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By Electronic Filing

July 30, 2021

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

RE: NOR 42172

302804

ENTERED
Office of Proceedings
July 30, 2021
Part of
Public Record

Dear Ms. Brown:

It has come to our attention that the Complaint of A.F. Gelhar Company, Inc. and Grede Holdings, LLC against C & NC Railroad Company and Application for Emergency Service Order or, in the Alternative, Petition for Injunction Requiring Continued Rail Service (the "Complaint") filed herein on July 28, 2021 inadvertently contained confidential mediation information arising out of the Board's Rail Customer and Public Assistance Program. Accordingly, we hereby request that the Complaint be withdrawn.

Enclosed is a Revised Complaint of A.F. Gelhar Company, Inc. and Grede Holdings, LLC against C & NC Railroad Company and Application for Emergency Service Order or, in the Alternative, Petition for Injunction Requiring Continued Rail Service, for filing herein.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "Michael F. McBride".

Michael F. McBride
Robin M. Rotman
Attorneys for A.F. Gelhar Company, Inc.

cc (w/encl.): All persons listed on Certificate of Service

BEFORE THE SURFACE TRANSPORTATION BOARD

A.F. GELHAR COMPANY, INC. N2402	)	
County Road A, Markesan, WI 53946, and	)	
GREDE HOLDINGS, LLC, 20750 Civic Center Drive,	)	
Suite 100, Southfield, MI 48076,	)	
<u>Complainants,</u>	)	
v.	)	NOR 42172
C & NC RAILROAD COMPANY,	)	
300 E. Walnut Street, Corydon, IN 47112	)	
<u>Defendant.</u>	)	
	)	

**REVISED COMPLAINT OF A.F. GELHAR COMPANY, INC. AND
GREDE HOLDINGS, LLC AGAINST C & NC RAILROAD COMPANY AND
APPLICATION FOR EMERGENCY SERVICE ORDER OR, IN THE ALTERNATIVE,
PETITION FOR INJUNCTION REQUIRING CONTINUED RAIL SERVICE**

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July 30, 2021

**REVISED COMPLAINT OF A.F. GELHAR COMPANY, INC. AND
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APPLICATION FOR EMERGENCY SERVICE ORDER OR, IN THE ALTERNATIVE,
PETITION FOR INJUNCTION REQUIRING CONTINUED RAIL SERVICE**

Part I

REVISED COMPLAINT

THE PARTIES

1. Complainant A.F. Gelhar Company, Inc. (“Gelhar”) operates a sand-extraction and supply business located at N2402 County Road A, Markesan, WI 53946.
2. Complainant Grede Holdings, LLC (“Grede”) operates several foundries in the United States, including one at New Castle, IN. Its headquarters are located at 20750 Civic Center Drive, Suite 100, Southfield, MI 48076.
3. Grede is the only rail customer of Defendant C & NC Railroad (“C & NC”). C & NC’s offices are located at 300 E. Walnut Street, Corydon, IN 47112.
4. Defendant C & NC is a Class III railroad owned by RMW Ventures, LLC (“RMW Ventures”). RMW Ventures is owned by Mr. Spencer Wendelin. Mr. Wendelin also manages C & NC. C & NC was authorized by the Board to operate over lines of Norfolk Southern Railroad Company (“NS”) in Indiana. In FD 33565, *RMW Ventures, L.L.C.—Control Exemption—C & NC, L.L.C., Maumee & Western, L.L.C., and Wabash Central, L.L.C.* (served March 10, 1998), Mr. Wendelin’s holding company, RMW Ventures, LLC was granted an exemption to permit it to control three railroads, including C & NC.
5. C & NC leases its lines from NS. C & NC is seeking authority from the Board to discontinue its operations in Docket No. AB-1093 (Sub-No. 2X) (Petition for Exemption filed July 9, 2021). In its Petition for Exemption in No. AB-1093 (Sub-No. 2X), C & NC alleges that it is cooperating with NS to arrange for another rail carrier to take over operations on the lines C & NC now leases from NS.

6. On information and belief, NS considers C & NC in violation of various provisions of the lease with NS, and has given C & NC a notice of default under the lease, requiring C & NC to discontinue operations over the lines when the STB authorizes C & NC to do so.

THE CIRCUMSTANCES GIVING RISE TO THIS REVISED COMPLAINT AND APPLICATION/PETITION

7. On a regular basis, Grede informs Gelhar of the amount of sand Grede needs to operate its New Castle foundry, and Gelhar then loads railcars (which are provided by Gelhar, not C & NC or any other railroad) with the requisite amount of sand for Grede. Typically, Gelhar provides Grede with 4-6 railcars of sand per week.

8. Wisconsin & Southern Railroad (“WSOR”) accepts the loaded Gelhar railcars from Gelhar and transports them to interchange with NS.

9. NS transports the loaded Gelhar railcars to interchange with C & NC in New Castle, IN. When C & NC is willing to provide service to Gelhar and Grede, it transports the loaded Gelhar railcars to a transloading facility, the Neal Metal Scrap facility, in New Castle, where the sand is off-loaded and transported by truck to the Grede foundry in New Castle. Empty Gelhar railcars are returned to Gelhar by the reverse routing – *i.e.*, C & NC-NS-WSOR.

10. When Gelhar became Grede’s sand supplier for Grede’s New Castle foundry in early 2021, Grede arranged to pay for the rail transportation at issue.

11. In recent months, C & NC has been billing both Gelhar and Grede for various charges that C & NC claims are due to it. Although Gelhar or Grede have paid some of those charges, they have disputed others, alleging that they are “overlapping charges” or are otherwise not the responsibility of Gelhar or Grede, because they are unreasonable or pertain to a time when Grede was not the shipper. *See EP 757, Policy Statement on Demurrage and Accessorial Fees and Charges* (served April 30, 2020), slip op. at 14, 21.

12. C & NC originally billed Grede for demurrage charges for service provided when Covia, Inc. (“Covia”) was providing sand to Grede’s New Castle foundry. When Covia was providing sand to Grede’s New Castle foundry, Covia was responsible for paying for the rail transportation involved. Covia went into bankruptcy in 2020 and was later discharged from bankruptcy. On information and belief, Covia was able to discharge in bankruptcy certain debts owed to C & NC.

13. Grede has refused to pay demurrage charges billed by C & NC for rail service provided when Covia was responsible for those charges. C & NC now claims those charges were owed by Grede for June-July 2021.

14. Despite C & NC’s assertion in its Petition for Exemption in No. AB-1093 (Sub-No. 2X) that rail service is continuing and would not be disrupted by allowing C & NC to discontinue its operations, Mr. Wendelin, who verified the Petition, demanded that Mr. Randy Neal, owner of the Neal transloading facility, pay Mr. Wendelin’s RMW Ventures over \$23,000 to acquire title to the rail switch into his facility, or RMW Ventures would physically remove the switch. Of course, if that switch were physically removed, rail service to the Neal transloading facility would be impossible.

15. On the first business day (July 12, 2021) after the Petition for Exemption in No. AB-1093 (Sub-No. 2X) was filed, Mr. Wendelin informed both Grede and Gelhar that he would revoke their credit (providing credit is customary in the railroad industry) if they did not pay all of his outstanding invoices by July 15, 2021. Gelhar offered to C & NC to submit disputed invoices to non-binding mediation by the STB’s Rail Customer and Public Assistance Program, but Mr. Wendelin did not respond to that offer.

16. When all of those outstanding invoices were not paid by July 15, 2021, Mr. Wendelin revoked credit for Grede and Gelhar, making them cash-basis customers of C & NC’s rail service.

17. Gelhar wired C & NC \$1998 on Friday, July 16, and C & NC delivered four loaded Gelhar railcars on Friday, July 16 to the Neal transloading facility.

18. The following week, Mr. Wendelin demanded that Gelhar pay C & NC approximately \$8800 for additional charges allegedly due, or C & NC would refuse to deliver the loaded rail cars on the new delivery day, Wednesday, July 21, 2021. Gelhar wired C & NC the amount demanded (approximately \$8800) but C & NC refused to deliver the loaded Gelhar rail cars.

19. On or about Thursday, July 22, 2021, Mr. Wendelin advised Gelhar and Grede that he was imposing still more charges, due to “congestion” (even though Grede is the only shipper on the C & NC), that he was imposing an embargo on rail service for Gelhar and Grede until they paid C & NC over \$31,000 in various charges that Mr. Wendelin alleges are owed to C & NC, a substantial portion of which were originally billed for rail service when Covia was responsible for the rail transportation rates and charges, and that he had refused to accept loaded Gelhar railcars in interchange from NS at New Castle.

20. If loaded Gelhar railcars were not delivered to the Neal transloading facility by Tuesday, July 27, 2021, the Grede New Castle foundry would soon thereafter have to shut down for lack of sand. On information and belief, no rail cars were delivered to the Neal Transloading facility on Tuesday, July 27, 2021.

COUNT I – UNLAWFUL EMBARGO

21. Paragraphs 1-20, *supra*, are incorporated herein by reference.

22. Under 49 U.S.C. §11101, the embargo imposed by C & NC during the week of July 18, 2021 is unlawful, because there was no circumstance, such as a washout, derailment, fire, or event of force majeure that might justify such an embargo.

23. The Board should declare that C & NC’s embargo was illegal, and order C & NC not to declare an embargo based on disputed fees and charges.

COUNT II – UNREASONABLE CHARGES

24. Paragraphs 1-20 are incorporated herein by reference.
25. Under 49 U.S.C. §11701, several of the charges being billed to Gelhar and Grede are “unreasonable” in that they are “overlapping charges” for the same event, *i.e.*, the alleged need to constructively place loaded Gelhar railcars on C & NC’s tracks if the loaded railcars cannot be delivered to the Neal transloading facility and placed on its tracks for transloading. EP 757, *Policy Statement on Demurrage and Accessorial Rules and Charges* (served April 30, 2020), slip op. at 14.
26. Under 49 U.S.C. §11701, several of the charges being billed to Gelhar and Grede are “unreasonable” because they were billed for circumstances beyond Grede’s and Gelhar’s reasonable control. EP 757, *Policy Statement on Demurrage and Accessorial Rules and Charges, supra*, slip op. at 21 (STB served Apr. 30, 2020) (“charges generally should not be assessed in circumstances beyond the shipper’s or receiver’s reasonable control”).
27. Demurrage charges originally billed to Grede for services performed are not owed by Grede to C & NC because Grede was not the customer of C & NC when the transportation related to those charges occurred. FD 36426, *Port of Benton, WA – Petition for Declaratory Order* (served July 15, 2021), slip op at 5 (“Accordingly, to assess charges under a tariff, a carrier must provide transportation or services to a customer after the customer has requested the carrier’s transportation or services under the tariff’s provisions. If a customer has not requested the carrier’s transportation or services under the tariff, and thus not agreed to the tariff’s provisions, the carrier’s charge is not a tariff charge.”). C & NC later claimed those charges were due for June-July 2021, but Grede disputes that it owes those charges no matter for what period they were billed.

28. The Board should determine that any charges that are overlapping, or were imposed for circumstances beyond Gelhar's and Grede's reasonable control, or were originally imposed for a time when Covia, not Grede, was responsible for rail-transportation costs, may not be collected by C & NC.

Part 2

EX PARTE APPLICATION FOR AN EMERGENCY SERVICE ORDER OR, IN THE ALTERNATIVE, PETITION FOR INJUNCTION REQUIRING CONTINUED RAIL SERVICE

Pursuant to 49 U.S.C. §11123, Gelhar and Grede hereby file an ex parte application for an emergency service order. In the alternative, Gelhar and Grede seek an injunctive under 49 U.S.C. §1321(b)(4) and 49 C.F.R. §1117.1 requiring C & NC to restore rail service and maintain that service in order to prevent irreparable harm. *See, e.g.,* NOR 42165, *Hasa, Inc. v. Union Pacific Railroad Co.* (served Aug. 21, 2019) (ordering UP to restore rail service until the Board could conduct further proceedings).

Delivery of loaded Gelhar railcars to the Neal transloading facility, for transloading and delivery of sand to the Grede New Castle foundry, is urgently and critically needed, to avoid an imminent shutdown of the Grede New Castle foundry. A shutdown of the Grede New Castle foundry would cause a substantial disruption of the automotive supply chain for both General Motors Corporation and Ford Motor Company.

The embargo imposed by C & NC on rail service for Gelhar and Grede was unlawful, because there were no circumstances that would prevent C & NC from providing needed rail service.

In EP 677, *Common Carrier Obligations of Railroads* (served Feb. 22, 2008), the Board stated:

“The common carrier obligation refers to the statutory duty of railroads to “provide [] transportation or service on reasonable request.” 49 U.S.C. § 11101(a).

A railroad may not refuse to provide services merely because to do so would be inconvenient or unprofitable.” *GS Roofing Products Co., Inc. v. STB*, 143 F.3d 387, 391 (8th Cir. 1998).”

This duty reflects the well-established principle that railroads “are held to a higher standard of responsibility than most private enterprises.” *General Foods Corp. v. Baker*, 451 F. Supp. 873, 875 (D. Md. 1978); *see also, Ethan Allen, Inc. v. Maine Cent. R.R. Co.*, 431 F. Supp. 740, 742-43 (D. Vt. 1977) (noting that “the quasi-public nature of railroads entails a higher degree of public responsibility than is required of most private corporations”).

When critical rail service is necessary, the Board will enjoin the railroad involved not to reduce or eliminate needed rail service, but instead to continue the needed rail service to preserve the status quo pending a determination by the Board of the merits of the dispute. NOR 42165, *Hasa, Inc. v. Union Pacific Railroad Co.* (served Aug. 21, 2019), slip op. at 2 (“To preserve the Board’s ability to provide meaningful and effective relief on the merits should Hasa prevail on its application or petition, it is necessary to temporarily maintain the status quo while the Board expeditiously considers the application and the petition. Accordingly, the Board will direct UP to maintain five-day per week service to Hasa until the Board has ruled on Hasa’s application and petition.”).

CONCLUSION

Complainants A.F. Gelhar Company, Inc. and Grede Holdings, LLC pray that the Board grant the relief sought in Counts I and II, and such other and further relief as may be appropriate, after providing Defendant C & NC Railroad Company an opportunity to answer or otherwise plead.

In the interim, and due to the urgent and critical need for rail transportation of Gelhar sand to Grede's New Castle, IN foundry, Gelhar and Grede respectfully request that the Board grant an ex parte emergency service order or, in the alternative, an injunction, as soon as possible, requiring Defendant C & NC Railroad Company to provide continued rail service, without interruption, until the Board can rule on the merits of the parties' disputes as set forth herein.

Respectfully submitted,

/s/ Jennifer M. Dudley

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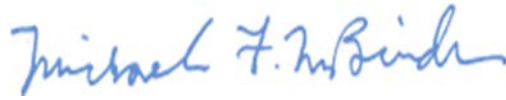


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Attorneys for A.F. Gelhar Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have served, this 30th day of July 2021, the foregoing Revised Complaint and Emergency Request for Injunction to Require Continued Rail Service of A.F. Gelhar Company, Inc. and Grede Foundries, Inc., by email, on Mr. Spencer Wendelin, owner and manager of C & NC Railroad Company, at swendelin@transmarkassociates.com, and as a courtesy to Mr. William Stewart and Ms. Louise Vuono, Vuono & Gray, attorneys for C & NC Railroad Company in STB Docket No. AB-1093 (Sub-No. 2X), at wstewart@vuonogray.com and lvuono@vuonogray.com.



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