

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. 42079



AG PROCESSING INC

v.

NORFOLK SOUTHERN RAILWAY COMPANY

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REPLY OF AG PROCESSING INC TO NORFOLK SOUTHERN OPPOSITION

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The disagreement between Ag Processing Inc ("AGP") and Norfolk Southern Co. ("NS") with respect to AGP's Petition for Injunctive Relief is narrow. The Opposition filed by NS relies principally, if not exclusively, on the claim that AGP does not need to use order bills of lading because of the availability of "other mechanisms" to receive payment prior to delivery. According to NS, the existence of such alternatives precludes a finding that AGP will be irreparably injured absent injunctive relief.

Other than one alternative approach described in its Opposition, NS offers no "other mechanisms." At pp. 6-7, NS argues that instead of using an order bill of lading or straight bill with restricted delivery conditions to insure payment for its shipments by their consignees prior to delivery, AGP could use straight bills of lading, with AGP listed

as consignor and consignee. According to NS, if AGP received payment while the shipment was in transit, AGP could then change the identity of the consignee from itself to the real purchaser. This approach, states NS, would entail no payment by AGP to NS if the name of the consignee was changed before the cars arrive at their destination..

There are errors in NS's factual assumptions and numerous problems with this arrangement that are not discussed by NS.

First, NS has omitted from its Opposition the fact that, under Rule 230(1) of NS Conditions of Carriage 1-E, AGP does not have the "right" to change the name of the consignee on the bill of lading from itself to the intended beneficial receiver of the goods. Any such change is subject to approval by "Norfolk Southern Central Yard Operations." There is no indication in the Rule of how long NS may take to act on any such request, nor any assurance that approval will be given.

Second, it is by no means clear from NS Tariff 8002-A that, if a "change in consignee is made before the goods arrive at destination, there would be no charge for the change," as claimed by NS. Item 2070(A)4 of that tariff appears to provide a charge of \$198.00 per bill of lading "on changes to original shipping document." Since a change in the name of the consignee from AGP to the intended beneficial recipient would appear to constitute a "change" to the "original shipping document," the NS tariff appears to impose a charge of \$198.00 for that step, contrary to what is stated in the NS Opposition. In addition, NS admits that it would charge a \$198.00 per car diversion charge if cars arrive at destination before AGP received payment and corrected the consignee name even though the only "diversion" would be from AGP to the real consignee at that consignee's facility.

Third, following NS's suggestion may create contractual complications for AGP that are overlooked by NS. AGP contracts to sell soybean meal to its present bankrupt customer under terms requiring the customer to pay the freight rate from Chicago to the destination. These terms are part of the sales arrangements demanded by the customer as a condition of the sale. If AGP names itself as the consignee at the intended destination of the shipment, the freight billing instructions might be viewed as conflicting with the terms of the soybean meal contract of sale, which names AGP's actual customer as the buyer and recipient of the meal. AGP, rather than its customer, could be exposed to liability for payment of freight charges from Chicago to the destination under NS Conditions of Carriage 1-E Rule 250 at rates much higher than those AGP contemplated when it agreed to sell soybean meal to its customer. Any such liability would upend the commercial bargain between AGP and its customer.

Fourth, if AGP names itself as the consignee at the billed destination and the cars are not accepted by the intended customer upon arrival, demurrage or other holding charges will accrue for the account of AGP, and not for the account of the intended customer as would be the case if the intended customer were named as the consignee on an order bill of lading. NS holding charges are \$20 to \$30 per car per day pursuant to NS Tariff 6004-B, Item 1100-C. This represents a substantial increase in the unrecoverable risk exposure of AGP by virtue of the NS suggestion. Unlike NS, which can refuse to release a shipment until all of its charges are paid, including destination demurrage, AGP has no way to assure recovery of any demurrage charges it may incur as a consignee.

Fifth, if AGP determines that its demurrage exposure is rising above unacceptable levels, and diverts the cars to another destination before changing the name of the con-

signee from itself to the intended buyer, the intended buyer may be able to claim that AGP did not perform on its soybean meal contract of sale because the cars were never tendered to the buyer for delivery. If cars are rebilled to another buyer, additional freight charges also will apply.

The foregoing considerations demonstrate that the "option" NS offers under which AGP would ship to its present bankrupt customer using straight bills of lading, on which AGP would identify itself as consignee, does not compensate for the unavailability of order bills of lading or straight bills with restricted delivery provisions. NS's suggestion offers far less protection and far greater risks than AGP has traditionally enjoyed in using order bills of lading. The actual and potential costs of the NS "alternative" not only are substantial, but are unrecoverable by AGP. Accordingly, NS's contention that this case does not involve irreparable injury to AGP is untenable.

For the foregoing reasons, and for the reasons set forth in AGP's Petition for Injunctive Relief, the Board should direct NS to continue to honor and implement order bills of lading.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served by telecopier and first-class mail on counsel for Norfolk Southern Railway Company this 12th day of June, 2003.



Andrew P. Goldstein