers are responsible for overloaded railcars, for cases in which the overload is at least partially due to weather conditions.
7. Petitioners were not among the customers that expressed concerns over overloads during the early 2010 storms.¹ NS keeps records of overloaded railcars. Such records would include any indication from a customer that the overload was due in part to weather conditions. NS's records on overloads currently date back to January 2008. There is no record of any Petitioner experiencing an overloaded car due in part to weather conditions on NS since at least as far back as January 2008. There is also no record of any tank car or covered hopper car becoming overloaded due in part to weather on NS as far back as January 2008.
8. In response to the original Petition in this case, NS amended Part D, effective August 4, 2010, and that amendment remains in effect at this time. The July 14, 2010 version of Part D was never applied to a NS customer.
9. To date, Petitioners have not had a single car to which Part D of Item 5000 has been applicable.

¹ The Petitioners in this matter include Ag Processing Inc A Cooperative ("Ag Processing"), Bunge North America, Inc. ("Bunge"), Archer Daniels Midland Company ("ADM"), Louis Dreyfus Corporation ("LDC"), and Perdue Agribusiness, Inc. ("Perdue").

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.

(Continued on next page)

▲ - 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

NS 8002-A

6TH REVISED PAGE 40

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 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.

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

HIGHLY CONFIDENTIAL
EXHIBIT B
PAGE 1 of 2

(REDACTED)

CURRENT HANDLING INSTRUCTIONS USED FOR MOVEMENT OF OVERLOADED EQUIPMENT.

(REDACTED)

HIGHLY CONFIDENTIAL
EXHIBIT B
PAGE 2 of 2

(REDACTED)