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BEFORE THE
SURFACE TRANSPORTATION BOARD

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CARGILL, INCORPORATED)
)
Complainant,)
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v.)
)
BNSF RAILWAY COMPANY)
)
Defendant.)
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Docket No. 42120

ENTERED
Office of Proceedings

MAY 28 2010

Part of
Public Record

BNSF RAILWAY COMPANY'S MOTION FOR PARTIAL DISMISSAL

Pursuant to 49 U.S.C. § 11701(b) and 49 C.F.R. § 1111.5, BNSF Railway Company ("BNSF") requests that the Board dismiss the claims stated in paragraphs 7 and 8 of the Complaint filed by Cargill, Inc. ("Cargill") on April 19, 2010, and that the Board dismiss Cargill's requests for relief in the form of damages. As described in more detail below, the Board lacks jurisdiction to consider these claims as "unreasonable practices" under 49 U.S.C. § 10702 because the claims constitute a challenge to the level of BNSF's rates which can only be maintained pursuant to the Board's jurisdiction to review the reasonableness of rates under 49 U.S.C. §10701(d). *Union Pacific Railroad Co. v. I.C.C.*, 867 F.2d 646 (D.C. Cir. 1989); *Dairyland Power Cooperative v Union Pacific Railroad Co.*, STB Docket No. 42105 (served July 29, 2008).

Background

Cargill's Complaint seeks "the prescription of reasonable fuel surcharge practices and monetary damages." Complaint at I. The basis for Cargill's Complaint is that the application of BNSF's mileage-based fuel surcharge to several specified commodities supposedly shipped by

Cargill in common carrier service constitutes an unreasonable practice. The fuel surcharge challenged by Cargill is set forth in BNSF Rules Book 6100-A, Item 3375L, Section B, which is attached to the Complaint as Exhibit A. As explained in Item 3375L, the amount of the fuel surcharge applied to a particular shipment is “calculated by multiplying the applicable fuel surcharge per mile times the number of miles per shipment.” Complaint, Exhibit A at 41. The amount of the fuel surcharge per mile is determined based upon the U.S. Average Price of Retail On-Highway Diesel Fuel (“HDF”) as published by the U.S. Department of Energy. The surcharge per mile to be applied in a given month (*e.g.*, May) is based on the average monthly HDF two months prior (*e.g.*, March).¹ The Fuel Surcharge Table at page 42 of Item 3375L identifies the specific Fuel Surcharge, Cents per Mile, to be applied based on the applicable average monthly HDF price. For example, as the monthly average HDF price for March 2010 was \$2.915, the surcharge chart contained in Item 3375L, Section B, indicates that the fuel surcharge per mile for May 2010 is \$0.42 per mile.²

Cargill makes three separate claims with respect to BNSF’s fuel surcharge that it asserts make the surcharge an “unreasonable practice.” First, Cargill asserts that “the general formula set forth therein to calculate fuel surcharges bears no reasonable nexus to, and overstates, the fuel consumption for the BNSF system traffic to which the surcharge is applied.” Complaint, ¶6. Second, Cargill alleges that the fuel surcharge is an unreasonable practice because BNSF is using the fuel surcharge “to extract substantial profits over and above its incremental fuel cost

¹ The time lag is the minimum necessary to permit publication of an entire month’s worth of HDF figures. Average prices for April could not be used in May because they would not be available in time. Weekly averages are available on the Department of Energy’s website at <http://www.eia.doe.gov/oog/info/wohdp/diesel.asp>.

² The Department of Energy’s Energy Information Administration reported weekly average HDF prices for March 2010 of \$2.939, \$2.946, \$2.924, \$2.904, and \$2.861. See http://www.eia.doe.gov/oog/info/wohdp/diesel_detail_report_combined.asp.

increases for the BNSF system traffic to which the surcharge is applied.” Complaint, ¶7.

Finally, Cargill claims that the fuel surcharge is an unreasonable practice because “BNSF is double recovering the same incremental fuel cost increases” in both the base rate and the fuel surcharge. Complaint, ¶8. Cargill requests that the Board order BNSF “to cease and desist from its unlawful fuel surcharge practices,” that the Board “prescribe reasonable fuel surcharge practices,” and that the Board “award Cargill damages, with interest . . . for all unlawful fuel surcharge payments it has made.” Complaint at 4.

Argument

I. Applicable Law Prohibits the Board from Considering Challenges to Rail Rates Through the Exercise of its “Unreasonable Practices” Jurisdiction.

It has been settled law for more than two decades that the Board (and its predecessor the Interstate Commerce Commission) cannot entertain a challenge to the level of a railroad’s rates under its jurisdiction to regulate unreasonable practices. In *Union Pacific Railroad Company v. I.C.C.*, 867 F.2d 646 (D.C. Cir. 1989) (“*Union Pacific*”), the court reversed an ICC determination that it was an “unreasonable practice” for railroads to charge rates to shippers of spent nuclear fuel that included costs that the ICC deemed “unwarranted.” In that case, the railroads had supposedly increased their rates for transportation of spent nuclear fuel by including in the rates certain “added costs attributable to the handling of radioactive materials,” such as the costs associated with government regulation of the speed of trains containing spent nuclear fuel. *Id.* at 648. The ICC concluded that it was an unreasonable practice for the railroads to increase their revenues on these movements by charging for these “unwarranted cost additives.” *Id.* at 649.

The court found that the ICC’s unreasonable practice determination was “grounded in an implicit finding that the railroads have charged unreasonable rates.” *Id.* While the ICC claimed

it was only addressing the reasonableness of including certain “cost additives” in the rates, the court found that in essence, the ICC was addressing the reasonableness of the level of the rates. “The labeling notwithstanding, form must yield to substance.” *Id.* Among other things, the ICC had “largely focused on the reasonableness of the added costs on which the railroads’ rates are predicated” and “the remedies it awards consist of rate relief in the form of prescribed rates and rebates.” *Id.* The court concluded that “the ICC’s regulation here falls squarely on the side of ‘rates’” because “the so-called ‘practice’ is manifested *exclusively* in the level of rates that customers are charged.” *Id.* (emphasis in original). Moreover, because the substance of the challenge related to the level of the rates, the agency was required to recognize that it has “no jurisdiction to inquire into the reasonableness of a challenged rate unless it first finds that the railroad enjoys market dominance over the shipment.” *Id.* at 649.

In *Rail Fuel Surcharges*, STB Ex Parte No. 661 (served Jan. 26, 2007), the Board acknowledged the limitations under *Union Pacific* on its jurisdiction to review fuel surcharges as unreasonable practices. In that decision, the Board addressed concerns that two aspects of railroad fuel surcharges practices were unreasonable: (1) the practice of “computing rail fuel surcharges as a percentage of a base rate”; and (2) the practice of “double dipping,” which the Board defined as “applying to the same traffic both a fuel surcharge and a rate increase that is based on a cost index that includes a fuel cost component.” *Rail Fuel Surcharges*, slip op. at 1. The railroads, citing *Union Pacific*, argued that the Board did not have authority to address these practices as unreasonable practices under 49 U.S.C. §10702 because the fuel surcharge is a component of the total rate and the Board cannot review the reasonableness of a rate without first determining whether the railroad charging the rate has market dominance over the transportation at issue. The Board acknowledged that *Union Pacific* limited its authority to address the

reasonableness of the level of a railroad's fuel surcharge, but it emphasized that "we are not limiting the total amount that a rail carrier can charge for providing rail transportation through some combination of base rates and surcharges. Rather, we are only addressing the manner in which railroads apply what they label a fuel surcharge." *Id.*, slip op. at 7.

The Board emphasized that its review of fuel surcharges was limited to what it viewed as the misleading nature of railroad representations regarding percent-of-rate fuel surcharges and explained that it was not addressing the reasonableness of the level of such fuel surcharges either in general or as applied in particular cases. The Board explained the basis for its finding of an unreasonable practice as follows: "Because railroads rely on differential pricing, under which rates are dependent on factors other than costs, a surcharge that is tied to the level of the base rate, rather than to fuel consumption for the movement to which the surcharge is applied, cannot fairly be described as merely a cost recovery mechanism." *Id.* at 6. The problem was that the fuel surcharge was being described by railroads as a fuel cost recovery mechanism when it "stands virtually no prospect of reflecting the actual increase in fuel costs for handling the particular traffic to which the surcharge is applied." *Id.* The Board made it clear that it was concerned that labeling a surcharge a "fuel" surcharge was misleading when it was not linked to fuel consumption. Since the problem was one of misrepresentation, the remedy was to require that when railroads assess a charge that they describe as a fuel surcharge, "there must be a reasonable nexus to fuel consumption." *Id.* at 9. The Board explicitly approved mileage-based fuel surcharges, noting that "mileage is one of the primary factors that affects fuel consumption." *Id.*

The *Rail Fuel Surcharges* decision did not involve a challenge to a specific railroad's fuel surcharge mechanism or a request by a particular shipper for damages. The first case involving a

claim by a shipper for damages from a railroad's fuel surcharge was *Dairyland Power Cooperative v. Union Pacific Railroad*, STB Docket No. 42105 (served July 25, 2008). There, Dairyland claimed that Union Pacific's mileage-based fuel surcharge was an unreasonable practice because it "resulted in fuel surcharge revenues charged to Dairyland that exceed UP's incremental fuel cost increases incurred in providing rail service to Dairyland." *Id.*, slip op. at 5. UP moved to dismiss the complaint on grounds that Dairyland was effectively challenging the level of UP's rates, which was prohibited under *Union Pacific*.

The Board did not dismiss the complaint, but it provided guidance on the types of claims relating to fuel surcharges that could be brought under 49 U.S.C. § 10702 consistent with *Union Pacific and Rail Fuel Surcharges* and the types of fuel surcharge claims that would be impermissible. The Board first reiterated that its authority to address fuel surcharges as unreasonable practices was grounded in the misrepresentational nature of certain fuel surcharges: "[I]f there is no 'real correlation' between the surcharge and the increase in fuel costs for the particular movement to which the surcharge is applied, then it is a misleading and ultimately unreasonable practice." *Id.*, slip op. at 2. Therefore, the Board explained, a claim could be asserted under 49 U.S.C. § 10702 if the complainant could "show that the general formula used to calculate fuel surcharges bears no reasonable nexus to the fuel consumption for the traffic to which the surcharge is applied." *Id.*, slip op. at 6. On the other hand, it would not be permissible for a complainant to "base its case only on the *level* of the fuel surcharge as applied to itself." *Id.* at 5 (emphasis in original). As the Board explained, "[t]o order a refund only because the fuel surcharge payments collected from Dairyland exceeded the carrier's incremental fuel costs incurred in handling Dairyland's traffic would cross that boundary and impermissibly regulate rate levels, contrary to *Union Pacific*." *Id.* The Board further cautioned Dairyland that it would

be unreasonable to “expect a precise match between fuel surcharge revenues and increased fuel costs for any one shipper. Practicably, we cannot require railroads to incorporate every conceivable factor that could affect fuel costs into a formula that would yield an exact match.” *Id.* at 5. As a result “evidence that the fuel surcharge collected from a complainant exceeds the actual incremental cost of fuel incurred in providing rail service to a complainant will not by *itself* demonstrate an unreasonable practice.” *Id.* at 6 (emphasis in original).

II. Cargill’s Claims in Paragraphs 7 and 8 of the Complaint Must Be Dismissed Because They Are Challenges to the Level of BNSF’s Rates.

Cargill’s Complaint reflects its awareness of the guidance provided by the Board in *Dairyland* as to what type of challenge to a fuel surcharge can be maintained under 49 U.S.C. § 10702. In paragraph 6 of the Complaint, Cargill draws directly on the language in *Dairyland* as to what sort of challenge to a fuel surcharge could properly be brought as an unreasonable practice claim. Paragraph 6 alleges that BNSF’s fuel surcharge is an unreasonable practice because the fuel surcharge formula “bears no reasonable nexus to, and overstates, the fuel consumption for the BNSF system traffic to which the surcharge is applied.” As noted above, in *Dairyland* the Board said a complainant must show that the fuel surcharge formula “bears no reasonable nexus to the fuel consumption for the traffic to which the surcharge is applied.” *Dairyland*, slip op. at 6. Cargill’s addition of the term “and overstates” to the language of *Dairyland* suggests that Cargill may intend to focus improperly on the level of the fuel surcharge as opposed to the nexus to fuel consumption. But it is too early in the case to know how Cargill will proceed to flesh out its paragraph 6 claim. Since paragraph 6 sets out a claim that is based at least in part on the language in *Dairyland*, it would be premature for BNSF to seek dismissal of that claim to the extent that it could provide a basis for Cargill to obtain injunctive relief.

However, paragraphs 7 and 8 violate the principles set out in *Dairyland, Rail Fuel Surcharges* and *Union Pacific* as to what type of claim can be maintained as an unreasonable practice claim. Paragraph 7 of the Complaint asserts that BNSF's fuel surcharge is an unreasonable practice because the fuel surcharge extracts "substantial profits over and above [BNSF's] incremental fuel costs." Complaint at ¶7. This claim runs afoul of the Board's instruction in *Dairyland* that it would not be permissible to challenge a fuel surcharge "only because the fuel surcharge payments collected from [a shipper] exceeded the carrier's incremental fuel costs incurred in handling [the shipper's] traffic." *Dairyland*, slip op. at 5. By seeking to challenge BNSF's fuel surcharge mechanism on the ground that it recovers more than BNSF's incremental fuel costs, the claim in paragraph 7 directly conflicts with the limits set out in *Dairyland* and it should be dismissed.

Paragraph 8 should be dismissed because it unabashedly purports to state a claim based on the level of BNSF's rates. Paragraph 8 claims that "BNSF is double recovering the same incremental fuel cost increases BNSF has incurred in providing common carrier service to Cargill." Cargill contends that it is an unreasonable practice for BNSF to apply its fuel surcharge when BNSF already recovers fuel costs (to some undetermined extent) through its base rates which are adjusted from time to time. But the impact of the challenged practice – setting base rates and assessing a fuel surcharge that amount to a double recovery of incremental fuel costs is "manifested *exclusively* in the level of rates." *Union Pacific*, 867 F.2d at 649. Paragraph 8 is a frontal assault on railroad rate-setting couched in terms of an unreasonable practice claim and it is a clear violation of the principles set out in *Union Pacific*.

Paragraph 8 also violates the principles set out by the Board in *Dairyland*. As in paragraph 7, Cargill's claim in paragraph 8 is based on an allegation that BNSF's surcharge

allows BNSF to recover more than BNSF's incremental fuel costs, which, according to paragraph 8, are already recovered in the base rates. Paragraph 8 thus runs afoul of the statement in *Dairyland* that the Board will not entertain a challenge to a fuel surcharge on grounds that "the fuel surcharge payments collected from [a shipper] exceeded the carrier's incremental fuel costs incurred in handling [the shipper's] traffic." *Dairyland*, slip op. at 5.

By characterizing the level of BNSF's rates in terms of a double recovery in paragraph 8, Cargill may be seeking to rely on the Board's prohibition on "double dipping" in *Rail Fuel Surcharges*, but that precedent is inapposite here. In *Rail Fuel Surcharges*, the Board prohibited "applying to the same traffic both a fuel surcharge and a rate increase that is based on a cost index that includes a fuel cost component." *Rail Fuel Surcharges*, slip op. at 1. The scenario envisioned by the Board in *Rail Fuel Surcharges* involved an explicit rate adjustment mechanism in the rate that recovered fuel costs, such as the RCAF, and an explicit fuel surcharge applied on top of the rate adjustment. In contrast, none of the price authorities at issue here specifies a base rate adjustment mechanism. New rates are set from time to time by BNSF without express reference to costs. Cargill is challenging the level of those new base rates and the factors that determine rate levels. Cargill's claim could only be maintained subject to the Board's rate reasonableness jurisdiction and cannot be addressed as an unreasonable practice. Accordingly, the claim in paragraph 8 of the Complaint must be dismissed.

III. Limits on the Board's Unreasonable Practices Jurisdiction Prohibit Any Recovery of Damages by Cargill.

In *Rail Fuel Surcharges*, the Board recognized that the principles established in *Union Pacific* limit the Board's authority to address claims that rail fuel surcharges constitute an unreasonable practice. As the Board acknowledged, a fuel surcharge is, by definition, a "component of the total rate that is charged for the transportation involved." *Rail Fuel*

Surcharges, slip op. at 1. The case law has long recognized that rate surcharges are not distinguishable from the rate itself. See *Parrish & Heimbecker, Inc. – Petition for Declaratory Order*, 4 S.T.B. 866, 877 (2000) (surcharges “form part of, or an addition to, the line-haul rate”); *Conrail Surcharge on Pulpboard*, 362 I.C.C. 740, 744 (1980) (“surcharges must be viewed as unilateral changes in the rates charged”). For this reason, challenges to the reasonableness of a surcharge or other charge corresponding to line-haul service must be treated as a challenge to the reasonableness of a rate. See *Decatur County Commissioners v. The Central Railroad Co of Indiana*, STB Fin. Docket No. 33386, slip op. at 22 (served Sept. 29, 2000) (dismissing challenge to surcharge because “Complainants fail to make out even the barest essentials of a prima facie case of rate unreasonableness”); *Georgia Power Co. v. Southern Ry. Co.*, ICC Docket No. 40581, slip op. at 12-13, 1991 WL 228043 at *11 (decided Nov. 6, 1991) (challenges to level of surcharge must be treated as a challenge to the reasonableness of the rate).

Recognizing that a challenge to the reasonableness of the level of a fuel surcharge would be treated as a challenge to the level of a rate, and that such a challenge could only be addressed under the Board’s rate reasonableness authority, the Board in *Rail Fuel Surcharges* made it clear that it was not addressing, and it would not have the power under 49 U.S.C. § 10702 to address, the reasonableness of the *level* of the fuel surcharge, or the *level* of the rates charged as a result of applying the fuel surcharge. As discussed above, the Board emphasized that its review of the railroads’ fuel surcharges was limited to the misrepresentational aspect of those surcharges, not to the level of the surcharges.

The Board foreshadowed the problem of damages in *Rail Fuel Surcharges* when it stated that “we are not limiting the total amount that a rail carrier can charge for providing rail transportation through some combination of base rates and surcharges.” *Rail Fuel Surcharges*,

slip op. at 7. In *Dairyland*, the Board went further and stated that “[t]o order a refund only because the fuel surcharge payments collected from Dairyland exceeded the carrier’s incremental fuel costs incurred in handling Dairyland’s traffic would cross that boundary and impermissibly regulate rate levels, contrary to *Union Pacific*.” *Dairyland*, slip op. at 5.

In the current case, Cargill has requested relief in the form of injunctive relief and damages. Given the claims asserted in Cargill’s complaint, there is no conceivable damages theory that Cargill could present that would not turn on the level of the fuel surcharges that it paid and the extent to which the fuel surcharge supposedly exceeded incremental fuel costs. The allegations of Cargill’s complaint demonstrate that any proof of damages presented by Cargill would be based on the level of fuel surcharges and/or base rates.

With respect to paragraphs 7 and 8 of the Complaint, Cargill does not even try to mask the fact that it is seeking damages based on the payment of fuel surcharges that exceed “the carrier’s incremental fuel costs in handling [Cargill’s] traffic.” *Dairyland*, slip op. at 5. This is precisely the approach that the Board rejected in *Dairyland*. Paragraph 7 claims that BNSF’s fuel surcharge is unreasonable because it “extract[s] substantial profits over and above its incremental fuel cost increases.” Paragraph 8 claims that BNSF’s fuel surcharge is unreasonable because it recovers incremental fuel costs twice, once in the base rate and once in the fuel surcharge. To obtain damages under either theory, the Board would have to “order a refund only because the fuel surcharge payments collected from [Cargill] exceeded the carrier’s incremental fuel costs incurred in handling [Cargill’s] traffic,” which the Board said in *Dairyland* it could not do.

The same problem would arise with respect to any attempt that Cargill might make to recover damages based on the claim set out in Paragraph 6. There, Cargill claims that BNSF’s

fuel surcharge is unreasonable because the surcharge does not bear a reasonable nexus to fuel consumption. But if Cargill succeeded in showing the lack of a reasonable nexus between fuel surcharge and fuel consumption, Cargill's only conceivable injury would result from its paying more than its incremental fuel costs. If the lack of a reasonable nexus resulted in a fuel surcharge that was less than Cargill's incremental fuel costs, Cargill would suffer no injury. Cargill could only suffer injury and recover damages if it paid more than its incremental fuel costs. Such a damage claim would run afoul of the Board's statement in *Dairyland* that "[t]o order a refund only because the fuel surcharge payments collected from Dairyland exceeded the carrier's incremental fuel costs incurred in handling Dairyland's traffic would cross that boundary and impermissibly regulate rate levels, contrary to *Union Pacific*." *Dairyland*, slip op. at 5.

Thus, under paragraph 6, Cargill's relief would be limited to declaratory and/or injunctive relief. This limitation on the relief available under Cargill's current complaint is an unavoidable consequence of Cargill's election to proceed solely on the basis of an unreasonable practice claim under section 10702, as opposed to a rate reasonableness claim under section 10701 or a combination of section 10701 and 10702 claims. Cargill, represented by the same counsel who represented the complaining shipper in the *Dairyland* case, plainly knew the hurdles that it would face under section 10702 in claiming damages predicated on the level of rates.

It bears emphasis that the relief Cargill seeks apart from damages is substantial:

WHEREFORE, Complainant Cargill requests that . . . the Board find the assailed fuel surcharge practices are unreasonable in violation of 49 U.S.C. §10702(2); that the Board enter an order requiring BNSF to cease and desist from its unlawful fuel surcharge practices; that the Board prescribe reasonable fuel surcharge practices as requested by Cargill. . . .

Complaint at 4. In fact, the requested injunctive relief is parallel to the relief that the Board granted on a broader basis to all shippers of regulated traffic who pay fuel surcharges in *Rail Fuel Surcharges*. But while this case holds the possibility of meaningful relief if Cargill should prevail, it should not be used as a vehicle to blur the bright line that has been drawn between unreasonable practice claims and unreasonable rate claims. If Cargill seeks the damages that could be available in a rate case, it should pursue a rate case.

IV. Granting this Partial Motion to Dismiss Is Appropriate under the Circumstances of this Case.

The Board has stated that motions to dismiss are disfavored and rarely granted. *See Dairyland*, slip op. at 5. There are several reasons why that general proposition is inapplicable here. First, BNSF is not seeking to dismiss Cargill's case in its entirety. If BNSF prevails on the instant motion, Cargill will still be able to pursue injunctive relief on its claim in Paragraph 6 of the Complaint that BNSF's mileage based fuel surcharge "bears no reasonable nexus to . . . the fuel consumption for the BNSF system traffic to which the surcharge is applied." BNSF believes that Cargill has a steep hill to climb to prevail on this claim, particularly since the Board recognized in *Rail Fuel Surcharges* that "[m]ileage is one of the primary factors that affects fuel consumption," but Cargill will nonetheless have the opportunity to make out its case if BNSF's motion is granted. *Rail Fuel Surcharges*, slip op. at 9.

Second, the Board, through its *Rail Fuel Surcharge* and *Dairyland* decisions, has already provided considerable guidance to shippers in Cargill's position as to what sort of claims regarding fuel surcharges are appropriate to pursue under section 10702. Cargill has heeded that guidance with regard to the claim set out in paragraph 6, but has otherwise disregarded it. Judicious exercise of the Board's authority to dismiss complaints is appropriate in cases such as

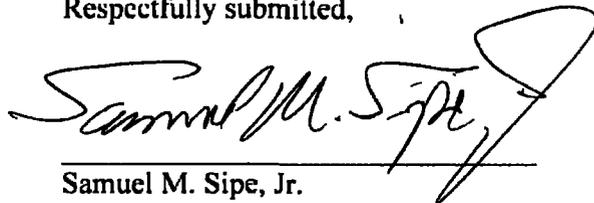
this where the standards for proceeding beyond the threshold level have already been clearly established by the Board.

Finally, the Board should not hesitate to grant the partial dismissal BNSF seeks here because there will be no prejudice to Cargill in restricting it at the outset to the relief it is entitled to under section 10702. If Cargill is determined to pursue rate relief, it can amend its complaint and seek rate relief now in a procedural posture that does not render its claim subject to challenge under *Union Pacific* and *Dairyland*. Under these circumstances, it is a better use of resources and an appropriate reinforcement of governing legal principles to grant BNSF's motion at the current stage.

Conclusion

For the foregoing reasons, BNSF requests that the Board dismiss the claims in paragraphs 7 and 8 of the Complaint and all requests for relief in the form of damages.

Respectfully submitted,



Samuel M. Sipe, Jr.
Anthony J. LaRocca
Frederick J. Horne
STEPTOE & JOHNSON LLP
1330 Connecticut Ave. N.W.
Washington, D.C. 20036
(202) 429-3000

Richard E. Weicher
Jill K. Mulligan
Adam Weiskittel
BNSF RAILWAY COMPANY
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2353

ATTORNEYS FOR DEFENDANT

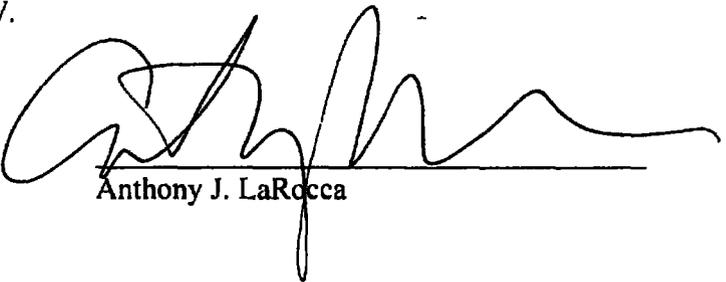
May 28, 2010

Certificate of Service

I hereby certify that on this 28th day of May, 2010, I have served a copy of the foregoing

Motion For Partial Dismissal on the following by hand delivery:

John H. LeScur
Peter A. Pfohl
Daniel M. Jaffe
Stephanie M. Adams
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, DC 20036



Anthony J. LaRocca