

ORIGINAL

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BEFORE THE
SURFACE TRANSPORTATION BOARD

207925



DOCKET NO. 42079

AG PROCESSING INC

v.

NORFOLK SOUTHERN RAILWAY COMPANY

ENTERED
Office of Proceedings

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Part of
Public Record

PETITION FOR INJUNCTIVE RELIEF

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Dated: May 29, 2003

PETITION FOR INJUNCTIVE RELIEF

I. STATUTORY ISSUES

Pursuant to 49 C.F.R. § 1117.1, Ag Processing Inc ("AGP" or "Complainant") seeks an order under 49 U.S.C. 721(b)(4) enjoining Norfolk Southern Railway Company ("NS" or "Defendant") from terminating all use on its lines of order bills of lading or straight bills of lading containing restrictive delivery provisions, as provided in Rule 560(2) of a document issued by NS, in the nature of a tariff, entitled "NS Conditions of Carriage # 1-E" ("COC 1-E"), to be effective June 1, 2003. A copy of Rule 560(2) is attached as Exhibit 1 hereto. The Verified Statement ("V.S.") of Terry J. Voss in support of this Petition is attached as Exhibit 2 hereto.

The formal complaint of AGP and this Petition for Injunctive Relief are occasioned by the refusal of NS, effective June 1, 2003, to permit shippers to continue to make order bill of lading shipments, using bill of lading forms prescribed by the Board for that purpose, or to continue to make shipments on straight bills of lading with restricted delivery instructions, thereby removing the ability of shippers, such as AGP, to secure payment for their goods prior to delivery, just as NS and other railroads are able to secure payment for their services prior to delivery of a shipment. AGP's complaint alleges that it is an unreasonable practice, in violation of 49 U.S.C. § 10702, for NS to deprive AGP of the ability to utilize shipping documentation, prescribed and recognized by the Board as lawful, to protect its sales, and that NS's written refusal to provide such services altogether amounts to a refusal to provide transportation "on reasonable request" in violation of 49 U.S.C. § 11101.

II. LEGAL STANDARDS FOR INJUNCTION

49 U.S.C. § 721(b)(4) states that the Board may "when necessary to prevent irreparable harm, issue an appropriate order without regard to subchapter II of chapter 5 of title 5." Subchapter II of chapter 5 of title 5, 49 U.S.C. § 551, et seq., commonly is known as the Administrative Procedure Act ("APA"). The provisions of 49 U.S.C. § 721(b)(4) accordingly are not subject to the usual rules attendant to the issuance of agency orders, and permit the Board to enjoin carrier action without observance of the adjudicatory and other requirements of the APA. See DeBruce Grain, Inc. v. Union Pacific Railroad Company, STB Docket No. 42023 (served December 22, 1997).

In the DeBruce case, supra, the Board rejected the "narrow view that irreparable harm ... is the only relevant consideration in addressing ... requests for injunctive relief" under Section 721(b)(4). Without expressly deciding what additional criteria would be relevant, the Board stated: "The generally accepted criteria for an injunction are (1) substantial likelihood of success on the merits; (2) irreparable harmed (sic) in the absence of the requested relief; (3) issuance of the order will not substantially harm other parties; and (4) granting the relief is in the public interest," citing Washington Metropolitan Area Transit Comm'n. v. Holiday Tours, 559 F.2d 841 (D.C. Cir. 1977). AGP accordingly will demonstrate that it meets the criteria for an injunction set forth in Holiday Tours.

III. BACKGROUND AND USE OF ORDER BILLS OF LADING

Each rail carrier is required by 49 U.S.C. § 11706 to "issue a receipt or bill of lading for property it receives for transportation." These statutory requirements differ in no material respect from the controlling statutory provisions that existed when the Interstate Commerce Commission ("ICC") first undertook to prescribe bills of lading. In In the

Matter of Bills of Lading, 52 I.C.C. 671, 686 (1919), the ICC made the following statement regarding the scope of its authority over bills of lading:

The Act specifically requires carriers subject thereto to issue bills of lading. The Commission has undoubted authority to enforce this requirement in a proper proceeding. It can require carriers to file with it the rules and regulations which they write into their bills of lading. It can, by due process, require that uniform rules and regulations be adopted by carriers subject to its jurisdiction. It can determine whether such are, in and of themselves, or as interpreted in the practices of the carriers, reasonable and non-discriminatory, and, if otherwise, condemn them and prescribe reasonable rules and regulations, in which event the carriers must obey.

In In The Matter of Bills of Lading, the ICC prescribed uniform terms and conditions for the issuance of both straight and "order" bills of lading. The agency thereafter explained that Congress intended order bills of lading to be the only form of negotiable bill of lading, and "by definitely fixing the law with respect to negotiability, and the imposition of greater responsibility upon carriers, to afford greater protection to those who in the course of commercial transaction handle and deal in such bills." Emergency Freight Charges, 1935, 208 I.C.C. 4, 50 (1935). Subsequently, the ICC explained that a "straight bill of lading with restricted delivery instructions can serve the same purpose as an order bill of lading." Charges for "Order of" Bills of Lading, Burlington Northern Railroad Company, ICC Docket No. 40679 (served November 27, 1992).

In 1973, the ICC instituted an investigation into the nature, extent, and effect of various service limitations imposed by carriers of all modes on c.o.d., freight-collect shipments, and shipments transported under order-notify bills of lading. Ex Parte No. 272, Investigation Into Limitations of Carrier Service on C.O.D. and Freight-Collect

Shipments, 343 I.C.C. 692 (1973). Noting that "the considered services are subject to our regulatory powers and are needed in the public interest" (343 I.C.C. at 767-68), the ICC ordered that all motor and rail carriers subject to its jurisdiction provide c.o.d., freight-collect and order-notify services. 343 I.C.C. at 796-97. Four years later, however, the agency altered its position. While in no way disturbing its prior conclusion that such services were required by the public interest, the ICC, after considering a number of petitions on behalf of carrier groups, determined that mandatory rules would interfere with the development of the subject services, stating:

* * * the alternative to mandatory provision of these services is not the total discontinuance of the services. Rather, the realistic alternative is a plethora of services offered at many different rates.

C.O.D. and Freight-Collect Shipments, 356 I.C.C. 37, 42 (1977). It is clear that the ICC thought that the absence of binding restrictions and directives actually would foster the availability of those services, and that its declination to impose mandatory rules was not intended to be an invitation for carriers to eliminate all c.o.d. or order bill of lading services.

As recently as 1993, the ICC considered "deprescription" of bills of lading, thereby freeing railroads from use of bills of lading containing terms prescribed by the ICC. Fearing that such a course of action would pave the way for each carrier to establish unilaterally its own preferred version of straight and "order of" bills of lading, the ICC determined to retain prescribed forms for both straight and "order" bills of lading and not to permit carriers to change those terms unilaterally. Ex Parte No. 495, Bills of Lading, 9 I.C.C. 2d 1137, 1144 (1993).

So far as AGP has been able to determine, Rule 560(2) of COC 1-E represents the first effort of a Class I railroad to remove completely from shippers the ability to utilize order bills of lading or straight bills with restricted delivery provisions. Anticipating the possibility that some carriers might at some point seek to opt out of c.o.d. shipments or order bills of lading, the ICC, when it announced its decision not to mandate the continuation of such services under all circumstances, cautioned carrier groups that --

if carriers presently offering c.o.d., freight-collect or order-notify services propose to eliminate or restrict the provision of those services, we are prepared to investigate and suspend the proposals.

C.O.D. and Freight-Collect Shipments, supra, 356 I.C.C. at 42-43.

The provisions under which the ICC was at that time empowered to suspend new tariff matter were repealed upon enactment of the ICCTA. However, Section 721(b)(4) was added to the statute at the same time, and its injunctive authority enables the Board to in effect suspend new tariff matter, as the ICC said it would do if any carrier sought to eliminate the provision of order-notify services. NS has done so, and its effort should be enjoined.

IV. THE CRITERIA TO SUPPORT AN INJUNCTION HAVE BEEN MET

A. There is a Substantial Likelihood that AGP Will Succeed on the Merits

The requirement that a party seeking an injunction demonstrate a substantial likelihood of success on the merits does not imply a "mathematical probability" of ultimate success, or even that a 50% plus probability is required. The necessary "likelihood of success" showing is "governed by the balance of equities as revealed through an exami-

nation of the other three factors" relevant to an injunction. Holiday Tours, supra, 559 F.2d at 843-44.

As noted previously, the services that NS intends to cancel on June 1, 2003 have been firmly and affirmatively recognized and fostered by the Board's predecessor, the ICC. An order bill of lading form has been prescribed for use in connection with rail shipments since 1919. The use of that form and its availability to shippers has been affirmed as recently as 1992 and 1993. See Charges for "Order of" Bills of Lading, supra, and Ex Parte No. 495, Bills of Lading, supra. The availability of delivery restriction provisions on straight bills of lading likewise has been endorsed recently by the ICC. Ibid.

Acting without prior consultation with AGP and, to the best of AGP's knowledge, without prior consultation with other customers (Voss V.S., ¶ 12), NS has determined that the prescribed documents and practices as a lawful means for shippers to protect their legitimate commercial needs while using rail service, no longer should be available to shippers. On its very face, these acts by NS, depriving shippers of access to recognized, lawful shipping agreements, are unreasonable practices, especially in the absence of any disclosed rationale by NS for the termination of these services.

As indicated above, the ICC recognized that order bill of lading shipments "are generally and definitely needed by the public." C.O.D. and Freight-Collect Shipments, supra, 343 I.C.C. at 762. In this case, the evidence demonstrates that order bills of lading are definitely needed by AGP. Such bills are used extensively by AGP to insure payment for the goods it ships prior to the release of those goods to a buyer that is not in healthy financial condition (indeed, operating while in bankruptcy). Absent the availability of

order bills of lading, there is no way for AGP to ship to such customers without exposing itself to substantial financial risk unaccompanied by any realistic hope of recovery of costs that may occur as a result of those risks. Voss V.S. ¶¶ 4, 6, 7. Under these conditions, there is a substantial likelihood that the Board will find ultimately that a shipper request for order bill services or for straight bill services is a "reasonable request" within the meaning of Section 11101, and that the blanket refusal by NS to provide "order bill" and similar straight bill services under any and all circumstances amounts to a failure to provide transportation or service "on reasonable request" in violation of 49 U.S.C. 11101.

AGP's complaint also alleges that NS's actions constitute an unreasonable practice. In this respect, AGP anticipates that NS may contend that the process for the implementation of order bills of lading is unnecessarily cumbersome and expensive. In Charges for "Order of" Bills of Lading, supra, the ICC described the traditional practice for the implementation of an order bill as follows: "After the order bill is executed, the shipper's copy is sent to the consignee's bank with instructions that it may not be endorsed to the consignee until payment for the goods is received. When the consignee's bank receives payments for the goods, the bank surrenders the order bill of lading to the consignee, and the consignee uses it to obtain possession of the goods from the carrier."

Today, these steps can be and are accomplished simply and quickly using electronic document transfer or overnight delivery services. Voss V.S., ¶ 9. Alternatively, the delivering carrier can request the consignee to post a performance bond against which shipments can be released in advance of completion of the order bill paperwork. Voss V.S., ¶ 10. AGP is not aware of whether NS has attempted to obtain, or actually has obtained, such performance bonds from its consignees, including the consignee of AGP's

order bill shipments. In any event, obtaining endorsement of any documents necessary to demonstrate that that payment has been made by the consignee is not a process that will engage the services of NS personnel for any substantial length of time, if at all. If necessary, a car can be held by NS on destination demurrage until NS has been presented with the required proof of payment. There is nothing at all unusual in holding a car at destination because delivery cannot be made; that is why carriers have demurrage rules and charges.

NS's position under proposed Rule 560(2) is absolutely inconsistent with the prerogatives that NS reserves to itself. NS reserves the right to withhold delivery of shipments whenever NS deems that step necessary to protect its own credit and payment needs. Indeed, COC 1-E contains an express reservation by NS of its right to insist on "provisions for payment satisfactory to NS before the cars will be delivered," even after NS has accepted the shipment on different payment terms. *Voss V.S.*, ¶ 5. NS's holding of a car short of delivery to collect its freight charges does not appear to be distinguishable from holding a car short of delivery while proof of payment to a shipper is provided. Under NS's new rules, however, a car shipped by AGP could be held short of delivery by NS while it affects collection of its freight charges, yet AGP could not through the use of an order bill of lading have the same car held short while payment is affected for the goods in the car. AGP believes that it is an unreasonable practice for NS to withhold from a shipper the right to protect its revenues in the same way that NS reserves the right to protect its own revenues.

B. AGP Will Be Irreparably Harmed By the Provisions of Rule 560(2)

In the context of a request for injunctive relief, irreparable injury generally means non-monetary or other forms of damage for which there is no realistic expectation of recovery. See, e.g., Virginia Petroleum Job. Ass'n. v. Federal Power Com'n., 259 F.2d 921 (D.C. Cir. 1958).

There is no hard and fast formula to determine irreparable injury. However, in this case there are multiple bases to support a finding of such injury.

First, the AGP customer on NS to which order bill of lading shipments have been made is in Chapter 11 proceedings. There is, accordingly, a much higher than normal risk associated with the ability of this customer to pay its bills when due and a much higher risk than usual that this customer ultimately will be able to pay in full for all soybean meal shipments if they are delivered without prior compensation to AGP. See, e.g., Holford USA Ltd., Inc. v. Cherokee, Inc., 864 F. Supp. 364, 371 (S.D.N.Y. 1994); Trans-america Rental Finance v. Rental Experts, 790 F. Supp. 378 (381) (D. Conn. 1992) ("an injunction may be appropriate where an action for damages would be inadequate because the defendant is insolvent or its assets are in danger of depletion and dissipation.") A consignee in reorganization raises similar legitimate concerns regarding its ability to pay for goods purchased if AGP is required to extend credit to this customer.

In the absence of order bill or restricted straight bill protection for AGP, AGP is faced with options that in all cases will cause it irreparable injury. AGP can simply cease selling soybean meal to its NS customer, and forego \$4,000,000 in annual revenue without any present prospects of replacing those sales with other sales. Voss V.S., ¶ 11.

AGP cannot procure pre-payment for its goods before they are shipped, as the customer is unwilling or unable to advance funds 10 to 14 days before receiving the soybean meal. Ibid. If AGP makes the shipment without prepayment, and is unsuccessful in obtaining payment when it notifies the bankrupt customer that delivery is imminent, AGP faces a serious dilemma. It cannot divert the car to another destination without the prior permission of NS, pursuant to a new rule contained in COC 1-E. Ibid. If it obtains that permission, it must pay a diversion charge of \$198 to NS, plus any applicable freight rate to the new destination. AGP is unlikely to find a new customer unless AGP sells the diverted soybean meal at a reduced, "distress" price. Neither the NS diversion charge (if diversion is permitted), nor the additional freight charges, nor the reduced "distress" price that AGP is likely to receive, are recoverable by AGP in any fashion.

C. Issuance of an Injunction Will Not Substantially Harm NS

The third prong of the Holiday Tours test is that the issuance of injunctive relief will not harm any other party -- in this case, NS. Since NS has not advanced any explanation of how it is harmed by honoring order bills of lading or straight bills with restricted delivery provisions, there is no allegation of harm by NS to be contested by AGP.

Nevertheless, AGP finds it difficult to see how NS will be harmed during the litigation of this complaint proceeding by the continuation of a practice with which NS has lived for decades. The absence of any such harm is underscored by the fact that all NS need do when an order bill is issued is to place the car on destination demurrage, short of the consignee's tracks, until proof of payment has been received by NS. These steps are no different than those which NS makes in the normal course of business whenever a

consignee is unable to receive a car, and are no different than the remedies that NS reserves to itself in the event NS determines to obtain payment of its freight charges before releasing the car at destination.

D. Granting an Injunction is in the Public Interest

Order bills of lading were recognized and legislated into existence by Congress to impose "greater responsibility upon carriers, to afford greater protection to those who in the course of commercial transaction handle and deal in such bills." Emergency Freight Charges, 1935, supra. The provisions of order bills have been prescribed by the ICC for more than 80 years and the use of order bills has been acknowledged and affirmed by the ICC within the past 10 years, even following passage of the Staggers Act. There is nothing in an order bill of lading, or in a straight bill of lading with restricted delivery provisions, that inherently conflicts with the Staggers Act.

AGP does not know to what extent order bills have been or are being used on NS, but AGP itself makes use of those bills to maintain important commercial relationships, just as Congress intended shippers could do. It clearly will be in the public interest for the Board to maintain the status quo while examining the question of whether, or under what conditions, a railroad may dispense with a long-standing practice that has been endorsed by the agency with railroad regulatory jurisdiction.

Because AGP has not been made aware of any specific difficulties encountered or contemplated by NS in the continued use of order bills, AGP is handicapped in attempting to seek solutions to any such problems. AGP, however, is willing and committed to make such efforts in discussions with NS. It may be, for example, that NS's concerns are

focused on situations where, as here, NS is not the originating carrier and is fearful that it may not receive adequate notice from the origin carrier of order bill or restricted delivery shipments. Concerns such as those can be addressed by AGP.

AGP submits that, on balance, the equities lie in the retention of a recognized, lawful, valid transportation and commercial practice pending consideration of the complaint that has been filed by AGP, rather than with an abrupt termination of those practices that will be costly to AGP and, perhaps, other shippers making use of order bills of lading elsewhere.

AGP requests the Board to consider this petition as a request for emergency relief. Section 721(b)(4) does not require the Board to await a reply by NS to this petition, and AGP urges the Board to act prior to June 1 or as soon thereafter as possible, even if NS has not yet replied on the merits. Any subsequent reply by NS can be treated by the Board as a petition to vacate the injunction that AGP seeks at this time.

WHEREFORE, AGP prays that the Board enter an order forthwith enjoining NS from canceling the use of order bills of lading or straight bills of lading with delivery restrictions, as described in Rule 560(2) of COC 1-E, or through any successor publication thereto.

Respectfully submitted,



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Attorney for
Ag Processing Inc

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served, this 29th day of May, 2003, on counsel for Norfolk Southern Railway Company by electronic transmission and by overnight mail.



Andrew P. Goldstein

SECTION 1
RULES

RULE 560 - NORMAL RAIL OPERATIONS-ORDER/NOTIFY SHIPMENTS

(1) All services provided pursuant to these Conditions of Carriage will be provided by NS in accordance with any applicable FRA and AAR guidelines and regulations and routine NS practice (including but not limited to switching, coupling and humping). Specialized rail handling such as "do not hump", speed restrictions and equipment size are special rail services and not routine rail services. Unless agreed to in writing by both NS and shipper, any restrictions on rail handling placed by shipper upon a particular car (including, but not limited to, "Do Not Hump" signs, notations as to speed or other restrictions on a bill of lading, EDI notations) shall have no effect and be void. Shippers desiring special handling must contact NS to arrange such special handling.

(2) NS does not provide Order/Notify service. Bills of lading or shipping instructions tendered to NS in the form of an order/notify bill of lading will be handled as straight bills of lading. Instructions to the effect of requiring NS to not complete delivery of a shipment until either securing authorization for delivery from the shipper or some other party, surrender of the bill of lading or notification by NS to the shipper or some other party shall have no effect and be void regardless of whether such instructions are contained in a straight or an order/notify bill of lading; and NS shall have no liability for delivering a shipment to the consignee listed in the bill of lading in such circumstances.

EXHIBIT 2

**STATEMENT OF
TERRY J. VOSS**

1. My name is Terry J. Voss. I am Senior Vice President - Transportation for Ag Processing Inc ("AGP"). I am the senior AGP official responsible for transportation of the products which AGP receives and ships by rail and other modes. I have been employed by AGP since 1991 and have a total of 32 years' experience as a transportation manager for rail shippers and receivers. I am offering this statement in opposition to Rule 560(2) of a "tariff" entitled "NS Conditions of Carriage # 1-E," ("Rule 560(2)" and "COC 1-E," respectively), issued by Norfolk Southern Railway Company ("NS") to become effective June 1, 2003. A copy of Rule 560(2) is attached as Appendix A.

2. AGP is a cooperative, owned by local farm and regional cooperatives, that merchandizes grain, ships and receives grain, and processes corn and soybeans. One of the products produced by AGP is soybean meal, derived from the crushing of soybeans. Soybean meal is used primarily as an animal or poultry feed ingredient and is sold by AGP mainly to buyers who blend various ingredients into a feed mixture. Because of economic conditions in the feed industry, an increasing number of feed merchants are exhibiting signs of financial instability.

3. A typical car of soybean meal has a value of between \$20,000 and \$22,000. Our company needs to be able to sell meal in as large volumes as possible to support the high fixed cost of constructing soybean crushing facilities and the high cost of plant operations. The two primary products of a soybean crushing facility are soybean oil and soybean meal, and unless there are markets for both products, the entire soybean

crushing operation suffers as common overhead and operating costs rise when sales volumes of either product are reduced.

4. Order bills of lading represent a time-tested method of making shipments subject to delivery restrictions and are designed to insure payment for the goods before they are delivered to the consignee. AGP currently ships 3-4 rail cars per week from our plants west of Chicago to NS destinations, utilizing a western carrier to the Chicago gateway and NS beyond, under order bills of lading. These shipments yield approximately \$4,000,000 in annual revenue to AGP. Because of the distances involved, truck is not an economically viable alternative to rail service. AGP needs to be able to retain that rail business. At present, AGP's principal customer on NS for meal shipments is a company in bankruptcy under chapter 11. AGP does not desire to forego the \$4,000,000 in annual sales to that customer, and needs the protection of an order bill of lading or a straight bill with delivery restrictions to continue to ship meal to that company without undue risk and cost exposure.

5. Over the years, I have observed that railroads, including NS, maintain that they have a right to seek full payment of their transportation charges before they make delivery of any shipment. I note that Rule 300(1) of COC 1-E (a copy of which is attached hereto as Appendix B) in fact purports to allow NS to revoke any credit arrangements for the payment of freight charges at any time, including shipments already in transit, and provides that NS may withhold delivery of a car unless a responsible party has made "provisions for payment satisfactory to NS before the cars will be delivered." AGP merely seeks to manage our commercial risk as NS manages its commercial risk.

6. Other than an order bill of lading, or a straight bill of lading subject to delivery restrictions, AGP is unaware of any other shipping mechanism that will effectively and efficiently deter, until the shipper receives payment, the delivery or release of a car to the consignee's tracks, and thereby permit the consignor to control its credit risk and costs. Once a car is placed on the consignee's tracks, the shipper loses the ability to obtain payment prior to unloading of the car.

7. AGP has attempted to determine if there are other feasible methods available to insure that, in the absence of an order bill or straight bill with restricted delivery provisions, a car will not be released to the consignee's possession until the shipper has been paid for the goods if that is the shipper's desire. Any such alternatives, however, appear to be prohibited by Rule 560(2) of COC 1-E, the third sentence of which bluntly states that NS will disregard any "instructions to the effect of requiring NS to not complete delivery of a shipment until either securing authorization for delivery from the shipper or some other party." Accordingly, unless AGP has its own tracks at NS destinations where soybean meal cars can be consigned and held on those tracks until payment is received from the buyer (and AGP has no such tracks), it does not appear possible to ship meal under billing instructions that prohibit NS from placing the cars on the customer's tracks.

8. NS has not made clear why it desires to terminate order bills of lading, other than to suggest that they are not widely used. In the case of AGP, I can say clearly that order bills are widely used on shipments made throughout the rail network, and the erosion of order bill of lading availability would be a serious blow to the commercial needs of AGP.

9. Contrary to what some people may believe, the implementation of an order bill of lading does not require a massive workforce or compel hand delivery of documents. The process of implementing an order bill of lading can commence as soon as the bill of lading is issued and well before the car arrives at destination. The necessary documents can be and are transferred electronically or by overnight delivery services, totally relieving NS or other carriers of the obligation to "walk" bills of lading back and forth between banks. If the car does arrive at destination before completion of all steps necessary to prove that payment for the goods has been made, the car can, if required, be constructively placed on the delivering carrier's tracks subject to appropriate demurrage charges, which are payable by the consignee to NS.

10. Additionally, carriers such as NS do not necessarily have to wait for surrender of an endorsed order bill of lading showing payment for the goods in order to obtain protection under the order bill. The Uniform Freight Classification Tariff, 6000-K ("UFC"), Rule 7, contains provisions under which consignees can post performance bonds against which railroads can release order bill or similar shipments prior to proof of payment for the goods. See Appendix C hereto. It is my understanding that NS subscribes to the UFC. While the posting of such bonds is not mandatory, many carriers have convinced consignees on their lines to take that step.

11. If NS withdraws order bills of lading, AGP has no alternative purchaser at hand for the meal presently moving to NS points under order bills and will face two basic choices. One is to forego sales to customers with credit problems, losing, in this instance, \$4,000,000 in annual sales without any assurance that such sales can be recouped. Additionally, the customer may be lost permanently. The other choice is to ship to our exist-

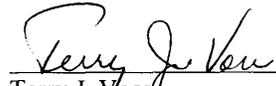
ing order bill customer, hoping that it will pay AGP for the meal before the car arrives. If the customer does not do so, then we have a problem. Under new language in Rule 230(1) of COC 1-E, diversions are now discretionary with NS (see Appendix D hereto), so that it may decide not to allow diversion, in which case our only option would be to reverse-route the car at substantial expense to AGP. If diversion is allowed, NS imposes a diversion charge of \$198 per car. Then we would have to divert the cars to the location of any other buyer that can be located, also paying NS any additional freight charges applicable to that point and no doubt selling the meal at a "distress" price. All of these alternatives entail substantial economic risk that is likely to cost AGP an estimated \$500 to \$2,000 per car, which will not be recoverable from any other party. If one wonders why AGP does not simply demand prepayment of the sales price before the meal is shipped, the answer is that customers who have credit problems generally have cash flow problems as well. It takes 10 to 14 days as a rule for a meal car to reach our NS customers, who refuse to consider payment until we can advise them, from car tracking records, that the car is nearing its destination.

12. Before publishing Rule 560(2) in COC 1-E, NS made no effort to discuss its proposed order bill termination intentions with AGP, even though we were using those services. To the best of my knowledge, NS made no effort to publicize the changes to its customers generally before formal tariff publication. Since learning of the Rule 510(2) proposals, AGP has endeavored to resolve its concerns regarding the imminent demise of NS order bills of lading through discussions with NS officials. In fact, one significant reason why this request for relief is being filed so near the June 1 effective date of COC 1-E is because AGP was involved in informal discussions with NS and was not advised

by NS that it would respond unfavorably to AGP's concerns regarding order bill of lading cancellation until approximately one week ago.

VERIFICATION

I, Terry J. Voss, hereby certify under penalty of perjury that I have read the foregoing statement, which I am authorized to make, and that it is true and correct.


Terry J. Voss

May 28, 2003

SECTION 1
RULES

RULE 560 - NORMAL RAIL OPERATIONS-ORDER/NOTIFY SHIPMENTS

(1) All services provided pursuant to these Conditions of Carriage will be provided by NS in accordance with any applicable FRA and AAR guidelines and regulations and routine NS practice (including but not limited to switching, coupling and humping). Specialized rail handling such as "do not hump", speed restrictions and equipment size are special rail services and not routine rail services. Unless agreed to in writing by both NS and shipper, any restrictions on rail handling placed by shipper upon a particular car (including, but not limited to, "Do Not Hump" signs, notations as to speed or other restrictions on a bill of lading, EDI notations) shall have no effect and be void. Shippers desiring special handling must contact NS to arrange such special handling.

(2) NS does not provide Order/Notify service. Bills of lading or shipping instructions tendered to NS in the form of an order/notify bill of lading will be handled as straight bills of lading. Instructions to the effect of requiring NS to not complete delivery of a shipment until either securing authorization for delivery from the shipper or some other party, surrender of the bill of lading or notification by NS to the shipper or some other party shall have no effect and be void regardless of whether such instructions are contained in a straight or an order/notify bill of lading; and NS shall have no liability for delivering a shipment to the consignee listed in the bill of lading in such circumstances.

SECTION 1
RULES**RULE 300 - EXTENSION OF CREDIT**

(1) Acceptance by NS of a tender of a shipment by Shipper does not constitute the extension of credit by NS to Shipper or to party responsible for payment of NS freight charges ("Payor"). Credit shall only be extended through the Credit Department of NS. If NS extends credit, it is granted only as a convenience to the Shipper or Payor and may be revoked by NS at any time as to any shipment (including those in transit) without notice by NS. In the event of a revocation of credit affecting any cars in transit, Shipper or Payor must either pay all charges for the cars in transit or make provisions for payment satisfactory to NS before the cars will be delivered. Any changes in Shipper's or Payor's ownership or financial condition which materially affects Shipper's financial standing must be reported to NS' Credit Department.

(2) Where credit has been extended to Shipper or Payor, payment must be received by NS within fifteen (15) days of the date of the freight bill or invoice.

(3) Where credit has not been extended to Shipper or Payor, payment of transportation charges must be made to NS in advance of the shipment in cash.

(4) In the event that Shipper or Payor shall dispute the amount of a bill, Shipper or Payor shall pay to NS within the credit period the undisputed amount of the bill. Shipper or Payor shall also notify NS within the credit period of the disputed amount and the basis for the dispute. Payment of bills, or any portion thereof, by Shipper or Payor which later are determined to be incorrect will not prejudice Shipper's or Payor's right to seek a refund within the statutory period.

(5) NS shall have the right to recover from Shipper or Payor all reasonable costs of collection, including but not limited to reasonable attorneys' fees, in the event of any violation of the credit terms of NS by Shipper or Payor.

▲ (6) With regard to collect bills of lading, the existence of the Payor does not serve to relieve the Shipper and Consignee for their responsibility for the payment of freight and other charges as established by these Conditions of Carriage and law unless otherwise expressly stated by a written agreement. The foregoing shall not affect the Shippers right to secure non-recourse pursuant to Section 7 of the bill of lading. With regard to prepaid bills of lading, the existence of the Payor does not serve to relieve the Shipper for its responsibility for the payment of freight and other charges as established by these Conditions of Carriage and law unless otherwise expressly stated by a written agreement.

(7) Effective October 1, 2003, NS will assess a finance charge of one percent (1%) per month (twelve percent (12%) per annum) against unpaid linehaul freight bills beyond credit terms. Finance charges will be calculated using a daily rate of .0329% (12% / 365 days) which will be applied to unpaid linehaul freight bills that are not paid within the governing credit period. The finance charge will accrue daily until payment is received by NS.

▲ - Change in wording which results in neither increase nor reduction in charges.

EFFECTIVE JUNE 1, 2003

Issued By
P. J. GLENNON, DIRECTOR
MARKETING SERVICES - NORFOLK SOUTHERN CORPORATION
110 Franklin Road, S.E.
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UNIFORM FREIGHT CLASSIFICATION 6000-K

LE	SUBJECT	APPLICATION	RULE
7 (Con- tinued)	DELIVERY OF SHIPMENTS COVERED BY ORDER BILLS OF LADING	<p>SECTION 3. Concluded. When a shipment has been released under a blanket bond of indemnity, the original bill of lading, properly endorsed, must be surrendered as soon as available at a bank or other source. In the event the required bill of lading is not surrendered within five (5) days, exclusive of Saturdays, Sundays and bank holidays, or, at carrier's option, a lesser time, immediately following the day on which the shipment was delivered, (See Note 2), further delivery of shipments under the bond shall cease, unless or until the principal shall deposit with the carrier's agent (1) Substitute 1 or (2) a specific bond of indemnity, in amount equal to twice the invoice or value of the property, with a corporate surety duly authorized to write surety bonds and regularly engaged in such business, except that when accompanied by evidence acceptable to the carrier, that settlement for the shipment has been accomplished, a specific bond with surety approved by the carrier may be accepted, or (3) unless or until Substitute 4 (open-end bond) is furnished by the principal or the shipper.</p> <p>Any deposit under Substitute 1 shall be refunded: (1) Upon surrender of the bill of lading properly endorsed; or (2) Upon receipt by the carrier of a specific bond of indemnity, with surety, in amount equal to twice the invoice or value of the property, except that, in the case of a party who operates under a blanket bond, the surety on the specific bond shall be a corporate surety duly authorized to write surety bonds and regularly engaged in such business, or, at carrier's option, an open-end bond of indemnity with corporate surety duly authorized to write surety bonds and regularly engaged in such business.</p> <p>NOTE 1. The writing may be contained in a bond or in a separate instrument, and may relate to a designated shipment or shipments or to all shipments (including future shipments) of a designated class or classes.</p> <p>NOTE 2. The MP may allow surrender of Shippers Order Bills of Lading by means of U.S. Mail. When the mail service is used, the time of mailing by the party which undertakes to surrender such Bill of Lading shall be deemed to be the time of surrender. In the case of dispute as to the time of mailing, the postmark date shall govern.</p>	7 (Con- cluded)
	FREIGHT CON-SIGNED TO ONE PARTY, NOTIFY OR ADVISE AN-OTHER PARTY	<p>SECTION 3½. The issuance of a Straight Bill of Lading for a shipment consigned to one party, notify or advise another party, is prohibited unless the name of the person, firm or corporation to which shipment is consigned is plainly shown after the words "Consigned to" and the name of the person, firm or corporation to be advised is shown immediately thereunder and preceded by the word "Advise".</p>	8
7 (Con- tinued)	DELIVERY OF SHIPMENTS COVERED BY STRAIGHT BILLS OF LADING	<p>SECTION 4. Shipments on straight bills of lading (including shipments consigned to one party, notify or advise another party) and in respect to which carriers are obligated not to make delivery except on surrender of written order or other required document, may be delivered in advance of surrender of the written order or other required document to, or as directed by, a party who states (see Note 1) to the carrier in writing (or orally if promptly confirmed in writing) that he is the owner or is lawfully entitled to the possession of the property, and that the written order or other required document has been lost, delayed, destroyed, or otherwise is not immediately available at a bank or other source, or states (see Note 1) in writing that if and when a shipment is delivered to him, or as directed by him, he will be at that time either the owner or lawfully entitled to the possession of the property, and who presents to the carrier as a substitute for the written order or other required document, security in the form of: Substitute 1. Currency, certified check or bank cashier's check in amount equal to 125% of the invoice or value of the property; OR AT CARRIER'S OPTION Substitute 2. A specific bond of indemnity with surety in amount equal to twice such invoice or value; OR AT CARRIER'S OPTION Substitute 3. A blanket bond of indemnity with surety; OR AT CARRIER'S OPTION Substitute 4. An open-end bond of indemnity with corporate surety duly authorized to write surety bonds and regularly engaged in such business.</p> <p>A specific bond of indemnity is one given to protect delivery of a single shipment. A blanket bond of indemnity is one that can repeatedly be made use of until cancelled as provided therein or at the option of the carrier. A bond executed by a partner as surety for his firm shall not be accepted. An open-end bond is one which may be used repeatedly until cancelled, at the carrier's option or in accordance with its terms, and which applies separately to each shipment in an amount equal to twice the invoice or value thereof, and which shall provide that if any written order or other required document is not surrendered within five days, exclusive of Saturdays, Sundays and bank holidays, immediately following the day whereon the shipment was delivered (See Note 2), the liability of the surety with respect to such shipment shall automatically be doubled. All bonds of indemnity must be satisfactory to the accepting carrier as to form, amount and surety.</p> <p>When a specific bond of indemnity has been accepted, the written order or other required document must be surrendered as soon as available at a bank, or other source. (Rule 7 concluded on next page)</p>	9

UNIFORM FREIGHT CLASSIFICATION 6000-K

RULE	SUBJECT	APPLICATION
	ONE CONSIGNOR, CONSIGNEE AND DESTINATION ON BILLS OF LADING	<p>SECTION 1. The name of only one shipper, one consignee and one destination shall appear on a shipping order or bill of lading, except that the shipping order and bill of lading may specify the name of a party at the same destination to be notified of the arrival of shipment. The issuance of a bill of lading for a shipment consigned, straight or "to order" at one point, with the consignee's address or instructions to notify the consignee or other party, at another point, will be permitted only under the following conditions: When the consignee or party to notify or advise is located at a point inaccessible to deliveries of rail carriers; or When the consignee or party to notify or advise is located at a prepay station or on a rural free delivery route or in the interior, in which cases the shipment must be consigned to an adjacent open station designated by the shipper; or When the destination station and consignee's post office address adjacent to such station are differently named. This rule does not prohibit showing the point or points at which shipments are to be stopped in transit for partial loading or unloading when such partial loading or unloading is specifically authorized by the carriers' tariffs applicable to such shipments.</p>
	FREIGHT CON-SIGNED "TO ORDER"	<p>SECTION 2. The issuance of a bill of lading for a shipment consigned "to order" is prohibited unless the name of the person, firm or corporation to whose order the shipment is consigned is plainly shown thereon after the words "to order".</p>
7	DELIVERY OF SHIPMENTS COVERED BY ORDER BILLS OF LADING	<p>SECTION 3. Surrender of original order bill of lading, properly endorsed, is required before delivery of the property therein described, but such property may be delivered in advance of surrender of the bill of lading to, or as directed by, a party who states (see Note 1) to the carrier in writing (or orally if promptly confirmed in writing) that he is the owner or is lawfully entitled to the possession of the property and that the bill of lading has been lost, delayed, destroyed or otherwise is not immediately available at a bank or other source, or states (see Note 1) in writing that if and when a shipment is delivered to him, or as directed by him, he will be at that time either the owner or lawfully entitled to the possession of the property, and who presents to the carrier as a substitute for the bill of lading, security in the form of Substitute 1. Currency, certified check or bank cashier's check in amount equal to 125% of the invoice or value of the property; OR AT CARRIER'S OPTION Substitute 2. A specific bond of indemnity with surety in amount equal to twice such invoice or value; OR AT CARRIER'S OPTION Substitute 3. A blanket bond of indemnity with surety; OR AT CARRIER'S OPTION Substitute 4. An open-end bond of indemnity with corporate surety duly authorized to write surety bonds and regularly engaged in such business. A specific bond of indemnity is one given to protect delivery of a single shipment. A blanket bond of indemnity is one that can repeatedly be made use of until cancelled, as provided therein or at the option of the carrier. A bond executed by a partner as surety for his firm shall not be accepted. An open-end bond is one which may be used repeatedly until cancelled, at the carrier's option or in accordance with its terms, and which applies separately to each shipment in an amount equal to twice the invoice or value thereof, and which shall provide that if the original bill of lading, properly endorsed, is not surrendered within five days, exclusive of Saturdays, Sundays and bank holidays, immediately following the day whereon the shipment was delivered (See Note 2), the liability of the surety with respect to such shipment shall automatically be doubled. All bonds of indemnity must be satisfactory to the accepting carrier as to form, amount and surety. When a specific bond of indemnity has been accepted, the original bill or bills of lading must be surrendered, properly endorsed, as soon as available at a bank, or other source. (Rule 7 continued on next page)</p>

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SECTION 1
RULES

RULE 230 - TRANSPORTATION CHARGES TO APPLY

(1) The charges applicable to the transportation from origin to destination will be those established by either the governing quotation, contract or tariff on the bill of lading date for the shipment in issue. Any change to the information of the bill of lading (including, but not limited to, the shipper, consignee, origin or destination) shall be invalid and without effect unless received and approved by Norfolk Southern Central Yard Operations. Any such change to the bill of lading must be transmitted to Norfolk Southern in such form as may be required by NS (including, but not limited to, telephone and facsimile) and may be subject to additional charges pursuant to NS 8002 Series.

(2) If it is ascertained that the commodity shipped is not as described on the bill of lading or other shipping document, NS at its option may (a) return such shipment to shipper at origin at a charge equal to the charge that would have applied had the commodity been properly described and transported to the destination named in the bill of lading; (b) choose to move said shipment to the destination named in the bill of lading or other shipping document at the transportation rate quoted; or (c) choose to move said shipment to the destination named in the bill of lading or other shipping document at a charge equal to the charge that would have applied had the commodity been properly described, plus an additional charge of \$350.00.

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