

SERVICE DATE – SEPTEMBER 22, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35387

AG PROCESSING INC A COOPERATIVE—PETITION FOR DECLARATORY ORDER

INSTITUTE PROCEEDING AND HOLD ORAL ARGUMENT

Decided: September 21, 2011

In response to a petition filed by Ag Processing Inc A Cooperative (Ag Processing) regarding the reasonableness of a Norfolk Southern Railway Company (NSR) tariff, the Surface Transportation Board is instituting a declaratory order proceeding under 49 U.S.C. § 721 and 5 U.S.C. § 554(e). The Board also will hold oral argument to address issues in this proceeding on Tuesday, October 25, 2011, at 9:30 a.m., in the hearing room at the Board's headquarters located at 395 E Street, S.W., Washington, DC. The oral argument will be open for public observation, but only counsel for the parties will be permitted to present argument.

On July 20, 2010, Ag Processing filed a petition for declaratory order challenging the reasonableness of an NSR tariff insofar as it imposes charges and penalties on loaded rail cars that exceed the car's weight limit as a result of weather conditions encountered after the car is delivered to the railroad. The petition was amended to add other shippers¹ and to continue the challenge after NSR revised the tariff. At Petitioners' request, the Board ordered the parties to mediate the dispute, but mediation was unsuccessful, and NSR filed a motion to dismiss the petition on January 27, 2011, along with confidential materials subject to a protective order. The Petitioners filed their reply on March 8, 2011.

The Board does not anticipate the need for additional evidentiary filings in this proceeding. The Board is setting this case for oral argument on the issues raised in this case. The parties should be prepared to discuss: (1) industry practice relating to cars made overweight by snow or ice; (2) how frequently closed-hopper cars and tank cars are made overweight by snow and ice and how those cars have been brought into compliance in the past; (3) what NSR's overweight policies were prior to adopting the procedures in question; and (4) whether the agency's treatment of demurrage—which also involves issues of due diligence and equipment usage—is a useful model to employ here. The Petitioners and NSR will each have 20 minutes of argument time. The Petitioners may reserve part of their time for rebuttal if they so choose.

¹ The amended petition added Bunge North America, Inc., Archer Daniels Midland Company, Louis Dreyfus Corporation, and Perdue Agribusiness, Inc. as petitioners (collectively, Petitioners).

By October 18, 2011, each party shall submit to the Board the name of the counsel who will be presenting its argument. The Petitioners, in their filing, shall also address the requested time reserved for rebuttal, if any. Parties should prepare a short oral statement and be prepared to answer questions from the Board. The purpose of oral argument is to provide an opportunity for questions that the Board may have regarding any issue in the proceeding.

Counsel for the parties shall check in with Board staff in the hearing room prior to the argument.

A video broadcast of the oral argument will be available via the Board's website at <http://www.stb.dot.gov>, under "Information Center"/"Webcast"/"Live Video" on the home page.

Instructions for Attendance at Hearing

The STB requests that all persons attending the hearing use the Patriots Plaza Building's main entrance at 395 E Street, S.W. (closest to the northeast corner of the intersection of 4th and E Streets). There will be no reserved seating, except for those scheduled to present oral arguments. The building will be open to the public at 7:00 a.m., and participants are encouraged to arrive early. There is no public parking in the building.

Upon arrival, check in at the 1st floor security desk in the main lobby. Be prepared to produce valid photographic identification (driver's license or local, state, or Federal government identification); sign-in at the security desk; receive a hearing room pass (to be displayed at all times); submit to an inspection of all briefcases, handbags, etc.; then pass through a metal detector. Persons choosing to exit the building during the course of the hearing must surrender their hearing room passes to security personnel and will be subject to the above security procedures if they choose to re-enter the building. Hearing room passes likewise will be collected from those exiting the hearing upon its conclusion.

Laptops and recorders may be used in the hearing room, but no provision will be made for connecting personal computers to the Internet. Cellular telephone use is not permitted in the hearing room; cell phones may be used quietly in the corridor surrounding the hearing room or in the building's main lobby.

The Board's hearing room complies with the Americans with Disabilities Act, and persons needing such accommodations should call (202) 245-0245, by the close of business on October 18, 2011.

For further information regarding the oral argument, contact Amy Ziehm, (202) 245-0391. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877-8339.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. A declaratory order proceeding under 5 U.S.C. § 554 and 49 U.S.C. § 721 is instituted.
2. Oral argument in this proceeding will be held on Tuesday, October 25, 2011, at 9:30 a.m., in the Surface Transportation Board Hearing Room, at 395 E Street, S.W., Washington, DC, as described above.
3. By October 18, 2011, the participants shall submit to the Board the names of the counsel who will be presenting argument and the name of the party counsel will be representing. The Petitioners shall also address the requested time reserved for rebuttal, if any.
4. This decision is effective on the date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.