

ADM sues railroads for price-fixing on fuel fees

By DAN BROWNING
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Agricultural giant Archer-Daniels-Midland filed a federal anti-trust lawsuit in Minneapolis made public today, accusing the five largest U.S. railroads of a price-fixing conspiracy.

ADM joins a growing chorus of companies that have filed such claims against the railroads since last year. Pretrial discovery is being handled by the U.S. District Court in Washington, D.C..

According to ADM's lawsuit, the railroads got together through their membership in the American Railroad Association and agreed to a scheme that fixed fuel surcharges. The surcharges are supposed to help railroads recover unanticipated costs when fuel prices spike. But ADM alleges that the railroads used them to extract profits from shippers.

ADM, based in Decatur, Ill., is one of the world's largest processors of agricultural products, including soybeans, corn, wheat, canola, biodiesel, ethanol, soybean oil, soy meal, corn sweeteners and flour. ADM says it has paid the railroads more than \$250 million in fuel surcharges since 2003, and it's seeking treble damages in the lawsuit.

Seven "Class I" railroads operate in the U.S. and they carry about 93 percent of the industry's freight, the suit says. Two of the companies are based in Canada and are not parties to the suit.

ADM named the five major U.S. railroads as defendants: Union Pacific Railroad Co. (UP), of Omaha, Neb., BNSF Railway Co. (also known as Burlington Northern Santa Fe), of Fort Worth, Tex., CSX Transportation Inc., of Jacksonville, Fla., Norfolk Southern Railway Co., of Norfolk, Va., and Kansas City Southern Railway Co., of Kansas City, Mo.

The CEOs of those railroad companies sit on the board of the Association of American Railroads. ADM alleges that the defendants used the association "as an instrument to develop, organize and conduct their conspiracy."

David Gelfand, a Washington, D.C., attorney representing the association, declined to comment on any litigation.

ADM alleges that the conspiracy began in or before 2003, when the rail association changed its shipping rate index. ADM says the change "enabled the defendant railroads

to impose agreed-upon price increases that did not correspond with the actual unanticipated increases in fuel costs" from market fluctuations. Rather, it enabled the rail companies to pad their profits, ADM says in its 42-page lawsuit.

As a result of the conspiracy, the suit says, rail fuel charges imposed by the defendants moved in lockstep within geographical operating areas.

ADM says the railroads selected nearly identical factors to trigger the surcharges. It included a chart showing nearly identical surcharge triggers for the two western railroads between July 2003 and March 2007. A similar chart showed nearly identical triggers for the three eastern railroads between March 2004 and March 2007.

"The similarities between the railroads' fuel surcharges are both too precise and too comprehensive to have been independent responses to any common market phenomenon," the suit says.

"Absent collusion, it is extremely unlikely that Defendants operating in similar geographic areas would independently price their rail fuel surcharges to arrive at the identical percentage [trigger point] month after month, year after year, for a period of more than three years," the suit says.

ADM says the railroads changed their past practice of negotiating discounts for some shippers on rail freight rates and said that fuel surcharges were "not negotiable." The railroads refused to lower prices even when doing so might have increased their market share, the suit says.

ADM alleges that the railroads used increases in fuel prices as a cover for "across-the-board rate increases. Although fuel prices increased between 2004 and 2007, Defendants continued to take in record, increased profits each year of the conspiracy," the suit says.

Congress deregulated the railroad industry in 1980, allowing the companies to set their own hauling rates. The number of Class I railroads dropped to seven from the 35 companies that operated before deregulation, the lawsuit says.

ADM notes that the Surface Transportation Board (STB) issued an administrative decision 15 months ago that described the railroads' method for calculating fuel charges as unreasonable.

And in September, the U.S. Government Accountability Office (GAO) recommended that the board investigate whether the railroads had too much market power, and if so, to suggest changes.

The legal actions against the railroads began last May, when Dust-Pro Inc. filed a federal class-action lawsuit in New Jersey. Dust-Pro accused the rail companies of violating the anti-trust laws known as the Sherman Act and Clayton Act by conspiring to fix, raise, maintain or stabilize prices of rail freight services through fuel surcharges.

The Dust-Pro case was swept into multi-district litigation late last year. So far, 17 lawsuits have been consolidated there. In addition, some class-action cases are ensuing under state laws by indirect purchasers of rail freight service.

Jerry Snider, a Minneapolis attorney representing ADM, said Wednesday that he was uncertain whether the ADM case would get pulled into the multi-district litigation. But if it does, it would only be for pretrial discovery issues. Any trial would take place in Minnesota, he said.