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June 17, 2005

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

Re: Docket No. 42060 (Sub-No. 1)
North America Freight Car Association, et al. v. BNSF Railway Company

Dear Secretary Williams:

Pursuant to a modified procedural schedule issued by the Board in the captioned proceeding on March 18, 2005, Complainants' Opening Statements are due on June 29, 2005. By this letter, Complainants, with the concurrence of Defendant BNSF Railway Company ("BNSF"), request adjustment of the remaining procedural schedule so that Complainants' Opening Statement is due on July 29, BNSF's Reply is due on September 16, and Complainants' Rebuttal is due on October 17. The bases for Complainants' request are as follows.

In a Decision served on January 6, 2005, the Board established a procedural schedule for this proceeding that included deadlines for Petitions for Protective Orders, Written Interrogatories and Document Requests, Objections to Discovery, Responses to Discovery, Notices of Depositions, Deposition Completion, Opening Statements of Complainants, Reply of Defendant, and Rebuttal of Complainants. The January 6 Decision also contained a provision requiring the parties to notify the Board by a certain date if the parties were at an impasse over any discovery disputes.

The parties met the dates set forth in the January 6 Procedural Order through the date set for filing Responses to Discovery. Because discovery objections led both Complainants and BNSF to declare discovery impasses, the Board was requested by the parties to intervene and a conference to address discovery impasses was held with the Board's Staff. Although that conference proved fruitful, Complainants and BNSF agreed that additional time, beyond the date set in the January 6 Decision, was necessary to complete discovery responses, in part due to the impasses. On March 14, 2005 the

parties jointly filed their request for a three-week extension of the discovery response date, and corresponding adjustments to all remaining due dates. That request was granted in the Board's March 18 Decision.

Written and documentary discovery responses were served by BNSF and by several of the Complainants on April 15, 2005, as due. Several of the Complainants submitted their discovery responses to BNSF after the due date, but without objection by or apparent harm to BNSF. It should be noted that complex written interrogatories and document requests were propounded by BNSF to 11 Complainants and resulted in voluminous responses. BNSF served over 15,000 pages of documents in response to Complainants' document requests.

Under the Board's modified procedural schedule, depositions were to be completed by May 20. Complainants served BNSF with timely notice of their intent to depose up to three BNSF witnesses. BNSF determined to take no depositions. Depositions of the BNSF witnesses commenced in Fort Worth on May 17, 2005. After deposing BNSF's first witness for nearly two days, Complainants' counsel determined that it would not be necessary to depose any further BNSF witnesses.

The court reporting company engaged to transcribe the BNSF depositions advised Complainants' counsel that the deposition transcript would be completed in no more than 10 days following conclusion of the deposition. On May 30, not having received the transcript, the undersigned called the court reporter to inquire, and was assured that the transcript would be transmitted by June 3. The transcript, however, was not received until yesterday, and it exceeds 325 pages. It will have to be reviewed and signed by BNSF's witness before its contents can be relied upon. A complete, accurate, and signed deposition transcript is absolutely essential to the preparation of Complainants' Opening Statement and will have to be reviewed carefully by Complainants' counsel in order to prepare that statement.

Among the discovery requested by Complainants were electronic records of car movements on BNSF for each of four years. After negotiations with BNSF, including consideration of BNSF's description of the complexities involved in reviewing the requested car movement records, Complainants reduced the scope of their request for car movement records from four years' records to three. Complainants believe that it is necessary to review the designated three years' worth of records in order to establish and compare BNSF car movement patterns.

Although discovery was to be completed by April 15 pursuant to the Board's modified procedural schedule issued on March 18, and while BNSF transferred physical possession of its electronic data on April 15, it was not until May 4 that BNSF furnished all information necessary for interpretation of the electronic data. While Complainants believe that both they and BNSF acted in good faith in discussing interpretive materials necessary from BNSF in order for Complainants' outside consultants to make full use of the electronic data furnished by BNSF on April 15, events nevertheless delayed the ability of Complainants' outside consultants to begin the complex task of analyzing BNSF's electronic records until May 4.

The electronic records of car movements furnished by BNSF encompass approximately 500 million car movement records. The task of establishing computer programs to analyze and sample these records is prodigious. When completed, the results will have to be analyzed and discussed by Complainants' counsel and consultants. This process cannot be completed in time to meet a June 29 filing date.

Complainants are submitting verified statements of not just one party, but on behalf of at least eight complaining entities. Although working diligently to prepare these statements, not all have been completed. This is in part due to the fact that Complainants' co-counsel, Mr. Cutler, has been unavailable due to scheduling conflicts, including appellate briefing schedules, that were not known when the procedural schedule was established. To complicate matters further, one of the attorneys with the undersigned's law firm, who was scheduled to assist in the preparation of opening argument, recently resigned and has not yet been replaced. In addition, Complainants recently determined to submit expert economic testimony. And as indicated, testimony relating to an analysis of BNSF's electronic car movement tapes has not been completed. It would be imprudent for Complainants to prepare their arguments until all testimony, especially that involving the car movement records, is complete. In addition, Complainants' argument and evidence will have to take into consideration up to 15,000 pages of documents produced by BNSF in discovery.

The finalization of Complainants' opening testimony will be time-consuming and far from simple. Virtually every document furnished by BNSF in response to BNSF's discovery, plus the transcript and exhibits of the BNSF deposition, have been designated as Highly Confidential by BNSF. It is probable that several days will be involved in negotiating any necessary redactions of Highly Confidential designations so that appropriate pleadings can be prepared and filed with the Board. Indeed, as it is anticipated that Complainants' pleadings will be extremely lengthy, so that the administrative redaction process necessary to separate Highly Confidential from public filings and to prepare two different sets of pleadings will itself be time-consuming.

When BNSF's outside counsel was contacted regarding this request, he advised that BNSF counsel and witnesses had planned August vacations based on the modified procedural schedule. To accommodate BNSF's concerns, Complainants agreed to an extension of BNSF's Reply filing until mid-September, which will still allow its counsel the same four weeks as available under the present schedule to prepare a Reply filing and no doubt will meet the needs of BNSF witnesses, as well.

Complainants, with the concurrence of BNSF, accordingly request adjustment of the remaining procedural schedule so that Complainants' Opening Statement is due on July 29, BNSF's Reply is due on September 16, and Complainants' Rebuttal is due on October 17.

Respectfully submitted,

Andrew P. Goldstein
Attorney for Complainants

cc: Robert M. Jenkins, III (via email and first-class mail)
All parties