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August 6, 2020
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August 6, 2020

By e-filing

Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

Re: Docket No. NOR 42170, *Kingsbury Elevator, Inc. v. Grand Trunk Western Railroad Company*

Ex Parte Docket No. 346 (Sub-No. 24), *Rail General Exemption Authority -- Miscellaneous Manufactured Commodities*

Dear Ms. Brown:

Hereby forwarded for filing are a Complaint in Docket No. NOR 42170 and a Petition for Partial Revocation of Class Exemption in related Ex Parte Docket No. 346 (Sub-No. 24).

The filing fee of \$350 each (total of \$700) is being paid through pay.gov.

A copy of the Complaint and Petition are being served on the Chief Legal Officer of Canadian National Railway Company by overnight mail.

FILED
August 6, 2020
SURFACE
TRANSPORTATION BOARD

Respectfully submitted,

/s/Thomas F. McFarland

Thomas F. McFarland
Attorney for Kingsbury Elevator, Inc.

TMcf:mg:1884\efSTB1

cc: Sean Finn, Esq.
Messrs. Edgar Lindborg
Paul Lindborg

FEE RECEIVED
August 6, 2020
SURFACE
TRANSPORTATION BOARD

BEFORE THE
SURFACE TRANSPORTATION BOARD

KINGSBURY ELEVATOR, INC.,	)	
	)	DOCKET NO.
<u>Complainant,</u>	)	NOR 42170
v.	)	
	)	
GRAND TRUNK WESTERN RAILROAD	)	
COMPANY,	)	
	)	
<u>Defendant.</u>	)	

COMPLAINT*

KINGSBURY ELEVATOR, INC.
P.O. Box 66
Kingsbury, IN 46345

Complainant

THOMAS F. McFARLAND
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Attorney for Complainant

DATE FILED: August 6, 2020

* This Complaint is related to a simultaneously-filed Petition in Ex Parte Docket No. 346 (Sub-No. 24), *Rail General Exemption Authority -- Miscellaneous Manufactured Commodities*

BEFORE THE
SURFACE TRANSPORTATION BOARD

KINGSBURY ELEVATOR, INC.,	)	
	)	DOCKET NO.
<u>Complainant,</u>	)	NOR 42170
v.	)	
	)	
GRAND TRUNK WESTERN RAILROAD	)	
COMPANY,	)	
	)	
<u>Defendant.</u>	)	

COMPLAINT

Pursuant to 49 U.S.C. § 11701(b) and 49 C.F.R. Part 1111, KINGSBURY ELEVATOR INC. (KE) hereby complains against GRAND TRUNK WESTERN RAILWAY COMPANY (GTW), as follows:

THE PARTIES

1

KE is engaged in the business of distributing canola meal, corn gluten meal, gluten feed pellets, and fertilizer to the agricultural community in and near Kingsbury, Indiana.

2

GTW is a common carrier by rail in interstate commerce subject to the jurisdiction of the Surface Transportation Board (the Board or the STB) under the Interstate Commerce Act, as amended, 49 U.S.C. § 10101, *et seq.* GTW is a subsidiary of Canadian National Railway Company (CN). CN's corporate office is located at Montreal, Quebec, Canada.

JURISDICTION AND REGULATORY AUTHORITY

3

GTW participates in transportation of canola meal, corn gluten meal, gluten feed pellets, and fertilizer from origins generally in Western Canada and the Western United States to KE's place of business at Kingsbury, Indiana. That international and interstate transportation is subject to the Board's jurisdiction, but the Board currently lacks regulatory authority over those commodities (except fertilizer) because they are included in the miscellaneous manufactured commodities that have been exempted from Board regulation as a class in *Rail General Exemption Authority -- Miscellaneous Manufactured Commodities*, 6 ICC 2d 186 (1989). See 49 C.F.R. § 1039.11 (Ex Parte Docket No. 346 (Sub-No. 24)).

4

Simultaneously with the filing of this Complaint, KE is filing a Petition for Partial Revocation of Class Exemption to the extent necessary for the Board to entertain this Complaint. See *Rail General Exemption Authority -- Miscellaneous Manufactured Commodities*, Ex Parte No. 346 (Sub-No. 24), 6 ICC 2d 186 (1989). If that Petition were to be granted, the Board would have both jurisdiction and regulatory authority over rail transportation of all commodities involved in this Complaint.

COUNT ONE - FAILURE TO PROVIDE STATUTORY NOTICE OF CHANGED COMMON CARRIER SERVICE TERM IN VIOLATION OF 49 U.S.C. § 11101(c)

5

A long-recognized standard of reasonable frequency of rail service at destination is one switch per day, five days per week, performed no later than the day after a car arrives at the carrier's local yard.

6

Prior to March 20, 2020, KE received rail service at Kingsbury seven days per week. On that date, GTW purported to reduce its service to KE from seven to three days per week.

7

The volume of traffic received by KE in the period before the service reduction was not substantially less than the volume received in other historic periods.

8

The only prior notice of GTW's reduction of service was an e-mail message from Paul Dorn, Sr. Representative, GTW Customer Service, Southern Region, to Ed Lindborg of KE, dated March 20, 2020, viz:

We are changing the Service Days to Sunday, Tuesday, Thursday and the Service Window 0800 to 2000. We normally provide a 10-day notice but can begin with service this Sunday if you are able to waive the 10 days. Please let us know if you are okay with the change right away and if you have any questions. This will change your service back to the L520 out of South Bend instead of L521 out of Battle Creek and would result in earlier service as L520 would have Kingsbury as first stop where L521 was last stop (when they had time).

9

KE did not waive notice of the service reduction nor otherwise agree to it in any way. GTW reduced KE's service from seven to three days per week beginning on or about March 30, 2020.

10

The number of days per week on which a rail carrier provides service to a shipper is a common carrier service term within the meaning of that term in 49 U.S.C. § 11101(c).

11

It is provided in 49 U.S.C. § 11101(c) that a rail carrier may not change any common carrier service term unless 20 days have expired after written or electronic notice is provided to any person who within the previous 12 months has made arrangements with the carrier for a shipment that would be subject to such changed term.

12

Within the 12-month period prior to March 30, 2020, KE made arrangements with GTW for shipments that would have been subject to the changed common carrier service term.

13

GTW failed to provide the requisite statutory notice to KE of the changed common carrier service term, i.e., the reduction of service from seven to three days per week.

14

As a result of GTW's failure to provide statutory notice, the reduction of service to KE from seven to three days per week did not lawfully take effect on or about March 30, 2020. Inasmuch as the requisite statutory notice has not been given to date, a reduction of rail service has not lawfully taken effect. GTW continues to be statutorily required to provide rail service to KE seven days per week, but has been providing such service only three days per week since the end of March, 2020.

15

By reason of the foregoing facts and circumstances, GTW has violated, and is continuing to violate 49 U.S.C. § 11101(c) by failing to have provided required statutory notice to KE of a reduced common carrier service term.

16

By reason of GTW's continuing violation of 49 U.S.C. § 11101(c), KE has incurred, and is continuing to incur damages including, but not limited to, lost profits on business that KE would have participated in but for the service reduction.

COUNT TWO - CONSISTENT PATTERN OF UNREASONABLE DELAY IN DELIVERY OF SHIPMENTS TO KE IN VIOLATION OF 49 U.S.C. § 11101(a)

17

KE realleges the assertions in Paragraphs 1-4 of this Complaint.

18

Rail carriers are required by 49 U.S.C. § 11101(a) to provide rail transportation on reasonable request.

19

The duty of a rail common carrier under 49 U.S.C. § 11101(a) includes providing reasonably prompt delivery of shipments at destination.

20

On numerous occasions, GTW has failed and refused to provide rail transportation to KE in a reasonably timely manner, with the result that KE's supply of canola meal has been exhausted, and KE has been forced to shut down its business until canola meal is delivered.

21

GTW's repeated failure to make reasonably prompt delivery of shipments to KE has been a consistent pattern of behavior, not sporadic instances of service failures.

22

When such a rail service failure and shutdown occurs, GTW personnel transmit a “Customer Shutdown Form” to KE on which GTW’s customer is requested to provide details regarding the shutdown and the impact of the shutdown on the customer’s business.

23

Inasmuch as the Customer Shutdown Forms are presented to KE by GTW personnel and contain a CN logo, it has been reasonable for KE to conclude that the forms are for the purpose of determining reimbursement to Customers for damages suffered by reason of GTW’s rail service failures and resulting customer shutdowns.

24

KE has completed and sent to GTW numerous Customer Shutdown Forms on which KE explained how GTW’s failure to provide timely delivery to KE at Kingsbury and resulting shutdown of KE’s canola meal business has had a serious adverse effect on KE’s overall business.

25

In disregard of its own Customer Shutdown Forms, GTW has refused to pay amounts claimed by KE in the “Impact of Shutdown to Customer” sections of the Customer Shutdown Forms, or any other amounts caused by GTW’s pattern of service failures and resulting customer shutdowns.

26

By reason of the foregoing facts and circumstances, GTW has violated, and is continuing to violate 49 U.S.C. § 11101(a) by repeatedly failing and refusing to provide reasonably prompt delivery of shipments to KE.

27

By reason of GTW's continuing violation of 49 U.S.C. § 11101(a), KE has incurred, and is continuing to incur damages including, but not limited to, lost profits on business that KE would have participated in but for GTW's failure and refusal to provide rail transportation on reasonable request.

COUNT THREE - OVERCHARGES
IN VIOLATION OF 49 U.S.C. § 11101(e)

28

KE realleges the assertions made in Paragraphs 1-4 of this Complaint.

29

It is provided in 49 U.S.C. § 11101(e) that: a rail carrier shall provide transportation or service in accordance with the rates and service terms, and any changes thereto, as published or otherwise made available under subsection (b), (c), or (d).

30

It is provided in CN Tariff 9000 that a charge of \$75 per car per day will be assessed on privately owned railcars held on GTW's tracks.

31

GTW sent the following invoices to KE that purport to assess charges for privately-owned railcars held on GTW's tracks, i.e.:

- (1) Invoice No. 754286162, 16 days@\$75 = \$1,200
- (2) Invoice No. 754292279, 30 days@\$75 = \$2,250
- (3) Invoice No. 754299037, 158 days@\$75 = \$11,850

TOTAL = \$15,300

32

Each such GTW invoice contains an entry that reads "OS start date" and "OS complete date". The abbreviation "OS" means "Optional Services". That term refers to the GTW tariff governing the service of holding privately-owned railcars on GTW's tracks, among other services. The chargeable days for that service are determined by subtracting the "start date" from the "complete date".

33

According to GTW's own entries on the invoices, the chargeable days for the three invoices identified above are as follows:

- (1) Invoice 754286162 Start Date 9-29-19 Complete date 10-5-19, chargeable days = 7
- (2) Invoice 754292279 Start Date 10-6-19 Complete date 10-12-19, chargeable days = 6
- (3) Invoice 754299037 Start Date 10-13-19 Complete date 10-19-19, chargeable days = 6

According to GTW's own entries, the invoices should be corrected to provide as follows:

- (1) Invoice 754286162 - 7 days@\$75 = \$525
- (2) Invoice 754292278 - 6 days@\$75 = \$450
- (3) Invoice 754299037 - 6 days@\$75 = \$450

TOTAL = \$1,425

The difference between the charges purportedly collectable on the three invoices (\$15,300) and the charges as corrected by application of GTW's own entries on the invoices (\$1,425) constitutes an overcharge of \$13,875.

By reason of the foregoing facts and circumstances, the invoices under consideration contain an overcharge of \$13,875 in violation of 49 U.S.C. § 11101(e), which has been improperly assessed and is not collectable.

**COUNT FOUR - REFUSAL TO PAY ALLOWANCES FOR SERVICES
PERFORMED BY KE AT CN'S REQUEST IN VIOLATION OF 49 U.S.C. § 10745**

KE realleges the assertions made in Paragraphs 1-4 of this Complaint.

It is provided in 49 U.S.C. § 10745:

A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part may establish a charge or allowance for transportation or service for property when the owner of the property, directly or indirectly, furnishes a service related to or an instrumentality used in the transportation or service. The Board may prescribe the maximum reasonable charge or allowance a rail carrier subject to its jurisdiction may pay for a service or instrumentality furnished under this section. The Board may begin a proceeding under this section on its own initiative or on application.

39

The turnout switch at Kingsbury is located on the south track of the GTW double track main line. As a result, KE is efficiently served by eastbound trains.

40

Until approximately one year ago, GTW provided rail service to KE primarily by means of eastbound trains via Chicago and Kirk Yard (Gary, IN).

41

Approximately one year ago, GTW began to provide rail service to KE by means of westbound trains via Battle Creek, MI and South Bend, IN.

42

When providing service to KE in westbound trains, GTW positions loaded cars behind the locomotive and pushes them onto KE's tracks. At the specific request of GTW, KE personnel uncouple the cars and switch them as required. KE repositions empty cars behind the locomotive, which then proceeds eastbound to South Bend with the empty cars at the rear of the locomotive.

43

If KE personnel did not uncouple loaded cars and perform switching to recouple empty cars on KE tracks, the GTW locomotive would be required to operate westbound to Valparaiso, IN in order to turn around and proceed eastbound to provide service to KE.

44

The rail operations performed by KE personnel at Kingsbury enable GTW to save approximately 2.5 hours per trip by not being required to operate to Valparaiso and turn the locomotive there.

45

KE is billing GTW to reflect the savings to GTW resulting from the services performed by KE personnel at GTW's specific request, but GTW refuses to pay any amount as a reasonable allowance for services performed by KE at GTW's request.

46

By reason of the foregoing facts and circumstances, GTW's refusal to pay reasonable allowances for the services performed by KE personnel at GTW's request has constituted, and is continuing to constitute a violation of 49 U.S.C. § 10745.

47

The Board should require that GTW cease and desist from such violations and require that GTW pay all such reasonable allowances billed and to be billed during the pendency of this Complaint.

**COUNT FIVE - UNREASONABLE PRACTICE - ASSESSING A
"NO-PULL" CHARGE IN VIOLATION OF 49 U.S.C. § 10702(2)**

48

KE realleges the assertions in Paragraph 1-4 of this Complaint.

49

Item 6100 of CN Tariff 9000 provides a charge to be assessed against a consignee if a railcar has been released by a consignee but, for a reason attributable to the consignee, is not available at the time of the rail carrier's pull of released empty cars ('no-pull' charge).

50

The table below identifies representative examples of no-pull charges assessed by GTW to KE:

<u>Date</u>	<u>Number of Cars</u>	<u>Charge per Car</u>	<u>Total Charge</u>
September 20, 2018	1	\$200	\$200
May 11, 2019	1	\$200	\$200
October 11, 2019	1	\$250	\$250
October 28, 2019	3	\$250	\$750

51

A typical GTW invoice for a no-pull charge contains the following entry:

Kingsbury Elevator switches the empty cars to an empty track where CN crew reported not finding the empty AEX 22957 to pull, therefore the car is subject to a charge.

52

There is no assigned “empty track” at KE’s facility. When KE releases empty cars, it moves them to the front of tracks to make them easily accessible to GTW. When GTW delivers loaded cars to KE, it often operates over more than one KE track, but it inexplicably refuses to do so when it picks up empty cars. GTW refuses to switch empty cars from more than one track in pulling them following release.

53

Cars released by KE are made reasonably accessible by KE for pickup by GTW.

54

GTW recovers the cost of empty car switching at KE’s sidetracks by means of an element for that cost in the line-haul rate that CN-GTW collects for transportation of loaded cars from origin to Kingsbury, IN.

55

Assessment of a no-pull charge in addition to that line-haul rate results in double recovery of GTW's costs.

56

By reason of the foregoing facts and circumstances, GTW's no-pull charge is an unreasonable practice related to transportation in violation of 49 U.S.C. § 10702(2).

57

The Board should require that GTW cease and desist from such violations and require that GTW refund or waive all such no-pull charges billed to date and to be billed during the pendency of this Complaint.

**COUNT SIX - DEMURRAGE CHARGES ASSESSED IN
VIOLATION OF 49 U.S.C. § 10702(2) AND 49 U.S.C. § 10746**

58

KE realleges the assertions in Paragraphs 1-4 of this Complaint.

59

It is provided in 49 U.S.C. § 10702(2) as follows:

A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall establish reasonable—

(2) rules and practices on matters related to that transportation or service.

60

It is provided in 49 U.S.C. § 10746 as follows:

A rail carrier providing transportation subject to the jurisdiction of the Board under this part shall compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to—

- (1) freight car use and distribution; and
- (2) maintenance of an adequate supply of freight cars to be available for transportation of property.

61

Item 9050 of CN Tariff 9000 provides for a demurrage charge of \$200 per car per day for detention of rail-owned cars beyond free time.

62

Demurrage charges assessed against KE accrued as a result of circumstances beyond the reasonable control of KE, such that assessment of such charges would not incentivize KE to take steps to avoid such charges.

63

By reason of the foregoing facts and circumstances, the Board should find that collection of the involved demurrage charges would be an unreasonable practice related to transportation in violation of 49 U.S.C. § 10702(2), and would be inconsistent with the provisions of 49 U.S.C. § 10746. Any such charges mistakenly paid by KE should be refunded with interest.

UNSUCCESSFUL INFORMAL ATTEMPTS TO RESOLVE DISPUTES

64

KE has verbally complained and has sent numerous informal claims to GTW attempting to resolve the foregoing disputes. GTW's consistent response has been a cryptic statement "Invoice Deemed Correct", with no explanation nor purported justification for such response. GTW's intransigence in that respect has not been conducive to a private resolution of such disputes.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the Board should find that:

(1) GTW has violated, and is continuing to violate, 49 U.S.C. § 11101(c) by failing to have provided the required statutory 20-day notice of proposed reduction of frequency of service to KE;

(2) GTW has violated, and is continuing to violate, 49 U.S.C. § 11101(a) as a result of a consistent pattern of failure and refusal to provide reasonably timely delivery of railcars at Kingsbury, IN;

(3) According to entries in its own invoices, GTW has overcharged KE for holding private cars on GTW's tracks in violation of 49 U.S.C. § 11101(c);

(4) GTW has failed and refused, and is continuing to fail and refuse, to pay reasonable allowances for railroad services performed by KE at GTW's request in violation of 49 U.S.C. § 10745;

(5) GTW has violated, and is continuing to violate, 49 U.S.C. § 10702(2) by assessing a "no-pull" charge when cars have been released by KE and are reasonably accessible for GTW to pull;

(6) GTW has violated, and is continuing to violate, 49 U.S.C. § 10702(2) and 49 U.S.C. § 10746 by assessing demurrage charges that accrued as a result of circumstances beyond the reasonable control of KE.

BASED ON THE FOREGOING FINDINGS, the Board should require that GTW cease and desist from such violations and pay damages in amounts to be determined in proceedings on this Complaint including, but not limited to, lost profits on business that KE would have participated in but for GTW's violations of law.

Respectfully submitted,

KINGSBURY ELEVATOR, INC.
P.O. Box 66
Kingsbury, IN 46345

Complainant

/s/ Thomas F. McFarland

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Attorney for Complainant

DATE FILED: August 6, 2020

CERTIFICATE OF SERVICE

In accordance with 49 C.F.R. § 1111.4, I hereby certify that on August 6, 2020, I served a copy of this Complaint by UPS overnight mail for delivery on August 7, 2020, on, Sean Finn, Esq., Chief Legal Officer, Canadian National Railway Company, 935 de La Gauchetière Street West Montreal, Quebec H3B 2M9.

I also certify that the front of the overnight express courier envelope includes the legend “Service of STB Complaint.”

/s/ Thomas F. McFarland

Thomas F. McFarland