

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS,	§	
	§	
	§	
Plaintiff,	§	
	§	Civil Action No. 4:15-cv-682
v.	§	
	§	
BNSF RAILWAY COMPANY,	§	
	§	
	§	
Defendant.	§	

PLAINTIFF’S ORIGINAL COMPLAINT

Plaintiff American Fuel & Petrochemical Manufacturers (“AFPM”) files this Complaint against Defendant BNSF Railway Company (“BNSF”) and would respectfully show the Court as follows:

NATURE OF THE ACTION

1. This is a civil action against BNSF for violating its common carrier obligation by imposing a financial penalty on shipping crude oil in rail tank cars expressly authorized for such shipments by the Pipeline and Hazardous Materials Safety Administration (“PHMSA”). To ensure a national, uniform system of safe transportation by rail, PHMSA administers the Hazardous Materials Transportation Act (“HMTA”), 49 U.S.C. §5101, *et seq.*, The HMTA grants PHMSA exclusive authority over hazardous materials transportation, including the power to set safety standards governing rail tank cars that ship crude oil. PHMSA establishes rail car standards in a public rulemaking process under the protections of the Administrative Procedure Act, 5 U.S.C. § 500, *et seq.* As a common carrier railroad, BNSF is legally obligated to accept

hazardous material such as crude oil that is offered for transportation in compliance with PHMSA's federal safety regulations.

2. Despite PHMSA's comprehensive regulatory regime, BNSF recently imposed a surcharge on using certain PHMSA-authorized rail cars to ship crude oil. Specifically, BNSF charges a \$1,000 more for each "general purpose DOT 111" tank car that ships crude oil. Tens of thousands of general purpose DOT 111s are used to ship crude oil, representing a significant portion of the national crude oil rail car fleet. BNSF does not apply the surcharge to certain other rail cars designated as "jacketed DOT 111s" or "CPC-1232s" that make up the remaining subset of rail tank cars that PHMSA authorized for crude oil transportation.

3. This \$1,000 surcharge on certain PHMSA-authorized rail cars breaches BNSF's common carrier duty to ship hazardous materials under the auspices of PHMSA's comprehensive regime governing hazardous materials transportation. Allowing railroads to penalize companies that ship crude oil in federally-authorized rail cars would circumvent PHMSA's statutory and regulatory process for setting rail car standards for hazardous materials shipments. There can be little doubt of the purpose of BNSF's surcharge to penalize and deter shipments of crude oil in general purpose DOT 111 tank cars. BNSF's surcharge is imposed at the same \$1,000 level regardless of how far a train travels, the geographic conditions of the shipment, or any factor other than the use of federally authorized DOT 111 tank cars. Indeed, BNSF has admitted that it wishes to create a pricing "disincentive" to use DOT 111s.

4. AFPM is a national trade association of more than 400 petroleum refiners and petrochemical manufacturers throughout the United States. AFPM members depend on crude oil for feedstock, including crude oil shipped by rail. BNSF's surcharge should be declared unlawful and/or enjoined because as it violates BNSF's common carrier obligation.

PARTIES

5. Plaintiff AFPM is a non-profit national trade association headquartered in Washington, D.C. AFPM members operate 120 U.S. refineries comprising more than 95 percent of U.S. refining capacity.

6. BNSF is a Delaware Corporation with a Regional Hub in Houston, Texas within the Southern District of Texas. BNSF may be served with process by its registered agent for service, CT Corporation System at 1999 Bryan Street, Suite 900, Dallas, Texas 75201.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, because it arises under the laws of the United States. Defendant's actions run afoul of the Interstate Commerce Commission Termination Act, 49 U.S.C. §§ 11101, 11704(c)(1), and the HMTA, 49 U.S.C. §§ 5101 *et seq.*

8. Venue is proper under 28 U.S.C. § 1391(b)(1) and (d). Defendant is subject to the personal jurisdiction of, and therefore is resident of, the Southern District of Texas. In addition, venue is proper under 28 U.S.C. 1391(b)(2), because a substantial part of property that is the subject of the action is situated in the Southern District of Texas.

9. All conditions precedent to the filing of this cause of action have been satisfied.

FACTS

10. BNSF is a major railway and common carrier that provides services throughout the United States. Its network is comprised of almost 400 railroad lines with service in 28 states, including a Regional Hub in Houston, Texas.

11. BNSF is the largest transporter of crude oil in North America, hauling more than 600,000 barrels per day. In the Bakken formation in North Dakota and Montana, BNSF transports more than half of the crude oil produced.

12. AFPM is a trade association that represents the interests of virtually every United States refiner and petrochemical manufacturer in judicial, legislative, and administrative forums. AFPM members own and/or employ rail tank cars to ship crude oil on BNSF lines, including those DOT 111 cars that are subject to the surcharge here at issue.

13. Nation-wide, one of the most commonly used rail tank cars in crude service is the general purpose DOT 111 railcar, which is also referred to as the “unjacketed DOT 111.” The American Association of Railroads (“AAR”), a trade association representing BNSF and other major railroads, recently filed comments with PHMSA estimating that nearly 23,000 general purpose DOT 111s were used to ship crude oil, representing about 28% of the national crude oil rail fleet.

14. PHMSA administers and oversees hazardous materials transportation under the Hazardous Materials Regulations (“HMR”). 49 C.F.R. Parts 105–177. PHMSA’s powers under the HMR include the exclusive authority to approve the specifications and standards for rail tank cars that ship crude oil. 49 U.S.C. § 5103 (b)(1)(A)(iii). PHMSA sets rail tank car standards through rulemaking proceedings under the Administrative Procedure Act. 49 U.S.C. § 5103(b); 5 U.S.C. §§ 500 *et seq.*

15. On October 24, 2014, BNSF announced that it would enact a \$1,000 per railcar surcharge on each general purpose DOT 111 used to ship crude oil. On December 18, 2014, BNSF officially distributed its proposed cost schedule to customers as BNSF Price Authority 90118, Amendment/Rev: 20, effective January 1, 2015. The schedule imposes a \$1,000 higher

cost to ship crude oil in general purpose DOT 111s when compared to identical shipments in jacketed DOT 111 tank cars, CPC-1232 specification tank cars, or “Next Gen” model railcars. BNSF’s reference to “Next Gen” cars is illusory since no such cars actually exist. Jacketed DOT 111s and CPC-1232s are authorized tank cars for crude oil shipments, but PHMSA does *not* mandate their use. Instead, general purpose DOT 111 railcars remain authorized for use in shipping crude oil. See 79 Fed. Reg. 45,015, 45,025 (Aug. 1, 2014) (“The DOT Specification 111 tank car is one of several cars authorized by the HMR for the rail transportation of many hazardous materials, including ethanol, crude oil and other flammable liquids.”)

16. BNSF’s price list imposes a consistent \$1,000 premium for general purpose DOT 111 shipments over other rail tank car shipments, despite destination or proportionality of the price. The \$1,000 surcharge is applied regardless of the route’s other characteristics. Factors which might speak to safety, such as distance, climate, or geography, are not reflected in the \$1,000 increase. As such, the flat-rate \$1,000 differential constitutes a surcharge on general purpose DOT 111 railcars.

17. The purpose of the surcharge is to cause shippers to retrofit or retire federally-authorized general purpose DOT 111 railcars. BNSF has admitted that the surcharge is intended to discourage the use of certain DOT 111s. Specifically, BNSF informed the Administrator of PHMSA at a March 19, 2014 meeting that “there needs to be [a] disincentive to use DOT 111,” and thus the company was “looking at pricing” to accomplish that objective. Notes from Administrator’s Meeting with BNSF for Docket PHMSA-2012-0082, Open Rulemaking HM-251 (Mar. 19, 2014) (attached as Exhibit A). Rather than allowing shipments of crude oil in authorized DOT 111 tank cars, BNSF told PHMSA that “crude should move by the ‘next generation’ rail car,” even though DOT does not require such cars, and, in fact, none

have been manufactured yet. *Id.* In October 2014, BNSF announced the surcharge, which was characterized as a fee to encourage shippers to scrap general purpose DOT 111s. Black et al., Berkshire's BNSF to Add Surcharge on Older Tank Cars, *Bloomberg Business* (Oct. 24, 2014), (attached as Exhibit B).

18. BNSF's assertion of unilateral regulatory authority over crude oil tank car standards conflicts with the pending PHMSA rulemaking on such standards. On August 1, 2014, PHMSA proposed a rule on tank car standards and operational controls on rail shipments of crude and ethanol. *See* 79 Fed. Reg. 45,015 (Aug. 1, 2014). The proposal would eventually phase out general purpose DOT 111 tank cars for crude oil shipments by requiring that they be retrofitted or retired. None of the regulatory options under consideration by PHMSA included BNSF's immediate \$1,000 per car surcharge upon the continued use of general purpose DOT 111 tank cars. The certainty provided by PHMSA's exclusive tank car standards, including the retrofit schedule to be announced in the pending rulemaking, would be undermined were BNSF and other railroads allowed to use financial surcharges and penalties to coerce companies to adopt different standards.

19. BNSF's surcharge also deprives companies of the procedural protections afforded to those that are participating in the pending PHMSA rulemaking on rail tank car standards for crude oil shipments. Under the Administrative Procedure Act, PHMSA must afford notice and an opportunity to comment on its proposed rules, which then must be considered in promulgating a final rule. In the pending crude by rail rulemaking, AFPM, AAR, and other interested parties availed themselves of those procedural rights by filing written comments with PHMSA. All of these comments advocate for a multi-year phase out of general purpose DOT 111s because tank car manufacturers are unable to immediately retrofit or replace all DOT 111s due to limitations

on their manufacturing shop capacity and other factors. *See* Excerpts from the Comments to PHMSA, attached as Exhibit C. As a practical matter, BNSF's surcharge on general purpose DOT 111s denies AFPM and other stakeholders the procedural benefits of the rulemaking process with PHMSA: No matter how PHMSA decides to proceed in crafting the schedule for retiring or retrofitting DOT 111s, BNSF has already declared an immediate financial penalty on the continued use of those tank cars.

20. BNSF's actions have a direct impact on AFPM members who ship crude oil in general purpose DOT 111 cars. With each such DOT 111 holding approximately 700 barrels of crude oil, BNSF's \$1,000 per railcar surcharge results in an additional \$1.50 in costs for each barrel of crude oil shipped in a DOT 111 railcar. Given the popularity of the general purpose DOT 111 car and the high volume of crude oil shipment, the financial harm to AFPM members is direct and substantial. AFPM has standing to bring this suit on behalf of its members, because its individual members would have standing to bring this suit on their own behalf to protect their respective financial interests.

21. Further, as the trade association comprised of virtually all major crude oil refiners, AFPM has standing to protect interests germane to its purpose. BNSF's surcharges apply to AFPM members who ship crude oil with BNSF and are subject to the unlawful surcharge on general purpose DOT 111 tank cars.

CLAIMS AND CAUSES OF ACTION

Count I – Declaratory and Injunctive Relief for Breach of BNSF's Common Carrier Obligation

22. Plaintiff incorporates and re-alleges each and every allegation contained in Paragraphs 1 to 21 of this Complaint as though fully set forth herein.

23. Section 171.1 of PHMSA's HMR provides, in relevant part: "Federal hazardous materials transportation law (49 U.S.C. 5101 *et seq.*) directs the Secretary of Transportation to establish regulations for the safe and secure transportation of hazardous materials in commerce, as the Secretary considers appropriate. . . Regulations prescribed in accordance with Federal hazardous materials transportation law *shall govern safety aspects*, including security, *of the transportation of hazardous materials that the Secretary considers appropriate.*" 49 C.F.R. § 171.1 (emphasis added).

24. Congress mandated that PHMSA "shall carry out" the "duties and powers" of the Secretary of DOT "related to . . . hazardous materials transportation and safety. . . ." 49 U.S.C. § 108(f)(1). PHMSA's authority over hazardous materials transportation "may be transferred" to another part of DOT or another government entity "only if specifically provided by law," 49 U.S.C. § 108(g), but no such transfer has been specifically authorized by Congress.

25. PHMSA's statutory authority includes the power to regulate "package[s], container[s], or packing component[s] . . . sold as qualified for use in transporting hazardous material in commerce." 49 U.S.C. § 5103 (b)(1)(A)(iii). PHMSA's HMR authorize certain rail cars as "bulk packagings" for the transport of hazardous materials, including DOT 111 rail tank cars for the shipment of crude oil and other "Class 3" flammable liquids. 49 C.F.R. §§ 173.241(a) (listing DOT 111 tank cars for the shipment of low-hazard liquids); 173.242(a) (listing DOT 111 tank cars for medium-hazard liquids); 173.243(a) (listing DOT 111 tank cars for high-hazard liquids). *See also* 49 C.F.R. § 172.101, Hazardous Materials Table, Column 8C (listing bulk packaging requirements for hazardous materials). As PHMSA has noted: "The DOT Specification 111 tank car is one of several cars authorized by the HMR for the rail

transportation of many hazardous materials, including ethanol, crude oil and other flammable liquids.” 79 Fed. Reg. at 45,025.

26. PHMSA’s rail tank car standards are exclusive. Section 173.3 of the HMR states, in pertinent part, that “[t]he packaging of hazardous materials for transportation by ... rail must be as specified in this part.” 49 C.F.R. § 173.3(a). Section 173.31 of HMR provides, in relevant part, that “[t]ank cars and appurtenances may be used for the transportation of any commodity for which they are authorized in this part . . .” 49 C.F.R. § 173.31(a)(2). Congress deemed uniformity in rail tank cars so important that it preempted States from enacting their own tank car standards. 49 U.S.C. § 5125(b)(1)(E); 49 C.F.R. § 171.1(f)(1)(iii)(E). Accordingly, PHMSA has exclusive authority to regulate the specifications and standards of rail tank cars used to transport crude oil.

27. BNSF is a common carrier subject to Interstate Commerce Commission Termination Act, and as such must provide rail transportation upon reasonable request. 49 U.S.C. § 11101. That statutory common carrier obligation includes a duty to transport hazardous materials where the appropriate agencies have promulgated comprehensive safety regulations. Here, BNSF is bound by PHMSA’s comprehensive regulatory regime governing the shipment of crude oil, and must accept for transportation those general purpose DOT 111 cars that are authorized for such transportation. Any changes to PHMSA’s regime must be processed through the rulemaking procedures under the Administrative Procedure Act, including the pending rulemaking on standards for rail cars that ship crude oil. Enacting a monetary penalty with the purpose of deterring hazardous materials shipments in authorized rail cars is contrary to BNSF’s common carrier obligation.

28. BNSF's surcharge conflicts with both PHMSA's current standards for railcars in crude service, and its exclusive right to enact and enforce a comprehensive regulatory regime. Despite BNSF's distaste for general purpose DOT 111 railcars, they are authorized bulk packagings for crude service under the HMR. Accordingly, BNSF's surcharge undermines its common carrier obligation to submit to PHMSA's authority under the Hazardous Materials Transportation Act and the Interstate Commerce Commission Termination Act.

PRAYER FOR RELIEF

For the above reasons, Plaintiff asks that judgment be rendered in favor of Plaintiff as follows:

- a. A judgment declaring that BNSF's proposed surcharge on movements of crude oil in general purpose DOT 111 railcars is null and void and unenforceable because it constitutes an unlawful attempt to regulate the standards and specifications of railcars used to ship crude oil, which is the exclusive province of PHMSA;
- b. A permanent injunction prohibiting BNSF from imposing the unlawful surcharge; and
- c. Such other and further relief to which AFPM may show itself to be justly entitled.

Respectfully submitted,

AMERICAN FUEL & PETROCHEMICAL
MANUFACTURERS

By its Attorneys,

HOGAN LOVELLS US LLP

/s/ Bruce D. Oakley

Bruce D. Oakley
Texas Bar No. 15156900
Southern District No. 11824
HOGAN LOVELLS US LLP
700 Louisiana Street, Suite 4300
Houston, Texas 77002
Tel: (713) 632-1400
Fax: (713) 632-1401
Email: bruce.oakley@hoganlovells.com

**ATTORNEY-IN-CHARGE FOR AMERICAN
FUEL & PETROCHEMICAL
MANUFACTURERS**

Of Counsel:

Justin A. Savage (D.C. Bar No. 466345) (*Pro Hac
Vice motion pending*)
555 Thirteenth Street, NW
Washington, D.C. 20004
Tel: (202) 637-5600
Fax: (202) 637-5910
Email: justin.savage@hoganlovells.com

Heaven C. Chee
Texas Bar No. 24087290
Southern District No. 2383177
700 Louisiana Street, Suite 4300
Houston, Texas 77002
Tel: (713) 632-1400
Fax: (713) 632-1401
Email: heaven.chee@hoganlovells.com