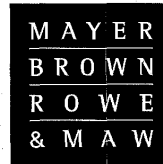


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October 29, 2002

BY HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
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Re: Docket No. 42060 (Sub-No. 1), North America
Freight Car Association v. The Burlington
Northern and Santa Fe Railway Company

ENTERED
Office of Proceedings
OCT 30 2002

Dear Secretary Williams:

On October 9, 2002, the North America Freight Car Association ("NAFCA") filed a letter pleading with the Board in the above-captioned subdocket, seeking (1) Board action on the Motion to Dismiss filed by The Burlington Northern and Santa Fe Railway Company ("BNSF") on October 5, 2001, and (2) in the event NAFCA's action is not dismissed, consolidation of the proceedings in this subdocket with the proceedings in the main Docket No. 42060.¹ On the same day, NAFCA filed in the main docket a "Petition for Clarification and, Alternatively, for Reconsideration; and for Resumption of Processing," which, among other things, also seeks consolidation of the proceedings in the main docket and the subdocket. BNSF has today filed a Reply to NAFCA's Petition that addresses the question of consolidation, which BNSF strongly opposes. Suffice it to say here that the issues in the two proceedings are quite different, and they should be dealt with separately.

Regarding the question of Board action on BNSF's pending Motion to Dismiss, BNSF believes that the time is ripe for such action. Over the past year, most of the parties' and the Board's attention has properly focused on the various proceedings implicating Ex Parte No. 328, *Investigation of Tank Car Allowance System*. Most of the challenges to the storage and diversion charges on empty private cars that BNSF and the Union Pacific Railroad ("UP") independently instituted in 2001 were made under the Ex Parte 328 Agreement. BNSF and UP were separately able to resolve virtually all of those cases.² Obviously, the railroads' ability to resolve those

¹ Intervenors National Industrial Transportation League and the American Chemistry Council joined in NAFCA's letter.

² See Board decisions served March 20, 2002, April 12, 2002, and May 29, 2002 in STB Docket Nos. 42060, 42061, 42062, and 42063 (dismissing the proceedings in Docket Nos. 42061, 42062, and 42063 and granting the requests of the Chlorine Institute, the U.S. Clay Producers Traffic

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cases, while maintaining their demurrage, storage and diversion charges on empty private cars, is instructive regarding the question of whether such charges constitute an improper "departure tariff" under the Ex Parte 328 Agreement. But it is also instructive regarding the question of whether such charges constitute an "unreasonable practice," or otherwise violate the ICC Termination Act, as contended by NAFCA in Docket No. 42060 (Sub-No. 1).

In the first place, most private car interests never joined in NAFCA's broadside "unreasonable practice" complaint. They limited their concerns to whether there was an inconsistency between the application of storage charges or diversion charges to empty private tank cars and the Ex Parte 328 Agreement. Once those concerns were resolved, they withdrew their opposition to BNSF's and UP's charges.

In the second place, the experience of the past year has validated BNSF's contention in its Motion to Dismiss that NAFCA's blunderbuss "unreasonable practice" attack entirely misses the legal mark. There can be no serious question as a general matter that the application of demurrage or storage charges to empty private cars is just as "reasonable" as the long-standing practice of applying such charges to loaded private cars, and to loaded or empty railroad cars. An empty private car takes up just as much track space, and can cause the same congestion and compensation problems that the Board and its predecessor, the ICC, have long applauded demurrage and storage charges for helping to alleviate. The real issues are (a) whether the imposition of new demurrage or storage charges to empty private cars may cause hardship to some shippers at specific locations and (b) whether a remedy is available to shippers for any demonstrated abuse of demurrage or storage charges.

Regarding the question of hardship at specific locations, over the past year BNSF has negotiated with dozens of parties about the applications of its demurrage and storage charges to their particular circumstances, and it has entered into numerous agreements to accommodate their concerns. Where shippers wished to construct their own track to hold their cars, BNSF announced its willingness to enter into agreements to share the cost of such construction by

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Association, BP Corporation North America Inc., Diversified CPC International Inc., and the Railway Progress Institute to withdraw from the proceedings). UP and E.I. DuPont have also reached a settlement in STB Docket No. 42064. North America Freight Car Association—Protest and Petition for Investigation—Tariff Publications of The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42060, et al. (Served September 19, 2002). On August 14, 2002, NAFCA notified the Board that it had also settled with UP, and it requested leave to withdraw from the docket upon settlement between UP and DuPont. Letter from Andrew P. Goldstein, Attorney for North America Freight Car Association, to Vernon A. Williams, Secretary of the Surface Transportation Board (Aug. 14, 2002).

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agreeing not to collect storage charges for a period in an effort to encourage them to do so. BNSF has also leased track to shippers to hold their empty cars and avoid storage fees.³ Doubtless there are shippers who would prefer to pay no charges at all for having their empty cars held on BNSF's track anywhere – just as they would prefer not to pay demurrage or storage charges on loaded private cars, or on loaded or empty railroad cars they have ordered – but they cannot claim any special hardship, and certainly no legally cognizable injury, from the assessment of such charges.

Regarding allegations of abuse of demurrage or storage charges – for example, where a shipper claims that a railroad has unreasonably assessed such charges where it was responsible for delay in spotting or picking up cars – BNSF and other railroads have always been willing to negotiate about such situations. Further, if agreement cannot be reached, shippers have always had a remedy at the ICC or the Board for any such demonstrated abuse – regardless of whether the cars are railroad owned or leased or privately owned or leased, and regardless of whether they are loaded or empty.

NAFCA has requested in its Petition in Docket No. 42060 that the Board provide for six months of discovery, including depositions, to develop evidence in Docket No. 42060 and Docket No. 42060 (Sub-No. 1). The reasons why that makes no sense in Docket No. 42060 are set forth in BNSF's Reply to that Petition. It makes no sense in Docket No. 42060 (Sub-No. 1) because it would be a pointless fishing expedition. If there are specific instances in which BNSF's charges have resulted in hardship or abuse at a particular location, the shipper or shippers involved are perfectly capable of bringing those situations to BNSF's attention, just as others have done over the past year. Moreover, if BNSF and the shipper cannot resolve a specific dispute, the shipper can take that specific dispute to the Board. Any evidence that NAFCA might develop in discovery of the possibility of hardship or abuse could not support NAFCA's generic claim in Docket No. 42060 (Sub-No. 1) that the application of any demurrage or storage charges to empty private cars is unlawful. If it could, then NAFCA could equally claim that the possibility of hardship or abuse should have long ago led the ICC or the Board to find that the application of demurrage or storage charges to loaded private cars, or loaded or empty railroad cars, rendered all such tariffs "unreasonable practices."

The Board should reject NAFCA's invitation for the Board to attempt to make a generic judgment that the application of demurrage or storage charges to empty private cars is an "unreasonable practice" or otherwise in violation of the ICC Termination Act. The Act

³ Further, although neither NAFCA nor any other party has challenged the reasonableness of the level of BNSF's storage or demurrage charges, BNSF on April 1, 2002, refined its storage tariff to assess lower charges in states and regions where there is less of a track congestion problem. BNSF maintained the charge of \$25 per day at locations where track congestion is likeliest, but reduced it to \$15 per day at locations where it is less likely, and \$10 per day where it is least likely. See Item 1800B, BNSF Private Car Storage Book 6005.

MAYER, BROWN, ROWE & MAW

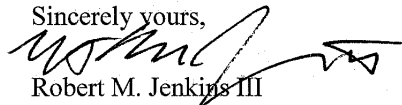
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encourages special charges to enhance car utilization, 49 U.S.C. § 10722. If there are concrete instances of hardship or abuse resulting from BNSF's demurrage or storage charges – regardless of the types of car involved or whether they are loaded or empty – the Board can and should remain open to entertaining complaints about those charges as applied. But it should not entertain an invitation to a fishing expedition based upon a generic complaint that is so deficient, on its face, in legal justification.

Sincerely yours,



Robert M. Jenkins III

Nicole H. Fradette

Counsel for The Burlington Northern and
Santa Fe Railway Company

RMJ/bs

cc: All Parties