UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

ORAL ARGUMENT

OPEN SESSION

IN THE MATTER OF: AG PROCESSING INC A COOPERATIVE, Finance Docket No.35387

VS. NORFOLK SOUTHERN RAILWAY.

Tuesday, October 25, 2011
Surface Transportation Board
Suite 120
395 E Street, S.W.
Washington, D.C.

The above-entitled matter came on for hearing, pursuant to notice, at 9:30 a.m. BEFORE:

Daniel R. Elliott, III Chairman
Ann D. Begeman Vice Chairman
Francis P. Mulvey Commissioner
APPEARANCES:

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Procedural Matters

Chairman Daniel Elliott ........... 4

Statement of Andrew Goldstein, Esquire, on behalf of Ag Processing, Inc A Cooperative. . . .7

Statement of Robert Wimbish, Esquire, on behalf of Norfolk Southern Railway. . . . . . 22

Rebuttal by Andrew Goldstein, Esquire, on behalf of Ag Processing, Inc A Cooperative ........ 50
CHAIRMAN ELLIOTT: Good morning, and welcome. Today we'll hear oral argument in the case of Ag Processing, Inc. A Cooperative petition for declaratory order. This case involves a petition for declaratory order filed by Ag Processing challenging the reasonableness of a Norfolk Southern tariff. Subsequently, Bunge North America, Archer Daniels Midland, Louis Dreyfus, and Perdue Agribusiness joined the petition. At issue is the tariff's imposition of charges and penalties on loaded cars that exceed an individual car's weight limit because of weather conditions encountered after the cars are delivered to NS. In an effort to move things along, the board members will not be making opening remarks this morning, but I wanted to cover a
few procedural matters before we begin.

We have asked each party to make a
short statement of its argument, but Counsel
should be prepared to answer questions from
the board at any time during your allotted
time.

I assure you that we have read all
of your pleadings, and there's no reason to
repeat every argument.

I should point out that due to a
different camera configuration in the hearing
room today, we have relocated the podium for
speakers to the side of the front room, but
otherwise, are following our usual procedures.

Any party making a PowerPoint
presentation or using similar hard copy aids
utilizing materials previously placed in the
record should have provided these materials in
hard copy eight and a half by eleven size to
opposing Counsel and the board. We will have
any pages used today in such presentations
bound in the transcript of this proceeding.
Each side has been allotted a total of 25 minutes, including an in camera session at the close of the public portion of this argument.

Each party will first have 20 minutes in open session to the public. At the conclusion of that portion, we will take a brief recess of approximately five minutes.

The board hearing room will be cleared, and the legal representatives arguing on behalf of the parties will conduct an additional five minutes each of oral argument on matters that refer to confidential information.

This portion will not be broadcast, and the transcript of those remarks will be retained in the board's confidential records, but will not be posted on the board's website.

As the party filing the request for declaratory order, Ag Processing will open with the allotted 20 minutes. Ag Processing
has reserved seven minutes for rebuttal.

    So, we'll begin with Ag Processing

with their 13 minutes.

    Mr. Goldstein, you've argued here

before. You're familiar with the red, yellow,

and green lights?

    MR. GOLDSTEIN: Very well, sir.

    CHAIRMAN ELLIOTT: Okay.

STATEMENT OF ANDREW GOLDSTEIN, ESQUIRE

ON BEHALF OF AG PROCESSING, INC A

                    COOPERATIVE

    MR. GOLDSTEIN: Good morning,

Chairman Elliot, Vice Chairman Begeman, and

Commissioner Mulvey. I'm Andrew Goldstein,

and I represent the petitioners.

    Sitting to my right today are Greg

Twist of Ag Processing, Darrell Wallace of

Bunge, Lorraine Hawley of ADM, and Sue Lyons

of Louis Dreyfus Corporation. And at Counsel

table is my partner, John Cutler.

    The issue of whether a railroad

can compel a shipper to remove snow and ice
that accumulates on a car while in carrier possession is an important one. Some of the petitioner's representatives sitting here today have traveled halfway across the country because of the potential implications of this case to their businesses and to practices throughout the railroad industry.

You may well hear shortly from NS a claim that its tariffs have always provided for the assessment of overload charges and penalties due to snow and ice. We dispute that for the obvious reason that NS would not have had to amend its tariff to add the words, attributable to weather conditions, as part of the definition of overloaded, and to add a new section D, explaining that rain, snow, and ice are the weather conditions that would make a car overloaded.

CHAIRMAN ELLIOTT: Mr. Goldstein, couldn't, as NS explained in their brief, couldn't that creation of this tariff that's at dispute here or provision in the tariff
have been created as a safe harbor due to the harsh weather conditions that were expected that winter? Wouldn't that make certain sense?

MR. GOLDSTEIN: Well, I don't know that it really is a safe harbor. If you read it closely, read the first edition of the tariff that came out, the safe harbor was there for five days, and the possible penalties could be alleviated if snow and ice were melted by natural events.

When you look at the current version of the tariff, that language has been removed, and instead, the tariff says that you have to, within five days, remove the lading, or otherwise clear the car, and at your own expense.

Now, I assume that if we're going to rely on warm sunshine, that's not at our own expense. So, I think that the current tariff doesn't really provide a safe harbor that is really worth anything if you consider
the costs of having to go into a car and clean out lading that is in there. And then, what do you do? You have a contract with your customer. You're supposed to ship a carload of stuff. You can't anymore. You have to get it there some other way. You're facing a claim for breach of contract. So we don't really look upon this as a safe harbor.

COMMISSIONER MULVEY: Could the tariff be considered, the language spoken just about a moment ago, a clarification?

I mean, Norfolk Southern has always had in its tariffs, like for coal and coke, a provision for any overweight regardless of the cause bearing a penalty.

This could be interpreted, as the way you said it, as a clarification. When we talk about overweight, we don't just mean overloaded, but also, any extra weight caused by weather conditions.

Would that be a possible interpretation of what they were doing in
their tariff?

MR. GOLDSTEIN: Well, I think that's what they are doing. I think they are saying that snow and ice have to be added to the weight of the car.

COMMISSIONER MULVEY: Yes.

MR. GOLDSTEIN: But our position, of course, is different.

COMMISSIONER MULVEY: Well, I'm saying that was always their intent, but they're just doing a clarification now, because maybe snow and ice were not considered the same as just overloading the car, but since snow and ice do add to the weight of the car, that therefore should be known by shippers as something that needs to be considered in determining a car's weight.

MR. GOLDSTEIN: Well, I don't see why, if snow and ice in their opinion was always to be included, it was necessary for them to amend their tariff to specifically put it in.
I think the fact that they did specifically put it in suggests that this is a new item for the shippers to worry about.

COMMISSIONER MULVEY: As opposed to just a clarification of the existing rule?

MR. GOLDSTEIN: Right. We think the existing rule didn't include snow and ice.

Yes, sir.

COMMISSIONER MULVEY: Thank you.

CHAIRMAN ELLIOTT: Did you ever, Mr. Goldstein, do any, I guess, research with some of your clients, maybe some that have open cars, that may have been affected by weather, if they had ever had cars pulled out of service because of weather?

MR. GOLDSTEIN: Well, we are aware of the fact that open cars are susceptible to snow dropping in, and as you know, it will then seep into that lading, and it will freeze. And once it freezes, it's not going to thaw out for a while. You can't handle it manually.
And we are very much aware of that, even though very few of our cars are open. In fact, maybe, of the petitioners here, none. I believe they all operate tank cars and covered hopper cars.

CHAIRMAN ELLIOTT: But are you aware of any situations where an open car's been pulled out due to weather, because it was overloaded?

MR. GOLDSTEIN: No. No, sir.

And that, of course, gets to the next point we were going to make, than an overload can only occur when a shipper loads the car.

And the NS interpretation of the term overload, we think, is a misuse of the word, because the car can't be overloaded unless it's loaded first. And loading requires the shipper to place goods in the car.

So snow and ice that descends from the heavens, and is not placed in the car as a load, cannot rationally be viewed as a
shipper overload.

I just want to briefly point out
that there are some serious consequences that
attach to the NS position, which I mentioned
a moment ago, in terms of the shipper not
being able to meet his contract of sale to a
customer if a car is parked due to a
snowstorm.

Now, the second question, I think
we've covered the first one, the second
question you have is how frequently closed
covered hopper cars and tank cars are made
overweight by snow and ice, and how those cars
have been brought into compliance in the past.

It's extremely appropriate that
the board has recognized the distinction
between closed tanked cars and covered hopper
cars on one hand, and all other types of car,
which are essentially open cars, with respect
to snow and ice.

NS itself asserts at page 8 of its
motion to dismiss that weather overloads are
not typically experienced by tank cars and
covered hopper cars, and petitioners have no
way of determining how often covered hopper
cars are made overweight by snow and ice while
in the position of NS or other carriers.

And the reason for that is two-
fold. Carriers don't report those events
publicly, and NS has certain relevant policies
that it treats as highly confidential, and
which I understand we'll discuss at a closed
session.

This question actually raises a

very interesting issue, which is that the

problem of overweight cars does not involve
tank cars and covered hopper cars, and this

conclusion is supported by a statement at page

10 of the NS motion to dismiss, where NS

asserts, quote, "petitioners know their

commodities, and the commodities' properties

for absorbing moisture," close quote.

Of course, there's never been any

indication that snow or ice is absorbed by the
properties of lading in a fully enclosed tank
or covered hopper car. Lading with absorption
property, as you noted, is that which is in
open cars.

So we feel that if NS is having
problems with those types of cars, it should
have directed this tariff in that direction
and not to covered hopper cars and tank cars.

COMMISSIONER MULVEY: Have any
shippers been underloading their cars in
response to this tariff that you're aware of?

Have the shippers been responding
saying that, well, we have to be careful now,
so we're going to put 6,000 pounds less in a
car in case the car has two inches of ice over
it?

MR. GOLSTEIN: Yes, sir. Yes,
sir. The answer to your question is yes.

Many shippers have scales at their
facilities.

COMMISSIONER MULVEY: Yes.

MR. GOLSTEIN: And when a car
comes in to be loaded, the gross permissible weight is stenciled on the side of the car.

The car is put on the scale empty. The result of that tells the shipper how much snow and ice is on top of the car, in terms of weight, because that's the difference between the tare weight and what the scale weight shows. And then the shippers subtract that amount from the lading that they put in the car.

COMMISSIONER MULVEY: And they have been doing that, then?

MR. GOLDSTEIN: They have. They have.

CHAIRMAN ELLIOTT: And you're saying that occurs when you're presented with a car with snow and ice on it?

MR. GOLDSTEIN: That's right. That's right. Now, I mean there are some small elevators that don't have these scales, but we're -- for the most part, for the most part, the elevators do.
And what they do when they load a car is they use a matrix, which tells them, in essence, how high in the car they can load before running into an overweight problem.

VICE CHAIRMAN BEGEMAN: Could you clarify something for me? I guess I'm a bit confused on how they know to underload by, say, the 5,000 pounds, because if it's a huge snowstorm, you know, ultimately, there could be 8,000 pounds of snow on the car. Is the shipper not penalized for that?

MR. GOLDSTEIN: Well --

VICE CHAIRMAN BEGEMAN: It's overweight.

MR. GOLDSTEIN: Yes. If the shipper can only deal with what is on the car when the car is at his facility for loading.

VICE CHAIRMAN BEGEMAN: So you --

MR. GOLDSTEIN: Once that car goes and more snow and ice is added, we don't feel that that is a load or an overload or our problem.
VICE CHAIRMAN BEGEMAN: But the tariff seems to imply that it is.

MR. GOLDSTEIN: Yes, ma'am. It does.

COMMISSIONER MULVEY: So you're saying that in anticipation, the shippers are not anticipating problems. In other words, the weather forecast calls for snow in Iowa and the car is going through Iowa, and maybe go through a yard in Iowa, and the shipper might know that there's a snowstorm heading there, and that would add weight.

But my question was, the shippers are not anticipating that there will be an accumulation of more snow and ice after the car has been loaded, and therefore, under-loading it to account for the possibility that ultimately it will get heavier.

MR. GOLDSTEIN: Yes. That was actually an issue I was going to address, and let me skip over to it now.

The problem is that the shippers
can't predict where their cars will be and when they will be there, and aside from the fact that all of us know just how reliable weather forecasts are on the radio. But the shippers have no way of telling when their car is going to hit some point where there might be a snowstorm.

They don't want to just shut down loading cars because there's some prediction of what's going on. If they had the power, which they don't, to determine what route on the NS system the cars would follow, you know, they might be able to route the cars around the storm. We don't have that power. NS does.

And I'd just like to read a short quotation from the board in docket 42068, upholding an argument made by NS. Quote, "Given the many variables outside a railroad's control that may affect delivery, a railroad generally cannot be expected to deliver cars at the same time every day," close quote.

In other words, the board
concluded, at NS's urging, that rail service is inherently unreliable, and in docket 42060 -- can I just intrude on my own --

CHAIRMAN ELLIOTT: Certainly.

MR. GOLDSTEIN: Thank you. In docket 42060, sub 1, another Class 1 railroad successfully asserted that quote, "Service variability is a necessary part of rail service to and from many shipper locations," close quote, citing the NS argument in docket 42068.

So, we think that NS itself has clearly established that there's no way that we can predict when our cars are going to be someplace where snow is going to fall. And with that, I'd like to reserve the rest of my time.

CHAIRMAN ELLIOTT: Thank you, Mr. Goldstein.

Now we'll hear from Norfolk Southern.

Mr. Wimbish, you have 20 minutes.
STATEMENT OF ROBERT WIMBISH, ESQUIRE

ON BEHALF OF NORFOLK SOUTHERN RAILWAY

MR. WIMBISH: Chairman Elliott,
Vice Chairman Begeman, and Commissioner Mulvey, good morning. I am Rob Wimbish, and here with me today from Norfolk Southern at the table, General Solicitor, Greg Summy, Assistant Vice President of Customer Service, Rush Bailey, and at the seats behind, attorney Christie Friedman.

At issue here today is whether Norfolk Southern's tariff governing overloaded rail cars is reasonable. The record in our presentation today will show that the tariff is eminently reasonable, and that the agricultural shippers involved in this proceeding have not proven, and indeed, cannot prove, that the tariff is unreasonable.

Now, there are four points I would like to express this morning that are very important for the board's consideration.

The first one is that the
Complainants are responsible for proving that the complained-of tariff is unreasonable. The second is that the Complainants have not met their burden of proof here. The third, that overloaded cars are unsafe, costly to the railroad, and interfere with normal operations. And finally, that it is reasonable to expect a shipper to exercise due diligence and prudent foresight to avoid an unsafe situation, including unsafe car loading. In the process, I hope to address the four questions that were presented in the board's order establishing oral argument. I would like first to address the appropriate legal standard. First, as a threshold matter, this matter was presented as a petition for a declaratory order. A declaratory order proceeding is appropriate where a genuine case or controversy exists, and because the Complainants here have not
provided facts to demonstrate an injury or
even the likelihood of injury under the
revised tariff, we believe that they have not
adequately provided a basis for board-issuance
of a declaratory order.

That said, the Complainants
alleging an unreasonable practice must prove
on the basis of case-specific facts that the
complained-of practice is unreasonable. This
is fundamental.

The Complainants must prove, based
on facts, that the complained-of practice does
not comport with the board's standards for
unreasonable practices.

In that regard, another very
important consideration, it is important for
the board to remember that under the
unreasonable practice standards, Norfolk
Southern's tariff need not be perfect or even
better than other alternatives. The standard
is only whether or not the complained-of
tariff is actually reasonable.
And in that regard, I would like to point out that roughly six months ago, the board pointed out in another rate unreasonableness challenge that the board stated that its role in such cases, and under the interstate Commerce Act, is not to micromanage the railroad industry.

Now, in light of the applicable legal standard, Complainants simply have not proven here that the tariff is unreasonable, and they offer no facts to show that they incur an unfair burden or any burden under the tariff.

Let's consider three important facts.

VICE CHAIRMAN BEGEMAN: Can I ask a question?

MR. WIMBISH: Sure.

VICE CHAIRMAN BEGEMAN: How does a shipper get to the overweight car that is now pulled aside because of the weight in snow?

Let's say it's 400 miles away from
where they first gave you the car. There's a huge snowstorm. How do they get there within the five days to take care of this problem?

And I also would like you to clarify, I think in your first sentence, you said that this is a tariff governing overloaded rail cars.

Now, I didn't get a sense from Mr. Goldstein that they believe that they should be able to overload their cars. I don't think there's any dispute that they shouldn't go over the allowable limit. So maybe you could help clarify overloading versus perhaps what happens after it has been loaded.

MR. WIMBISH: Sure, Vice Chairman. There were two questions. I think the first question was, what does a shipper do when it is alerted to the existence of an overloaded car.

VICE CHAIRMAN BEGEMAN: Well, how practically do they get there to shovel off the car or remove the excess load --
MR. WIMBISH: Right. Okay.

VICE CHAIRMAN BEGEMAN: -- when it's a huge snowstorm, and you have five days?

MR. WIMBISH: Normally, if a car is detected as being overloaded in transit, I think I'd like to stress, first of all, that the record so far here has reflected, and the board had asked a question during the initial presentation, of how often agricultural cars become overloaded.

And I think it's important, and I will get to this again in a moment, that that simply is not happening.

But that said, to the practice of it, where a car is detected en route as being overloaded, the shipper will be alerted.

In most cases, in my understanding, what happens is the shipper invariably contracts with a contractor who is experienced with offloading them out of that commodity that is inside the car.

The portion of the load that may
be in excess of the weight is either
transferred to a truck and then shipped off to
another location, or it may be loaded into
another rail car.

VICE CHAIRMAN BEGEMAN: What was
the practice prior to this new tariff? Was it

MR. WIMBISH: Same.

VICE CHAIRMAN BEGEMAN: -- in

essence the shipper's responsibility?

MR. WIMBISH: No, it was the same.

It was the exact same.

VICE CHAIRMAN BEGEMAN: So it was

exactly the same?

MR. WIMBISH: Yes.

VICE CHAIRMAN BEGEMAN: So then
what's the difference between the old tariff
and the new tariff, if it's exactly the same?

MR. WIMBISH: The difference
between the old tariff and the new tariff is
that, as Mr. Goldstein pointed out --

VICE CHAIRMAN BEGEMAN: I don't
mean the amended one, but the terms from many
years ago.

MR. WIMBISH: Okay. Between the
old tariff and tariffs before that?

VICE CHAIRMAN BEGEMAN: Well, you
know, not the tariff that was originally the
subject of this declaratory order that was
then subsequently amended about a month later,
but prior to July of 2010, or June, when the
new tariff was issued.

MR. WIMBISH: Right. Under the
original tariff, before any of these changes
from the summer of 2010.

VICE CHAIRMAN BEGEMAN: Yes.

MR. WIMBISH: In that case, the
practice would have been exactly the same.
The car had been detected as overweight -- and
this gets to the second part of your question
of how we define overloaded, whether or not
that's a verb, an adjective, a noun, for us,
any car that exceeds the maximum weight limits
is an overloaded car, by our definitions.
Those shippers who have encountered overloaded cars are aware of that definition.

Now, the agricultural shippers would claim that this is something brand new, and it may be because in their experience, they do not encounter overloaded cars, and therefore, have not been aware of this longstanding definition of ours. Our record establishes that this has been the longstanding Norfolk Southern policy.

Those handful of shippers that have experienced weather-related overloads are aware of that situation, and comport themselves appropriately. They take appropriate steps, where necessary. The fact that they weren't aware of it doesn't mean it's not new. It may be new to them. But it isn't new to affected shippers.

VICE CHAIRMAN BEGEMAN: And is this portion of the tariff concerning the overload similar to how you treat coal?
MR. WIMBISH: No, actually, the coal and coke provisions are actually much more stringent. So, I mean, they're not -- obviously, not at issue here, but --

VICE CHAIRMAN BEGEMAN: Is it the shipper's responsibility to unload and to shovel?

MR. WIMBISH: If appropriate, but again, there, I think that you'd have to look at whether or not, under the circumstances, the tariff is imposing unfair restrictions or conditions on shippers, including coal shippers.

They're not here complaining about their provisions, and I think that they work adequately under the circumstances.

So it would be tough for me to presume that, in light of a more strict condition or circumstance, that the coal or coke shippers are subjected to an unreasonable practice themselves.

COMMISSIONER MULVEY: The problem
with overloaded cars, in part, is a safety one. Now, the cars today are able to handle 143 tons, 286,000 pounds, and that's usually considered to be what the right of way can support.

But is there any leeway? Is there any variance in that? In other words, is the infrastructure really capable of handling cars that -- 286 plus or minus some amount, or is 286 the maximum threshold that the infrastructure can handle?

In other words, do overloaded cars really do damage if the overload is only, say, 3 or 4 percent of what the track is classified to handle?

MR. WIMBISH: Well, the answer is, in some cases, tracks are capable of withstanding additional weights above and beyond the maximum you've listed.

But you've also hit on an important point that the most significant element -- there are really two significant
elements to the overload provisions, and I don't want them to be lost on the board today. One of them is that it is inherently a safety issue. An overloaded car places considerable stresses, additional stresses, on track.

    But as you've said, there are instances where Norfolk Southern, as has been admitted in this record, provides for internal tolerances.

    But that reach leads to the other point for why the overload condition is so important, and why we have provided for a certain amount of latitude.

    An overloaded car that has to be pulled from a through-movement is extremely disruptive to the NS operations.

    That car has to be removed from the train. It may be moving on, it must be set aside, it requires the use of additional Norfolk Southern infrastructure and effort, simply to relocate that car.
It is incumbent upon the railroad to make decisions as best it can to ensure fluidity. So in that regard, the internal tolerances that the agricultural shippers have complained about are yet an additional safeguard, both for us and for them.

It allows us, in certain circumstances, to evaluate the physical plant characteristics of our line, and decide whether or not we are in a position to continue to move that car, regardless of the fact that the shipper may have not exercised appropriate due diligence in loading the car in the first place.

VICE CHAIRMAN BEGEMAN: Could you explain, I guess, from a business standpoint, why it makes more sense from your perspective to pull the car out of service, not just for the 24 hours to determine whether or not it was loaded properly or at the correct weight originally, but once that's determined, why doesn't it make sense for the carrier to take
care of the snow and ice, just as they are
taking care of their track?

I mean, how is it -- you know, it
seems like there's a lot of administrative
cost expense and delay in getting the car back into
service, if you're going to wait for at least
five days.

MR. WIMBISH: Well, the two parts
to that answer is, well, the first one is, in
many cases, shippers do not provide a
certificate of loading, so we don't know when
a car is presented to us and we detect that
it's overloaded whether or not the shipper has
undertaken due diligence in loading the car or
not. And we're not forensic scientists.

VICE CHAIRMAN BEGEMAN: And that's
where the 24 hour clock kicks in that you give
them the opportunity to provide that?

MR. WIMBISH: Well, once we've
detected the overload and the car has been
placed, and the shipper has been alerted that
the car has been detected as overloaded, now,
what we've provided for is a carve out where
they can actually establish that the car was
loaded within established parameters.

But in the vast majority of cases
where we encounter this, it just so turns out
that the shipper does not have a certificate
of loading, and as a result, cannot prove that
the car was not overloaded in the first case.

In our experience, most overloaded
cars that Norfolk Southern encounters are ones
that in all likelihood were overloaded at
origin to begin with.

COMMISSIONER MULVEY: You talked
about the inefficiencies associated with
pulling out a car and having to reload the
car, and taking care of the overload problem.

Has Norfolk Southern studied the
costs it incurs when it has to deal with an
overloaded car and is looking for a tariff
that would just cover those costs, as opposed
to a tariff that was, say, punitive, or tried
to encourage the shippers not to overload the
car to begin with?

MR. WIMBISH: No, I'm not aware

that they have. I think that would be a very
difficult and I think very circumstance-
dependent situation.

I think in many respects, the
overload conditions here are akin to
liquidated damages, because it is impossible,
under the circumstances, to state with
particularity in every circumstance when a
car, what kinds of costs a car is subjected
to, or the railroad's subjected to, rather,
when it incurs an overload.

We don't want overloaded cars on
our railroad. That's not our objective here.
We don't see this as a revenue opportunity by
imposing these charges against shippers.
That's not the purpose at all.

The purpose is to encourage
shippers to engage in responsible behavior
when they load a car. Some of these shippers
use cars that they know have a tendency to
become overweight in certain circumstances. Once that car becomes overweight, to an extent where it exceeds our internal tolerances, that car simply cannot move. The car has to be removed, and it has to sit somewhere until the shipper takes appropriate steps.

The tariff is basically designed to address those kinds of situations, and, in certain circumstances, now is even more accommodating than it was before.

COMMISSIONER MULVEY: But isn't this all somewhat speculative, as you haven't identified any of the petitioner's cars actually being pulled out of service for being overweight here, in this case, as I understand it?

How many times, for example, have these tariff provisions actually been applied to the shippers? Or is this something that's prospective?

MR. WIMBISH: Well, I'm glad you
asked that, because one of the things that we
looked at in response to this inquiry was how
often agricultural shippers' cars are actually
becoming overweight.

Now, they -- I think they answered
the very same question for you, and the answer
was, they could find no times where it had.

Our conclusion was, why are these
agricultural shippers so upset, and are they
really engaging in any different behavior now
under the new rules than they were before?

When they load a car, they have to
remove snow from it, because these are top-
loading cars that they're using in the first
place, both tank cars and covered hoppers.

VICE CHAIRMAN BEGEMAN: But can't
one assume that since the tariff has been in
effect, even though they have not been given
the call that their car is overweight due to
snow and ice, some shippers probably
proactively had tried to figure out, "What am
I going to do and who am I going to contract
with", to avoid all of these additional costs and fees?

And so they've had to proactively probably contract with certain vendors. I think that's what one of you said.

MR. WIMBISH: Right. They have, and they do, and that's not new under the new tariff provisions.

This is something that shippers that encounter overloads have been doing for years. This is not -- in other words, the implication that the new tariff is imposing new responsibilities on shippers that have experienced overloads is simply not the case.

Under the old tariff, the way that Norfolk Southern had interpreted that and shippers that had encountered overloads have understood that, is that once an overload is detected, they have affirmative responsibilities to arrange for its overloading. That was the case before August 10th, 2010, and after, as well.
CHAIRMAN ELLIOTT: Quick question.

It goes to the Vice Chairman's question.

There's obviously a big difference of opinion here about what the tariff meant prior to the new tariff coming in, or the new provision.

And your statement is that weather has always been considered when there's an overload, so if you go through a snowstorm, they'll pull the car out, if it's overloaded, weather, or whatever the reason is.

So is there any way that we can at least firm that up here today? Especially not just with respect to you, but with respect to all the other carriers you supplied in the record, various tariffs? And you made the statements that those all take weather into account.

So, I think it would be helpful if we could somehow firm that up today, that maybe either one party doesn't understand, or I'm looking for a little bit more confirmation
that your interpretation of the tariff is the way it's always been applied.

Is there documentation of cars being pulled out of service due to weather?

MR. WIMBISH: Yes. There is, and that's what I'm saying, is that we are able, on the basis of our experience, to say that yes, when a weather-related overload has occurred, that is exactly how we have carried things forward.

The shipper has been notified, the shipper has made arrangements within a certain time frame to unload the excess lading in the car, or do whatever was necessary to bring the car back into compliance. That has always been the case.

The issue here is that the agricultural shippers that are coming here saying no, that wasn't the case before, they don't know that, because they never had any experience under the old tariff of encountering any overloads.
CHAIRMAN ELLIOTT: I guess that's my biggest concern, is, if they haven't had any experience, maybe they aren't following what the tariff did in the past, because it never occurred to them.

I just want to get it nailed down here that both sides are on the same page with respect to that.

MR. WIMBISH: They may be of the opinion that it doesn't mean that. They may be of the opinion that it doesn't mean that, but they aren't in a position here to say that we haven't interpreted our tariff provisions that way in the past.

All they can say is that they didn't have any experience with them. Other shippers have, and incidentally, those shippers are not here today.

COMMISSIONER MULVEY: Those shippers who have experienced the overloading are primarily coal and coke shippers, or open hopper car shippers?
MR. WIMBISH: No, the shippers, as our record indicated here, the shippers that tend to have issues with this are the shippers that are using open-top containers, like gondolas or hoppers, in which snow, ice, and water can accumulate, can percolate in in some cases, when it's chips or wood chips or whatever, and cause the car to become overloaded.

Now, those shippers can exercise due diligence in a number of different ways, but they know when they use that kind of car that during certain types of conditions, simply loading the car to maximum is not an assurance that that car might not later become overloaded due to weather conditions. And I don't think it's fair to say --

COMMISSIONER MULVEY: Have they complained about that?

MR. WIMBISH: -- that they, that we alone bear the responsibility, when they use a car and load it in a way that might
ultimately expose it to an overload.

COMMISSIONER MULVEY: Have they complained about that practice, when they have a car pulled? Do they say, "When we loaded this car, it was well below the maximum weight, and now because of rain and absorption of water, they're now overweight, and we can't control the weather?" Have they complained about that, too, to you?

MR. WIMBISH: Well, I don't know about complaint, but I do understand that there were some misgivings, and that was the intention behind providing for additional leeway under the revised tariff.

We already incur costs and risks associated with these overloaded cars, and I think in some respects, this case is an example of no good deed going unpunished, these particular shippers saying, we have an issue with this, us saying, we don't want to be obstinate, we would like to be flexible in your case, because you're shippers that
experience this, we will provide for
additional accommodation, five days.

COMMISSIONER MULVEY: Following up
on the accommodation issue and the flexibility
issue, wouldn't it make more sense for Norfolk
Southern to say, look, this car is overweight,
and we have it at this yard, and then have a
crew -- because you have people right there
who could clean the car, get rid of the ice,
bring it back to a reasonable legal weight,
the prescribed weight, and then bill the
shipper for that service, as opposed to
requiring the shipper to come down and unload
it or contract with somebody?

That seems to be less efficient
than having your personnel, who are right
there, get rid of the extra snow and ice.

MR. WIMBISH: Well, that depends.
I mean, certainly, under the circumstances,
there might be issues where there was an
extraordinary event, in the interest of
keeping an entire train or entire yard moving,
that may, indeed happen.

Part of the problem of course is when we're talking about overloads, we're talking about many overloads where the situation may have been caused by a -- you know, overloading of the lading to begin with, and it would not be appropriate for us to simply go into a car and start pulling the contents out for the purpose of rectifying the situation.

But I will add one other thing, and that is that under your standard, remember, it's whether or not our tariff is reasonable, not whether or not it's the most perfect, or the preferred, or that you couldn't find other more efficient solutions to the problem.

COMMISSIONER MULVEY: Yes. Okay.

CHAIRMAN ELLIOTT: One more question. It just seems -- it's possible here that there's a misunderstanding. And the way I've looked at it, I went back and looked at
old ICC cases, and it always seems like there's been these internal tolerances or some form of tolerance in place to deal with weather, and that's the way shippers and railroads have dealt with it over time.

And is it your understanding that all of the railroads have such tolerances in place to deal with this weather issue?

MR. WIMBISH: We do not have complete understanding of what other railroads' tolerances are. We do know that with respect to interline moves, that, as is reflected in the documents that were produced --

CHAIRMAN ELLIOTT: Yes.

MR. WIMBISH: -- that there are internal tolerances, that these are pretty much network-wide.

CHAIRMAN ELLIOTT: Sure.

MR. WIMBISH: And we know that the principal reason for these tolerances really is two-fold, but the primary reason for them
is to ensure fluidity of the system.

If we simply eliminated these tolerances, I believe the railroad system would come to a screeching halt, because we're talking about heavily-loaded bulk commodities, and loading these cars is an inexact and imprecise science, even if you have scales available to you.

So without these tolerances, you have a much less efficient and much more overburdened railroad system.

CHAIRMAN ELLIOTT: In fact, one of the staff pulled a case from 1909 where there was a tolerance involved, and the tolerance was in place because the scales back then were so inaccurate, so you needed to have a little leeway.

And also, weather was mentioned in that case, so it seems like this has been going on for quite some time.

So, thank you very much.

Mr. Goldstein, you have seven
REBUTTAL BY ANDREW GOLDSTEIN, ESQUIRE
ON BEHALF OF AG PROCESSING, INC
A COOPERATIVE

MR. GOLDSTEIN: Thank you, Mr. Chairman.

There were a couple of points raised in Mr. Wimbish's presentation that I'd like to just mention briefly.

First, he was talking about the burden of proof being upon the petitioners. This is a declaratory order proceeding. It's not a complaint, and my understanding is that in a declaratory order proceeding, what the board normally does is balance the positions of the parties.

I'm not aware that there is the same strict burden of proof here that we normally see. But if there is any ambiguity involved in the tariff, and there's some suggestion that there is, then ambiguities normally are construed against the maker of
And if there's a problem here because there is something unclear about the tariff, it should be, I guess, debited to the NS position, not ours.

There was a discussion about safety, and this being an important safety issue, and I guess moving an overloaded car can be. Of course, we have a basic difference when asked about the definition of overload.

We don't think that if a car is loaded within limits and then somewhere along the line of movement for operating convenience is parked someplace, and now it snows, and the car now acquires 6,000 or 7,000 pounds of additional weight that puts it over the top, we don't think that's our fault, but the tariff makes it our fault. And that's one of our primary problems.

VICE CHAIRMAN BEGEMAN: But do you have any objection to the first part of the tariff, which requires you to certify within
24 hours that it was not overloaded?

MR. GOLDSTEIN: We have no objection to being required to stay within the stenciled limits. If we are not within the stenciled limits when we load out the car and tender it, it's our problem.

VICE CHAIRMAN BEGEMAN: And is the 24-hour clock a problem? Or are you able to get -- are there enough, I guess, are the smaller shippers, do they have access to that information readily if they need --

MR. GOLDSTEIN: I think that's one of the reasons why Mr. Wimbish said that they don't have the certifications is that there's probably a break in the link of communication.

The car is deemed overloaded someplace in the middle of Illinois, and it was loaded someplace in Iowa, and how does the information get back to the shipper? We don't know.

I -- there was some discussion, also, of these internal tolerances. I had
thought, frankly, that that would be the
subject of our closed session, so I haven't
mentioned them up until now. But they --

CHAIRMAN ELLIOTT: I think the
highly confidential matters were the actual
numbers, not the concept.

MR. GOLDSTEIN: Well, I thought it
was both, but whatever. I think when we get
to the actual numbers, later on, you'll see
that it's not an insignificant issue. These
are not -- you know, the ICC used to have
tolerances of a quarter of a percent, if you
read some of those old cases, to deal with
weights. We're not going to be talking about
that. We're going to be talking about
altogether different numbers.

CHAIRMAN ELLIOTT: Let me ask you
something with regard to that.

Hypothetically, if what NS is saying is
correct, that weather has always been taken
into account prior to this, and then they have
these tolerances in place, which are supposed
to deal with weather, now if those numbers, 
those tolerances, are hypothetically a 
reasonable number and would take care of 98 
percent of all weather-related issues, 
wouldn't that change the picture here and make 
their tariff seem reasonable?

MR. GOLDSTEIN: Well, I don't know 
if it would make it seem reasonable. It 
certainly would change things. They're called 
internal tolerances, and that's because the 
shippers don't know what they are. 
And so I don't know, if the 
shippers don't know what they are, I don't 
know how it can affect the shippers' behavior. 

CHAIRMAN ELLIOTT: Okay. But I 
guess, it seems to me like this situation -- 
I'm not sure because I'm not a historian on 
railroads -- has been going on for many years. 
Weather has always been out there. 
And what I'm concerned about here 
is that there's been a process in place with 
tolerances to deal with weather, and that
right now, you're asking us basically to overturn a process that might have been in place for 100 years of dealing with weather, which is tolerances, and that makes me nervous. So I just want to make sure that we're clear that that's not an effective process.

MR. GOLDSTEIN: I don't think it is, and I think the tolerances you're talking about, you said you read in some old decisions, that means they were public. That means shippers knew what they were. That's not the situation we're dealing with.

CHAIRMAN ELLIOTT: But why would that be different, if they were public or private? If they were public, I mean, the number, the weather, if it still affects it, the tolerance would still be applied the same.

MR. GOLDSTEIN: Well, if they were public, then shippers could know how much over the stenciled gross weight they could load a car and not run into a problem.
Let me just say, before the red light goes on, please, that other railroads don't follow the practice that NS does. We don't see any other railroad publishing a tariff that uses the words snow or ice.

We don't see any other railroad telling a shipper that if they have to park the car, even a covered hopper car, nice flat top, have to park that car someplace, and then it snows on the car, that that's going to be considered an overload, under any circumstances.

CHAIRMAN ELLIOTT: Prior to bringing this case, did you talk with any other railroads with respect to this issue? Have you asked them whether or not weather could result in an overload, pursuant to the tariffs that were presented to us in the record?

MR. GOLDSTEIN: We spoke at length with NS, and we spoke, to my knowledge, with one other railroad.
CHAIRMAN ELLIOTT: And did that railroad say weather was not an issue?

MR. GOLDSTEIN: What that railroad does is when it sees snow accumulate on a car, after the car has been shipped in good order, that railroad delivers the car or knocks the snow off the top, we don't know which, but they don't make a point of it.

CHAIRMAN ELLIOTT: That's what -- those are closed cars, right, because you wouldn't be able to knock it off the top of an open car?

MR. GOLDSTEIN: Absolutely, absolutely not.

CHAIRMAN ELLIOTT: And what do they do in the situation where it's an open car?

MR. GOLDSTEIN: I don't know.

CHAIRMAN ELLIOTT: Okay.

MR. GOLDSTEIN: I suppose they just penalize the shipper. I don't know how you can offload frozen lading.

Maybe NS thinks there's a way, but
we don't know of a way to offload frozen lading. When it occurs in a covered hopper car, it has to wait until it thaws.

CHAIRMAN ELLIOTT: So it's possible, in that situation, that they would pull the car out and penalize them?

MR. GOLDSTEIN: I would think so, but I don't know their tariffs that apply to the open cars.

CHAIRMAN ELLIOTT: All right.

COMMISSIONER MULVEY: Well, I have seen one NS operation, where they're unloading coal cars that are overturned. Those cars are open cars, and it's frozen, and they actually have a guy there with a sledgehammer breaking some of that coal loose, so they can get the coal out, especially coal on the bottom. Coal does freeze to the bottom, and you can't send the car back with all that coal still in it. It's a dangerous job, but they actually sometimes use sledgehammers to break the coal loose.
So, I was going to ask you one other question. Wouldn't it be reasonable because, you know what the maximum the car can hold -- is supposed to hold, as I said, 283,000 pounds, then, if a car came in that was, say, 291,000 pounds, and there was snow, the car's overloaded, and it should be corrected.

If there is snow, you can make a judgment as to how thick the snow is and what the weight would be, and that would be a case where snow and ice were the cause.

Could you distinguish between cars that are overloaded because they were overloaded, and ones that have become overloaded because of snow and ice, simply by observation?

MR. GOLDSTEIN: Well, yes, because the latter category are those cars that are shipped out clean, and then somewhere along the route of movement, they accumulate snow and ice.
And so I think it's a perfectly logical assumption that the snow and ice has nothing to do with the load in the car.

COMMISSIONER MULVEY: And therefore, it's an act of God, and not the shipper's fault?

MR. GOLDSTEIN: Not the shipper's fault. That's correct.

COMMISSIONER MULVEY: Okay. So the railroad would have to charge God somehow or other to pay for the extra costs.

MR. GOLDSTEIN: Well, we are always paying God for extra costs, so maybe that works out.

CHAIRMAN ELLIOTT: Thank you, Mr. Goldstein.

We'll now take a five-minute recess, and proceed to an in camera session.

The broadcast portion of this argument will end now.

(Whereupon, the above-entitled matter was concluded at 10:19.)
Page 67

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In the matter of: AG Processing v Norfolk Southern

Before: STB

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