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April 29, 2022

Ms Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E. Street, SW
Washington, D.C. 20423

IN RE: STB Docket No. EP 770
Urgent Issues in Freight Rail Transportation

Dear Ms. Brown:

Attached to this letter for inclusion in the record of this proceeding is the written version of the testimony which I provided orally as counsel for Sweetener Supply Company and TransDistribution Brookfield Railroad on the second day of the hearings (April 27th) held in the hearing room of the Surface Transportation Board.

Please contact me if you have any questions.

Sincerely,



David C. Dillon, Counsel for
Sweetener Supply Company and
TransDistribution Brookfield Railroad

**David C. Dillon, Esq., on behalf of
Sweetener Supply Company (SSC) and
Trans Distribution Brookfield Railroad (TBFR)**



Our purpose here today is to bring to the attention of the Surface Transportation Board ongoing problems being imposed by BNSF Railroad (hereinafter "BNSF") on the adjacent entities consisting of: Sweetener Supply Company, an Illinois corporation (hereinafter "SSC"), and the switching railroad, TransDistribution Brookfield Railroad Company (hereinafter "TBFR"), a Class III Terminal Switching Railroad, operating exclusively as an onsite switch carrier on the property of SSC, and the Interchange Track of BNSF at SSC's location.. SSC is located at 9501 Southview Avenue, Brookfield, Illinois. It is also located directly adjacent to the BNSF Railroad East/West main line running from Chicago to Eola, Illinois, and points West.

INFORMATION ABOUT SSC, TBFR AND BNSF

SSC is a family-owned company, which has been located at its present site since 2000. In 2015, SSC formed TransDistribution Brookfield Railroad Company by filing Articles of Incorporation with the Illinois Secretary of State in January of 2012. It filed its Verified Notice of Exemption with the Surface Transportation Board on December 10, 2014. It received its Verified Notice of Exemption under 49 CFR §1150.31, to acquire from SSC, the operation of the switching tracks and overall railroad switching operation pursuant to an Operating Agreement with BNSF. The TBFR is exclusively a Class III Terminal Switching Railroad providing switching service for SSC. It operates on approximately 2,450 feet (0.46 miles) of track referred to as the BNSF/TBFR, Brookfield Transload facility in Brookfield, Illinois, plus rights to enter onto the BNSF Interchange Track at the SSC plant at Brookfield, Illinois.

SSC gets its cars at its Brookfield site from BNSF switch trains, through a car movement process as follows. Cars arrive at Eola, Illinois on BNSF road freight trains at BNSF's Yard.

SSC obtains computerized daily information on loaded cars arriving at the BNSF Eola yard. SSC then communicates to BNSF the preferred cars to be brought to SSC's Brookfield site. At the present time, BNSF hauls the inbound cars from Eola yard, right past the Brookfield SSC, and BNSF owned Interchange Track, further East into BNSF's Cicero yard. The Interchange takes place between BNSF and TBFR/SSC. Later, BNSF hauls the loaded inbound cars West from Cicero yard, back to the SSC Brookfield site. BNSF brings loaded inbound cars from Eola to BNSF's Cicero yard three days per week. The inbound loaded cars are charged a daily demurrage fee of \$150 per carday, if they arrive at Cicero Yard before 2:15 p.m. If they arrive after 2:15 p.m., they get a free carday. The expectation is that all cars BNSF brings to Cicero will be pulled to the 27 car Interchange Track at SSC Brookfield. Any loaded cars brought to Cicero yard not taken to the SSC/BNSF Interchange Track, stay on at Cicero, at \$150.00 per carday demurrage, until they arrive at the BNSF Interchange Track at SSC Brookfield. The result to SSC is high demurrage costs (see attachment A), and shutdowns for SSC, and SSC's customers, due to SSC not having the cars with a variety of ingredients, which they need unloaded to keep the plant running.

SSC DEMURRAGE COSTS AND OPERATIONAL PROBLEMS RESULTING FROM POOR CAR SWITCHING

SSC objects to the manner in which freight cars are being delivered and pulled by BNSF at its 27 car (+/-) Brookfield Interchange Track, owned by BNSF and used by BNSF and TBFR, and also the manner in which BNSF is charging demurrage to TBFR/SSC. Details will be provided herein. SSC is a leading manufacturer and marketer of food grade ingredients offering a full lineup of sugars, corn sweeteners, molasses, honey, and plant-based cellulose fibers used in soft drinks, baked goods, and other purposes. The operation works seven (7) days a week, 24 hours a day. The Company employs some 150 people, providing them with attractive wages

and benefits. The company provides bulk ingredients to major food and drink processors. Rail freight car shipments are solely delivered to SSC via the BNSF Railroad. However, BNSF limits its loaded car deliveries to the Interchange Track at SSC to Monday through Friday. TBFR brings loaded cars to loading points on tracks on SSC's site, then when unloaded, returns the empty cars to the Interchange Track. BNSF then brings the cars back to the SSC suppliers..

SSC could process more of its products at the Brookfield site, if BNSF would deliver loaded cars and pull-out empty cars on the Interchange Track on Saturdays and Sundays. This would enhance the businesses of both SSC and SSC's customers. Further, it would add to BNSF's business. It also would minimize the car demurrage (\$300 per car, per weekend) which SSC is being forced to pay. This demurrage is incurred as a result of cars being left at the Cicero yard on Saturdays and Sundays. For the last 24 months, SSC's demurrage bills for Saturday and Sunday cars left on the Interchange Track total \$341,700 (see Attachment A). More SSC jobs could be created, and greater and more reliable deliveries of SSC's finished products could be truck delivered to SSC's customers. This could be accomplished if BNSF would serve the plant with deliveries and pulls on Saturday and Sunday of each week. This has been repeatedly requested of BNSF by SSC, to no avail.

BNSF's response to SSC's request for the necessary switching, up to now, is not only to refuse to provide Saturday and Sunday car deliveries of loaded cars and pulls of empty cars to and from the Interchange Track at SSC Brookfield, but also to charge \$150.00 per carday in demurrage charges for Saturday and Sunday cardays at BNSF's Cicero yard. Those cars are here for the sole reason that BNSF will not serve the plant on Saturday and Sunday. The charges are unfair. They are based on the premise presented to SSC by BNSF:

"We won't provide switching of cars on Saturday and Sunday, but we will charge demurrage on the cars sitting on the Interchange Track Saturday and Sunday (and cars at Cicero yard)."

The result is an unjustified charge levied by BNSF against SSC/TBFR as follows:

Demurrage fee per carday = \$150.00 x 2 car days per car on site
x total capacity of 27 cars on the Interchange
Track = \$8,100 x 52 weeks = up to \$421,200 per year in
demurrage costs, just on Saturday and Sunday cars.
More may be found elsewhere.

The latest known actual example of cardays charged with demurrage Saturday and Sunday at SSC Brookfield total \$341,700 over a period of 24 months. There could be more demurrage charges from causes other than not serving the plant on Saturdays and Sundays.

**SSC IS NOT ONLY BEING MADE THE RECIPIENT OF
UNDUE DEMURRAGE COSTS, DUE TO BNSF'S REFUSAL
TO PROVIDE SATURDAY AND SUNDAY SWITCHING,
BUT ALSO, A RECEIVER OF RAILROAD INDUSTRY-WIDE
SERVICE PROBLEMS WHICH LEAD TO SHUTDOWNS.**

As is the case for all of the seven remaining Class One Railroads, BNSF Railroad operates its freight business 365 days a year, seven days a week, 24 hours a day, yet it refuses to service SSC on Saturday and Sunday. It is recognized that much of the INDUSTRY switching of freight car deliveries and pulls in urban areas is done after the first shift, between the afternoon and night shifts and on weekends. Railroads have long used train crews which operate up to 12 hours a day (on overtime pay) in order for the Railroads to serve their customers, as the freight is needed. The current continuing media commentary on the supply chain failures point out repeatedly the major causes of unsatisfactory and irregular rail service. The railroad and shipping publications, including *TRAINS* Magazine, *TRANSPORT TOPICS*, and others, as well as the general media, repeatedly point out:

- The major railroads have eliminated some 25% of their employees' positions in the past two to three years, and,

- The major railroads have stored hundreds, if not thousands, of locomotives and freight cars all over the country. This makes for difficulty in putting the needed numbers of train crews to work, emptying rail yards, and taking freight cars to their final destination—the consignee's place of business. SSC employees frequently are told by BNSF people in response to service requests, "We don't have locomotives or crews available."

- According to the trade press and other sources, overtime pay for trainmen to maximize the movement of freight cars needed by rail customers is now looked upon with disfavor by railroad management. Operating costs are to be contained, operating ratios are to be kept low and customers are given minimum service. Cars instead are left delayed until they can be brought to their destination, without the use of overtime pay to permit crews to complete their work, in order to cut railroads' operating costs.

- Much has been said in the trade press and general media concerning railroads having adopted the practice of operating fewer but much longer freight trains (as much as three miles long). The goal is once again, to cut costs. This method of operation causes car delay, as enough cars are gathered and classified to make up the very long trains. These types of trains have to be put together in switch yards, with cars properly put in classified sections within the train. This causes further delay. Then additional time is consumed by tying up two to three miles of track, blocking movements out of the yard, while two to three miles of freight car brakes are inspected and tested. This is required by federal law. On arrival, it takes longer to put such

a train into various yard tracks, and to “dig out” cars needed by their consignees. Thus, arriving cars in such large numbers delay destination switching and delivery of freight cars to customers.

These compounding delays create supply chain failures, and result in reduced industrial production and fewer jobs as consignees wait for the final delivery of inbound loaded cars at their plant sites.

- Another aspect current railroad practices create, despite the higher cost, is the greater use of trucks, as recently reported in *The Wall Street Journal*. This hurts companies’ efforts to minimize their carbon footprint, which is coming under scrutiny by Boards of Directors.

- Demurrage costs are one way that railroads prevent wastage of car days. However, SSC’s business is being irreparably harmed due to freight car demurrage costs incurred. This is caused, not by SSC’s creating delays of receipt of inbound cars, and/or outbound cars, but by car delays resulting from BNSF’s refusal to serve the plant on Saturday and Sunday. Another factor is SSC’s inability to get from BNSF the cars with the specific type of freight needed to keep their plant running and their customers adequately supplied. And further, the ability for SSC to produce sufficient amounts of its products for its customers to keep their own businesses running is also damaged.

SSC'S AND TBFR'S PARTICULAR SERVICE PROBLEMS IMPOSED BY BNSF RAILROAD

The SSC rail freight receiving, and dispatching operation consists of receiving freight carloads of dry bulk and liquid sweeteners, which are brought to its site by BNSF Railroad.

The process is:

- (a) to have the BNSF road trains bring the inbound loaded cars to SSC's Eola Yard;
 - (b) to then have a BNSF switch train take the loaded cars right past SSC's Brookfield plant and the BNSF Interchange Track, on the switch train's way to Cicero Yard;
 - (c) demurrage costs billed to SSC begin at BNSF's Cicero yard (Cicero, IL). If the loaded cars arrive after 2:15 p.m., they are given a free carday. Arrival at Cicero before 2:15 p.m. costs the SSC customer one \$150 carday for each loaded car brought to Cicero yard; (this happens even though the cars are still in BNSF possession, on their completion of their trip).
-
- (d) cars are then taken to the Interchange Track at the SSC Brookfield plant;
 - (e) cars then are removed from BNSF's Interchange Track and are switched to unloading spots at SSC Brookfield, by the TBFR Railroad;
 - (f) TBFR then returns the empty cars back to the Interchange Track; and
 - (g) BNSF then comes the next day to remove the empties, and place loaded inbound cars on the Interchange Track, for the cycle to begin again.

These deliveries of loaded cars and the associated removals of empty cars from the SSC site, take place via the BNSF Railroad switch train five evenings or nights per week, Monday through

Friday. But BNSF refuses to provide service on Saturday and Sunday, which are two of the busiest days in freight railroading. So, SSC has a situation beyond its control, which limits or stops the manufacture of its products by SSC, sometimes causing SSC shutdowns, and also causing shutdowns of SSC's customers. This results in:

- job losses
- lost profits
- customer dissatisfaction and search for other suppliers
- increased costs to SSC for substituting truck deliveries incurred by SSC in order to prevent its customers from having to shutdown
- \$150.00 per carday demurrage charges to SSC for the two cardays (Saturday and Sunday) each freight car generates because BNSF will not bring them from the Interchange Track.

SSC receives its inbound ingredients for its manufacturing of food products by rail freight car delivery service performed by BNSF Railroad, with the final movement by the BNSF being the moving of the inbound loaded cars to the Interchange Track at SSC's/TBFR's property. The final railroad to handle these cars delivered to the Interchange Track is the Class III Switching Railroad TBFR. The delivery by BNSF begins by filling the Interchange Track. The TBFR then switches the cars from the Interchange Track to the unloading locations on SSC tracks at its plant. Until the inbound cars are placed on the BNSF outbound Interchange Track, they are in the possession of the BNSF Railroad. The BNSF switch train brings these loaded ingredient cars to the BNSF-owned Interchange Track on the SSC/TBFR site. After the cars are

emptied, TBFR returns them to the Interchange Track where the BNSF switch train brings them to their Cicero yard. Then the next cycle begins with the next days' arrival of BNSF's daily switch train delivery of loaded cars.

A BRIEF SUMMARY OF THE SSC/TBFR FACILITY AND OPERATION

The SSC Southview Avenue property includes:

- a large three-story building which contains SSC's processing equipment, which it uses in creating its food ingredients and in completing the transload movement on site—removing components from inbound freight cars;
 - various SSC tracks are used by TBFR and SSC to get the materials unloaded and into the building for transloading;
-
- A major question in the processing of inbound freight cars from BNSF to TBFR on the Interchange Track is, why does the BNSF not pull the loaded cars in from Eola, directly to SSC's plant, and then spot them on the BNSF Interchange Track, and then take the empty cars from the Interchange Track to the Cicero Yard about 1.5 miles East? This would shorten the amount of time needed to get the loaded cars from Eola to SSC's Brookfield Plant, and it would eliminate SSC having to pay to BNSF at least one \$150 per carday demurrage charge on each car, which has not yet been delivered to SSC. This method of car delivery would reduce cardays billed to SSC by BNSF and reduce fuel and crew costs of BNSF taking the cars from Eola Yard to Cicero Yard, then back to SSC Brookfield. It would no longer be required to pull

the SSC cars in BNSF's train right past SSC Brookfield on the way to Cicero yard, wasting time, fuel, and wage costs.

- Another unanswered question is, why are inbound loaded cars for delivery to the SSC Interchange Track put on freight car demurrage charged to SSC, when the cars are still in BNSF's possession in BNSF's Cicero Yard, without the cars having been brought to the BNSF/TBFR Interchange Track? At that time the cars are still in transit by BNSF, completing the line haul. There is no basis to put these cars on daily demurrage. Further, in cases where the BNSF has "bunched" these cars to a number in excess of the 27-car capacity of the Interchange Track, that is a problem created by BNSF, not TBFR or SSC. If the cars have been "bunched" by BNSF, no demurrage should be paid. If the cars have not yet been put in TBFR's possession at the BNSF/Brookfield Interchange Track, no demurrage should be charged. The only thing preventing BNSF's delivery to the Interchange Track would be BNSF "bunching" cars in excess of the 27 cars (+/-) that the TBFR/SSC Interchange Track will hold, or BNSF's lack of an engine and crew to complete the line haul delivery of the cars to the Brookfield BNSF/TBFR Interchange Track.

SUMMARY OF SSC's FREIGHT CAR SERVICE PROBLEMS WHICH SSC HAS ENCOUNTERED FROM BNSF RAILROAD

There are several types of problems which have been and continue to be incurred by SSC. The first of these is:

1. Poor and irregular delivery of loaded cars to SSC/TBFR's Interchange Track and

removal of the unloaded cars from the Interchange Track. Secondly, SSC has grown into a 7-day a week, 24 hour a day manufacturer, which currently is limited to being switched to five days a week, but never Saturdays or Sundays. The carload business which BNSF enjoys at the SSC site has increased from 1,506 cars per year in 2016, to 2,172 cars per year in 2021. The present BNSF switching service results in production shutdowns and irregularity on the part of both SSC and SSC's customers. SSC's customers also receive shutdowns, because when SSC is shut down, so are its customers, due to an inability to get SSC's ingredient material cars placed on the Interchange Track to be unloaded at SSC. Once on the Interchange Track, the cars are removed by TBFR's track mobile and crew and spotted on the parts of SSC's trackage, which access the specialty parts of SSC's operation. From there, the loaded cars are promptly unloaded by TBFR's crews and specialized unloading equipment. The material is then put into SSC's production process, and the unloaded cars are not on the Interchange Track.

2. The third major operating problem with BNSF is the following: BNSF's absolute refusal to work with SSC by delivering loaded cars and pulling out empty cars to be put on the Interchange Track for BNSF to remove on Saturdays and Sundays. The reason BNSF has given for denying Saturday and Sunday service is that it does not have enough crews and locomotives to provide switches on Saturday and Sunday. As stated earlier, SSC is a seven day a week, 24 hour per day business. Railroads are also well-known to be 24/7 operations. SSC's business with BNSF is mutually beneficial, having grown from 1,506 cars per year in 2016 to 2,175 cars in 2021. The poor level of service being provided by BNSF is creating a paralysis of a growing business, a business which could grow even bigger and more beneficial to both BNSF and SSC, if SSC had adequate rail freight service.

3. The fourth problem, “bunching,” arises because SSC’s inbound carload freight business with BNSF has grown by an overall 44% since 2016, as stated above. The number of inbound cars went to 2,172 for the year 2021. SSC could handle the latter number of cars and even more if BNSF were moving cars from Eola to SSC Brookfield on a regular basis. Currently the BNSF switch train from Eola to Cicero yard runs on Tuesdays, Thursdays, and Saturdays only. There needs to be action taken to see that SSC gets the number of needed cars each day at the SSC site, BNSF Interchange Track. The inbound car movements from BNSF would be even more efficient if the switch train movement from Eola Yard were made directly to SSC Brookfield. This could be done in the late hours after the commuter train rush. The cars could be taken to SSC’s Interchange Track directly, probably saving SSC at least one carday for each car.

If these cars moved from Eola to Cicero consistently, there would not be a problem created by “bunching,” as there is now. Nor would SSC have the problem of not enough of the several kinds of materials at the Brookfield plant which are needed from the different freight cars in order to keep its plant running at the high capacity level the plant needs in order to keep its customers from having shut downs, just as SSC has shutdowns because BNSF is not providing it with the necessary movement of cars from Eola to Cicero.

As a result, SSC is forced to shut down some of its operations, when a lack of material arises due to not being given the necessary number of freight cars due to an inadequate movement of cars per week. In addition, the customers of SSC are large manufacturers of soft drinks, baked goods, and the like. SSC’s customers must shut down just as SSC itself must shut down, losing business opportunities. SSC’s customers also are forced to shut down when SSC

cannot provide them with their ingredients.

ROOT CAUSE OF PROBLEMS

Inadequate service. SSC is a large and growing business, serving many large customers. This company has provided well-paying jobs for its employees. The SSC Interchange Track to which:

- BNSF's switch crews bring inbound loaded cars from Eola yard to Cicero yard three times a week, Tuesday, Thursday, and Saturday. This movement of cars is not sufficient to handle the number which SSC could process, if available, thereby preventing production of more of its products and making more new jobs. The cars that BNSF moves to Cicero yard on Saturdays are not available to SSC until Monday, which adds to the inadequate service, and under present procedures, causes SSC to pay for demurrage in cases where SSC does not yet possess the inbound loaded cars.
- On the Monday through Friday deliveries at SSC Brookfield, BNSF places the loaded cars on SSC's property, where they are needed to keep manufacturing food ingredients.

- As the loaded cars get emptied, the TBFR moves the now empty cars to the shared BNSF/TBFR Interchange Track so that BNSF can remove all empty cars from this track.
- SSC is a 7-day per week, 24 hour per day business. Since SSC's requests to BNSF for more switches, particularly on Saturday and Sunday, have been repeatedly refused, SSC's business has been and continues to be impaired by poor rail service. In addition to material shortages on Saturday and Sunday resulting in less products to sell, BNSF still requires a demurrage charge of \$150.00 per day to be billed to SSC.

Thus, a car delivered to SSC Brookfield on Friday, but not switched on Saturday or Sunday, will incur two days of demurrage charged at \$150.00 per day. Cars left at Cicero yard on Saturday and Sunday would acquire a \$150.00 per day weekend charge of \$300.00 per weekend and could create an annual cost as much as \$234,000 per year.

**ALLEGED REASONS FOR BNSF'S REFUSAL TO
PROVIDE MORE SWITCHING TO TBFR AND INCREASE
JOBS, BUSINESS AND MORE INCOME FOR ALL**

The management of BNSF has responded to SSC and TBFR's repeated requests to allow their business to grow even more than the 75% revenue growth, which it has grown in the past six years, with the same excuse all of the seven Class One railroads use when asked to supplement inadequate service, i.e.,

“We do not have the crews or the locomotives to provide more service.”

The reason for that is the 25% reduction in employment with the Class One Railroads, including BNSF, and the fact that thousands of locomotives have been stored serviceable. This negates the common carrier service obligation.

POSSIBLE ALTERNATIVES TO BE UTILIZED TO GET MORE NEEDED CARLOADS OF INGREDIENTS

SSC has had to resort to inbound trucks shipping on a number of occasions. The Company desires to avoid this due to high costs. Secondly, SSC, along with its customers, desire to minimize their respective carbon footprints. Truck usage will only make those worse.

For the above reasons, SSC and TBFR are left with only the alternatives of either obtaining a reciprocal switching railroad to pull and place cars from either the Eola yard or the Cicero Yard to SSC-Brookfield (and reverse), or applying for trackage rights over BNSF from Eola yard to SSC's Brookfield facility. This would be a last resort. But it is an option. If trackage rights are the only alternative, TBFR will have to apply to the STB for trackage rights over BNSF from Eola to Brookfield. TBFR would have to get their engineer-conductors trained and qualified to operate trains on a Class One railroad (BNSF), with a request for trackage rights between SSC and BNSF's Cicero Yard. Statute and case law show that this “forced cooperating” is available if the STB wishes to so decree. Obviously, it is preferable to avoid that, and provide SSC with 7-day switching. But that is an available remedy.

**LEGAL SUPPORT FOR REMOVAL OF CAR DEMURRAGE
CHARGED BY BNSF ON CARS AT SSC BROOKFIELD**

In the case of Illinois Central RR v. Ready Mix Concrete, Inc. E.D La. 1971, 323 F.Supp.

609, the court ruled:

“Demurrage” is a daily rate charged by a railroad to a consignee on each railroad car which the consignee fails to unload within a certain time after the car has been actually or constructively placed by a railroad at the consignee’s disposal for unloading.”

Further, “where freight cars are kept on the property of the shipper for convenience if the carrier until they are appropriated to the use of the shipper, demurrage cannot be charged.” (emphasis added)
Chicago & N.W. Ry Co. V. Union Packing Co., D.C Neb. (1971)
326 F.Supp. 1304

For the foregoing reasons, it can be seen that the demurrage charges being levied against SSC/TBFR for freight cardays incurred as a result of BNSF’s operating decisions, to not move cars consistently to BNSF’s Cicero yard and then to the BNSF Interchange Track at SSC’s site, are illegal and unjust. BNSF’s other alternative would be direct delivery of cars from Eola to SSC Brookfield and return. This would be the most effective way to proceed. So, the demurrage problem being billed to SSC is created by BNSF, not SSC. Further case law adds additional strength to the idea that, having created the car delay problem, BNSF has no legal right to compound the problem by adding demurrage charges to SSC’s production costs and other operating problems.

BNSF has caused a great deal of unwarranted demurrage to be paid to BNSF (\$314,700) over the past 24 months. (see Exhibit A)

**SSC AND TBFR'S LEGAL POSITION CONCERNING
BEING REQUIRED TO PAY DEMURRAGE CHARGES
OF \$150.00 PER CAR PER DAY FOR CARS TENDERED
TO IT BY BNSF IS THAT BNSF IS RESPONSIBLE FOR SSC/
TBFR BEING UNABLE TO REMOVE THE CARS TO BNSF**

The major problem in the matter of BNSF requiring that SSC/TBFR pay demurrage on cardays in excess of free day due to the consignee SSC, is that

- BNSF delivers loaded cars to SSC/TBFR on Friday.
 - SSC is still left in possession of the now empty cars on Saturday and Sunday because BNSF will not remove them from the Interchange Track.
 - SSC is being required to pay demurrage for car days brought about by BNSF Saturday and Sunday.
-

So, the situation created by BNSF is that, BNSF wants to charge two demurrage days per Saturday and Sunday cars not yet delivered by BNSF, because BNSF refused to switch SSC on Saturday and Sunday. Thus, BNSF is demanding payment of demurrage charges of \$150.00 per day, which demurrage days are solely being created by BNSF.

**AUTHORITY FOR ISSUANCE OF A RULING THAT
BNSF'S CLAIM FOR DEMURRAGE TO BE PAID TO IT
FOR CARDAYS WASTED AT SSC BROOKDILED IS ILLEGAL**

In STB Docket No. E.P. 757 POLICY STATEMENT ON DEMURRAGE AND ASSESSORIAL RULES AND CHARGES, (4/30/2022), the STB stated (page 4):

“ . . . the overarching purpose of demurrage is to incentivize the efficient use of rail assets (both equipment and track) by holding rail users accountable when their actions or operations use those sources beyond a specified period of time, NAPSEP 75 slip op. @6-7, citing Kittanig, 253 U.S. @323. That period of time must be reasonable and further, it is unreasonable to charge demurrage for days attributable to the rail carrier.” See e.g., “RR Salvage & Restoration, Inc., NOR 42102, et al. slip op. @4 (a shipper is not required to compensate a railroad for delay in returning its asset if the railroad and not the shipper is responsible for the delay.)” (emphasis added). The Board reiterated its concerns about demurrage charges for delays that a shipper or receiver did not cause. NPPS, EP 757, slip op. @7 citing Utah Peat. rej. Pet. for Declaratory Order; Kenco Logistic Service, LLC (FD 36131, slip op. @12 N38) (Exemption of Demurrage Regulations) EP 462, slip op. @4. (emphasis added)

Note that in the Oversight Proceeding, EP 754, the Board Stated:

“Congress framed the purpose of demurrage not in terms of cost recovery . . . but rather as incentive.” Further at Docket No. EP 757, the STB noted in the Oversight Proceeding and the STB stated: “The compensatory function of demurrage is achieved, along with its incentive function, by permitting the delivering carriers to retain the charge assessed for a rail user causing

undue detention of the rail assets.” In this case, the delivering carrier is TBFR. So, SSC and TBFR respectfully requests that the STB direct that the demurrage billed from the cars placed by BNSF in the Cicero yard and not switched to the SSC/TBFR on Saturday and Sunday, removes SSC/TBFR from any demurrage responsibility for those cars. (emphasis added)

The Oversight Proceeding. EP 754 went even further at EP 754 - “CSXT agreeing that demurrage should not be assessed where charges penalize a shipper who is powerless to avoid or abate the detention.” The position of SSC and TBFR is one of total lack of power to avoid or abate the detention which is being charged by BNSF. (emphasis added)

Regarding the case of Illinois Central RR v. Ready Mix Concrete, Inc., E.D. La. 1971, 323 F.Supp 609, the court ruled:

“Demurrage” is a daily rate charged by a railroad to a Consignee on each railroad car which the consignee fails to unload within a certain time after the car has been actually or constructively placed by a railroad at the consignee’s disposal for unloading.” (emphasis added)

Further, “where freight cars are kept on the property of the shipper for convenience if the carrier until they are appreciated to the use of the shipper, demurrage cannot be charged.” Chicago & N.W. Ry Co. v. Union Packing Co., D.C. Neb. (1971) (emphasis added)

In the instant case, there is no failure to unload the car by the consignee. The problem is created by BNSF’s failure to move cars from their Eola yard to Cicero yard consistently allowing Cicero to switch on the Interchange Track at SSC/TBFR.

For the foregoing reasons, it can be seen that the charges being levied against SSC for freight cardays incurred as a result of BNSF's decisions and operations to not move loaded cars consistently from Eola to BNSF's Cicero yard and/or on the Interchange Track at SSC's site, are illegal and unjust. The problem is created by BNSF, not SSC.

**RELIEF REQUESTED ON
BEHALF OF SSC AND TBFR**

Based on the facts and law presented herein, SSC and TBFR respectfully request the following relief:

1. That BNSF, forthwith, begin to deliver loaded cars to SSC at the BNSF INTERCHANGE TRACK at SSC's Brookfield location to be available to SSC/TBFR and the cars to be placed on the Interchange Track when empty. And in the absence of good cause, BNSF should expedite the movement of cars by shipping them directly from Eola yard to the BNSF Interchange Track at SSC Brookfield.

2. That BNSF is directed to move empty cars to be taken from the BNSF INTERCHANGE TRACK at SSC's location, each Saturday and Sunday, thereby taking these cars off demurrage and permitting the delivery of the loaded inbound cars to SSC/TBFR.

3. For such other and further relief which the STB believes to be appropriate.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David C. Dillon". The signature is written in a cursive, flowing style.

David C. Dillon, on behalf of Sweetener
Supply Company and TransDistribution
Brookfield Railroad

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