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July 26, 2019

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

ENTERED
Office of Proceedings
July 26, 2019
Part of
Public Record

Re: STB Finance Docket No. 36311, ARI Railcar Services LLC – Petition for Declaratory Order

Dear Ms. Brown:

Norfolk Southern Railway Company (“NS”) filed a reply (“Reply”) on July 19, 2019 in this proceeding, making several factual misstatements and mischaracterizations that warrant clarification so that the Board may have a complete record on which to resolve the important issues raised in the Petition for Declaratory Order of ARI Railcar Services LLC (“Railcar Services”). Railcar Services respectfully requests that the Board accept this letter into the record.¹

First, NS erroneously refers to Railcar Services’ “contractual....responsibility to pay these storage charges.” See NS Reply at 24. There is no contract between Railcar Services and NS, as Railcar Services made clear in its Petition.²

NS is incorrect in its assertion that “NS did not miss any switches during this period of congestion, nor did any NS service issues contribute to the backlog.”³ NS’s own Reply confirms that this assertion is plainly not true. Specifically, Exhibit 4 to the NS Reply reveals that Railcar Services informed NS on January 14, 2019 that “we were not switched Friday as scheduled” and “[t]hat was the second time last week we were not switched as scheduled.” The same Exhibit 4 also reveals that Railcar Services told NS on January 15, 2019 that “[w]e requested 17 cars last night and only received 13.”⁴

¹ Railcar Services recognizes that Board rules prohibit a “reply to a reply.” 49 CFR § 1104.13(c). However, Railcar Services respectfully requests that the Board accept this brief letter into the record in order to correct the factual misstatements and mischaracterizations in the NS Reply, as well as to create a more accurate and complete record. See, e.g., Texas Central Railroad and Infrastructure, Inc. et al. – Petition for Exemption – Passenger Rail Line Between Dallas and Houston, Tex., STB Docket No. 36025, slip op. at 3 (n. 5) (served July 18, 2016) (reply to reply accepted in the interest of “compiling a more complete record”); Norfolk Southern Railway Company – Petition for Declaratory Order – Interchange with Reading Blue Mountain & Northern Railroad Company, STB Docket No. 42078, slip op. at 1 (n. 2) (served Apr. 29, 2003) (accepting reply to reply which was claimed necessary by NS to correct misstatements of fact, clarify mischaracterizations, and reply to affirmative relief sought).

² See Railcar Services Petition for Declaratory Order at 5.

³ NS Reply, Ewers V.S. at 7.

⁴ NS Reply, Exhibit 4, showing e-mail messages of BJ Thompson (Railcar Services) to Daniel Juhasz (NS) on Jan. 14, 2019 and Jan. 15, 2019.

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NS is also incorrect in its claim that Railcar Services “urged” NS to move to a FIFO approach “in the midst of the congestion.”⁵ In fact, ARI’s evidence established that NS had recommitted to utilizing a FIFO system at Tennille in October 2018, and it was NS that unilaterally and suddenly changed away from this system without advance notice to Railcar Services, thereby causing additional problems.⁶

After making these factually incorrect statements, NS asserts that its version of events relating to FIFO and closed gate status shows that Railcar Services has not met its burden to prove that NS was at fault. Reply at 3. This is completely backward. The actions that NS took on FIFO, closed gate, missed switches, and demurrage charges in these circumstances are at the heart of Railcar Services’ Petition on these unreasonable charges. Railcar Services did not file a complaint, even though complaints have a much lower filing fee, because (1) Railcar Services has no contract with NS and (2) because Railcar Services is not seeking damages from NS. Moreover, it would be inequitable to condition relief in this dispute on whether Railcar Services has intimate knowledge of NS’s internal operations – knowledge that Railcar Services cannot have because Railcar Services does not control transportation to its facility and because internal rail operational information is closely guarded by railroads. If the Board believes that additional information on every movement to Tennille by NS might be needed to fully address this Petition, then Railcar Services respectfully requests that the Board provide time for discovery and caution NS that NS will have to respond to discovery requests on its internal operations in a full and forthright manner.

To bolster its defense, NS also engaged in a misleading quotation from the Petition. Specifically, NS partially quoted a sentence from the Petition about storage charges being assessed against the Tennille facility in the past. In the Petition, Railcar Services stated that “[t]o the knowledge of Mr. Thompson, the Tennille Facility did not experience demurrage or storage charges in the past.” Petition at 7. NS omitted the first part of this sentence in its Reply, thus creating a misleading partial quotation.⁷ More importantly, any payment of comparatively minor amounts to NS in the past cannot and should not give NS free reign to act however it wants today. To give NS carte blanche on its recent assessment of hundreds of thousands of dollars against Railcar Services, especially in light of the expense and difficulty of challenging railroad tariffs at the Board, would be extremely inequitable. In fact, NS’s own tariffs have a “no waiver” provision,⁸ but of course this provision only protects NS behavior – which again shows the

⁵ See NS Reply, Ewers V.S. at 7-8 (“In the midst of the congestion, ARI urged NS to move to a first-in-first out (FIFO) approach to the placement of railcars.”).

⁶ See Railcar Services Petition for Declaratory Order, Exhibit 9, e-mail from Andrea Collier (NS) to BJ Thompson (Railcar Services) on Oct. 17, 2018 (“The crews should be spotting the oldest cars in the yard. I will remind the Trainmasters to reiterate this to them.”); Exhibit 10, e-mail from Courtney French (NS) to BJ Thompson (Railcar Services) on Feb. 21, 2019 (“going forward, I am letting American Railcar Industries know NS does not have a FIFO process”).

⁷ See Reply at 12 (“ARI asserts that ‘the Tennille Facility did not experience demurrage or storage charges in the past.’”).

⁸ See NS Conditions of Carriage #1-E, Item 530.

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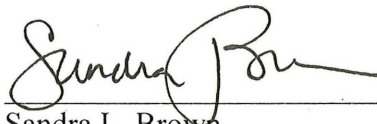
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unfairness of this situation for a repair facility like Tennille, where NS apparently seeks to have no standards at all applied to its behavior.

Finally, NS repeatedly claims throughout its Reply that Railcar Services is asking the Board to declare that it is entitled to “free storage.” See, e.g., Reply at 8. This is incorrect, and is not found in the Petition for Declaratory Order. Instead, Railcar Services is asserting that the NS car storage fees assessed against the Tennille facility in late 2018 and early 2019 are inapplicable, unreasonable, and unlawful given the facts in this case.⁹ Moreover, rail car repair facilities play a crucial role in the nation’s rail system as an instrumentality of transportation in keeping rail cars operational. Repair facilities like the Tennille facility do not ship or receive freight on the system – indeed they are neither consignors nor consignees¹⁰ – but they help support and maintain the system for others’ use so that interstate commerce can continue. As instrumentalities of transportation, the Board should declare that it is an unreasonable practice to assess storage/demurrage charges against rail car repair facilities.

Railcar Services appreciates the Board’s attention to the important issues that have been raised in this proceeding. Please do not hesitate to contact the undersigned should you have any questions.

Best regards,



Sandra L. Brown

David E. Benz

Thompson Hine LLP

1919 M Street NW, Suite 700

Washington, DC 20036

Attorneys for ARI Railcar Services LLC

cc: Counsel for Norfolk Southern Railway Company

⁹ In fact, since NS gets notice of cars moving on their line before Railcar Services, NS is in the best position to address any unique flare up like what happened here. NS has ways to control the flow of freight traffic on its lines, including but not limited to embargoes and rerouting which are specifically for situations temporary in nature.

¹⁰ See, e.g., Evans v. ICC, 729 F.2d 1107, 1113 (7th Cir. 1984).
