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ENTERED
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Public Record

October 5, 2020

By e-filing

Allison C. Davis, Director
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

Re: Docket No. NOR 42170, *Kingsbury Elevator, Inc. v. Grand Trunk Western Railroad Company*

Dear Ms. Davis:

Hereby transmitted is a Motion for Leave to Amend Count Three of Complaint Filed on August 6, 2020 for filing with the Board in the above referenced matter.

Respectfully submitted,

/s/Thomas F. McFarland

Thomas F. McFarland
Attorney for Kingsbury Elevator, Inc.

TMcf:mg:1884\efSTB2

cc: All parties of record

BEFORE THE
SURFACE TRANSPORTATION BOARD

KINGSBURY ELEVATOR, INC.,	)	
	)	DOCKET NO.
<u>Complainant,</u>	)	NOR 42170
v.	)	
	)	
GRAND TRUNK WESTERN RAILROAD	)	
COMPANY,	)	
	)	
<u>Defendant.</u>	)	

**MOTION FOR LEAVE TO AMEND COUNT THREE
OF COMPLAINT FILED ON AUGUST 6, 2020**

KINGSBURY ELEVATOR, INC.
P.O. Box 66
Kingsbury, IN 46345

Complainant

THOMAS F. McFARLAND
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Attorney for Complainant

DATE FILED: October 5, 2020

BEFORE THE
SURFACE TRANSPORTATION BOARD

KINGSBURY ELEVATOR, INC.,	)	
	)	DOCKET NO.
<u>Complainant,</u>	)	NOR 42170
v.	)	
	)	
GRAND TRUNK WESTERN RAILROAD	)	
COMPANY,	)	
	)	
<u>Defendant.</u>	)	

**MOTION FOR LEAVE TO AMEND COUNT THREE
OF COMPLAINT FILED ON AUGUST 6, 2020**

Pursuant to 49 C.F.R. Part 1111 and 49 C.F.R. § 1117.1, KINGSBURY ELEVATOR, INC. (KE) hereby respectfully seeks leave to amend Count Three of its Complaint filed on August 6, 2020. The Defendant, GRAND TRUNK WESTERN RAILROAD COMPANY (GTW), has not yet answered the Complaint nor responded otherwise.

As its proposed amendment, KE seeks to voluntarily strike Count Three as it currently appears in the Complaint, and to insert in its place a proposed Count Three as appears in the attachment to this Motion. Essentially, the Motion would substitute an unreasonable practice claim under 49 U.S.C. § 10702(2) for an overcharge claim under 49 U.S.C. § 11101(e).

WHEREFORE, leave should be granted to amend Count Three of the Complaint as proposed.

Respectfully submitted,

KINGSBURY ELEVATOR, INC.
P.O. Box 66
Kingsbury, IN 46345

Complainant

/s/ Thomas F. McFarland

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Attorney for Complainant

DATE FILED: October 5, 2020

PROPOSED COUNT THREE OF COMPLAINT FILED ON AUGUST 6, 2020

**COUNT THREE - UNREASONABLE PRACTICE IN VIOLATION OF 49 U.S.C. §
10702(2) - PRIVATE CARS HELD ON GTW TRACKS PRIOR TO UNLOADING**

28

KE realleges the assertions made in Paragraphs 1-4 of this Complaint.

29

It is provided in 49 U.S.C. § 10702(2) that a rail carrier providing transportation or service subject to the jurisdiction of the Board is required to establish reasonable rules and practices on matters relating to that transportation or service.

30

It is provided in GTW Tariff 9000 that a charge of \$75 per car per day will be imposed on KE when privately-owned or privately-leased railcars are held on GTW tracks prior to being unloaded at KE's elevator. That charge is referred to as a private equipment charge.

31

GTW has assessed a total of \$15,300 in private equipment charges against KE in 2019 which have not been paid.

32

The charges referred to in Paragraph 31 accrued when an employee of GTW having apparent authority stated to a representative of KE that in view of excess track space in GTW's South Bend yard at the time, KE could store the private equipment in that yard for the foreseeable future without charge.

33

Collection of private equipment charges in those circumstances would be an unreasonable practice related to transportation or service in violation of 49 U.S.C. § 10702(2).

34

Wherefore, for the reasons stated, the Board should find that GTW cannot collect the private equipment charges at issue.^{1/}

35-36

Paragraphs 35 and 36 are withdrawn.

^{1/} As a conforming amendment, Conclusion and Requested No. 3 on page 16 of the Complaint is hereby stricken and is replaced by the following:

“(3) Collection of private equipment charges in the circumstances of this matter would constitute an unreasonable practice related to transportation or service in violation of 49 U.S.C. § 10702(2).”

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2020, I served the foregoing Motion For Leave To Amend Count Three Of Complaint Filed On August 6, 2020 by e-mail on the following: Bradon J. Smith, Esq. at *bsmith@fletcher-sippel.com*, Thomas J. Litwiler, Esq., at *tlitwiler@fletcher-sippel.com*, and Michael J. Barron Jr., Esq. at *mbarron@fletcher-sippel.com*, Attorneys for Grand Trunk Western Railroad Company, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 800, Chicago, IL 60606-3208.

/s/ Thomas F. McFarland

Thomas F. McFarland