

FreightCar America, Inc.  
Form S-1/A  
September 16, 2005

As filed with the Securities and Exchange Commission on September 16, 2005

Registration No. 333-128122

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# SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

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Amendment No. 2

to

**FORM S-1**

REGISTRATION STATEMENT

UNDER

THE SECURITIES ACT OF 1933

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**FreightCar America, Inc.**

(Exact name of Registrant as specified in its charter)

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**Delaware**  
(State or other jurisdiction of  
incorporation or organization)

**3743**  
(Primary Standard Industrial  
Classification Code Number)  
**Two North Riverside Plaza**

**25-1837219**  
(I.R.S. employer identification  
number)

**Suite 1250**

**Chicago, Illinois 60606**

**(800) 458-2235**

(Address, including zip code, and telephone number, including area code, of registrant's principal executive offices)

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**John E. Carroll, Jr.**

**President and Chief Executive Officer**

**FreightCar America, Inc.**

**Two North Riverside Plaza**

**Suite 1250**

**Chicago, Illinois 60606**

**(800) 458-2235**

(Name, address, including zip code, and telephone number, including area code, of agent for service)

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*Copies To:*

**Robert F. Wall, Esq.**

**Stephen T. Giove, Esq.**

**David A. Sakowitz, Esq.**

**Lisa L. Jacobs, Esq.**

**Winston & Strawn LLP**

**Shearman & Sterling LLP**

**35 W. Wacker Drive**

**599 Lexington Avenue**

**Chicago, Illinois 60601-9703**

**New York, New York 10022-6069**

**(312) 558-5600**

**(212) 848-4000**

**Approximate date of commencement of proposed sale to the public:** As soon as practicable after the effectiveness of this registration statement.

If any of the securities being registered on this form are to be offered on a delayed or continuous basis pursuant to Rule 415 under the Securities Act of 1933, please check the following box. "

If this form is filed to register additional securities for an offering pursuant to Rule 462(b) under the Securities Act, please check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. "

If this form is a post-effective amendment filed pursuant to Rule 462(c) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. "

If this form is a post-effective amendment filed pursuant to Rule 462(d) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. "

If delivery of the prospectus is expected to be made pursuant to Rule 434, please check the following box. "

**The registrant hereby amends this registration statement on such date or dates as may be necessary to delay its effective date until the registrant shall file a further amendment which specifically states that this registration statement shall thereafter become effective in accordance with Section 8(a) of the Securities Act, or until the registration statement shall become effective on such date as the**

Commission, acting pursuant to said Section 8(a), may determine.

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**EXPLANATORY NOTE**

The sole purpose of this Amendment is to file an exhibit to the Registration Statement. Accordingly, this Amendment consists only of the facing page, this explanatory note and Part II of the Registration Statement. The Prospectus and Financial Statement Schedules are unchanged and have been omitted.

**PART II**

**INFORMATION NOT REQUIRED IN PROSPECTUS**

**Item 13. Other Expenses of Issuance and Distribution.**

The following are the estimated expenses to be incurred in connection with the issuance and distribution of the securities registered under this Registration Statement, other than underwriting discounts and commissions. All amounts shown are estimates except the Securities and Exchange Commission registration fee and the National Association of Securities Dealers, Inc. filing fee. The following expenses will be borne solely by the registrant.

Securities and Exchange Commission registration fee	\$ 11,794
National Association of Securities Dealers, Inc. filing fee	10,520
Printing and engraving expenses	175,000
Legal fees and expenses	550,000
Accounting fees and expenses	525,000
Transfer agent and registrar fees	2,500
Miscellaneous	25,186
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<b>Total</b>	<b>\$ 1,300,000</b>

**Item 14. Indemnification of Directors and Officers.**

We are incorporated under the laws of the State of Delaware. Section 145 of the Delaware General Corporation Law provides that a corporation may indemnify any persons who were, are or are threatened to be made, parties to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of such corporation), by reason of the fact that such person is or was an officer, director, employee or agent of such corporation, or is or was serving at the request of such corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise. The indemnity may include expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by such person in connection with such action, suit or proceeding, provided such person acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the corporation's best interests and, with respect to any criminal action or proceeding, had no reasonable cause to believe that

his or her conduct was unlawful.

Section 145 of the Delaware General Corporation Law further authorizes a corporation to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation or enterprise, against any liability asserted against him or her and incurred by him or her in any such capacity, arising out of his or her status as such, whether or not the corporation would otherwise have the power to indemnify him or her under Section 145 of the Delaware Corporation Law.

Our certificate of incorporation, as amended, eliminates the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, except for liabilities arising (a) from any breach of the director's duty of loyalty to the corporation or its stockholders; (b) from acts or omissions not in good faith or which involve intentional misconduct or a

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**PART II**

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knowing violation of law; (c) under Section 174 of the Delaware General Corporation Law; or (d) from any transaction from which the director derived an improper personal benefit. In addition, our bylaws provides for indemnification of directors, officers, employees and agents to the fullest extent permitted by Delaware law and authorizes the company to purchase and maintain insurance to protect itself and any director, officer, employee or agent of the company or another business entity against any expense, liability, or loss, regardless of whether the company would have the power to indemnify such person under the company's bylaws or Delaware law.

Insofar as indemnification for liabilities arising under the Securities Act may be permitted to directors, officers or persons controlling the registrant pursuant to the foregoing provisions, the registrant has been informed that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Securities Act and is therefore unenforceable.

In addition, we have purchased director and officer liability insurance for the benefit of such persons.

**Item 15. Recent Sales of Unregistered Securities.**

On December 23, 2004, we granted stock options to purchase 1,014 Units (consisting of 557,700 shares of our common stock and 1,014 shares of our Series A voting preferred stock), at an exercise price of \$0.01 per Unit, to certain of our officers and directors. No consideration was paid for any of the options. The grant of these stock options was deemed to be exempt from registration under the Securities Act in reliance on Section 4(2) of the Securities Act, or Regulation D promulgated thereunder, as transactions by an issuer not involving a public offering. The grant of these stock options did not involve the use of any underwriter, and no commissions were paid in connection with the grant of any of the stock options.

Following the completion of our initial public offering on April 11, 2005, we granted options to purchase shares of our common stock to the executive officers listed below in the respective amounts in accordance with our 2005 Long-Term Incentive Plan.

<b>Executive Officer</b>	<b>Option Amounts</b>
John E. Carroll, Jr.	164,904
Edward J. Whalen	98,942
Kevin P. Bagby	65,962
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Total	329,808
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No consideration was paid for any of the options. The exercise price for these options were \$19.00 per option share. The grant of these stock options was deemed to be exempt from registration under the Securities Act in reliance on Section 4(2) of the Securities Act, or Regulation D promulgated thereunder, as a transaction by an issuer not involving a public offering. The grant of these stock options did not involve the use of any underwriter, and no commissions were paid in connection with the grant of any of the stock options.

**Item 16. Exhibits and Financial Statement Schedules.**

**(a) Exhibits**

See Exhibit Index at the end of this registration statement.

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**PART II**

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**(b) Financial Statement Schedules**

The following financial statement schedules of the registrant are included in Part II of the Registration Statement:

Schedule I Condensed Financial Information of Registrant

Schedule II Valuation and Qualifying Accounts

All other schedules for which provision is made in the applicable accounting regulations of the Securities and Exchange Commission are not required under the related instructions, are inapplicable or not material, or the information called for thereby is otherwise included in the financial statements and therefore has been omitted.

**Item 17. Undertakings.**

Insofar as indemnification by the registrant for liabilities arising under the Securities Act may be permitted to directors, officers and controlling persons of the registrant pursuant to the provisions described under Item 14 of this Registration Statement or otherwise, the registrant has been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Securities Act, and is therefore unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the registrant of expenses incurred or paid by a director, officer or controlling person of the registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered hereunder, the registrant will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Securities Act and will be governed by the final adjudication of such issue.

The undersigned registrant hereby undertakes that:

- (1) For purposes of determining any liability under the Securities Act, the information omitted from the form of prospectus filed as part of this Registration Statement in reliance upon Rule 430A and contained in the form of prospectus filed by the registrant pursuant to Rule 424(b)(1) or (4) or 497(h) under the Securities Act shall be deemed to be part of this Registration Statement as of the time it was declared effective; and
- (2) For the purpose of determining any liability under the Securities Act, each post-effective amendment that contains a form of prospectus shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at the time shall be deemed to be the initial bona fide offering thereof.



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- (3) The undersigned registrant hereby undertakes to provide to the Underwriters at the closing specified in the Underwriting Agreement certificates in such denominations and registered in such names as required by the Underwriters to permit prompt delivery to each purchaser.
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**PART II****SIGNATURES**

Pursuant to the requirements of the Securities Act of 1933 (the Securities Act), FreightCar America, Inc. has duly caused this Amendment No. 2 to the Registration Statement to be signed on its behalf by the undersigned, thereunto duly authorized, in Chicago, Illinois, on September 16, 2005.

**FREIGHTCAR AMERICA, INC.**

By: /s/ JOHN E. CARROLL, JR.

**Name: John E. Carroll, Jr.**  
**Title: President and Chief Executive Officer**

Pursuant to the requirements of the Securities Act, this Amendment No. 2 to the Registration Statement has been signed by the following persons in their capacities on the dates listed below.

<b>Signature</b>	<b>Title</b>	<b>Date</b>
/s/ JOHN E. CARROLL, JR. <hr/> <b>John E. Carroll, Jr.</b>	President and Chief Executive Officer (principal executive officer) and Director	September 16, 2005
/s/ KEVIN P. BAGBY <hr/> <b>Kevin P. Bagby</b>	Vice President, Finance, Chief Financial Officer, Treasurer and Secretary (principal financial officer and principal accounting officer)	September 16, 2005
* <hr/> <b>Camillo M. Santomero, III</b>	Chairman of the Board and Director	September 16, 2005
* <hr/> <b>Mark D. Dalton</b>	Director	September 16, 2005
* <hr/> <b>Jay R. Bloom</b>	Director	September 16, 2005
* <hr/> <b>James D. Cirar</b>	Director	September 16, 2005
* <hr/> <b>Robert N. Tidball</b>	Director	September 16, 2005

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Director

September 16, 2005

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**S. Carl Soderstrom**

\*By: /s/ JOHN E. CARROLL, JR.  
**John E. Carroll, Jr.**

**as Attorney-in-fact**

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## EXHIBIT INDEX

Exhibit No.	Description of Exhibit
1.1	Form of Underwriting Agreement by and among UBS Securities LLC, Jefferies & Company, Inc., CIBC World Markets Corp., FreightCar America, Inc. and certain stockholders of FreightCar America, Inc.
3.1*	Certificate of Incorporation of FreightCar America, Inc.
3.2*	By-laws of FreightCar America, Inc.
3.3*	Certificate of Ownership and Merger of FreightCar America, Inc. into FCA Acquisition Corp.
3.4*	Amended and Restated By-laws of FreightCar America, Inc.
4.1*	Form of Registration Rights Agreement, by and among FreightCar America, Inc., Hancock Mezzanine Partners, L.P., John Hancock Life Insurance Company, Caravelle Investment Fund, L.L.C., Trimaran Investments II, L.L.C., Camillo M. Santomero, III, and the investors listed on Exhibit A attached thereto.
4.2*	Specimen Common Stock Certificate of FreightCar America, Inc.
5.1****	Opinion of Winston & Strawn LLP.
10.1*	Employment Agreement, dated as of December 17, 2004, between FreightCar America, Inc. and John E. Carroll, Jr.
10.1.1*	Amendment to Employment Agreement, dated as of March 11, 2005, between FreightCar America, Inc. and John E. Carroll, Jr.
10.2*	Employment Agreement, dated as of November 22, 2004, between JAC Holdings International, Inc. and Kevin P. Bagby.
10.2.1*	Amendment to Employment Agreement, dated as of December 21, 2004, between FreightCar America, Inc. and Kevin P. Bagby.
10.3*	Employment Agreement, dated as of December 20, 2004, between FreightCar America, Inc. and Edward J. Whalen.
10.4*	Employment Agreement, dated as of December 20, 2004, between FreightCar America, Inc. and Glen T. Karan.
10.5*	2005 Long-Term Incentive Plan and Form of Option Agreement.
10.6*	Lease Agreement, dated as of December 20, 2004, by and between Norfolk Southern Railway Company and Johnstown America Corporation.
10.7****	Amended and Restated Credit Agreement, dated as of April 11, 2005, by and among Johnstown America Corporation, Freight Car Services, Inc., JAC Operations, Inc., JAIX Leasing Company and FreightCar Roanoke, Inc. as the Co-Borrowers, the various financial institutions party thereto, as Lenders, and LaSalle Bank National Association, as Administrative Agent.
10.8*	Management Incentive Plan of Johnstown America Corporation.
10.9*	Nomination Agreement, dated as of April 11, 2005, between FreightCar America, Inc. and each of Caravelle Investment Fund, L.L.C., Trimaran Investments II, L.L.C. and Camillo M. Santomero, III.
21.1****	Subsidiaries of FreightCar America, Inc.

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**EXHIBIT INDEX**

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<b>Exhibit No.</b>	<b>Description of Exhibit</b>
23.1****	Consent of Deloitte & Touche LLP.
23.2****	Consent of Winston & Strawn LLP (included in Exhibit 5.1).
24.1****	Power of Attorney (included on signature page of FreightCar America, Inc.).

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\* Incorporated by reference to FreightCar America, Inc.'s Registration Statement on Form S-1 (File No. 333-123384).

\*\*\* Incorporated by reference to FreightCar America, Inc.'s Current Report on Form 8-K filed on April 14, 2005.

\*\*\*\* Previously filed.

Confidential treatment has been granted for the redacted portions of this agreement. A complete copy of the agreement, including the redacted portions, has been filed separately with the Securities and Exchange Commission.

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