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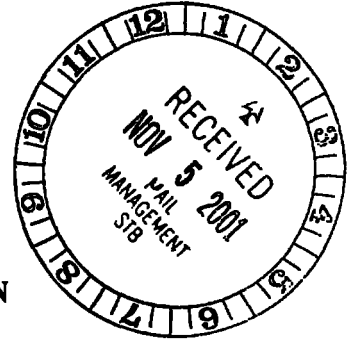
BEFORE THE
SURFACE TRANSPORTATION BOARD

42060
DOCKET NO. ~~40260~~ (SUB-NO. 1)

NORTH AMERICA FREIGHT CAR ASSOCIATION

v.

THE BURLINGTON NORTHERN AND SANTA FE
RAILWAY COMPANY



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REPLY TO MOTION OF THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY TO DISMISS
THE COMPLAINT

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Dated: November 5, 2001

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I. INTRODUCTION

North America Freight Car Association ("NAFCA") and certain of its members identified in the Complaint, as well as Intervenors E. I. du Pont de Nemours and Company, The National Industrial Transportation League, and U.S. Clay Producers Traffic Association, Inc. (collectively "Complainants") hereby reply to the Motion of The Bur-

lington Northern and Santa Fe Railway Company ("Defendant" or "BNSF") to dismiss the Complaint.

BNSF's Motion has two fatal flaws that compel denial. First, the Motion largely mischaracterizes the Complaint. BNSF assails a variety of propositions, but they are simply not propositions that accurately reflect the Complaint before the Board.

Second, BNSF fails to state why the Complaint is inadequate as a matter of law. Instead, the Motion sets forth BNSF's disagreement with the theories of relief contained in the Complaint. On numerous occasions, however, the Board and the Interstate Commerce Commission ("ICC") have recognized that disagreement with the merits of a complaint, prior to the development of a thorough and complete record, is no basis for dismissal of the complaint. Indeed, that was the finding of the ICC in one of the central cases relied upon in BNSF's Motion, ICC Docket No. 40169, National Grain and Feed Association v. Burlington Northern R.R., 8 I.C.C. 2d 421 (1992), reversed in part, National Grain and Feed Association v. ICC, 5 F.3d 306 (8th Cir. 1993). See ICC decision of May 23, 1990 in Docket No. 40169, denying the motion of Burlington Northern Railroad Company for dismissal of complaint. The instant BNSF Motion also must be denied.

II. APPLICABLE STANDARD

Fundamentally, the issues BNSF seeks to avoid through its Motion to Dismiss go to the heart of a railroad's responsibilities to its providers of private cars. BNSF accuses NAFCA (and the Intervenor) of seeking unlimited free storage of empty private cars. This is wrong, but a similar question can be asked of BNSF. Does it acknowledge any

obligation to provide pre-loading holding tracks without charge? Could the 24 hours of free time it allows be reduced to one hour, or none?

The guidance sought from the Board in this proceeding will affect the terms on which private cars are supplied, and therefore will affect the extent to which they will be available for transportation. More and more, railroads are turning over the economic burdens and risks of car supply to private car sources, who now furnish 54 percent of all railroad cars; Class I railroads supply less than 30 percent. Providers of private cars have seen their compensation for furnishing most types of cars shrink over the last 15 years, through the replacement of cost-based mileage allowances with a market-based standard.¹ The new charges and rules would transfer yet additional railroad infrastructure costs to BNSF's customers, who must either build private holding track to replace track traditionally supplied by BNSF, or pay track rentals to BNSF in the form of storage and demurrage.

Complainants are concerned with the cost implications where a railroad levies new charges without reducing line haul rates and transfers infrastructure investment obligations to customers without compensation. The new charges are also likely to result in a reduction in the number of cars available to move goods on BNSF.

It is not necessary for the Board to consider the public interest implications of this proceeding in order to deny BNSF's Motion. As shown below, none of the applicable standards has been met. However, the Board should recognize that a refusal to set this

¹ See LO Shippers v. Aberdeen & R. Ry. Co., 4 I.C.C. 2d 1 (1987), aff'd. LO Shippers Action Committee v. ICC, 857 F.2d 802 (D.C. Cir. 1988), cert. denied 109 S. Ct. 2429 (1989).

Complaint for processing would send the worst possible signal to private car suppliers, and would further discourage their investments.

As BNSF knows, motions to dismiss are disfavored and rarely will be granted even where there are doubts about the complaining party's ability to prevail on the merits. Scheuer v. Rhodes, 416 U.S. 232 (1974); Sosa v. Coleman, 646 F.2d 991, 993 (5th Cir. 1981). Relying on those cases, the ICC has held:

Granting a motion to dismiss requires that all factors be viewed in the light most favorable to complainant [footnote omitted]. Moreover, as a general rule, motions to dismiss prior to the submission of evidence or the agency's pronouncement of standards are denied to insure that participants have a full and fair opportunity to meet their burden of proof. Hill v. Federal Power Comm'n., 335 F.2d 355, 363 (5th Cir. 1964).

ICC Docket No. 40169, supra, Decision of May 23, 1990.

For the most part, BNSF's Motion does not challenge the factual allegations in the complaint, which are that: (1) BNSF relies entirely or largely on its customers to supply certain types of railroad cars, (2) in turn, BNSF has furnished the tracks on which to hold empty private cars prior to placement on shipper tracks for loading, with the furnishing of those holding tracks included in the line-haul rates paid by BNSF's shippers, (3) private car suppliers invested hundreds of millions of dollars in car acquisition costs and long-term lease commitments in reliance on BNSF holding tracks being available for empty private cars prior to loading, inasmuch as shipper facilities were inadequate for those purposes, (4) effective July 1, 2001, BNSF instituted "storage" charges of \$25.00 per day per car to hold empty private cars (other than covered hopper cars for grain and grain product service) on railroad tracks prior to loading or repair, subject to as little as 24

hours' free time before commencement of the charges, and demurrage charges of \$75.00 per car per day for covered hopper cars in grain or grain product service, likewise subject to limited free time,² (5) BNSF controls almost the entire movement cycle of a private car, and often provides erratic service, so that the use, arrival, and number of private cars necessary to serve any shipping location is largely subject to BNSF's actions, (6) many shippers who utilize private cars will suffer economic injury if forced to pay the BNSF storage or demurrage charges, and have no feasible alternative to those charges in the form of alternative, private track space on which to store private cars, and (7) as a consequence of the storage and demurrage charges and the lack of alternative track storage space, there may be a reduction in the availability of private cars, thereby resulting in a less than adequate supply of freight cars.

In addition, the Complaint observes that, despite the fact that the BNSF storage charges and demurrage charges have the effect of transferring the construction, ownership, and maintenance costs of holding tracks from BNSF to car suppliers, BNSF is unwilling to compensate the car suppliers through payment of any type of allowance, save a refund of calendar year 2001 storage bills to be credited toward the construction of private storage tracks, if feasible.

² As published to be effective on July 1, 2001, limited relief was accorded from both the storage and demurrage charges if empty cars were "bunched" by BNSF (but not by its connections). However, effective November 1, 2001, BNSF entirely eliminated demurrage bunching relief for empty cars awaiting loading, so that BNSF's tariff has no provision for relief from demurrage charges if BNSF delivers at one time an unlimited number of empty covered hopper cars for grain or grain product loading, in excess of the shipper's ability to load those cars in any rational manner. See BNSF Demurrage Book 6004-A, Item 5010C, effective November 1, 2001.

III. COUNT I OF THE COMPLAINT SHOULD NOT BE DISMISSED

A. BNSF Misstates Count I.

Count I of the Complaint alleges that the BNSF storage and demurrage programs as published constitute unreasonable practices and a failure to furnish reasonable car service or to observe reasonable rules and practices on car service. BNSF seeks dismissal of Count I, arguing that "the asserted wrongdoing is assessing any charge for holding an empty private car on BNSF's tracks" (Motion at 10, emphasis in text). That is not a correct statement of Count I.

The Complaint asserts that tracks on which to hold empty private cars prior to placement for loading have been and are an essential and integral part of BNSF's holding out to provide service, are paid for as part of the line haul rate, and, when used as part of an actual car use cycle, should be distinguished from genuine car "storage." See Complaint, ¶¶ 6, 7, 16. The Complaint alleges that BNSF's storage tariff provides as little as 24 hours' free time before the commencement of charges and that its demurrage tariff provides even less free time and only 2 credit days per car, constituting unreasonable practices and unreasonable car service.

Thus, complaining parties are entitled to prove, and the Board can find, that either any refusal of BNSF to continue to furnish holding tracks for empty private cars prior to loading is improper, or that the free time limitations and demurrage calculation provisions presently in the BNSF tariffs are improper and should be altered. Under the Complaint as presented, the Board may also conclude that the BNSF storage and demurrage charges are improper because they apply even when brought about by carrier actions such as bunching.

It is categorically untrue that the Complaint compels the Board to choose between dismissal or a finding that BNSF must furnish unlimited holding tracks for unlimited periods of time at no charge. The Complaint clearly allows for other reasonable alternatives, the basis for which will be developed through discovery and the presentation of appropriate evidence.

B. BNSF's Managerial Discretion Does Not Support Dismissal.

Having proffered an untenable characterization of the Complaint as the linchpin of its contention that Count 1 should be dismissed, BNSF then proceeds to advance a number of arguments designed to sustain the theory that BNSF is entitled to exercise sufficient discretion to replace its practice of furnishing car holding tracks for empty private cars prior to loading with the new regime of storage and demurrage charges. BNSF's contentions do not go to the question of whether the Complaint is insufficient as a matter of law, but instead to the merits of the Complaint, which are not before the Board at this point. In seeking dismissal, BNSF is effectively arguing that railroad managerial discretion trumps the Act's prohibition against unreasonable practices. In any event, most of BNSF's arguments and authorities are inapt.

For example, BNSF (again engaging in an incorrect, self-serving characterization of the Complaint) states that the "ICC long since rejected the notion, as a general matter, that it is unreasonable for railroads to assess special charges for special services, just because they have not previously done so," citing ACF Industries, Inc. -- Petition for Exemption, ICC Docket No. 40194, 1989 I.C.C. LEXIS 108 (Motion at 11). The ACF Industries case cited by BNSF has nothing in common with the issues in this proceeding but for the fact that both cases involve freight cars. In ACF, the petitioner was seeking an

exemption from freight charges for moving cars to a scrap dealer in order to avoid enforcement proceedings "to stop a fraudulent program." Denying the exemption, the ICC observed that "Commission policy under the [Rail Transportation Policy] is clearly contrary to the free transportation of cars." Here, private car owners are not seeking "free transportation of cars." BNSF is paid its full charges for transporting and servicing the cars involved, both loaded and empty. Indeed, in many respects the question here is whether BNSF should get paid twice for providing the same service -- once when it receives payment for transportation service (which includes holding empty cars prior to placement for loading) and a second time in the form of "storage" charges.

It is ironic that BNSF, which opposed the "unbundling" of rates in the so-called "Bottleneck" proceedings, now embraces the concept in order to levy a new charge on an old service. And, BNSF adds insult to injury when it argues that Complainants at this point cannot even challenge these storage charges.

In any event, the Complaint does not contend that BNSF's new charges and rules are improper "just because [BNSF] had not previously" assessed those charges. However, neither should the charges be presumed reasonable merely because they are new. The Complaint in part alleges that private car suppliers had relied to their detriment on BNSF's course of dealing in treating holding tracks for empty private cars in advance of loading as a service included within the shipper's rates. Subsequent to passage of the Staggers Act, the ICC recognized that it could be an unreasonable practice for a railroad to renege on a course of action that had been relied upon by the railroad's customer. See Buckeye Cellulose Corp. v. L&N R.R. Co., 1 I.C.C. 2d 767, 773 (1985), affirmed, Seaboard System R.R. Inc. v. U.S., 794 F.2d 635 (11th Cir. 1986).

C. Section 10722 Does Not Warrant Dismissal.

BNSF next attempts to justify its storage and demurrage charges under § 10722, which BNSF incorrectly refers to as a warrant "for railroads to assess special charges to enhance car utilization." Motion at 12. Section 10722, set forth in the Motion, id., in fact refers to "premium charges for special services or special levels of service not otherwise applicable to the movement." The BNSF storage and demurrage provisions do not fit this statutory description.

In order for there to be "premium charges for special services" within the meaning of § 10722 (formerly § 10734), the railroad must also offer conventional services at conventional charges and the shipper must have an opportunity to elect one or the other. See National Grain and Feed Assoc. v. Burlington Northern R.R. Co., supra, and National Grain and Feed Association v. U.S., supra, 5 F.3d at 309. BNSF, however, does not offer its shippers a choice between a conventional method of using a holding track for an empty private car awaiting loading and a "premium" method; a systemwide "storage" or demurrage regime has been imposed with respect to all private cars, and a shipper required to rely on BNSF to hold cars has no choice but to fall under that regime.

Nor does the shipper receive a special service, one way or the other. BNSF provides the same track, switches the car into the shipper facility for loading in the same amount of time, and in all respects handles the car in the same way whether or not the shipper incurs storage or demurrages charges. Section 10722 does not support BNSF's arguments for dismissal.

D. Railroad Car Practice Discretion Is Not Unlimited And Does Not Warrant Dismissal.

Another argument advanced by BNSF is that its new storage and demurrage provisions cannot be unreasonable practices because of the alleged "wide latitude accorded railroads to manage their car practices," citing National Grain and Feed Assoc. v. BNRR, supra. Motion at 12. BNSF neglects to mention, however, that National Grain and Feed Assoc. v. BNRR was reversed in part by National Grain and Feed Association v. U.S., supra. Indeed, the Eighth Circuit reversed on the very points for which BNSF cites the ICC decision.

At issue in those cases was the former Burlington Northern Railroad's Certificate of Transportation ("COT") program, under which shippers were offered an opportunity, pursuant to former § 10734, to purchase an assured grain car supply for a premium charge. Those failing to purchase COTs would continue to rely on conventional common carrier car distribution and would be at risk of not receiving cars if they were in short supply. As the Motion indicates, the ICC approved the COT regime relying extensively on former § 10734, and concluding that any shipper unwilling to run the risk of inadequate common carrier grain car supply could simply purchase special service arrangements for preferred car supply at the premium rate.

The court reversed the ICC to the extent that the Commission had regarded former § 10734 as carte blanche for car service practices. The court held:

To be clear, we stress that Congress intended the common carrier obligations to continue to apply to a rail carrier's conventional tariff service -- that is, to its common carriage. Although a rail carrier also may offer other forms of service through ... premium tariffs, no shipper must avail itself of these special offerings simply to receive common carriage.

5 F. 3d at 312. Thus, the court set aside the notion, advanced in the Motion, that there is unfettered "wide latitude accorded railroads to manage their car practices." Those car practices must comport with other duties of the railroad, and must be reasonable. To the extent that BNSF's new storage and demurrage regime conflicts with any obligation of BNSF to provide holding tracks for empty private cars prior to loading, cleaning, or any other normal car use function, the storage and demurrage regime is unlawful and clearly is reviewable by the Board in any event.

Whether BNSF has an obligation to provide holding tracks as part of its undertaking is at least in part a question of fact. In Furnishing of Grain Doors, Southern Frt. Terr., 355 I.C.C. 930 (1977), the ICC considered the lawfulness of a railroad cancellation of tariff provisions under which "grain doors" were furnished to make boxcars suitable for grain transportation.³ The ICC made the following finding regarding the grain door cancellation tariff:

* * * it [is] the duty of every common carrier subject to part I to provide and furnish transportation upon reasonable request. "Transportation" is defined ... to include "all instrumentalities and facilities" of shipment. Further ... it [is] the duty of every carrier to furnish safe and adequate car service. Boxcars are inadequate to transport the bulk commodities involved ... unless grain doors are installed to prevent leakage, and it was found in [citation omitted] that grain doors are integral parts of the rail car. It, therefore, follows, that a carrier which supplies boxcars to transport the bulk shipments involved here must also furnish grain doors.

³ To make a boxcar suitable for transport of a dry bulk commodity such as grain, temporary barriers, made of wood or reinforced cardboard, and known as "grain doors," were nailed across the opening created when the exterior door of the boxcar was opened. A passageway was left at the top of the grain door for the insertion of a loading spout.

355 I.C.C. at 932. Similarly, to the extent that holding tracks for empty private cars prior to loading are an integral part of BNSF's duty to furnish transportation for commodities requiring such cars, BNSF may not unilaterally transfer that obligation to its customers. The Board must consider evidence and legal argument before it can determine the extent to which BNSF may have such an obligation and the extent to which its practices are reasonable.

E. Miscellaneous BNSF Arguments Do Not Warrant Dismissal.

1. One of the issues affecting the reasonableness of the BNSF storage regime is whether it is appropriate for BNSF to impose strict storage rules and expensive storage charges on shippers when BNSF is primarily responsible for car cycle performance. Erratic service by BNSF leads not only to bunching of empty cars placed for loading, but also makes it necessary for shippers to maintain a larger fleet of private cars than would be required if BNSF service were more predictable.

In response to this point, BNSF offers two excuses. First, it claims that, because it is required to return an empty private car to a designated loading point, it does not really "control" private cars in the same manner that the railroad controls carrier-owned cars. Motion at 14. This argument is outlandish on its face. BNSF might just as well maintain that, because a bill of lading specifies a delivery point for a loaded car, BNSF does not control the movement or transit times of that car.

BNSF's second argument is that an "empty private car presents the same problem for the railroads as an empty railroad car that has been assigned to or ordered by a shipper, but which the shipper will not take.... If demurrage or storage charges may appro-

priately be assessed against the empty railroad car, then they may appropriately be assessed against the empty private car." Id.

There are important distinctions between empty railroad cars and empty private cars which render the BNSF analogy inapt. The first distinction applies to assigned cars, which are railroad-owned cars that are assigned, with the consent of railroad and shipper, to a pool that serves one or more shippers at a specific loading point. These assigned cars thus return to that loading point when unloaded. While storage charges attach if the empty assigned car is not accepted for loading under BNSF tariff rules, the shipper can terminate the assignment at will in order to avoid unnecessary or onerous storage charges. In contrast, a private car owner cannot simply terminate its ownership or lease interest in a car whenever storage or demurrage charges become unmanageable.

It is curious that BNSF would seek to compare its rules and practices regarding the placement of empty railroad cars for loading with its storage and demurrage provisions for empty private cars awaiting loading. BNSF provides as little as one day's leeway for acceptance of an empty private car following arrival at a station near the loading point, after which storage charges begin to attach. There is no comparable provision for empty railroad-owned equipment, which BNSF may hold indefinitely on its own tracks after arrival at a yard dispatching cars to loading facilities. In fact, under BNSF's tariff provisions for the conventional placement of grain cars for loading, a shipper is under no obligation whatsoever to accept any empty car for loading until an order has been placed for that car, indicating a "want date." No similar opportunity to specify a "want date" for placement of an empty private car is available to shippers.

2. BNSF's next argument (Motion at 15-16) is that, even if storage tracks for empty private cars prior to loading are a necessary component of rail service, it does not follow that BNSF must provide such tracks free of charge; and, moreover, that any such requirement would be contrary to the provisions of § 11121.

BNSF is not being requested to provide any service or facility free of charge. The freight rates paid by shippers to BNSF over the years have compensated and continue to compensate BNSF for the pre-loading holding tracks necessary to accommodate both private and railroad cars. What is involved in the assessment of storage or demurrage charges for the use of the same tracks is a second payment, not cancellation of a free ride. Further, the first sentence of § 11121(a)(1) requires BNSF to "furnish safe and adequate car service and establish, observe, and enforce reasonable rules and practices on car service." Contrary to BNSF's contentions, the Complaint does not call upon the Board to compel BNSF to furnish holding tracks under the additional provisions of § 11121(a); BNSF already does so. BNSF's arguments thus are at best a defense, not grounds for dismissal.

3. BNSF accuses NAFCA of ignoring the car utilization impacts of its new provisions: "NAFCA does not deny that the application of demurrage and storage charges to empty private cars can have the same kind of salutary effect on car utilization and railroad cost coverage that the application of such charges to other cars has had." Motion at 16. However, it is not incumbent on NAFCA to deny something that has not yet been made the subject of proof. For the Board's information, NAFCA and the other Complainants believe that there is good reason to question whether the new charges and rules will, in fact, enhance the efficient use of private freight cars. It is more likely that

the new provisions will result in a contraction of the private car fleet (and shipments made on BNSF in that fleet), a mere transfer in the cost of owning and maintaining holding tracks for private cars, or both. In any event, the question of whether the BNSF storage and demurrage charges will further a statutory goal is one which awaits resolution after the development of a record. Merely raising these questions, as BNSF does in its Motion, does not provide a foundation for dismissal of the Complaint.

4. Finally, BNSF argues that Count I should be dismissed and replaced with negotiations; and that no complaint against BNSF should be processed unless a specific, unresolvable dispute has arisen. Motion at 18.

Complainants certainly favor negotiated solutions, and will pursue them with BNSF where feasible. But a preference for negotiations is not grounds for dismissal of a complaint. Neither can a complaint be dismissed because a specific bilateral monetary dispute has not come before the Board with respect to the practices at issue. BNSF's provisions are new and it will be far more efficient for the Board to consider the reasonableness of those provisions on the basis of a complaint supported by numerous parties than to entertain unlimited individual complaints filed after the fact. Such complaints are also unlikely to address the implications for the BNSF as a whole, or for private car suppliers as a group, of the disputed new storage charges.

IV. COUNT II OF THE COMPLAINT SHOULD NOT BE DISMISSED

Count II of the Complaint is addressed exclusively to the new demurrage provisions of BNSF that apply to grain and grain products equipment. It alleges that those provisions violate § 10746 in addition to being unreasonable practices and unreasonable car service provisions.

Again utilizing the technique of misstating the Complaint, BNSF asserts that Count II should be dismissed because it is an assertion that "any assessment of demurrage on empty private cars violates 49 U.S.C. § 10746." Motion at 19. This is the same type of overreaching, inaccurate, and self-serving restatement of the Complaint that BNSF applied to Count I. Count II of the Complaint, like Count I, requests the Board either to set aside the demurrage provisions in their entirety or to indicate the modifications to those provisions necessary to render them reasonable and lawful.

BNSF also premises its Count II attack on the claim that the Complaint does not assert "that BNSF has failed to compute those charges in a manner that encourages efficient freight car use and distribution or an adequate car supply." Motion at 20. This is another misstatement of the Complaint. Paragraphs 12 and 13 of the Complaint assert that the new BNSF demurrage provisions will cause a reduction in car supply and a worsening of rail service. These allegations plainly address the criteria of § 10746.

Underlying BNSF's position on Count II seems to be the assumption that, because demurrage for loaded cars, railroad or privately-owned, is an established practice, demurrage on empty private cars awaiting loading must automatically be deemed to be lawful. Once again, however, BNSF overlooks the fact that there are no comparable demurrage provisions applicable to empty railroad-owned equipment prior to loading. Grain cars can be ordered by BNSF customers for placement on a designated "want date." Under BNSF's COT program, conducted pursuant to former § 10734 (now § 10722), a shipper can specify the number of empty cars to be placed for loading within a defined two-week time frame, and only if BNSF performs according to those instructions do penalty charges attach for untimely use of the car. On the other hand, it expects its shippers to

accept an empty private car for loading whenever BNSF decides to deliver it, bunched if BNSF chooses, with the demurrage clock beginning to run on the first 12:01 a.m. following constructive placement of the car. BNSF points to no case which would bar the Board as a matter of law from concluding that it is an unreasonable practice, unreasonable car service, or a violation of § 10746 for BNSF to treat privately-owned cars as do the BNSF tariff provisions addressed in the Complaint.

V. COUNT III OF THE COMPLAINT SHOULD NOT BE DISMISSED

Count III of the Complaint asserts that private car shippers are entitled to an allowance under § 10745 if BNSF transfers to them its obligation to furnish holding tracks for private cars prior to loading. BNSF calls for rejection of this "specious" claim because "neither BNSF nor any other railroad is legally required to provide shippers unlimited track space at no charge for storing their empty private equipment." Motion at 21.

The BNSF argument once again reflects a misstatement of the Complaint, for reasons explained previously. Additionally, it displays a misunderstanding of the law. The obligation to pay an allowance arises either from a legal obligation of the carrier to provide service or from its holding out to do so under its line-haul rates. Allowances for Trucking Baled Cotton, 326 I.C.C. 335, 350 (1966). "Carriers are obliged to perform or make allowances for all services necessary to give effect to their published rates." Terminal Charges at Pacific Coast Ports, 255 I.C.C. 673, 676 (1943). BNSF clearly has held out to provide tracks for holding empty private cars prior to loading within its rate structure. Additionally, in holding out to transport goods moving in private cars, BNSF must provide the yard tracks for such movements, according to § 11101 (rail carrier must provide transportation and service on reasonable request) and § 10102(9), defining "trans-

portation" to be provided by a rail carrier as including yards, property and other facilities. When those obligations are transferred to shippers, § 10745 requires the payment of allowances.

It is possible that the storage of empty private cars prior to loading or repair for an extended period of time may raise the question of whether it is "transportation" or is a reasonable interpretation of what the carrier holds out to provide within its line-haul rate. But to leave this determination to the railroad is to write the requirement of reasonable practices out of the Act. The Complaint contends that such a transfer does not occur so long as the private cars remain within the boundaries of normal car use, a condition which is a question of fact. See, e.g., Corn Products Refining Co. Terminal Service, 302 I.C.C. 627 (1958). Accordingly, BNSF's arguments for dismissal must be rejected.

VI. CONCLUSION

The grounds advanced by BNSF in support of its Motion are at best a series of disagreements with the Complaint, rather than a basis for the Board to find that the Complaint cannot succeed as a matter of law. Even if those arguments were not utterly meritless, they would fail to justify dismissal of the Complaint.

To a great extent, the Complaint calls upon the Board to determine the reasonableness of what BNSF has done (or has failed to do). This determination entails an evidentiary record almost of inherent necessity, and cannot be made summarily, based on a review of the Complaint.

In the case on which BNSF relies most heavily, National Grain and Feed Association v. Burlington Northern RR, *supra*, the ICC denied the railroad's motion to dismiss because to do so would deprive the complaining party of the right to develop essential

evidence. The current BNSF Motion must also be denied and the Complaint must be permitted to go forward.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply to Motion of the Burlington Northern and Santa Fe Railway Company to Dismiss the Complaint has been served upon all parties of record by hand delivery or first class mail, postage prepaid, this 5th day of November, 2001.



Andrew P. Goldstein

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