

Law Offices

*John A. Vuono
Mark T. Vuono*
Dennis J. Kusturiss
Louise R. Vuono
William H. Stewart, III
William A. Gray, Retired*

VUONO & GRAY, LLC

310 Grant Street, Suite 2310
Pittsburgh, PA 15219-2383

*Telephone
412-471-1800
Facsimile
412-471-4477*

www.vuonogray.com

*Email Address
wstewart@vuonogray.com*

**Also Admitted in Florida*

August 13, 2021

302853

Re: C & NC Railroad, LLC
-A.F. Gelhar Company, Inc. and Grede Holdings, LLC
v. C & NC Railroad Company
(Docket No. NOR 42172)
Our File 6162

ENTERED
Office of Proceedings
August 13, 2021
Part of
Public Record

VIA E-FILING

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

Dear Ms. Brown:

In response to the Surface Transportation Board's Decision dated August 9, 2021 in connection with the above-referenced proceeding, we are submitting for e-filing C&NC Railroad, LLC's Answer to the Revised Complaint filed by Complainants, which includes a response to the application for emergency service order and petition for injunction filed by Complainants.

Sincerely yours,

VUONO & GRAY, LLC



William H. Stewart III

Enclosure

cc: Michael F. McBride, Esq. (w/enc.)
Robin M. Rotman, Esq. (w/enc.)

Before the
SURFACE TRANSPORTATION BOARD

A.F. GELHAR COMPANY, INC. N2402
County Road A, Markesan, WI 53946, and
GREDED HOLDINGS, LLC,
20750 Civic Center Drive, Suite 100
Southfield, MI 48076,

Complainants,

NOR 42172

C & NC RAILROAD COMPANY,
300 E. Walnut Street, Corydon, IN 47112

Defendant.

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

WILLIAM H. STEWART III, ESQ.
Pa. I.D. #209490
DENNIS J. KUSTURISS, ESQ.
Pa. I.D. #28003
Attorneys for C&NC Railroad, LLC
310 Grant St., Suite 2310
Pittsburgh, PA 15219
(412) 471-1800
(412) 471-4477 fax

August 13, 2021

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

1. The averments of Paragraph 1 are admitted upon information and belief.
2. The averments of Paragraph 2 are admitted upon information and belief.
3. The averments of Paragraph 3 are admitted in part and denied in part. It is admitted that Defendant's offices are located at 300 E. Walnut Street, Corydon, IN 47112. It is denied that Grede Holdings, LLC ("Grede") is the only rail customer of Defendant. To the contrary, Neal Scrap Metal, LLC ("Neal") is also a rail customer of Defendant, among others. By way of further response, all service is currently being provided at Neal's facility based on a standard railroad side-track agreement between Neal and C & NC Railroad. Further, the proper corporate name of Defendant is C & NC Railroad, LLC ("C & NC"); it is not related to a former non-operating railroad entity called C&NC, LLC that no longer exists. *See* Surface Transportation Board ("STB" or "Board") docket FD 33451.
4. The averments of Paragraph 4 are admitted in part and denied in part. It is admitted that C & NC is a Class III railroad. It is denied that C & NC is owned by RMW Ventures, LLC ("RMW"). Further, Mr. Wendelin is not a manager or employee of RMW or C & NC. Those entities are managed by third parties under management services contracts. Mr. Wendelin acts on behalf of C & NC in his capacity as a consultant under a management services contract. While it is admitted that RMW is owned by Mr. Spencer Wendelin, C & NC has no corporate affiliation with RMW and RMW is not involved in this matter. It is denied that C & NC was involved in the Board proceeding at FD 33565.

To the contrary, an entity called *C&NC, LLC* was involved in that proceeding and later merged into RMW pursuant to FD 33451. Accordingly, C&NC, LLC no longer exists. C & NC was later formed as a limited liability company in the State of Indiana on October 20, 2011.

5. The averments of Paragraph 5 are admitted in part and denied in part. It is admitted that C & NC leases the lines at issue from Norfolk Southern (“NS”) and is seeking authority from the Board to discontinue its operations in Docket No. AB-1093. The averments of the Revised Complaint concerning the C & NC’s Petition for Exemption are denied as a mischaracterization of said Petition, which speaks for itself. It is further denied that C & NC alleges in its Petition 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. To the contrary, C & NC has alleged in its Petition that NS has advised C&NC that it will resume rail operations over the Line upon the discontinuance of service by C&NC and that C&NC and NS are cooperating in preparing for an orderly transition of service, so that there should be no interruption in rail service.
6. The averments of Paragraph 6 are denied. To the contrary, NS terminated its month-to-month lease with C & NC. By way of further denial, NS has neither issued a notice of default to C & NC nor informed it that it has violated any lease provisions.

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

7. The averments of Paragraph 7 are admitted in part and denied in part. It is admitted that the railcars are not provided by C & NC. The remaining averments of Paragraph 7 denied since after reasonable investigation C & NC is without knowledge or information

sufficient to admit the truth of the averments. By way of further response, C & NC records show that the rail traffic destined to Grede varies considerably from week to week.

8. The averments of Paragraph 8 are denied since after reasonable investigation C & NC is without knowledge or information sufficient to admit the truth of the averments.
9. The averments of Paragraph 9 are admitted in part and denied in part. It is admitted that NS transports the loaded Gelhar railcars to interchange with C & NC in New Castle, IN and that C & NC thereafter transports the loaded Gelhar railcars to the Neal Scrap Metal transloading facility in New Castle (where the sand is off-loaded). It is denied that C & NC provides such service only at its discretion. To the contrary, C & NC schedules regular weekly service to the designated consignee, Grede, at the Neal facility in New Castle. By way of further response, C & NC is often called upon to provide extra switching and other ancillary services for Complainants' benefit in connection with the railcars involved. C & NC lacks knowledge to admit the truth of the averment that empty Gelhar railcars are returned to Gelhar by reverse routing.
10. The averments of Paragraph 10 are admitted in part and denied in part. It is admitted that Grede is responsible for paying all rail transportation charges provided by C & NC which benefit Grede. The remaining averments of Paragraph 10 are denied since after reasonable investigation C & NC is without knowledge or information sufficient to admit the truth of the averments. By way of further response, although C & NC has no knowledge concerning how it was decided which Complainant party would be responsible for paying the line haul transportation charges, Grede has refused to pay for ancillary services provided by C & NC on Complainants behalf directly related to the rail

transportation at issue. Additionally, when Gelhar started to supply Grede in early February 2021, Covia, Inc. ("Covia") was also supplying Grede with sand, which resulted in rail car congestion and traffic problems. Due to the congestion, at the direct request of Grede, Gelhar rail cars were held while the Covia cars were being unloaded first, a process that took place over a multi-week period. The holding of the rail cars resulted in the accrual of demurrage charges while Gelhar cars were being held on C & NC tracks and property. Shipments from Covia continued for some time after Gelhar became a supplier for Grede, which caused continuing congestion and traffic problems. C & NC had no control over the congestion and traffic problems. The holding of the rail cars resulted in Grede being responsible for substantial demurrage charges.

11. The averments of Paragraph 11 are denied. The implication that C & NC is seeking to have both Grede and Gelhar pay its bills is denied. Both Gelhar as the shipper and Grede as the consignee are responsible for C & NC's charges and C & NC started to send bills to both of them because of Grede's refusal to pay charges. In that way, the two of them can determine which will pay the charges. The remaining averments of Paragraph 11 are denied as conclusions of law to which no response is required. By way of further response, C & NC denies that it has billed for any "overlapping charges."
12. The averments of Paragraph 12 are admitted in part and denied in part. It is admitted that C & NC originally billed Grede for ancillary charges for services provided, including demurrage, when Covia was providing sand to Grede's New Castle foundry and that payment of many of said charges came from Covia. It is also admitted that Covia obtained a bankruptcy discharge from the bankruptcy court for certain debts it owed. The remaining averments are denied. C & NC is without knowledge or information sufficient

to admit the truth of the averment that Covia was responsible for paying for the rail transportation provided to Grede, as C & NC was not privy to the arrangements between Covia and Grede. By way of further denial, Grede as the consignee is legally responsible for all transportation charges and the discharge granted to Covia did not relieve Grede of responsibility for paying any unpaid C & NC bills for ancillary services provided for Grede's benefit.

13. The averments of Paragraph 13 are admitted in part and denied in part. It is admitted that Grede has refused to pay certain demurrage charges billed when Covia was supplying Grede. By way of further response, Grede has continued to refuse to pay demurrage charges billed to it after Covia stopped supplying Grede. It is denied that C & NC claims any charges owed by Covia were for June and July 2021. To the contrary, such charges were billed to Covia in 2020 and remain the responsibility of Grede as the consignee for the charges involved.
14. The averments of Paragraph 14 are denied. It is specifically denied that Mr. Wendelin demanded that Randy Neal pay for the switch in question under threat of physical removal. To the contrary, Neal has purchased the switch from RMW pursuant to a contract between RMW and Neal and as such there will be no interruption in the service. By way of further denial, neither RMW nor Neal are parties to this action and allegations concerning the switch are irrelevant to the dispute between the parties to this action.
15. The averments of Paragraph 15 are admitted in part and denied in part. All allegations concerning action taken directly by Mr. Wendelin are denied as any actions taken by Mr. Wendelin were done on behalf of C & NC and not on his own behalf. It is admitted that C & NC informed Grede and Gelhar that the company would revoke their credit if C &

NC's outstanding invoices were not paid by July 15, 2021. The remaining averments of Paragraph 15 are denied. By way of further response, C & NC's tariffs, which Complainants have, cover how disputes about demurrage should be handled and other provisions of the same tariffs permit C & NC to discontinue granting credit to customers that do not pay their bills.

16. The averments of Paragraph 16 are admitted in part and denied in part. All allegations concerning action taken directly by Mr. Wendelin are denied as any actions taken by Mr. Wendelin were done on behalf of C & NC and not on his own behalf. It is admitted that C & NC revoked credit for Grede and Gelhar upon their failure to pay all outstanding invoices by July 15, 2021, making them cash-basis customers of C& NC's rail service. By way of further response, the revocation of credit status for Gelhar and Grede, under C & NC's published and long-standing tariffs, was undertaken appropriately by C & NC. Further, while providing credit status is typical in the railroad industry, it is neither mandatory, nor a legal requirement.

17. The averments of Paragraph 17 are admitted.

18. The averments of Paragraph 18 are admitted in part and denied in part. All allegations concerning action taken directly by Mr. Wendelin are denied as any actions taken by Mr. Wendelin were done on behalf of C & NC and not on his own behalf. It is admitted that C & NC demanded the payment identified. It is further admitted that the amount demanded was wired by Gelhar, but service was performed on the following date because the wire arrived too late in the day for C & NC to be able to arrange for power and crews to complete the service same day. It is denied that C & NC refused to deliver the loaded Gelhar rail cars.

19. The averments of Paragraph 19 are admitted in part and denied in part. All allegations concerning action taken directly by Mr. Wendelin are denied as any actions taken by Mr. Wendelin were done on behalf of C & NC and not on his own behalf. It is admitted that C & NC advised Grede and Gelhar that it was imposing additional charges and that an embargo was being imposed. It is denied that the embargo on rail service for Gelhar and Grede was based on failure to pay various charges. To the contrary, the embargo has nothing to do with tariff charges; the embargo was based on an operational issue under AAR service rules and was put in place based on congestion at customer's location. It is further denied that Grede is the only shipper on the C & NC line. To the contrary, it is not a shipper at all but rather a consignee. Further, no part of the \$31,000 plus outstanding demurrage bills referenced in Paragraph 19 is associated with Covia shipments.

20. The averments of Paragraph 20 are denied since after reasonable investigation C & NC is without knowledge or information sufficient to admit the truth of the averments. By way of further response, Tuesday is not a regularly scheduled service date at New Castle; such service is regularly scheduled on Wednesdays.

COUNT I – UNLAWFUL EMBARGO

21. The responses to paragraphs 1 through 20 are incorporated herein as though fully set forth at length.

22. The averments of Paragraph 22 are denied as conclusions of law to which no response is required. By way of further response, the embargo imposed was based on track congestions/accumulations, as stated on the embargo document, and was lawful.

23. The averments of Paragraph 23 are denied as conclusions of law to which no response is required. By way of further response, the embargo was not based on disputed fees and charges. To the contrary, the embargo was based on congestions/accumulations, as stated on the embargo document, and was lawful.

COUNT II – UNREASONABLE CHARGES

24. The responses to paragraphs 1 through 23 are incorporated herein as though fully set forth at length.

25. The averments of Paragraph 25 are denied as conclusions of law to which no response is required. By way of further response, all charges were lawful and reasonable and based on C & NC's tariffs, the provisions of which were properly and lawfully applied.

26. The averments of Paragraph 26 are denied as conclusions of law to which no response is required. By way of further response, all charges were lawful and reasonable and based on C & NC's tariffs, the provisions of which were properly and lawfully applied.

Further, the circumstances resulting in the majority of the demurrage charges billed by C & NC to Grede were not just within Grede's reasonable control, they were directly caused by Grede's actions. *See* response to Paragraph 10 above.

27. The averments of Paragraph 27 are denied as conclusions of law to which no response is required. By way of further response, there are no demurrage charges billed to Grede in connection with services provided when Grede was not C & NC's customer¹. Although Covia on Grede's behalf paid for services performed by C & NC for Grede, Covia was never a customer of C & NC; Grede was at all times relevant hereto C & NC's customer and remains responsible for all demurrage and other ancillary service charges in connection with C & NC's services to Grede. By way of further response, C & NC did

¹ C & NC has provided services to Grede since 2011.

not originally claim that certain charges were due for 2020 demurrage when Covia was Grede's supplier and then later claim those same charges were actually due for June-July 2021. The 2020 charges and June-July 2021 charges are for separate and distinct services provided by C & NC on Grede's behalf. Further, Grede as the consignee is responsible for all of C & NC's charges including demurrage.

28. The averments of Paragraph 28 are denied as conclusions of law to which no response is required. By way of further response, all charges were lawful and reasonable and based on C & NC's tariffs, the provisions of which were properly and lawfully applied. Further, Grede as the consignee is responsible for all of C & NC's charges including demurrage, regardless of who the sand supplier/consignor was.

Part 2

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

Complainants' ex parte application for an emergency service order should be denied because there is no situation requiring immediate action to serve the public under 49 U.S.C. §11123. Specifically, there has not been an unauthorized cessation of operations, as C & NC has continued to provide service to Complainants.

Similarly, Complainants' Petition for Injunctive Relief under 49 U.S.C. §1324(b)(4) and 49 C.F.R. §1117.1 should be denied because rail service has not been stopped and therefore there is no rail service to be restored. The authority cited by Complainants as supporting their Petition, NOR 42165, *Hasa, Inc. v. Union Pacific Railroad Co.* (served Aug. 21, 2019), involved a situation where Hasa alleged that Union Pacific, after providing five-day per week service to Hasa for over 50 years, announced its intention to reduce service to three days per week, and the

Board ordered Union Pacific to continue five-day per week service until the Board ruled on Hasa's Application and Petition. Here, C & NC has announced no intention to make changes to the services that it has been providing to Complainants. Instead, C & NC has merely insisted on being paid in full for past services that it has provided to Complainants.

C & NC has no intention to reduce or eliminate the rail service being provided to Complainants prior to authorization from the Board to discontinue its operations. Complainants' requested relief of enjoining C & NC not to reduce or eliminate service and continue rail service to preserve the status quo would simply require C & NC to provide the service it has been providing and continues to provide, and therefore is unnecessary.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim for Relief)

1. Complainants fail to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

(Jurisdiction)

2. The Board lacks jurisdiction over Complainants' claims to the extent the claims involve movements pursuant to contracts.

THIRD AFFIRMATIVE DEFENSE

(Standing)

3. Complainants lack standing to assert the claims for damages asserted.

FOURTH AFFIRMATIVE DEFENSE

(Estoppel, Waiver)

4. Complainants' claims are barred, in whole or in part, by the doctrines of estoppel and waiver.

FIFTH AFFIRMATIVE DEFENSE

(Statute of Limitations)

5. Complainants' claims are barred, in whole or in part, by the applicable statute of limitations.

SIXTH AFFIRMATIVE DEFENSE

(Failure to Mitigate)

6. Complainants are barred from recovery by reason of their failure to mitigate, minimize, or avoid the damages alleged in the Complaint.

SEVENTH AFFIRMATIVE DEFENSE

(Set-Off)

7. To the extent that Complainants have suffered any damages, such damages should be set off by amounts owed to C & NC for unpaid ancillary services.

EIGHTH AFFIRMATIVE DEFENSE

(Compliance With Tariffs)

8. Complainants have failed to comply with C & NC's legal tariffs.

NINTH AFFIRMATIVE DEFENSE

(Failure to Join Indispensable Party)

9. The track in question is not owned by C & NC and is leased to C & NC by NS.

10. On May 12, 2021, NS informed C & NC that it was terminating the lease for the track as of August 10, 2021.

11. NS subsequently informed C & NC on August 3, 2021 that NS was extending the lease tenancy of C & NC to terminate on the earlier of October 27, 2021 or the earliest date permitted by the Board in a future decision granting C & NC's petition to discontinue its common carrier obligation.

12. Complainants have failed to join NS, which is an indispensable party to this action and is directly affected by the relief sought in the Complaint.

WHEREFORE, C & NC requests that the Complaint be dismissed with prejudice; that the Board deny the relief sought in Counts I and II of Complainants' Complaint; that the Board deny Complainants' request to grant an ex parte emergency service order or an injunction required Defendant to provide continued rail service, without interruption, because such remedies are unnecessary where rail service has not been stopped and does not need to be restored; that no relief of any kind be awarded to Complainants; that C&NC be awarded its costs; and that the Board grant C & NC such other and further relief as may be appropriate.

Respectfully submitted,


William H. Stewart III, Esq.
Dennis J. Kusturiss, Esq.
Vuono & Gray, LLC
310 Grant Street, Suite 2310
Pittsburgh, PA 15219
Attorneys for C&NC Railroad, LLC

CERTIFICATE OF SERVICE

I hereby certify that I have served, this 13th day of August, 2021, the foregoing Answer to Revised Complaint by email on counsel for Complainants, Jennifer M. Dudley, Vice President and General Counsel of Grede Holdings, LLC, at Jennifer.Dudley@grede.com, and Michael F. McBride and Robin M. Rotman of Van Ness Feldman, LLP, at mfm@vnf.com and rmr@vnf.com, respectively.


William H. Stewart III, Esq.
Dennis J. Kusturiss, Esq.
Vuono & Gray, LLC
310 Grant Street, Suite 2310
Pittsburgh, PA 15219
Attorneys for C&NC Railroad, LLC