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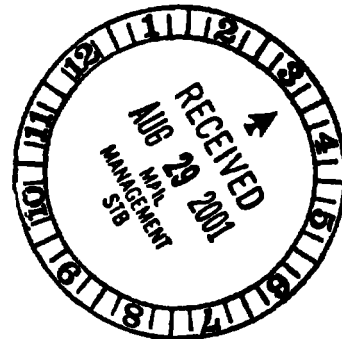
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OF COUNSEL
KAREN R. O'BRIEN

August 29, 2001

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423



Re: Docket No. 42060 (Sub-No. 1)
North America Freight Car Association v. The Burlington Northern and Santa Fe Railway Company

Dear Secretary Williams:

Enclosed please find a signed original and 10 copies of a Complaint in the above-referenced case. Also enclosed please find a check in the amount of \$5,700 as the filing fee for the same.

Sincerely,

Andrew P. Goldstein

FILED

AUG 29 2001

Enclosures

APG/rmm

**SURFACE
TRANSPORTATION BOARD**

FEE RECEIVED

AUG 29 2001

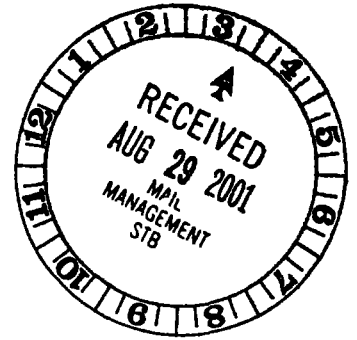
**SURFACE
TRANSPORTATION BOARD**

**ENTERED
Office of the Secretary**

AUG 30 2001

**Part of
Public Record**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



DOCKET NO. 42060 (Sub-No. 1)

NORTH AMERICA FREIGHT CAR ASSOCIATION

v.

**THE BURLINGTON NORTHERN AND SANTA FE
RAILWAY COMPANY**

COMPLAINT

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TRANSPORTATION BOARD**

FILED

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TRANSPORTATION BOARD**

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**Attorneys for
North America Freight Car Association**

Dated: August 29, 2001

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BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. 42060 (Sub-No. 1)

NORTH AMERICA FREIGHT CAR ASSOCIATION

v.

**THE BURLINGTON NORTHERN AND SANTA FE
RAILWAY COMPANY**

COMPLAINT

1. This Complaint is filed pursuant to 49 U.S.C. § 11701 and 49 C.F.R. Part 1111 by North America Freight Car Association ("NAFCA"), an unincorporated association of entities that manufacture, lease, own, or operate private freight cars, on behalf of itself and 11 of its members ("Complainants") listed in Appendix A hereto who seek affirmative relief including damages, if appropriate.¹

¹ Those NAFCA members whose names are not listed in Appendix A have determined, for reasons of policy or lack of impact from the described events, not to join in this pleading.

2. Defendant is The Burlington Northern and Santa Fe Railway Company ("BNSF"), a Class I railroad subject to the jurisdiction of the Board.²

3. Effective July 1, 2001, BNSF instituted, through tariff publications, certain new provisions applicable to privately-owned freight cars while on the property of BNSF ("July 1 changes"). Insofar as the July 1 changes apply to tank cars, Complainants filed a Protest and Petition for Investigation on June 26, 2001, pursuant to the provisions of Ex Parte No. 328, Investigation of Tank Car Allowance System, 3 I.C.C. 2nd 196 (1986) ("Ex Parte 328"). See Docket No. 42060, North America Freight Car Association – Protest and Petition for Investigation.³ Because Ex Parte 328 applies only to tank cars, this Complaint has been filed to challenge the July 1 changes as applied to railcars other than tank cars. This Complaint also supplements NAFCA's petition in Docket No. 42060 by asserting grounds other than Ex Parte 328 for finding BNSF's new charges unlawful and unreasonable as applied to tank cars.

4. BNSF declines to furnish any tank cars to its customers and declines to furnish other car types as necessary to meet the timely transportation requirements of customers for such cars.⁴ To overcome these shortages, BNSF customers, with the inducement, acquiescence, and permission of BNSF, have had to acquire private cars for use on BNSF. Currently, some 54 percent of all freight cars operated on the Nation's railroads

² Complainants also seek relief against any other railroad that participates in the tariff publications herein alleged to be unlawful.

³ BNSF has moved to dismiss the proceeding in Docket No. 42060, and Complainants have replied. The issue awaits decision by the Board.

⁴ Complainant anticipates that its proof will focus on those BNSF rules and charges impacting cars originated by shippers participating in this proceeding.

are furnished by private car interests. Class I railroads own fewer than 30 percent of the fleet.

5. Private car use is largely subject to the control of the originating carrier and its connections, rather than to shipper control. A private car use cycle begins with the loading and billing of the car, functions which the shipper largely does control. Movement to destination is controlled by the originating carrier and its connections. At destination, the frequency of switching is controlled by the terminating carrier, as are the rules, if any, under which the car is held for unloading. The consignee, and not the owner of the car, controls the unloading process. Once empty, the return of the car to the next loading point is again within carrier control, as is the frequency of switching when the car arrives at its next loading point. Of the four basic elements in the car cycle, the carrier directly and exclusively controls the two movement segments and is positioned to exert influence over the destination segment. The only element of the car cycle directly within the shipper's control is the time necessary to actually load and bill the car.

6. Holding tracks for empty cars at origin, whether private cars or railroad cars, are a necessary component of railroad service and freight car supply. BNSF historically has furnished, without additional charge, all track space on its own lines necessary for holding empty cars, whether private or railroad controlled, prior to loading. The July 1 changes, as partially modified by BNSF on August 1, 2001, impose new charges of from \$25.00 to \$75.00 per car per day on private car operators if empty private cars are held on BNSF tracks prior to placement for loading. No such charges apply to cars operated by BNSF unless they have been expressly ordered.

7. The charges described in paragraph 6, except those applicable to cars to be loaded with grain or grain products, have been classified by BNSF as "storage" charges. BNSF does not define "storage" or explain what distinguishes storage from the routine holding of empty private cars for loading, historically and traditionally undertaken by BNSF as part of its normal common carrier service. The storage rules and charges are to be found in BNSF's Private Car Storage Book 6005, including Item 1300 (cars held for loading on railroad controlled or public delivery tracks). Storage charges under Item 1300 begin on the second 12:01 a.m. after actual or constructive placement and apply until the car is released (Saturdays, Sundays and holidays within the calculation to the second 12:01 a.m. will be excluded). The charge is \$25.00 per chargeable day, or fraction thereof. There are limited provisions for adjustment of storage charges due to bunching, acts of God, or strike interference.

8. Those charges described in paragraph 6 that are applicable to covered hopper cars intended to transport grain or grain products are classified as "demurrage." The relevant demurrage rules and charges are set forth in BNSF's Demurrage Book 6004-A. The computation of these demurrage charges commences with the first 12:01 a.m. after constructive placement of a car on railroad tracks and continues until BNSF receives a request for placement of the car on private track. Thereafter, each car is given two "credit," or free, days. Following the two credit days, demurrage charges were applied at \$25.00 per day between July 1 and July 31, 2001 and increased to \$75.00 per day starting August 1. Limited relief from these charges is provided due to acts of God or strike interference, but not due to bunching. Upon information and belief, BNSF has

stated that it may revert to the \$25.00 per day level at those times when there is less demand for cars.

9. Because BNSF declines to furnish tank cars, shippers of liquid bulk products must supply their own tank cars or risk significant economic harm. Because BNSF declines to furnish a timely supply of cars for other forms of transportation, such as grain products, shippers of such commodities must supply such cars or risk significant economic harm.

10. At the time Complainants acquired private cars for use on BNSF, Complainants relied on BNSF to provide track space, at no additional charge, to hold such cars prior to loading, and BNSF was aware of such reliance. Complainants have invested hundreds of millions of dollars in acquisition costs and lease commitments for private cars for use on BNSF under these circumstances.

11. BNSF has acquired substantial market power over Complainants by virtue of their private car investments described in paragraph 10 hereof.

12. If Complainants are unwilling or unable to pay the new BNSF storage and demurrage charges described in paragraphs 7 and 8 hereof, Complainants must either find alternate track space or reduce their private car fleets.

13. Reductions in private car fleets would have an adverse impact on Complainants and on the shipping public for several reasons. First, most of Complainants' private cars operated on BNSF are owned or under multi-year leases. Removing such cars from service prior to the end of the lease or the end of their operational life would result in economic injury to Complainants. Second, BNSF does not have an adequate supplemental supply of cars that it is willing to make available to Complainants when

additional cars prove necessary as a result of erratic rail service, market fluctuations, acts of God, or other matters. Third, a reduction in the number of private cars operated may adversely impact car supply, and lead to reductions in service to shippers and receivers.

14. Complainants whose loading facilities lack sufficient land capacity to add trackage to hold empty cars prior to loading cannot avoid the new charges by constructing holding tracks.

15. In some instances, BNSF does not have any nearby tracks that it is willing to lease to shippers to hold empty private cars prior to loading. In other instances, BNSF has quoted lease charges for such tracks that are exorbitant and commercially damaging.

16. Although BNSF in effect demands, through the July 1 changes, that Complainants assume responsibility for furnishing and maintaining holding tracks for empty private cars prior to loading, such tracks heretofore have been provided by BNSF without additional charge as part of its normal and routine service. BNSF has offered to pay Complainants no allowance if they furnish the holding tracks formerly furnished by BNSF, with one partial exception: BNSF has offered to refund calendar year 2001 storage bills incurred as a result of the July 1 changes to those customers who build or expand tracks at their facilities this year, but there is no provision for full cost reimbursement or for track maintenance reimbursement.

17. BNSF retains all of the charges collected by it pursuant to the tariff publications described in paragraphs 7 and 8 hereof, including such portion of those charges representing the costs of car ownership, even though BNSF has no car ownership costs for empty private cars on holding tracks awaiting loading.

COUNT I

18. Complainants hereby incorporate paragraphs 1-17 as if repeated in their entirety.

19. The refusal of BNSF to continue to furnish holding tracks without additional charges for empty private cars awaiting loading, and BNSF's imposition of the rules and charges described in paragraph 7 and 8 hereof, are (a) unreasonable practices in violation of 49 U.S.C. § 10702, and (b) constitute a failure to furnish adequate car service and to establish, observe, and enforce reasonable rules and practices on car service in violation of 49 U.S.C. § 11121(a).

COUNT II

20. The provisions of paragraphs 1-17 are incorporated herein as if repeated in their entirety.

21. The demurrage provisions of BNSF as described herein are in violation of 49 U.S.C. § 10746, are unreasonable practices in violation of 49 U.S.C. § 10702, and constitute a failure to furnish adequate car service and to establish, observe, and enforce reasonable rules and practices on car service in violation of 49 U.S.C. § 11121(a).

COUNT III

22. The provisions of paragraphs 1-17 are incorporated herein as if repeated in their entirety.

23. It is a violation of 49 U.S.C. § 10745 for BNSF to transfer from itself to Complainants the obligation to furnish holding tracks for empty private cars awaiting loading without payment of an adequate allowance.

24. WHEREFORE, Complainants urge the Board (1) to institute a proceeding to address the issues raised by this Complaint,⁵ (2) to enter an order requiring BNSF to cease and desist from its unlawful practices, (3) to prescribe reasonable rules and practices pursuant to 49 U.S.C. § 10704, (4) to order the payment of damages, with interest, by BNSF to such of the Complainants as may, upon proof, establish a basis for the payment of such damages, including, without limitation, reimbursement of the filing fee for this Complaint, and (5) to take such other actions as may be reasonable and necessary in the premises.

Respectfully submitted,



Andrew P. Goldstein
John M. Cutler, Jr.
McCarthy, Sweeney & Harkaway, P.C.
Suite 600
2175 K Street, N.W.
Washington, DC 20007
(202) 393-5710

Attorneys for
North America Freight Car Association

Dated: August 29, 2001

⁵ Complainants intend to file at an appropriate time a petition with the Board seeking the consolidation of this proceeding with Docket No. 42060, North America Freight Car Association - Protest and Petition for Investigation. Counsel for Complainants will confer with counsel for BNSF concerning discovery and a protective order.

First Union Rail
6250 N. River Road
Rosemont, IL 60018

GLNX Corporation
10077 Grogan's Mill Road
The Woodlands, TX 77380

The David Joseph Company
300 Pike Street
Cincinnati, OH 45202-4214

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Complaint has been served by express overnight courier on Jeffrey R. Moreland, Esq., The Burlington Northern and Santa Fe Railway Company, 2500 Lou Menk Drive, Ft. Worth, TX 76131, this 29th day of August, 2001.



Andrew P. Goldstein

s:\mcd\NAFCA Complaint

APPENDIX A

Complainants

North America Freight Car Association
c/o Andrew P. Goldstein
McCarthy, Sweeney & Harkaway, P.C.
Suite 600
2175 K Street, N.W.
Washington, DC 20037

A. E. Staley Manufacturing Company
2200 East Eldorado Street
Decatur, IL 62525

Ag Processing Inc
P. O. Box 2047
Omaha, NE 68103-2047

Archer Daniels Midland Company
P. O. Box 1470
Decatur, IL 6252

Bunge North America, Inc.
P. O. Box 28500
St. Louis, MO 63146-1000

Cargill, Incorporated
P. O. Box 9300
Minneapolis, MN 55440

Cenex Harvest States Cooperative
P. O. Box 64796
St. Paul, MN 55164

Chicago Freight Car Leasing Company
One O'Hare Centre
6250 North River Road
Rosemont, IL 60018

ConAgra Trade Group
11 ConAgra Drive
Omaha, NE 68102