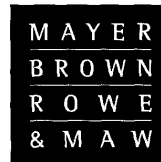


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June 9, 2003

BY HAND-DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

Re: Docket No. 42060, North American Freight Car
Association – Protest and Petition for Investiga-
tion – Tariff Publications of The Burlington
Northern and Santa Fe Railway Company

Dear Secretary Williams:

Please find enclosed for filing an original and ten (10) copies of "Opening Statement of The Burlington Northern and Santa Fe Railway Company in Response to STB Decision Served April 28, 2003."

Please date-stamp the enclosed extra copy of the Reply and return it to our representative. Also enclosed are 3 diskettes containing the Statement in electronic format.

Sincerely yours,

Robert M. Jenkins III

RMJ/bs

Enclosures

cc: All Parties of Record

[COLOR EXHIBITS INCLUDED]

208019

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET No. 42060

NORTH AMERICA FREIGHT CAR ASSOCIATION – PROTEST
AND PETITION FOR INVESTIGATION – TARIFF PUBLICATIONS
OF THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

OPENING STATEMENT OF
THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY IN RESPONSE
TO STB DECISION SERVED APRIL 28, 2003

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Attorneys for The Burlington Northern and Santa Fe Railway Company

Dated: June 9, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET No. 42060

NORTH AMERICA FREIGHT CAR ASSOCIATION – PROTEST
AND PETITION FOR INVESTIGATION – TARIFF PUBLICATIONS
OF THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

OPENING STATEMENT OF
THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY IN RESPONSE
TO STB DECISION SERVED APRIL 28, 2003

The Burlington Northern and Santa Fe Railway Company ("BNSF") files herewith its Opening Statement in response to the Board's Decision served April 28, 2003, in the above-captioned proceeding.

The Board in its April 28 Decision focuses principally on the central issue in this proceeding, which is whether BNSF's storage and diversion charges on empty private tank cars constitute "departure tariffs" within the meaning of Section 8 of the Ex Parte No. 328 Agreement. See Ex Parte No. 328, Investigation of Tank Car Allowance System, 3 I.C.C.2d 196 (1986), 7 I.C.C.2d 645 (1991). In Part I of the Argument below, we address each of the questions raised by the Board about that issue. We show that BNSF's storage and diversion charges are not departure tariffs, because the Ex Parte No. 328 Agreement by its terms, and under established Board precedent, applies only to the tank car allowance system expressly prescribed within "the four corners" of the Agreement. Charges for Movement of Empty Cars, Buffalo & Pittsburgh R.R., 7

I.C.C.2d 18, 25 (1990) ("Buffalo & Pittsburgh"). Since BNSF's tariffs do not "depart" from the prescribed system, they are not subject to the special investigation procedures of Section 8.

In Part II of the Argument, we address the broader questions raised by the Board with respect to the allegations of the North America Freight Car Association ("NAFCA") in STB No. 42060 (Sub-No. 1) concerning all private car types. We show that the line-haul rates paid by BNSF's shippers do not cover the storage and diversion services required by some shippers. We also show that BNSF does not control the movement of privately owned cars, and we provide information concerning the widely varying practices of shippers and car owners¹ concerning the holding of empty private cars.

Attached in support of BNSF's opening statement are the verified statements of (1) John J. Robinson, formerly Assistant Vice President for the Operations and Maintenance Department of the Association of American Railroads (AAR) and Secretary to the AAR's Committee on Compensation, and (2) Douglas W. Langston, General Director Demurrage and Miscellaneous Charges for BNSF.²

BACKGROUND

NAFCA filed its Protest and Petition for Investigation in this proceeding on June 26, 2001. NAFCA claimed that BNSF's newly published changes to its Private Car Storage Book 6005 and Diversion Book 6200-A, which applied storage and diversion

¹ We use the term "car owners" herein to refer to both private car owners and lessees.

² The statements of Messrs. Robinson and Langston are referenced herein as "VS Robinson" and "VS Langston."

charges to empty private cars, including tank cars, constituted unauthorized "departures" from the Ex Parte No. 328 Agreement. BNSF timely filed a Motion to Dismiss on July 16, 2001. Citing the Buffalo & Pittsburgh decision, BNSF argued that the law was clear that only tariffs that violated the express provisions of the tank car allowance scheme set forth in the Ex Parte No. 328 Agreement could constitute "departure tariffs" under that Agreement and that, on their face, neither its storage nor its diversion charges conflicted with any of the provisions of the Agreement. Accordingly, pursuant to 49 U.S.C. § 11701(b), BNSF requested that the Board dismiss NAFCAs's case for failure to state reasonable grounds for investigation and action.

The Union Pacific Railroad ("UP") had also published its own storage charges applicable to empty private cars, and NAFCAs's case against BNSF was one of several cases that were filed by tank car interests against BNSF and UP claiming that their changes to their storage and diversion tariffs constituted unauthorized "departure tariffs."³ The Board in a decision served October 18, 2001, ordered the proceedings in

³ STB Docket No. 42060, North America Freight Car Association—Protest and Petition for Investigation—Tariff Publications of The Burlington Northern and Santa Fe Railway Company (the U.S. Clay Producers, the Chlorine Institute, the National Industrial Transportation League ("NITL"), BP Corporation North America, E.I. DuPont, and CPC-Diversified International all filed petitions to participate in the proceeding); STB Docket No. 42061, Railway Progress Institute Committee on Tank Cars Petition for Investigation and Protest Pursuant to Ex Parte No. 328 (the U.S. Clay Producers, the Chlorine Institute, NITL, BP Corporation North America, and E.I. DuPont all filed petitions to participate in the proceeding); STB Docket No. 42062, The Chlorine Institute, Inc.—Protest and Petition for Investigation—Tariff Publications of Union Pacific Railroad Company; STB Docket No. 42063, Railway Progress Institute Committee on Tank Cars Petition for Investigation and Protest Pursuant to Ex Parte No. 328 (NITL filed a petition to participate in the proceeding); STB Docket No. 42064, E.I. DuPont de Nemours and Company—Protest and Petition for Investigation (NITL and NAFCAs filed petitions to participate in the proceeding).

all of those cases held in abeyance while the railroads and tank car owners negotiated their disputes in accordance with the Ex Parte No. 328 Agreement. In response to the Board's decision, the parties determined that it would be preferable for them to attempt to settle their disputes in the individual cases before endeavoring to engage in industry-wide negotiations. They filed a joint motion asking the Board to hold its decision in abeyance pending those negotiations. The Board granted that motion, and also granted subsequent requests for extensions of time to continue the settlement process.⁴

BNSF held discussions not only with the parties and intervenors in the cases that had been brought before the Board, but also with other shippers and car owners that had concerns about the application of BNSF's demurrage and storage charges in their particular circumstances. BNSF reached settlement agreements with the Railway Progress Institute's Committee on Tank Cars ("RPI"), the Chlorine Institute, the U.S. Clay Producers, BP Corporation North America Inc., and Diversified CPC International, and they withdrew their petitions or interventions.⁵ In Statements filed with the Board, several parties recognized that BNSF and UP must be allowed to set tariffs as necessary to address congestion on their systems, so long as the railroads were

⁴ See Board decisions served November 20, 2001, January 8, 2002, February 22, 2002, March 20, 2002, April 12, 2002, and May 29, 2002, in STB Docket Nos. 42060, 42061, 42062, 42063, and 42064.

⁵ STB Docket No. 42060, et al., North America Freight Car Association—Protest and Petition for Investigation—Tariff Publications of The Burlington Northern and Santa Fe Railway Company (served March 20, 2002); STB Docket No. 42060, et al., North America Freight Car Association—Protest and Petition for Investigation—Tariff Publications of The Burlington Northern and Santa Fe Railway Company (served April 12, 2002); STB Docket No. 42060, et al., North America Freight Car Association—Protest and Petition for Investigation—Tariff Publications of The Burlington Northern and Santa Fe Railway Company (served May 29, 2002).

prepared to discuss, and, if possible, reach agreement with individual shippers concerning their needs at specific locations.⁶ BNSF agreed to establish a process for such discussions, and did so. It entered into numerous agreements with shippers regarding individual locations. Where shippers wished to construct their own tracks to hold their cars, BNSF announced its willingness to enter into agreements to share the cost of such construction by agreeing not to collect storage charges for a stated period in order to encourage them to do so. BNSF also leased track to shippers to hold their cars and thereby avoid storage fees.⁷ VS Langston at 5.

⁶ Joint Statement of the Chlorine Institute and The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42060, North America Freight Car Association—Protest and Petition for Investigation—Tariff Publications of The Burlington Northern and Santa Fe Railway Company (filed Feb. 26, 2002); Notice of Settlement and Withdrawal of Petition to Intervene by U.S. Clay Producers Traffic Association, STB Docket No. 42060, et al., North America Freight Car Association—Protest and Petition for Investigation—Tariff Publications of The Burlington Northern and Santa Fe Railway Company (filed May 20, 2002); Statement of Diversified CPC International, Inc., STB Docket No. 42060, North America Freight Car Association—Protest and Petition for Investigation—Tariff Publications of The Burlington Northern and Santa Fe Railway Company (filed May 23, 2002); and Joint Statement of the Chlorine Institute and the Union Pacific Railroad Company, STB Docket No. 42062, The Chlorine Institute, Inc.—Protest and Petition for Investigation—Tariff Publications of the Union Pacific Railroad Company (filed April 2, 2002).

⁷ BNSF and UP also agreed with RPI to publish notes to their storage tariffs to except private tank cars held outside repair facilities from those tariffs. RPI had protested BNSF's and UP's storage tariffs solely on the ground that those tariffs would constitute "departure tariffs" if they supplanted the holding charges prescribed in Section 5 of the Ex Parte No. 328 Agreement for cars held outside repair facilities. When BNSF and UP amended their tariffs, RPI withdrew its protests.

UP independently negotiated with parties and intervenors concerned about UP's tariffs and reached settlements regarding those tariffs.⁸ Significantly, neither UP's nor BNSF's settlements resulted in any significant amendments to their tariffs.

While BNSF was not required by its settlements to withdraw or significantly amend its tariffs, BNSF did listen carefully to the concerns expressed by shippers, and on April 1, 2002, BNSF made some changes to fine-tune its storage charge program:

- BNSF established a three-tier rate structure for storage charges, depending on geography and operational constraints. The charge of \$25 per car for cars held beyond the 48-hour free period was retained at locations where track congestion is likeliest, but reduced 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.
- BNSF revised its diversion tariff to allow one free diversion on empty private cars. See BNSF Diversion Book 6200-A. Previously, no free diversions on empty private cars had been allowed.
- BNSF revised its storage tariff to provide one credit day for empty private cars if the car is loaded and shipped via BNSF revenue line-haul. See Item 1700, BNSF Private Car Storage Book 6005.
- BNSF revised its switching tariff to waive the \$300 intra-terminal switch charge for cars ordered, placed, and subsequently cancelled (except for grain and grain products). See Item 140, BNSF Switching Book 8005-A.

⁸ Joint Statement of the Chlorine Institute and the Union Pacific Railroad Company, STB Docket No. 42062, The Chlorine Institute, Inc.—Protest and Petition for Investigation—Tariff Publications of the Union Pacific Railroad Company (filed April 2, 2002); Notice of Settlement and Withdrawal of Petition for Investigation by Railway Progress Institute Committee on Tank Cars, STB Docket No. 42061, Railway Progress Institute Committee on Tank Cars Petition for Investigation and Protest Pursuant to Ex Parte No. 328, (filed March 6, 2002); Letters from Frederic L. Wood, Attorney for E.I. du Pont de Nemours and Company (dated August 5, 2002) and Andrew P. Goldstein, Attorney for North America Freight Car Association (dated August 14, 2002) to Vernon A. Williams, Secretary of the Surface Transportation Board, concerning settlements in Docket No. 42064.

- BNSF reinstated its \$75 per day storage charge for loaded private equipment. See Item 1700, BNSF Private Car Storage Book 6005.

Despite its tariff refinements and its considerable success in settling with most organizations and with individual shippers, BNSF was unable to reach agreement with NAFCA.⁹ On October 9, 2002, NAFCA filed a Petition for Reconsideration or Clarification of the Board's October 18, 2001 decision. In its petition, among other things, NAFCA asked the Board to bypass BNSF's Motion to Dismiss, which BNSF filed on July 16, 2001, and proceed with an investigation of whether BNSF's storage charges on empty private cars constitute "departure tariffs" within the meaning of the Ex Parte No. 328 Agreement. NAFCA also asked the Board to consolidate this proceeding with the proceedings in Docket No. 42060 (Sub-No. 1) and to provide for six months of discovery, including depositions, in the combined proceedings. BNSF filed a timely Reply to NAFCA's petition on October 29, 2002, opposing NAFCA's effort to bypass

⁹ Although NITL has been an intervenor in Docket No. 42060 from the outset, it permitted NAFCA to take the lead in discussions about settlement. The American Chemistry Council ("ACA") did not enter an appearance in any proceeding until it belatedly filed intervention papers in Docket Nos. 42060 and 42060 (Sub-No. 1) on September 20, 2002.

NAFCA's interest appears to be narrowly focused on the use of tank cars to transport grain products (*e.g.*, soybean oil). UP's storage charges do not apply to grain products transported in tank cars. Although NAFCA claims that any storage charge applied to an empty tank car constitutes a "departure tariff" under the Ex Parte 328 Agreement, NAFCA withdrew its protest against UP under the Ex Parte 328 Agreement on the condition that UP would notify NAFCA if and when UP applied its storage charges to cars transporting grain or grain products. Letter from Andrew P. Goldstein, Attorney for North America Freight Car Association (dated August 14, 2002) to Vernon A. Williams, Secretary of the Surface Transportation Board, in Docket No. 42064. While UP's storage charges do apply to tank cars carrying certain chemicals, oil, and other industrial products neither NITL nor ACA has pursued a challenge to UP's charges. Thus, no party is any longer challenging the application of UP's storage charges to empty tank cars as "departure tariffs."

BNSF's Motion to Dismiss, opposing consolidation with Docket No. 42060 (Sub-No. 1), and opposing discovery.

On April 28, 2003, the Board served its Decision requesting additional comments on the questions set forth therein. The Board stated that it sought those comments to assist in resolving the issues remaining in this proceeding and that it was taking no action at this time on the matters pending in Docket No. 42060 (Sub-No. 1). Slip Op. at 3 and n.5.

ARGUMENT

I. BNSF'S STORAGE AND DIVERSION CHARGES ARE NOT "DEPARTURE TARIFFS" WITHIN THE MEANING OF THE EX PARTE NO. 328 AGREEMENT

In seeking comment on what constitutes a "departure tariff" within the meaning of Section 8 of the Ex Parte No. 328 Agreement, the Board appropriately focuses on the express language of Section 8 and the interpretation that the ICC gave that language in the Buffalo & Pittsburgh case. Slip Op. at 3-4. As we discuss further below, in Buffalo & Pittsburgh the complaining shippers and car owners argued that the ICC should read into the Agreement a prohibition on individual railroads' charging private tank car owners for moving their cars to repair facilities, because the established "rule" when the Agreement was negotiated was that no private car owner could be assessed such charges. 7 I.C.C.2d at 20. Although the ICC acknowledged that this had in fact been the established "rule," it held that when it later overturned that "rule," nothing in Section 8 or any other part of the Ex Parte No. 328 Agreement prohibited such charges being assessed against private tank car owners. *Id.* at 25-29. Whatever the parties may have assumed or discussed in negotiating the Agreement, if it was not encompassed within "the four corners" of the Agreement, it was not prohibited. *Id.* at 25.

The logic of Buffalo & Pittsburgh is, if anything, even more compelling in this case. No “rule” has ever prohibited railroads from assessing storage, demurrage, or diversion charges. In fact, railroads have long assessed storage, demurrage, and diversion charges on loaded private cars, and on both loaded and empty railroad-owned and leased cars. NAFCA cannot claim, therefore, that private tank car owners and shippers have had a reasonable basis for assuming that individual railroads could never assess storage or diversion charges on empty private cars. As we discuss next, this was particularly true in the wake of passage of the Staggers Rail Act of 1980, which discouraged collective rate actions and encouraged independent, market-based pricing.

Moreover, the history of the Ex Parte No. 328 Agreement puts the lie to the notion that the genesis of the “departure tariff” provisions in Section 8 of the Ex Parte No. 328 Agreement was the rates that railroads charge for demurrage, storage, diversion, weighing, switching, or any of the myriad other services they may provide in connection with freight movements. The genesis of Section 8 was the mileage allowance “caps” and other tariff devices that railroads had used unilaterally to opt out of the prescribed mileage allowance system. VS Robinson at 8. That was what the Joint Negotiating Committee (“JNC”) discussed, that was what the JNC presented to the ICC as the justification for Section 8, and that was the basis upon which the ICC approved the Agreement. Ex Parte No. 328, 3 I.C.C.2d at 201-202; VS Robinson at 5, 8. The JNC did not seek, and the ICC did not approve, any restriction on individual railroads’ rights to set independent storage, demurrage, or diversion charges on cars held for loading or diverted to new consignees or destinations.

A. The Purpose Of The "Departure Tariff" Provision Was To Prevent Railroads From Unilaterally Opting Out Of The Prescribed Mileage Allowance System, Not To Prevent Railroads From Setting Their Own Storage, Demurrage, or Diversion Charges

Historically, railroads enjoyed antitrust immunity to collectively set mileage allowances, per diem, demurrage, and storage charges. In an era when railroads were authorized even to set line-haul rates collectively in rate bureaus, few questioned the wisdom of such collective action. See, e.g., Association of American Railroads – Agreement, 277 I.C.C. 413, 423 (1950) ("For many years it has been necessary for the carriers to handle per diem, mileage, storage and demurrage jointly on a uniform national basis.").

With passage of the Staggers Rail Act of 1980, the regulatory climate changed dramatically. The railroads were required to justify approval for the continuation of collective action regarding mileage allowances, per diem, demurrage, and storage charges. See Section 5B Application No. 7, Railroads Per Diem, Mileage, Demurrage and Storage Agreement (served Oct. 25, 1982). Shippers were likewise required to obtain approval to discuss collectively private car compensation. See 49 U.S.C. § 10706(a)(5)(A) (permitting the Board to approve such agreements "only when it finds that the making and carrying out of the agreement will further the transportation policy set forth in section 10101 of this title").

The ICC by no means equated the collective consideration of car compensation with the collective consideration of demurrage and storage charges. In fact, in Railroads Per Diem, Mileage, Demurrage and Storage Agreement, 1 I.C.C.2d 924 (1985), the ICC decided to permit railroads to continue collectively to discuss per diem

and mileage allowances, but not demurrage and storage charges. *Id.* at 933-936. The

ICC concluded:

Unlike per diem and allowances, the primary purpose of demurrage and storage charges is not to compensate the owner of the car, but to enhance efficient car use by ensuring the prompt turnaround of equipment. . . . [I]n a competitive environment [independently set] demurrage and storage charges will more accurately track car supply and demand conditions, as well as the specific priorities and needs of individual carriers and shippers, and thus more effectively promote both the general goals of the national rail transportation policy, particularly 49 U.S.C. 10101a(3), (4), and (5), and the equipment allocation goals of 49 U.S.C. 10750.

Id. at 934-35.¹⁰

¹⁰ Shortly thereafter, the ICC proposed to exempt demurrage and storage charges altogether from regulation – Ex Parte No. 462, Exemption of Demurrage from Regulation (served December 16, 1985) – and the ICC determined to permit provisional antitrust immunity for demurrage and storage charges to continue pending its decision whether to exempt demurrage from regulation altogether. Section 5b Application No. 7, Railroad Per Diem, Demurrage and Storage Agreement (served June 4, 1986). The issue of antitrust immunity effectively became moot in 1986 when the railroads decided no longer to make use of antitrust immunity for the collective consideration of demurrage and storage charges. See Section 5b Application No. 7, Railroad Per Diem and Mileage Allowances Agreement (served Sept. 22, 1987). Nevertheless, the ICC continued to consider whether to exempt demurrage and storage charges altogether from regulation. See Ex Parte No. 462, Exemption of Demurrage from Regulation (served April 15, 1992). Finally, in 1996 the Board determined to confirm that it was removing antitrust immunity for the collective consideration of such charges, but not exempting individual demurrage and storage charges from regulation. See Ex Parte No. 462, Exemption of Demurrage from Regulation (served March 20, 1996). The Board stressed:

“[T]he national rail transportation policy (NRTP), 49 U.S.C. 10101a(1), (11) [now 49 U.S.C. 10101(1), (10)], requires that, to the maximum extent practicable, rates be set individually, rather than collectively. Section 10706 authorizes the Board to grant antitrust immunity only when it will advance the NRTP. As the NRTP envisions

(cont'd)

Shortly before the ICC issued its decision withdrawing the railroads' authority collectively to discuss storage and demurrage charges, the ICC issued a decision circulating for comment the agreement that the JNC had proposed, after three years of negotiations, to govern mileage allowances for private tank cars. Ex Parte No. 328, Investigation of Tank Car Allowance System (served Aug. 23, 1985). There was no mention in the ICC's decision, or in the JNC's proposed order and agreement attached to the ICC's decision, of any collective agreement on the setting of demurrage or storage charges, other than the provision in Section 5 for charges for holding cars outside of repair facilities.¹¹

There was considerable discussion of the new "departure tariff" provisions that the JNC wished to insert into the Agreement, and it made quite clear the specific reason why those provisions had been added. The original tank car allowance agreement approved by the ICC in 1979 had resulted in allowances that imposed severe financial hardship on the railroads. See Ex Parte No. 328, Investigation of Tank Car Allowance

(... cont'd)

independent rather than collective rate setting, withdrawal of immunity is in the public interest.

Slip Op. at 5. (noting that "[t]he Chemical Manufacturers Association [now the ACA] supports the elimination of antitrust immunity for collective consideration of demurrage, as a means of introducing market forces (coupled with appropriate protection for captive shippers) to enhance railroad efficiency").

¹¹ The narrow provision in Section 5 was a holdover from the original Ex Parte No. 328 Agreement that generated little discussion at all when the Agreement was renegotiated, let alone any suggestion that it represented a collective Agreement among the railroads and shippers concerning the demurrage and storage charges that railroads could assess elsewhere on their system. VS Robinson at 11.

System, 367 I.C.C. 48 (1982). Some railroads responded by setting tariff “caps” on those allowances where they believed they were excessive. VS Robinson at 8.¹² The shipper and car owner representatives on the JNC were willing to talk about revisions to the tank car compensation system, but they wanted assurances that individual railroads’ tariffs departing from that system would be investigated. VS Robinson at 8-9. This was the genesis of the “departure tariff” provisions of Section 8. *Id.*

In its August 23, 1985 decision circulating the proposed Agreement for comment, the ICC characterized the “departure tariff” procedures as “designed . . . to provide limited opportunities for individual carriers to file departures from the prescribed national system.” Slip Op. at 2. The ICC noted that “[t]he proposed procedures, which essentially provide for automatic investigation (but not suspension) of protected mileage allowance caps, and preclude justification of such caps on grounds that the lesser allowance will cover the tank car ownership costs, are likely to be controversial.” *Id.* at 6. The ICC wanted to hear from “the railroads who will be most affected” before it imposed those provisions on the industry. *Id.*

Attached to the ICC’s decision was the JNC’s draft order adopting the JNC’s proposed agreement. There, the JNC characterized the purpose of the “departure tariff” provisions as intended “[t]o assure car providers that the railroads will not hereafter file tariffs which depart unilaterally from the terms of the allowance system which has been agreed to and which the parties here request be prescribed in this reopened proceeding

¹² The ICC generally did not suspend those railroads’ tariffs, on the ground that the Agreement did not prohibit individual railroads from setting their own allowances. See, e.g., STB Docket No. 39720, Clay-Slurry-Appeal of Decision Not to Reject Tariff Publication (served May 21, 1984).

...” *Id.* at 10-11. The draft order set forth examples of the kinds of “allowance caps” or other forms of tariff publication – “[f]or example: a railroad could publish a tariff restricting the payment of allowances to cars having a value not in excess of some specified dollar figure” – that would constitute “departures” which would be automatically investigated, and which a railroad would have to justify. *Id.* at 23-24.

Needless to say, neither the ICC nor the JNC suggested that storage or diversion charges could constitute “departure tariffs” under the proposed agreement. Given the ICC’s sensitivity to the scope of collective agreements in the wake of the Staggers Act, one can imagine what the ICC’s reaction would have been to the suggestion that the renegotiated tank car allowance agreement would not only limit the right of individual railroads to set tariffs departing from the allowance system set forth in that agreement, but would also require a railroad to justify setting or changing a tariff regarding storage, demurrage, diversion or any other service that could have an economic impact on tank car shippers or owners. The ICC was troubled enough by the strictures that the proposed agreement would place on the railroads’ right to set individual tariffs governing mileage allowances.¹³

In its final decision adopting the revised Agreement over a year later, the ICC once again described the purpose of the “departure tariff” provisions of Section 8 as “an agreement concerning the treatment of tariffs filed by individual railroads that set allowances other than those based on the national allowance formula.” Ex Parte No.

¹³ Indeed, when the ICC finally approved the Agreement in 1986, two of the five Commissioners dissented, on the ground that such car hire should be deregulated. Ex Parte No. 328, 3 I.C.C.2d at 203.

328, 3 I.C.C.2d at 198. Once again, there was no suggestion from anyone that the departure tariff provisions dealt with anything other than railroad tariffs that sought to opt out of the prescribed allowance system.

B. The ICC's Buffalo & Pittsburgh Decision Properly Rejected Any Notion That Railroad Rates and Practices That Were Not Mentioned In The Ex Parte No. 328 Agreement Were Thereby Prohibited

Any doubt that there might have been about the proper interpretation of the Ex Parte No. 328 Agreement was resolved a few years later by the ICC in the Buffalo & Pittsburgh case. One of the most entrenched remnants of the pre-Staggers Act regulatory era had been the notion that railroads could not charge for moving empty private cars of any type to repair facilities, because such cars were "instrumentalities of transportation" whose costs, including repair move costs, were the collective responsibility of the railroads. See Union Tank Car Co. Terminal Service, 268 I.C.C. 338 (1947). This principle was repeated so many times in the case law that it effectively became a "rule." See General American Transp. Corp. v. Indiana Harbor, 357 I.C.C. 102 (1977) ("IHB-I"), *aff'd sub nom. Indiana Harbor R.R. v. General American Transp. Corp.*, 577 F.2d 394 (7th Cir. 1978). Any railroad that derived more than a *de minimus* amount of revenue from loaded movements of private cars was barred from assessing a separate charge for empty repair moves. 357 I.C.C. at 126-27.

Although this "rule" resulted in substantial economic hardship for railroads with a large number of repair facilities on their lines, the ICC's only pre-Staggers Act suggestion was that railroads work out a collective means of allocating the burden as part of the allowance systems on various types of private rail cars. *Id.* at 135-36. After the Staggers Act was passed, however, the ICC began to focus more attention on the harmful cross-subsidization and uneconomic rate averaging that resulted from "rules"

like the bar on charging for empty repair moves. See, e.g., STB Docket No. 38792, Switching Charges for Privately Owned Cars Billed to Repair Facilities (served Oct. 18, 1982). Ultimately, the ICC determined to revisit the doctrine. After a lengthy proceeding, the ICC overturned the empty repair move “rule” in General American Transp. Corp. v. Indiana Harbor Belt R.R., 3 I.C.C.2d 599 (1987) (“IHB-II”), *aff’d sub nom. General American Transp. Corp. v. ICC*, 872 F.2d 1048 (D.C. Cir. 1989), *reh’g denied*, 883 F.2d 1029 (1989), *cert. denied*, 493 U.S. 1069 (1990).

The ICC’s 1987 decision permitting railroads to set independent charges for moving empty private cars to repair facilities applied to all car types (3 I.C.C.2d at 619), but much of the discussion focused on tank cars, since most tank cars are privately owned, and the tank car owners and shippers were the most vigorous complainants in the IHB-II proceedings (*id.*). Despite the ICC’s clear decision approving charges for empty tank car repair moves, when the Buffalo & Pittsburgh Railroad in late 1988 filed tariffs setting such charges, tank car owners challenged those tariffs on the ground that they constituted “departure tariffs” within the meaning of Section 8 of the Ex Parte No. 328 Agreement.

In Buffalo & Pittsburgh, the car owners argued that Section 8 applied “not only to the computation of mileage allowances, but to practices affecting all elements of tank car compensation in effect at the time the agreement was negotiated, to the extent that a change in such practices reduces the car owners’ net compensation.” 7 I.C.C.2d at 24. Since the free repair moves “rule” was still in effect at the time the Agreement was negotiated, the car owners claimed it was embedded in the Agreement. They argued that while the JNC had discussed the possibility that the ICC might overturn the free

repair moves “rule,” the JNC had decided to defer the question of repair move charges for future negotiations, and that the JNC had intended that “the status quo be maintained for all matters affecting tank car compensation, including the free repair moves rule.” *Id.*

The railroads responded that the Section 8 departure tariff provisions were intended to deal with the specific problem of mileage allowance “cap” tariffs and other mechanisms by which an individual carrier “directly attempts to reduce the net allowance paid.” *Id.* at 24-25. They denied that the JNC had intended Section 8 to apply to charges for repair moves or anything else that was not specifically negotiated by the JNC, and they emphasized that Section 8 itself defines a nonconforming tariff as one departing “from the allowance system prescribed herein.” *Id.* at 24 (original emphasis).

The ICC agreed with the railroads’ interpretation, on two grounds. The first ground was the plain language of Section 8. The ICC found persuasive the railroads’ point that Section 8 was limited by its terms to tariffs “departing in any way from the allowance system prescribed herein.” *Id.* at 25 (original emphasis). It noted that the question of whether the free repair move rule should be continued was nowhere addressed in the Agreement, and that it was only by “unduly straining the language of the agreement” (*id.*) that the interpretation advanced by the car owners could be supported:

Even if one accepts the proposition that the phrase “tank car allowance system,” is a term of art embracing all of the rules bearing on tank car compensation contained in PHJ 6007, including the free repair moves rule, it is virtually impossible to read the phrase “prescribed herein,” as an intent to freeze and immunize from change – even Commission change –

matters which are beyond the four corners of the agreement and which were specifically excluded from consideration by the JNC.

Id.

The ICC found additional textual support for the limited applicability of the departure tariff procedures in Section 8(e), which sets standards for evaluating departure tariffs and refers to “special circumstances justifying an exception from the general rule that the nationally prescribed allowance level applies, and must be paid’ (emphasis ours).” *Id.* The ICC concluded:

That language, on its face, suggests that the JNC’s sole concern was with attempts by rail carriers to avoid paying the full allowance specified by the formula, whether in the form of tariffs imposing direct caps, raising the rate on tank car commodities, or other rate mechanisms by which the carrier attempts to reduce the net *allowance* paid. Separate rates for empty car movements do not involve allowances in this sense.

Id. at 25-26 (original emphasis).

The second ground on which the ICC agreed with the railroads’ interpretation was the circumstances surrounding the negotiations. *Id.* at 27-28. Although the decision in IHB-II did not issue until 1987, and thus postdated the ICC’s 1986 approval of the Ex Parte No. 328 Agreement, the ICC had reopened the free repair move “rule” in 1984. Thus, the JNC was obviously aware that that “rule” might be reversed. The ICC concluded that “[t]he JNC could not have intended to freeze by inference all aspects of the tank car allowance system (including rules that were not directly a part of the agreement itself) thereby excluding in advance a major portion of the private car fleet from the benefits of such an important change.” *Id.* at 27. Moreover, even if the JNC had intended such a quixotic result, “[w]e would not have approved an agreement

with such obvious potential for conflict with an action that we were considering at the time.” *Id.* The ICC accordingly rejected the car owners’ claim that the railroad tariffs imposing charges for movements to repair facilities constituted “departure tariffs” within the meaning of Section 8 of the Ex Parte No. 328 Agreement.

Buffalo & Pittsburgh is on all fours with this case. NAFCA’s claim is that BNSF’s storage and diversion charges on empty private cars constitute “departure tariffs” simply because they may reduce some car owners’ or shippers’ income. NAFCA does not claim that the Ex Parte No. 328 Agreement by its terms prohibits the imposition of storage charges on cars awaiting loading or diversion charges on cars that are rerouted at the shipper’s request. Nor does NAFCA claim that BNSF has refused or failed to pay allowances at the levels prescribed in the Ex Parte No. 328 Agreement. Further, the JNC knew that wide-ranging proposals had been made for collective agreement on storage and demurrage charges for cars awaiting loading, but no agreement was ever reached regarding those proposals (VS Robinson at 10-11), just as no collective agreement was reached to block independent railroad charges for movements to repair facilities. Thus, the logic and authority of Buffalo & Pittsburgh is dispositive in this case.

NAFCA nevertheless has sought to distinguish Buffalo & Pittsburgh, and the Board in its April 28 Decision requested comments on several of the differences between NAFCA and BNSF concerning the authority of that case. We answer each of the Board’s questions below.

1. Particularly Given The Mandate Of The Staggers Act For Independent, Market-Based Railroad Rates And Practices, The ICC Necessarily Limited The Agreement To Its Express Terms, And So Should The Board

The first request made by the Board in its April 28 Decision is that that the parties “comment on the language in Buffalo & Pittsburgh that [i] matters beyond the four corners of the agreement were not frozen, but also that [ii] carrier attempts to reduce the net allowance paid were not permitted.” Slip Op. at 3. NAFTA suggests that there is a discrepancy between these two holdings, but in fact they are perfectly consistent. As the Board notes in the preceding paragraph, NAFTA attempts to create a discrepancy by focusing on the “in any manner” language of the definition of a departure tariff as one that “departs in any manner from the allowance system prescribed herein,” while BNSF focuses on the reference to “the allowance system prescribed herein.” Slip Op. at 2. The reason that BNSF focuses on “the allowance system prescribed herein” is simple: that is what the ICC itself properly focused on in Buffalo & Pittsburgh. 7 I.C.C.2d at 25. The issue then, and the issue now, is whether a tariff departs from the allowance system prescribed in the Agreement. The “in any manner” language simply makes clear that a railroad cannot tinker in any way with the allowance level resulting from the prescribed formula.

That obviously does not mean that railroads were or are disabled from making any changes in rates or practices for their services that might affect the income earned by some car owners or shippers. As the ICC concluded, the prescription of allowances could not have been intended to “freeze and immunize from change” matters “beyond the four corners of the [A]greement.” *Id.* Any doubt in that regard is resolved by Section 8(e), which, as the ICC itself stressed, refers to “the general rule that the

nationally prescribed allowance level applies, and must be paid' (emphasis ours)." *Id.* The ICC itself explained that this language, "on its face," refers to "rate mechanisms by which the carrier attempts to reduce the net allowance paid." *Id.* at 25-26 (original emphasis). And it held that "[s]eparate rates for empty car movements do not involve allowances in this sense." *Id.* at 26.

Separate charges for storing or diverting empty private cars likewise "do not involve allowances in this sense." BNSF is not trying to "cap" allowances to shippers or car owners or otherwise opt out of the prescribed allowance calculation system. BNSF is providing incentives for shippers and car owners either to assist in moving their cars more efficiently or to pay some compensation for the extra costs BNSF incurs as a result of holding cars on its tracks awaiting loading or having to switch cars or blocks of cars to a second new destination. Those shippers who timely take their cars for loading (or provide their own track space for holding their empty cars) incur no storage charges at all. By the same token, those who do not put BNSF to the expense and inefficiency of a second diversion of their cars do not incur any diversion charges. The fact that some shippers and car owners incur those charges does not undercut the prescribed allowance system for all shippers and car owners, any more than the charges BNSF assesses for holding loaded private cars for some shippers undercuts the allowance system. BNSF pays the full allowance to all private tank car owners who wish to use the Ex Parte No. 328 Agreement.

Of course, just as the car owners who pay for movements to repair facilities, the shippers or car owners who pay storage or diversion charges incur a real out-of-pocket

expense.¹⁴ But, as the ICC concluded in Buffalo & Pittsburgh, it is only by “unduly straining the language of the [A]greement” that one could conclude that such charges for extra services have either the intention or the result of reducing the “net allowance paid.” 7 I.C.C.2d at 25-26 (original emphasis).

Indeed, if anything, the case for not construing the language of the Section 8 to apply to storage or diversion charges is even stronger than it was in Buffalo & Pittsburgh for repair move charges. Free repair moves had historically been considered a predicate of the allowance system. See IHB-I, 357 I.C.C. at 127-28. No such authority exists suggesting that free storage of empty private cars, any more than free storage of loaded private cars, has ever been considered a predicate of the allowance system. Demurrage and storage charges on empty and loaded railroad-owned cars always existed side-by-side with per diem and mileage allowances on the such cars, and the ICC never held that they could not co-exist.

Furthermore, the free repair move principle had hardened into a “rule” that the car providers strenuously argued they were entitled to rely on in their JNC negotiations. No such “rule” exists with respect to charges for storing or diverting empty cars. While the railroads may not generally have assessed separate charges for holding empty private cars when a shipper or car owner did not take them, this historical practice was

¹⁴ We discuss in Part I.C. below NAFCAs contention that Buffalo & Pittsburgh is distinguishable because the ICC expected that some portion of charges for movements to repair facilities could be recovered through the allowance system. Suffice it to say here that the reason that the car owners fought IHB-I so vigorously is that they knew that the allowance formula would not fully reimburse those who paid for movements to repair facilities. No one, including the ICC, doubted that some car owners would incur extra costs as a result of its ruling. But that did not, and does not, mean that such charges for extra services constituted “departure tariffs” within the meaning of Section 8.

never enshrined as a “rule,” and it was and is no less subject to change than a host of other historical railroad practices that make no good economic sense.

Finally, when the ICC determined in Buffalo & Pittsburgh that the Ex Parte No. 328 Agreement must be restricted to its express terms, the case was one of first impression. The ICC had dealt previously only with efforts by railroads to “cap” mileage allowances or otherwise opt out of the mileage allowance system for particular traffic. Having determined in IHB-II that continuation of the free repair move “rule” was inconsistent with the mandate of the Staggers Act for the elimination of practices that encouraged cross-subsidization and promoted inefficiency, 3 I.C.C.2d at 611, the ICC was confronted in Buffalo & Pittsburgh with the contention that any charges for what had previously been free would constitute an improper “departure” from the tank car Agreement. The ICC thoroughly addressed that issue and found not only that the Agreement itself could not sustain the car providers’ interpretation, but that such an interpretation would be at odds with the goal of IHB-II and the Staggers Act to maximize efficient individual railroad rate-setting. 7 I.C.C.2d at 28.

In this case, the Board confronts no issue of first impression. In fact, it has strong controlling precedent to inform its decision. The ICC in Buffalo & Pittsburgh thoroughly demolished the notion that the Ex Parte No. 328 Agreement could be read as prohibiting any charges for services or changes in practices outside the four corners of the Agreement.¹⁵ Moreover, both the ICC and the STB have confirmed that

¹⁵ NAFA has argued that the Board should begin an investigation in this proceeding to determine whether BNSF’s charges constitute “departure tariffs” because the ICC began an investigation proceeding in Buffalo and Pittsburgh. NAFA’s Petition for Clarification or Reconsideration, filed October 9, 2002, at 9. But this argument
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independently set demurrage and storage charges for cars awaiting loading or unloading comport with the Staggers Act mandate for maximizing individual pricing of services and minimizing cross-subsidization. See Railroads Per Diem, Mileage, Demurrage and Storage Agreement, 1 I.C.C.2d at 934 (confirming "that such charges clearly can be established on a unilateral basis, and that a free market approach to such charges will more effectively foster the goals of the national rail transportation policy"); Ex Parte No. 462, Exemption of Demurrage from Regulation, served March 29, 1996, slip op. at 4 (same).

NAFCA has claimed that it can show that the JNC had a different understanding than what is apparent on the face of the Ex Parte No. 328 Agreement and consistent with the ICC's contemporaneous view of its Staggers Act mandate. We discuss in Part I.C. below what the JNC in fact considered, but it bears emphasizing here that the critical question is what the ICC thought it prescribed. Particularly in the post-Staggers Act era, when collective action by railroads and shippers was required to be minimized, and market forces permitted to allow independent rate-setting and innovative services, the ICC could not, and would not, simply rubber-stamp collective action. Having found

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effectively asks the Board to ignore settled law. The ICC initiated an investigation in Buffalo and Pittsburgh because the issue there was one of first impression. Nothing in law or common sense requires the Board to reinvent the wheel and conduct an investigation in this case just because it did so in Buffalo and Pittsburgh. In fact, the ICC itself was confronted with that question in Docket No. 40433, Switching Charges for Privately Owned Cars Moving to and from Repair Facilities, NW and SOU (served March 11, 1991). The ICC found that since the issues there were controlled by its Buffalo and Pittsburgh decision, no purpose would be served by an investigation, and, accordingly, that the case would be dismissed. *Id.* The same disposition is appropriate here.

in 1985 that independent demurrage and storage charges would “more effectively promote both the general goals of the national rail transportation policy, particularly 49 U.S.C. 10101a(3), (4), and (5), and the equipment allocation goals of 49 U.S.C. 10750,” 1 I.C.C.2d at 935, the ICC could not be deemed in 1986, *sub silentio*, to have approved an agreement to freeze in place all demurrage, storage charge, and diversion charge practices.

2. The Rationale Of The Buffalo & Pittsburgh Decision Did Not Turn On The Possibility That Car Owners Could Recover Some Of The Costs Of Movements To Repair Facilities Through The Allowance System

In an effort to avoid the controlling authority of Buffalo & Pittsburgh, NAFCA has argued that the ICC’s decision in Buffalo & Pittsburgh turned on its recognition in IHB-II that charges for car repair movements were an item of maintenance costs that could be recouped by the car owners through increased mileage allowances. Citing NAFCA’s argument, the Board in its April 28 Decision asks the parties to “comment on the significance of the absence of storage charges on cars awaiting loading in the Ex Parte No. 328 agreement.” Slip Op. at 4. We address below the question of whether storage charges were not included in the Agreement because they were considered by the parties to be a “railroad cost.” Slip Op. at 3. Here, we address the question of whether the authority of Buffalo & Pittsburgh was limited to independent railroad charges for costs that could be recouped through the allowance system.

The most obvious problem with NAFCA’s contention is that it is at odds with the express rationale of the ICC’s decision. As discussed earlier, the core position taken by the ICC in Buffalo & Pittsburgh was that the “departure tariff” language it had approved in Section 8 could not be read to “freeze and immunize from change” anything that was

beyond “the four corners of the agreement.” 7 I.C.C.2d at 25. In that case, the matter that was beyond the four corners of the Agreement was charges for movements to repair facilities. In this case, it is charges for storage of cars awaiting loading and charges for the second diversion of cars or blocks of cars to a new destination. NAFCAs contrary view – that charges not mentioned in the Agreement are prohibited – cannot be squared either with the plain language of Section 8 or with the plain language of Buffalo & Pittsburgh.

It is certainly true that the ICC also addressed, by reference to IHB-II, the question of whether the costs of new railroad charges for movements to repair facilities might be recovered, in whole or in part, through the car repair formula. 7 I.C.C. 2d at 27-28. The ICC, however, rejected the idea that unless and until the railroads and car providers renegotiated the Agreement to ensure that the car providers were made whole, it must treat all charges for movements to repair facilities as “departure tariffs.” *Id.* at 28. The ICC noted that the Agreement by its terms, in Section 3(a), provided for charges for empty repair moves to be treated as costs that could be passed back through the mileage allowance system, but it left to the parties the implementation of that provision. *Id.* at 23. The fact that “car owners might not recover all of their repair move charges” under that provision provided no grounds for the ICC to reopen the Agreement, much less to treat any new charges as “departure tariffs.” *Id.*

Buffalo & Pittsburgh stands for the straightforward proposition that the Ex Parte No. 328 Agreement must be construed according to its express terms. Charges that are not prohibited are permitted. Whether some, none, or all of a new charge is recoverable by the car providers depends on the terms of the Agreement. The mere

fact that it is new, however, does not make it a “departure tariff.” Only tariffs like allowance “caps,” which represent direct attacks on the level of the allowance paid, are departure tariffs. *Id.* at 25-26. BNSF’s storage and diversion charges no more represent attacks on the level of the allowance paid by BNSF than do the charges for movements to repair facilities at issue in Buffalo & Pittsburgh. Of course, the income of some car providers may be adversely affected. But that does not make the charges for the services they receive “departure tariffs” within the meaning of Section 8.

C. Section 5 Of The Agreement Provides No Support For NAFCA’s Position That BNSF Or Any Other Railroad Is Barred From Setting Or Changing Storage Or Diversion Charges On Private Rail Cars, Whether Loaded Or Empty

Section 5 of the Ex Parte No. 328 Agreement sets forth uniform storage charges for private cars being held outside repair facilities for maintenance or repair. BNSF has pointed to Section 5 as evidence that the JNC knew how expressly to reach collective agreement on storage charges, and did so only with respect to cars being held outside repair facilities. Because storage charges on empty cars awaiting loading (or loaded cars awaiting shipment) are not addressed in Section 5, new or changed charges for such services cannot be considered “departure tariffs” within the meaning of Section 8.

NAFCA argues that the reason there is nothing in the Agreement about storage charges on cars being held for loading is that the costs of such services were considered in the Ex Parte No. 328 negotiations to be a “railroad cost.” It follows in NAFCA’s view, apparently, that any charge for such services is a “departure tariff.” The Board in its April 28 Decisions asks for comments on “whether the cost of operating and maintaining holding tracks for private cars prior to loading was considered by the parties to be a railroad cost in the Ex Parte No. 328 negotiations.” Slip Op. at 3.

The first answer to this is that what the parties agreed to in the Ex Parte No. 328 negotiations, and all they agreed to, is set forth in the express language of the Agreement. VS Robinson at 9-10. The negotiations on the revised Agreement were extremely hard fought over a three-year period from 1982-85. Likewise, the original Agreement was vigorously negotiated between the time the ICC first established the Joint Tank Car Task Force ("JTCTF") in 1976 and the ICC's adoption of the JTCTF's proposal in 1979. See Ex Parte No. 328, Investigation of Tank Car Allowance System (served June 15, 1979). The parties were acutely aware that there were major differences among the competing interests and that the only understanding they had was what was reduced to writing and presented to the ICC as their joint recommendation. VS Robinson at 12, 13-14.

This was particularly so in light of the strong interest the railroads had in maintaining their right of independent action to the maximum extent possible. Even during the 1970s, when collective action on railroad rates and practices was much more common, railroads took the position that they had a right of independent action. VS Robinson at 11. Both before and after the original Ex Parte No. 328 Agreement was approved by the ICC in 1979, individual railroads frequently filed allowance "cap" tariffs with respect to the allowances they would pay. *Id.* at 8-9. When the JNC renegotiated the Agreement between 1982 and 1985, the issue of allowance caps remained a continuing source of dispute, "and almost resulted in a breakdown in negotiations." Buffalo & Pittsburgh, 7 I.C.C.2d at 25.

Ultimately, as the ICC concluded in Buffalo & Pittsburgh, the railroads agreed to limit their right of independent action, through the "departure tariff" provisions of Section

8, with respect to allowance caps and other tariffs by which an individual railroad might attempt to opt out of the allowance system prescribed in the Agreement. But that was all the railroads agreed to. They did not agree to give up their right of independent action with respect to anything that was not prescribed in the agreement. VS Robinson at 13.

NAFCA argues that since the railroads agreed in Section 5 on charges for holding cars outside repair facilities, and since they agreed in Section 3 that such charges would be included in maintenance costs, it follows that the railroads agreed that all other costs of storage are railroad "operating costs" for which the railroads could not charge. Of course, that does not follow at all. From the outset of the JNC's negotiations in 1976, a wide variety of proposals were made for collective action by the railroads and shippers concerning private cars, including broad proposals for collective setting of demurrage, storage, and diversion charges on empty private cars awaiting loading or in transit. VS Robinson at 10-11. These proposals were never adopted. *Id.* at 11. The only thing to which the railroads agreed collectively was uniform storage charges for cars held outside repair facilities.¹⁶

The fact that the railroads agreed to uniform storage charges for cars held outside repair facilities did not mean that they agreed to abandon their right of independent action with respect to rates on empty cars held for loading or diverted to a

¹⁶ That provision was included in the original 1979 Agreement. See Ex Parte No. 328, *Investigation of Tank Car Allowance System* (June 15, 1979). It was carried forward unchanged into the revised 1986 Agreement, except that the railroads agreed in Section 3 to treat the cost of those charges as a maintenance cost that would be included in the mileage allowance formula. VS Robinson at 11.

new destination. VS Robinson at 12. It simply meant that the railroads and the shippers were unable to reach collective agreement. *Id.* If the parties had intended in Section 5 to agree that the only time a railroad could assess demurrage or storage charges on a car was when the car was being held outside a private repair facility, they would have said so.¹⁷ They did not do so because there was no such agreement. VS Robinson at 12.¹⁸

Nor does the fact that the railroads agreed in Section 3 to treat storage costs for cars held outside private repair facilities as maintenance costs make any difference. It does not follow that the railroads agreed that they could not charge for any other services, and that, if they did, such charges would be treated as “departure tariffs.” It simply means that the parties agreed that these specific costs could be included as maintenance costs in the formula. VS Robinson at 11.

It bears emphasizing that the issue here is only whether BNSF’s storage and diversion charges on private tank cars constitute “departure tariffs” subject to the special procedures of Section 8 of the Ex Parte No. 328 Agreement. BNSF does not claim that the car owners in the Ex Parte No. 328 negotiations agreed that they could not bring an independent challenge to any demurrage, storage, or diversion charges that individual

¹⁷ As discussed earlier, it is highly questionable whether the ICC would have approved such an agreement in 1986, even if that agreement had been made expressly, but it is certain that the ICC could not be deemed to have approved an undeclared agreement to limit the railroads’ right of independent action *sub silentio*.

¹⁸ Significantly, the organization that represented the largest tank car owners in the JNC negotiations – RPI – has never claimed that Section 5 represents anything other than an agreement regarding charges for cars held outside repair facilities. When BNSF and UP amended their storage tariffs to except such charges, RPI withdrew its challenges to those tariffs. See note 7, *supra*.

railroads might set on empty tank cars. See VS Robinson at 6. In effect, that is what NAFCA has done in Docket No. 42060 (Sub-No. 1). While BNSF does not believe that NAFCA's complaint in Docket No. 42060 (Sub-No. 1) has any legal merit,¹⁹ BNSF is not asserting that the railroads and car providers made any agreement in the Ex Parte No. 328 negotiations about storage charges for cars awaiting loading or diversion charges for cars rerouted to a new destination. Private tank car providers stand, and should stand, in the same shoes as any other private car providers regarding such charges. If those charges are lawful for other private car providers, they are lawful for tank car providers.

II. NAFCA'S ALLEGATIONS ABOUT THE NATURE AND PURPOSE OF BNSF'S STORAGE AND DIVERSION CHARGES ARE UNFOUNDED

The Board in its April 28 Decision seeks responses from the parties to several matters that relate to BNSF's storage and diversion charges, but that are not unique to tank cars. Slip Op. at 4. We address each of those issues below.

A. The Line-Haul Rates Paid By Shippers Using Private Cars Do Not Cover BNSF's Storage and Diversion Services

The Board seeks comments on the claim NAFCA made in Docket No. 42060 (Sub-No. 1) that the furnishing of holding tracks is included in the line-haul rates paid by BNSF shippers. As Mr. Langston discusses in detail in his statement, there are several fallacies in that claim.

The first fallacy is the implicit assumption that a single "bundled" price should cover every level of service that a railroad may offer to a shipper. There was a time

¹⁹ As the Board knows, BNSF currently has pending a Motion to Dismiss the complaint in Docket No. 42060 (Sub-No. 1), filed October 5, 2001.

when breaking out different prices for different services was discouraged because it was thought to contribute to unfair "discrimination" among shippers.²⁰ Single-car shippers, for example, should pay no more per car than multi-car shippers, and shippers who used smaller cars should pay no more per pound or ton than those who used larger cars. VS Langston at 11.

The problem with this policy was obvious – it resulted in cross-subsidization and provided little incentive for shippers to operate more efficiently. VS Langston at 11. Single-car shippers, for example, had no incentive to pre-block their traffic and limit the amount of industrial switching and railroad yard work required to serve them. When railroads began to set lower rates for multi-car shipments, shippers had incentives to organize their own operations and invest in plant infrastructure to qualify for the lower rates. This in turn reduced the amount of switching required to serve them, freed up yard space, and improved the railroads' financial performance. *Id.*²¹

²⁰ Almost uniquely among regulatory agencies, the old ICC focused on questions of "unjust discrimination" against shippers in railroad tariffs and virtually ignored the financial implications of its decisions on the industry. See Alfred E. Kahn, *The Economics of Regulation*, Vol. I at 54-55 and n.85 (1970). All this changed with passage of the Staggers Rail Act in 1980. Although Congress had earlier mandated significant regulatory reforms in the Railroad Revitalization and Regulatory Reform Act of 1976, the ICC had been very slow to implement those reforms. In the Staggers Act, Congress put more teeth in its deregulatory mandate. It substantially narrowed the range of individual pricing actions that could be considered "discriminatory" in railroad tariffs (49 U.S.C. § 10741(b) and (c)), and, for the first time, permitted railroads to enter into private contracts with shippers that were exempt from regulation (49 U.S.C. § 10709). Far from being discouraged, independent, demand-based price discrimination was now statutorily encouraged (49 U.S.C. § 10101a; H.R. Rep. No. 1430, 96th Cong., 2d Sess. 79 (1980)), and the ICC responded with the kinds of decisions discussed above, promoting independent action and "unbundled" pricing.

²¹ As Mr. Langston points out, this is the same effect that is achieved when a landlord "unbundles" rental charges to tenants from the charges for water and electrical
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Similarly, when railroads began charging separately for holding loaded private cars while shippers decided when and where to ship them, shippers began to provide shipping instructions more quickly or to make arrangements for holding loaded private cars on their own track or on rented track. VS Langston at 11-12. Initially, shippers complained about the change in policy, asserting that railroads in the past had been willing to hold their cars as part of the railroads' line-haul service. Over time, however, shippers and car owners began to see the benefit of the incentives the separate charges provided for efficient car utilization. VS Langston at 12. Indeed, when BNSF in July 2001 lowered its per car charge for holding most types of loaded private cars from \$75 to \$25, BNSF "received complaints from shippers and car owners that the lower charge did not provide sufficient incentive for those loading the cars to move them out expeditiously." *Id.* at 12. As a result, BNSF restored the \$75 per car charge in July 2002, with virtually no complaints. *Id.*

The same benefits have begun to be realized from BNSF's charges for holding empty private cars beyond a two-day free period. The number of empty private cars being held on BNSF's track has decreased significantly. BNSF's sidings, yards, and main track are less congested than two years ago, and BNSF's ability to provide efficient service to all of its customers has improved. Although there was considerable

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services. By requiring tenants to "internalize" the costs of those services, the landlord encourages tenants to make use only of those components for which they are willing to pay. "The issue is not whether that component constitutes an independent service – water and electrical services may or may not be considered integral to apartment rental – but whether separate charges for different components will encourage more efficient utilization of the services offered." VS Langston at 10.

initial opposition from shippers and car owners who had grown used to using BNSF's track to store their empty cars, that opposition began to fade when the car providers focused on the fact that charges would be imposed only on those who were unable or unwilling to take their cars when they became available. VS Langston at 13. BNSF has worked closely with any shipper that could demonstrate a significant hardship from the transition, including waiving charges where shippers committed to constructing their own track to hold their cars. Numerous shippers have built or leased track space to hold their cars when they are not in use. VS Langston at 5-6.

NAFCA claims that its members had a right to expect that BNSF would continue in the future to hold their cars on its track at no extra charge because BNSF has done so in the past. This a prescription for gridlock. As Mr. Langston explains:

[B]y this reasoning BNSF would never be able to charge separately for any service, or component of a service, that it had not previously charged separately for. It could not have begun charging for storing loaded private cars, because it had not done so in the past. It could not have set higher rates for single-car service and lower rates for multi-car service, because it had not done so in the past. It could not differentiate its rates to take account of the fact that the growth in rail traffic had absorbed much of the capacity on its system, and the problem of congestion and costs of storage had risen apace. It could not favor those shippers that moved their cars efficiently and helped eliminate congestion, but must require all shippers to bear the congestion burden caused by the unwillingness of some shippers to deal with the problem created by their refusal to take their cars when they are ready for delivery.

Id. at 13.

NAFCA implies that unless the line haul rates of shippers that must pay storage or diversion charges are lowered, they will be "double-billed," because previously the line-haul rate covered those costs. But BNSF's line-haul rates are based on market

demand, not the costs of individual components of its service.²² Moreover, the services covered by those rates are always subject to change. As Mr. Langston explains, for example, the fact that BNSF in the past had a single line-haul charge for movements from Chicago to all points in Southern California does not mean that it could not break out separate charges for separate points in Southern California, nor does it mean that BNSF could not raise its rates to some points and lower its rates to others points. *Id.* at 14. The fact that some shippers were now charged more than they were charged in the past would not mean that they were being “double-billed.” *Id.* It would simply mean that BNSF had changed its rate structure. *Id.* By the same token, if BNSF in the past had included car weighing as part of its line-haul service and decided in the future to charge separately for weighing, without lowering the line-haul rate, those shippers that elected to have their cars weighed would incur an effective rate increase, but they would not be “double-billed.” They would simply be paying more than they had in the past. VS Langston at 14.

This points to yet another fallacy in NAFCA’s reasoning. If every shipper that incurred storage charges had to have its line-haul rate lowered (to avoid “double-billing”), it would defeat the purpose of the storage charges, because shippers would have no incentive to avoid leaving their cars on BNSF’s tracks. The cross-subsidization

²² Of course, BNSF must cover the minimum directly variable cost of its services, otherwise it would lose money on every shipment. Once those costs are covered, however, BNSF’s rates are driven by market forces and requirements, not by any cost formula. VS Langston at 15. See also Ex Parte No. 347 (Sub-No. 1), Coal Rate Guidelines-Nationwide, 1 I.C.C.2d 520 (1985) (endorsing demand-based differential pricing principles), *aff’d sub. nom. Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3rd Cir. 1987).

would be obvious, because shippers that did not require BNSF to store their cars would pay higher line-haul rates than those that did. If BNSF bowed to NAFCA's pressure and simply did not charge for storage of empty cars at all, the cross-subsidization would still exist, because shippers who did not impose storage costs on BNSF would be paying the same as those who did. And the shippers causing those costs could have no incentive to limit them. VS Langston at 15.

In the end, NAFCA's claim that BNSF's line-haul rates must be deemed to cover BNSF's storage and diversion services is nothing but a repackaged claim that all past practices must be frozen in place. Since the passage of the Staggers Act, however, railroads have been strongly encouraged to price differentiate in order to encourage efficient operations and avoid cross-subsidization. That is what separate storage and charges on private cars, whether loaded or empty, accomplishes. VS Langston at 12-13. If BNSF charges separately for that service, then its line-haul rates, by definition, do not include the furnishing of holding tracks beyond the free period established in its tariff.

B. BNSF Does Not Control The Movement Of Private Cars

The Board asks for comment on NAFCA's claim that "BNSF controls almost the entire movement cycles of private cars, and that the number of private cars necessary to serve any shipping location is largely subject to BNSF's actions." Slip Op. at 4. Of course, BNSF physically is in control of the car when it moves from origin to destination. But the car provider controls where the car goes, how long it sits on BNSF's tracks at the destination before it is moved into the shipper's facility for loading, and how long it sits on BNSF's tracks after it is loaded and ready to be moved. VS Langston at 24. Unlike empty railroad-owned cars, which BNSF can send to another location if the

shipper is unwilling to take them, empty private cars must be returned to the shipper. BNSF has no ability to reroute private cars or use them at another facility. VS Langston at 25, n.9. Thus, in the most meaningful sense of the term, BNSF does not “control” the movement of private cars.

Insofar as NAFCA’s complaint is that the cycle time for private cars depends upon the efficiency of the operations of BNSF and the other railroads involved in a movement, that is partially true. *Id.* at 24. But it argues for more efficiency-inducing charges like those at issue here, not fewer. As a general rule, the less congestion there is on the railroads’ systems, the faster traffic can move, and the lower the cycle times will be. *Id.* at 23. It is also the case that a significant amount of the delay in private cars returning to the car provider is attributable to private car receivers holding on to those cars inside their facilities. The car providers have the ability to impose their own demurrage charges on receivers who delay in returning the cars, and BNSF has encouraged them, with some success, to do so. Where they have, the cycle times on their cars have improved. *Id.* at 25.

Finally, the car providers have the ability to divert cars to different destinations than those set forth on the bill of lading, and they frequently do so. *Id.* at 24. As discussed below, this imposes significant costs on BNSF, particularly when multiple diversions are involved. By the time the car gets back to the original origin, it may have been used for multiple trips elsewhere, at the owner’s direction. In that circumstance, the cycle time back to the original origin is largely of the owner’s own making. *Id.* at 24.

C. There Is No "Typical" Holding time For Tank Cars Or Other Types Of Cars Being Held For Loading

The Board asks for comments on "the typical duration for holding private tank cars awaiting loading, and on the length of track that is used in holding these cars." Slip Op. at 4. As explained by Mr. Langston, there is no "typical" duration or length of track. VS Langston at 9. Many shippers regularly take their cars within the allowed free period. *Id.* at 9. Others, particularly before BNSF instituted its storage charges on empty cars, have left their cars on BNSF's track for months. On April 30, 2001, there were 2,686 empty private cars sitting on BNSF's tracks that had been there for more than 30 days, taking up over 31 miles of BNSF's track space. *Id.* at 2. Of these, 1,572 had been sitting on BNSF's track for over 100 days. *Id.*

By May 7, 2003, the number of empty private cars being left on BNSF's tracks more than 30 days had decreased by more than 60%, *id.* at 5, but there are still some shippers who routinely leave their cars on BNSF's track for long periods, *id.* at 9. In the past, the number of private empty cars being stored on BNSF's tracks has forced BNSF to lease track from shortlines. *Id.* at 10. Now BNSF is working with shippers to encourage them to build or rent track space when they are unable to use their private cars. This has had a significant positive impact on the problem, but it still remains the case that there are wide differences in the length of time that shippers require BNSF to store their cars, and the amount of track space involved. *Id.* at 9-10.

As far as the average time for empty private cars held on BNSF's track is concerned, the improvement since BNSF instituted its storage charges has been dramatic. *Id.* at 4. The average time for private industrial cars (*i.e.*, all cars transporting commodities other than agricultural commodities) in May 2001 was approximately two

days. As of May 2003, it was one-half of a day. *Id.* at 5 and Exh. A. The average time for agricultural cars in May 2001 was one and one-third days. As of May 2003, it was one-third of a day. *Id.* at 5 and Exh. B. Thus, there can be no question that BNSF's policy has significantly improved the average speed with which shippers take their cars.

D. Diversion Charges Cover Switching Costs, Not Excess Mileage Costs

The Board asks for comment on "the process of diverting empty cars" and whether "switching out cars or blocks of cars that a shipper in mid-shipment diverts to a new location" fully reflects all of the situations in which diversion charges may be applied. Slip Op. at 4. Preliminarily, it deserves emphasizing that, contrary to NAFC's assertions, diversion charges are not assessed to compensate BNSF for the extra miles the car may travel when it is diverted to a different destination. Diversion charges are assessed instead to compensate BNSF for the operating and administrative costs that BNSF incurs when it must redirect a car to a different destination, consignor, or consignee than was shown on the bill of lading and to discourage shippers from making unnecessary diversion requests. VS Langston at 19-20.²³

As Mr. Langston explains in his verified statement, unless they have been directed to do otherwise on the bill of lading, railroads automatically return empty private tank cars to their point of origin after they have been unloaded. *Id.* at 17. For example, a tank car of liquid fertilizer originating at a shipper's plant in Houston, Texas, and destined for Kansas City, Kansas, will automatically return empty to the shipper in

²³ BNSF charges a shipper \$150 per car or bill of lading, up to a maximum of \$450 for a block of cars, for second diversions. See Items 200B and 1000B, BNSF Diversion Book 6200-A.

empty private cars and also encourages shippers to avoid unnecessary diversions.²⁶

Fewer diversion requests improves the efficiency of BNSF's operations, which benefits both BNSF and its customers.

III. IF BNSF'S STORAGE AND DIVERSION CHARGES WERE TREATED AS "DEPARTURE TARIFFS," THEY COULD BE JUSTIFIED BY "SPECIAL CIRCUMSTANCES," BUT THE MORE LIKELY RESULT WOULD BE THE DEMISE OF THE EX PARTE NO. 328 AGREEMENT

Although both parties have appropriately focused to date on whether the charges at issue are "departure tariffs," the Board asks for "comment on how, in today's environment, we should evaluate a charge if we find that it is a departure tariff." Slip Op. at 4. In one respect, this is not a difficult question. Section 8 itself sets forth a "special circumstances" standard, which the ICC acknowledged was a "broad term" when it adopted the revised Agreement in 1986. Ex Parte No. 328, 3 I.C.C.2d at 202. The ICC refused to narrow that term, finding that "it would be difficult, if not impossible, to identify all sets of conditions that could or should warrant allowance caps." *Id.* Accordingly, the ICC held that the issue was "best left to adjudication on a case-by-case basis." *Id.*

Of course, storage and diversion charges are not "allowance caps," so the ICC's discussion of the standard under which such a cap might be justified provides yet another illustration of why the procedures in Section 8 have no application at all in this

²⁶ Shippers can avoid diversions by providing BNSF with proper reverse routing instructions on the original bill of lading for the loaded move or by changing the bill of lading before the car is released empty at its unloading point. VS Langston at 18, n.7. If the shipper fails to take advantage of either of those opportunities to redirect the car, BNSF will have to perform a diversion. Under BNSF's diversion policy, shippers are not charged for the first diversion. Thus, the shipper can still redirect the car to Houston without incurring any charge.

case. Nevertheless, assuming *arguendo* that the Board found BNSF's charges constituted "departure tariffs" within the meaning of Section 8, the "special circumstances" test is the prescribed standard for assessing such a tariff. BNSF could present evidence that circumstances had changed since the revised Agreement was prescribed in 1986. Whereas the rail system had substantial excess capacity in the mid-1980s, and more space to hold idle private cars, BNSF and other railroads have shed many redundant lines and concentrated their traffic on the remaining lines, so that private cars held on their tracks present much more of a congestion problem. That could be one basis for meeting the "special circumstances" test.

Another basis for meeting the "special circumstances" test would be the sea change in car hire regulation since the Ex Parte No. 328 Agreement was prescribed in 1986. Today, the Ex Parte No. 328 Agreement for tank cars is the last vestige of an earlier era of collective nationwide agreements on car hire rate levels. Private car allowances for all other car types are set either unilaterally by individual railroads or through individual negotiations with the car providers. Indeed, by the choice of the individual car providers themselves, most of BNSF's tank car traffic moves under contracts or "zero-rated" line-haul rates that do not require the payment of allowances. VS Langston at 25. Thus, if the Ex Parte No. 328 Agreement were interpreted to hinder or prevent BNSF and other railroads from setting market-based storage and diversion charges, it would be highly questionable whether that Agreement should survive. Clearly, it is no longer necessary, and if it stood in the way of the kinds of efficient charges that apply to every other car type (and to all railroad-owned and controlled cars as well), it would be seriously counterproductive.

Indeed, a determination by the Board that railroads' storage and diversion charges would, if challenged, be considered "departure tariffs," requiring the railroads involved to justify their charges under the "special circumstances" test, could itself spell the end of the Ex Parte No. 328 Agreement. Under Section 9 of the Agreement, any three interested parties can obtain reopening of the Agreement without showing good cause. In any event, a determination that railroads were constrained by the Agreement to justify their independent storage and demurrage charges would certainly constitute good cause. And, once reopened, there is little chance that the Agreement would survive. All concerned have demonstrated that they can individually set or negotiate market-based car hire rates, including for tank cars, and the Board has stressed that "the national rail transportation policy . . . requires that, to the maximum extent practicable, rates be set individually, rather than collectively." Ex Parte No. 462, Exemption of Demurrage from Regulation (served March 29, 1996), slip op. at 5.

CONCLUSION

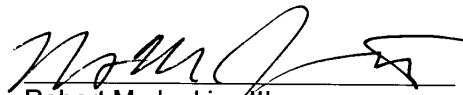
The ICC's decision in Buffalo & Pittsburgh is dispositive of the "departure tariff" issue in this case. Demurrage, storage, and diversion charges on empty private cars awaiting loading or diverted to a new destination are nowhere prescribed or proscribed in the Ex Parte No. 328 Agreement, and Buffalo & Pittsburgh made crystal clear that matters beyond the four corners of the allowance system prescribed in that Agreement are not "departure tariffs" within the meaning of Section 8 of the Agreement. The JNC knew how to agree collectively on holding charges. It did so in Section 5 – but that collective agreement was expressly limited to the narrow circumstance of cars held outside repair facilities. If the JNC had intended to otherwise limit the railroads' right of independent action to set their own demurrage, storage, or diversion charges, it would

have said so. It did not because no such agreement was reached, and none was prescribed by the ICC.

This does not mean that NAFCA cannot challenge BNSF's tariffs, as it has already done in Docket No. 42060 (Sub-No. 1). It simply means that NAFCA cannot use Section 8 of the Ex Parte No. 328 Agreement to place the burden on BNSF of justifying its tariffs as applied to tank cars. If the Ex Parte No. 328 Agreement could be so abused, it is doubtful that it would long survive.

Respectfully submitted,

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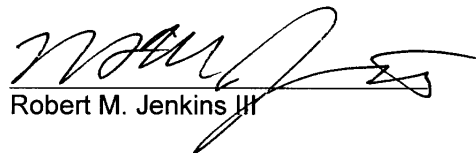
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Dated: June 9, 2003

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Opening Statement of The Burlington Northern and Santa Fe Railway Company in Response to STB Decision Served April 28, 2003" has been served by hand delivery on counsel for the North America Freight Car Association, Andrew P. Goldstein, counsel for the National Industrial Transportation League, Nicholas J. DiMichael, and counsel for the American Chemistry Council, Thomas E. Schick, this 9th day of June 2003.


Robert M. Jenkins III

ROBINSON

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET No. 42060

**NORTH AMERICA FREIGHT CAR ASSOCIATION – PROTEST
AND PETITION FOR INVESTIGATION – TARIFF PUBLICATIONS
OF THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY**

VERIFIED STATEMENT OF JOHN J. ROBINSON

My name is John J. Robinson. I am a railroad transportation consultant with over 40 years of experience in the rail industry. From 1981-1992, I was Assistant Vice President for the Operations and Maintenance Department of the Association of American Railroads ("AAR"). In 1993, I was appointed Senior Assistant Vice President of the Casualty Prevention Division until my retirement from the AAR at the end of 1994. From 1971 through 1994, I served as Secretary to the Committee on Compensation of the AAR. I also served as Senior Assistant Vice President of the Transportation Division of the AAR. I received a B.S. in Mechanical Engineering from Penn State University and a J.D. from the University of Maryland Law School.

As Assistant Vice President for the Operations and Maintenance Department and Secretary to the Committee on Compensation of the AAR, I participated directly in the negotiations in Ex Parte No. 328, *Investigation of Tank Car Allowance System*. In addition, I submitted testimony in the proceedings in Docket No. 40200, *Charges for Movement of Empty Cars, Buffalo & Pittsburgh Railroad, Inc.*, which I understand the Board has specifically asked the parties in this proceeding to comment upon. I have been asked by The Burlington Northern

and Santa Fe Railway Company (BNSF) to respond to certain questions posed by the Board in its April 28, 2003 decision in Docket No. 42060.

I. Background and Intent of Tank Car Allowance Agreement

Historically, the amount of the allowance railroads would pay to private tank car owners¹ was set in nationwide tariffs. *See, e.g., Manufacturing Chemists Association, Inc. et al. v. Aberdeen and Rockfish Railroad Company, et al.*, 350 I.C.C. 886 (1975). These initial allowances for private tank cars were not tailored to apply to particular traffic but were instead uniform, flat rates that applied across the entire rail system. The same allowance was paid regardless of the type of traffic moved (e.g., chemicals, edible oils, etc.), the type of tank car used (e.g., size, valves, lining, insulation, etc.), or the amount of freight rate paid. In some cases, where individual railroads determined that the uniform allowance rate was too high for a particular commodity or movement and was adversely affecting their ability to earn revenue on the move, the individual railroads would publish tariffs that limited or “capped” the amount of allowance they would pay for that commodity or movement. The railroads might do this for competitive reasons or because the prescribed allowance was excessive in relation to the revenues the railroads could earn on the movement. The railroads were essentially trying to use allowance caps to tailor the allowance amount to fit particular private tank car movements.²

¹ For purposes of this statement, the term “private tank car owner” refers not only to private tank cars owners, but to those who lease private tank cars as well.

² For example, assume that the nationwide tariff set a flat mileage allowance rate of 75 cents per actual mile traveled for all private tank cars. An individual railroad might determine that a flat rate of 75 cents per mile traveled was too high in relation to the revenue that was available for particular commodities being transported between particular origins and destinations under a prescribed freight rate. The railroad might determine that a payment of 65 cents per actual mile was more appropriate to pay for the movement of certain commodities over particular routes and decide to publish a tariff “cap” stating it would only pay a mileage allowance rate of 65 cents per mile for the movements of tank cars involving the transportation of a specific commodity over certain of its routes.

Shippers generally would object to railroads' attempts to impose allowance caps or limits and would on occasion protest the publication of such tariffs with the Interstate Commerce Commission ("ICC").

In 1976 after many years of litigation over mileage allowances, the ICC authorized the formation of a joint committee comprised of railroads, shippers, and tank car owners, the Joint Tank Car Task Force ("JTCTF"), to collectively negotiate a national mileage allowance formula. I participated in the negotiations as AAR's representative. After more than three years of intense negotiation, the parties submitted a compromise agreement for adoption by the ICC. The compromise agreement established a new allowance system for private tank cars. The agreement set forth a tank car compensation formula for establishing the amount of mileage allowances railroads would pay to private tank car owners. In a decision served June 14, 1979, the Commission adopted the agreement.

In a petition filed in July 1982, the AAR asked the ICC to suspend the annual update of the allowance formula and to allow the parties to renegotiate the 1979 agreement. The petition explained that the 1979 agreement was not working as intended and was resulting in the payment of excessive allowances to tank car owners and resulted in mileage allowances that did not appropriately track tank car supply and demand. The AAR's petition noted that the amount of mileage allowances railroads were required to pay for private tank cars were increasing even though the amount of miles the tank cars were moving was decreasing. Although the Commission refused to suspend the annual update of the allowances, it did direct renegotiation of the agreement and authorized the formation of another joint committee comprised of railroads, shippers, and tank car owners, "the Joint Negotiating Committee" or "JNC." I, again, participated in the negotiations. From 1979 through the mid-1980's, some railroads continued

publishing allowance caps or limits as a means of addressing the 1979 mileage allowance formula's tendency to dictate the payment of excessive allowances.

The Joint Negotiating Committee negotiated for more than three years and eventually developed a revised compromise agreement that it submitted to the Commission for its approval and prescription. The revised agreement, which the Commission prescribed in Ex Parte No. 328, *Investigation of Tank Car Allowance System*, 3 I.C.C. 2d 196 (1986), revised the national tank car mileage allowance system and formula that the Commission had originally prescribed in 1979 at the request of the JTCTF. The most recent of the two Ex Parte No. 328 Agreements was a compromise agreement that adopted a new formula for calculating the mileage allowances that railroads would pay to private car tank owners. The formula was intended to reduce the disparity in compensation that existed between newer and older cars, to lessen the prior formula's tendency to encourage over-investment in new cars, and to track more accurately the conditions of tank car supply and demand. In addition, one of the tank car providers' goals of the revised Ex Parte No. 328 Agreement, which resulted in the addition of the Section 8 "departure tariff" procedures to the agreement, was to deter rail carriers from unilaterally placing caps or limits on the amount of mileage allowance they would pay to private car owners.

II. Negotiations of Joint Tank Car Task Force and Joint Negotiating Committee

As AAR's representative to and one of the designated recorders for both the JTCTF and the JNC, I was intimately involved in the negotiations that culminated in both the original and the revised mileage allowance formulas prescribed by the Commission, respectively, in 1979 and 1986. I attended each joint committee meeting, as well as a number of the subcommittee meetings, and actively participated in the discussions that led to both the original and final revised agreement. I am fully aware of the issues that were discussed and agreed to by the joint committee in the course of both sets of negotiations, as well as all of the provisions contained

within both agreements. In addition, as an active participant and scribe at all of the joint committee meetings, I have first hand knowledge with respect to those issues to which the joint committees did not agree.

The negotiations that culminated in the adoption of both the original and revised agreements were lengthy and intense. In both cases, the negotiations lasted approximately three years. The joint committees reached agreement on a number of major issues in the course of both negotiations and everything the parties agreed to was reflected in the original and revised agreements that were submitted to the Commission for its approval. Particularly because the Joint Negotiating Committee planned to ask the Commission to not only approve but, once again, to expressly prescribe the terms of the revised agreement, the parties were extremely careful to ensure that everything the parties agreed to in the second round of negotiations was specifically spelled out within the nine sections of the revised agreement. The parties were also careful to ensure that everything the parties did not agree to was excluded from the terms of the revised agreement. Thus, the agreement prescribed in 1986 by the ICC in Ex Parte No. 328 effectively contains everything to which the parties agreed, nothing more and nothing less. In my opinion, the Joint Negotiating Committee never intended to freeze in any way any rail industry practices or procedures that were in place at the time the agreement was negotiated that went beyond the four corners of the agreement itself. I firmly believe that the JNC only intended the agreement to cover those items that were specifically spelled out in the text of the agreement.

A. Definition of Departure Tariff

In its April 28, 2003 decision the Board specifically asked for “comment on what constitutes a departure tariff under section 8” of the Tank Car Allowance Agreement. April 28 Decision at 3. Section 8 of the agreement provides that a departure tariff is one “that departs in any manner from the allowance system prescribed herein.” This definition is an extremely

narrow one and reflects the parties' intention to ensure that Section 8's departure procedures would only apply to changes in any item specifically prescribed in the agreement. For example, Section 2(d) of the revised agreement provides for calculation of maximum allowance car values for any given year. A tariff that amended Section 2(d) of the revised agreement to provide, say, that "the maximum allowable car value paid by this carrier for any loaded tank car movement, shall not exceed \$75,000," would be a departure tariff because it would constitute a change in an item specifically prescribed in the agreement, by capping or limiting the allowance payment on all cars valued over \$75,000. In contrast, a tariff that assessed demurrage on a loaded private car held on railroad tracks beyond a two-day free period would not be a departure tariff, because it does not constitute a change in an item specifically prescribed in the agreement.

Simply put, tariffs that do not address items specifically prescribed and spelled out in the agreement are outside the scope of the agreement and cannot be departure tariffs. This is not to say that a shipper may not object to a tariff that is beyond the scope of the Ex Parte No. 328 Agreement; it simply means that they cannot use Section 8's departure procedures to register their objection.

NAFCA asserts that the term "allowance system" referred to "practices affecting all elements of tank car compensation in effect at the time [Ex Parte No. 328] was negotiated, to the extent that a change in such practices reduce[d] the car owner's net compensation." STB Docket No. 42060, North American Freight Car Association—Protest and Petition for Investigation—Tariff Publications of The Burlington Northern and Santa Fe Railway Company, filed October 9, 2001 at 14. This is simply not true. As used in Section 8, the term allowance system refers to the formula and rules specifically spelled out in the nine sections of the revised tank car allowance agreement and that were prescribed by the Commission in 1986. These nine sections

spell out how the mileage allowance is to be calculated, how adjustments for inflation will be made, how the mileage equalization formula is to be calculated, the level of storage charges that will be assessed on empty tank cars held outside private repair facilities, and how parties to the agreement can ask for negotiations to be reopened.

NAFCA claims that storage and diversion charges reduce the value of the mileage allowances under the Ex Parte No. 328 Agreement and, therefore, constitute departure tariffs and changes in the rules or conditions governing the allowance system within the meaning of Section 8. Again, this assertion is simply not true. The charges BNSF assesses for storing empty private cars on its tracks have no direct effect on the mileage allowance private tank car owners receive. Private car owners still receive the prescribed allowance as specified in the terms of the revised Ex Parte No. 328 agreement, or as provided for in contracts they have negotiated with individual railroads.³ The only thing that has changed is that the cost of doing business for some shippers, specifically those who store large amounts of private cars on BNSF's tracks for a significant period of time, has increased. If one were to accept NAFCA's erroneous interpretation of what was intended to constitute a departure tariff, then anything that increases a private car owner's cost of doing business would be considered a departure tariff. Such a position was never agreed to nor intended by the parties to the Joint Negotiating Committee. The purpose of Section 8's procedures was to prohibit railroads from unilaterally imposing caps or limits on the amount of mileage allowances they would pay. The departure procedures were intended to ensure that

³ Based on my recent conversations with representatives of the four major U.S. rail carriers, it is conservatively estimated that over one-half of the mileage allowances these rail carriers currently pay to private tank car owners are paid to the owners as provided for in individual privately negotiated contracts rather than as provided for under the mileage allowance formula prescribed in Ex Parte No. 328.

railroads desiring to impose such caps or limits would have to show that such measures were justified.

B. Section 8 Procedures

The departure procedures set forth in Section 8 were not included as part of the original Tank Car Allowance Agreement that was prescribed by the Commission in 1979. The genesis of the Section 8 procedures evolved out of concerns, primarily of the private tank car owners, that parties to the revised agreement needed to be prevented from continuing to publish tariffs excepting themselves from the provisions contained within the four corners of the agreement. In the years immediately following the negotiation of the 1979 agreement several railroads published tariffs that effectively limited the amount of mileage allowances they would pay for certain private tank car movements. Shippers wanted assurance that railroads would not unilaterally impose such caps in the future or amend the allowance formula (e.g., by limiting the maximum allowance values that would be utilized) to reduce the amount of allowance to be paid. Thus, while they were willing to discuss revisions to the tank car allowance system as part of the JNC negotiations, they wanted to ensure that individual railroad tariffs that departed from the system would be investigated. This was the context in which the Section 8 procedures were developed.

The procedures contained within Section 8 were in no way intended to apply to matters that were beyond the scope of what the parties to the Joint Negotiating Committee agreed to and that were specifically spelled out in the text of the agreement. Despite NAFCAs assertions to the contrary, the procedures were never intended to prevent railroads from modifying practices and procedures as they existed in the mid-1980s that were beyond the scope of the agreement. The railroads did not and would not have agreed to freeze all of their existing rates and practices.

In its April 28, 2003 decision in this proceeding, the Board specifically asked the parties in this proceeding to comment on the ICC's decision in *Charges for Movement of Empty Cars, Buffalo & Pittsburgh R.R.*, 7 I.C.C.2d 18 (1990). As discussed above, I submitted testimony in the *Buffalo & Pittsburgh* proceeding and am familiar with the issues addressed in that proceeding as well as the ICC's final decision. I agree completely with the ICC's decision in *Buffalo & Pittsburgh* that Section 8's procedures were intended only to thwart rail carriers' attempts "to avoid paying the full allowance specified by the formula" (for example, by the imposition of allowance caps or by modifying elements of the allowance formula itself). The procedures in Section 8 were in no way intended to prevent railroads from charging discrete rates for separate services not covered by the agreement.

III. Joint Tank Car Task Force and Joint Negotiating Committee Did Not Consider Cost of Operating and Maintaining Holding Tracks for Cars Awaiting Loading

The Board also asked the parties to comment on "whether the cost of operating and holding tracks prior to loading was considered by the parties to be a railroad cost in the Ex Parte No. 328 negotiations." Decision at 3. I do not recall either the railroads or the private tank car owners ever raising the issue, nor do I recall the parties ever discussing this issue as part of the Ex Parte No. 328 negotiations.

The tank car owners took the lead with respect to determining what operating and maintenance costs would be considered in the tank car allowance formula. Everything the parties agreed to with respect to this issue is included in Section 3, *Maintenance and Operating Cost* of the revised agreement. Section 3 of the original agreement did not specifically provide for including in maintenance costs the cost of charges incurred for moving or storing cars en route to or from car repair facilities. Such charges were first established collectively in Section 5 of the original agreement. It was only during renegotiation of the agreement that the tank car

owners asked that the agreement specifically state that such charges be includable in a private tank car owner's maintenance costs. Maintenance and operating costs were intended to cover the cost of repairs associated with keeping the tank cars in the type of condition needed to safely transport the commodity they were designed to haul (e.g., edible oils, chemicals, fuel oil, etc.). In addition to basic repair expenses, such costs include tank car linings, valves, certain retrofits, and required safety inspections. The railroads concluded that the private tank car owners' request to include as part of maintenance costs movement or storage charges incurred on tank cars that were either on their way to or on their way back from being repaired was reasonable and agreed to the request. The revised agreement prescribed in Ex Parte No. 328 contains all of the major items that have traditionally been considered part of freight car ownership – specifically interest, depreciation, and the cost of repairs and maintenance. It should be noted that these are the same items that were reflected in railroad car hire charges, which railroads paid one another for the use of each other's rail cars prior to depreservation of such charges.

IV. Storage Charges Were Considered On Empty Private Tank Cars

As discussed above, I was intimately involved in the negotiations that culminated in both the original and revised mileage allowance formulas prescribed by the Commission in Ex Parte No. 328 as AAR's representative to both joint committees. I attended every joint committee meeting and participated directly in the discussions that led to the two final agreements. In addition, as a designated recorder for both the JTCTF and the JNC, I specifically recorded or reviewed and concurred in the actual minutes of each meeting. I also attended most of the subcommittee meetings held during both sets of negotiations.

The negotiations concerning both the original and revised mileage allowance agreements were extremely hard fought. The parties considered and vigorously debated a wide range of issues and proposals in the course of both negotiations, including the assessment of storage and

handling charges on empty private tank cars held prior to loading on railroad owned or controlled tracks. The JTCTF and JNC were unable to reach agreement on every proposal that was raised. The issues we reached agreement on are specifically reflected in the actual language of the original and revised agreements. Despite NAFCA's vigorous protestations to the contrary, there was absolutely no agreement with respect to anything else.

During the negotiations over the original agreement, the parties considered and vigorously debated broad proposals to assess holding and handling charges for empty private tank cars. None of those broad proposals was adopted. In the end, the parties were only able to reach a narrow agreement with respect to the establishment of uniform storage charges for private cars at repair facilities. The JTCTF specifically included this agreement in Section 5 of the original Ex Parte No. 328 Agreement. The JNC did not make any substantive changes to Section 5 when it renegotiated the tank car allowance formula, except to provide that the cost of holding cars outside repair facilities would be considered a maintenance cost in Section 3 of the Agreement. Therefore, the language in Section 5 of the revised agreement reflects the only collective agreement the parties ever reached with respect to storage charges for empty private tank cars. If any agreement had been reached that railroads could not charge for storing empty private cars except where the cars were held outside repair facilities, we would have included it in the agreement. There was never any such agreement and NAFCA's persistent claims to the contrary are simply wrong.

The right of independent action is vital to the railroads and one that they hold dear. It is not a right they would give up lightly. After lengthy and vigorous debate in the JNC, the railroads agreed to give up their right to independent action with respect to limiting the amount of mileage allowances they would pay and the level of storage charges they would assess on

empty private cars held outside private repair facilities. This in no way meant that the railroads had given up their unilateral right to assess storage charges on empty private tank cars held elsewhere on their system. The railroads always understood that they could assess such charges individually if they determined it was appropriate to do so. Moreover, if the railroads had given up their right with respect to anything else, including their right to assess storage charges on empty private cars held elsewhere on their system, there is no doubt that the car owners would have insisted that such an agreement be reflected in the language of both the original and revised agreements.

I have read NAFCA's petition which claims that the JNC considered the cost of holding empty private tank cars on rail tracks to be a "railroad cost." There was never any agreement that such costs would be considered a railroad cost for which they could not charge. The railroads have always believed that they could exercise their right of independent action and charge for holding empty private cars on their tracks.

It must also be remembered that all of the parties to the JNC were well aware that the Commission would be prescribing what the parties ultimately agreed upon. Thus, the parties were extremely careful to ensure that what they agreed to, and only what they agreed to, was specifically included within the language of agreement. The parties never intended that items not specifically included within the agreement would be prescribed. This is reflected in the Joint Negotiating Committee's petition to the Interstate Commerce Commission where the Committee provided a draft decision and asked the Commission to prescribe the terms of the allowance system to which the parties agreed. The Joint Negotiating Committee advised the Commission that the parties to the agreement reserved the right to abandon the agreement if the Commission

made any substantial changes to the agreement. Thus, the parties to the JNC were clear that the agreement contained everything the parties agreed to and nothing else.

The members of the Joint Negotiating Committee in no way intended or desired the agreement to be expanded by implication or legal argument to matters which were beyond that to which the parties had specifically agreed. This is why the parties specifically stated that tariffs which departed from the terms prescribed within the agreement were subject to Section 8's procedures. The use of the words prescribed within the agreement was deliberate. The words were intended to make clear that the parties were only agreeing to be held to what was contained within the agreement, nothing more and nothing less.

V. Conclusion

I agree wholeheartedly with the ICC's decision in *Buffalo & Pittsburgh*. The Ex Parte No. 328 Agreement was never intended to freeze in place rail practices and procedures that were not specifically contained within the agreement. If that were the intent of the agreement, the parties would have so stated in the agreement itself. As already discussed above, the agreement defines a departure tariff as a tariff that "departs in any manner from the allowance system prescribed herein." This language was thoroughly debated and the inclusion of the words "prescribed herein" was intentional. The parties to the JNC included this language because they wanted to make it clear that the agreement did not pertain to issues that were not specifically contained within the agreement, thereby preventing future debates such as this one. Thus, any issues or items upon which the parties could not reach agreement were excluded from the agreement.

The idea of railroads charging for storing private empty cars on railroad owned or controlled tracks was raised more than once both inside and outside the joint committee negotiations. Indeed, as discussed above, broad storage charge proposals were debated early on

in the negotiations of the original agreement in the mid to late 1970's. However, the railroads and tank car owners were only able to reach agreement on the establishment of uniform, national charges for private tank cars being held on railroad owned or controlled tracks outside private repair facilities. This agreement is reflected in Section 5 of the Ex Parte No. 328 agreement. By no means was there ever any agreement that individual railroads could not through their right of independent action assess such charges elsewhere on their system.⁴ NAFTA implies that there was some type of quid pro quo agreement between the railroads and private tank car owners that if the private tank car owners agreed to the assessment of storage charges on private empty tank cars held at private repair facilities, the railroads would agree not to charge for storing empty private tank cars anywhere else on their system. There was never any such agreement.

⁴ The lack of collective agreement with respect to storage charges for empty private tank cars held on railroad tracks that were not adjacent to private repair facilities never meant that tank car owners and shippers were barred from challenging the assessment of such charges. It simply means that they could not challenge the charges under the departure procedures set forth in Section 8.

VERIFICATION

I, John J. Robinson, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on June 9, #, 2003.

John J. Robinson
John J. Robinson

LANGSTON

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET No. 42060

**NORTH AMERICA FREIGHT CAR ASSOCIATION – PROTEST
AND PETITION FOR INVESTIGATION – TARIFF PUBLICATIONS
OF THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY**

VERIFIED STATEMENT OF DOUGLAS W. LANGSTON

My name is Douglas W. Langston. I am a General Director for The Burlington Northern and Santa Fe Railway Company with 13 years of experience in the railroad industry. I began my career with the former Burlington Northern Railroad performing pricing activities for various Industrial Commodity Segments. In 1993, I was promoted to Manager of Pricing for Chemicals and Plastics, where I was involved in the pricing activities for plastics and other, related, chemical commodities. In 1995, I was appointed Sales Manager for BNSF, where I was involved in various sales and day to day operational issues impacting our customers. In 1998, I was appointed to the position of Director Equipment Utilization at our headquarters in Ft. Worth, Texas. In this capacity, I assumed various roles managing fleets of equipment such as Gondolas, Flats, Covered Hoppers, Open Top Hoppers, and Refrigerated Boxcars. I was also responsible for any issues (expense, inventory reporting, claims handling, pool management, etc.) relating to private equipment. In this capacity, I became directly involved in the review and development of BNSF's Private Equipment Policy. I have also been involved in all negotiations pertaining to settlements, contracts, and other customer or commercially related activities concerning

Demurrage, Private Storage, and other Miscellaneous charges. In 2002, I was appointed to the position of General Director Demurrage & Miscellaneous Charges. This includes Demurrage, Private Car Storage, Switching, and Diversions. I now manage a group responsible for the development and enforcement of policies to support improvements in asset utilization and billing for ancillary charges on BNSF. We also work to educate both our internal and external customers on the policies, their application, and how they can help manage through these policies. I received a B.S. in Biological Sciences from Texas A&M University and an MBA in Finance & Marketing from Texas Christian University.

The purpose of my statement is to respond to certain questions posed by the Board in its April 28, 2003 decision in Docket No. 42060.

I. Overview of BNSF's Private Car Storage Charge Policy

A. Purpose of the policy

The number of empty private cars being stored on BNSF's system at any given time directly affects BNSF's ability to provide efficient service. Such cars consume valuable track capacity, increase system congestion, and can make it more difficult for BNSF to serve its customers efficiently. Prior to the adoption of its Private Car Storage Tariff, BNSF had an excessive number of empty private cars sitting on its tracks for extended periods of time. For example, on April 30, 2001, there were 2,686 empty private cars sitting on BNSF's tracks, taking up over 31 miles of BNSF's track space. These cars had been sitting on BNSF's track at the same location for more than 30 days. A total of 1,572 of these empty private cars had been sitting on BNSF's tracks for over 100 days.

The congestion caused by these empty private cars was hampering BNSF's ability to build trains efficiently and to readily move them through its yards. BNSF was regularly forced to move empty cars around its yards and, in some cases, even between yards in order to free up

space to prepare blocks of cars for its linehaul trains.¹ BNSF was also forced to stop empty private cars short of their final destination and store them at intermediate points between the cars' origin and destination because there was no room for them in the Houston yard. Such additional movements unnecessarily increased the amount of time needed to prepare BNSF's line haul trains and forced BNSF to incur additional expense moving them around.²

The situation BNSF was experiencing in its yards with the large numbers of empty private cars was similar to what happens to the flow of traffic on a road when cars are parked illegally in a lane reserved for rush hour traffic. In such a situation traffic comes to a halt when it encounters the parked car and the traffic in that lane must move over to the next lane before it can continue forward. The net effect is a reduction in the flow of all the traffic as the traffic in the free lane must slow down to allow traffic from the other lane to enter. The situation is compounded on the rail system because trains run on rails and cannot simply move over to the

¹ At times, for example, BNSF was forced to move trains of empty cars back and forth from its yard in Houston, Texas to its yards in Brownwood and Fort Worth, Texas to create space in its Houston yard. Once, BNSF even had to move empty cars back and forth from Houston to Saint Louis, Missouri, to free up track space in its Houston yard.

² Like other railroads, BNSF builds a train by putting groups of cars together that are moving in the same direction. Such groups are referred to as "blocks." Separate tracks are needed to build each block. For example, BNSF may build a line haul train in Houston, Texas that is traveling to Seattle, Washington, and will be making stops in Denver, Colorado, and Pasco, Washington, on its way. BNSF will combine all of the cars heading to Denver in one block, the cars heading to Salt Lake City in another block, and the cars heading to Pasco in a third block. When the train arrives in Denver, BNSF will switch out the block of cars destined for Denver and may pick up a block of cars headed for Seattle. The train will then continue on to Pasco where BNSF will switch out the block destined for Pasco before moving on to Seattle.

"Blocking" cars in this way enables BNSF to more easily switch out all of the cars heading in the same direction, thereby reducing trains' dwell times (the amount of time trains sit in a yard). This method is far more efficient than switching individual cars out of the train one at a time.

next lane of tracks. Instead they must first be moved to an area where they can be switched onto a separate track. I note that it only takes one car to slow down the flow of traffic.

As the level of congestion caused by the empty private cars stored on BNSF's system grew, BNSF realized it would have to do something to encourage shippers to stop using BNSF's track as a parking lot and to keep their cars moving efficiently through the rail system. BNSF and other railroads have long used demurrage and storage charges to encourage the efficient utilization of loaded and empty railroad owned cars and loaded private cars, to encourage the efficient movement of cars and to recover some of the costs associated with holding cars on their tracks. As a general matter, such charges have been fairly successful at encouraging shippers to keep loaded private and loaded and empty railroad owned and controlled cars moving. BNSF already assessed demurrage charges on loaded private cars that were left on BNSF's track for more than a two day period, and we decided that a similar program for empty private cars was needed. BNSF designed a private car storage policy to encourage shippers to keep their cars moving and to help BNSF recover the costs associated with storing the empty cars on its tracks.

BNSF implemented its new private car storage policy on July 1, 2001. Nearly two years later, it is clear that BNSF's private car storage policy is working. As shown by the attached charts, the total average amount of time all empty private cars spend on BNSF's track before being moved has declined dramatically since BNSF adopted its private car storage policy. Exhibits A and B show the average amount of time that all industrial and agricultural private cars have sat empty on BNSF's track before being moved by the shipper.³ The charts clearly show that the average time that all industrial and agricultural private cars are left on BNSF's tracks has

³ I use the term "industrial" cars to refer here to all private cars other than private agricultural cars.

declined by approximately one full day since the storage policy was first adopted. See Exhibits A and B, attached. In May 2001, empty industrial private cars sat on BNSF's tracks for an average of two days after constructive placement; in May 2003, the average was one-half of a day. See Exhibit A. Empty agricultural private cars sat on BNSF's track for an average of one and one-third days in May 2001; the average was one-third of a day in May 2003. See Exhibit B. Moreover, since the policy was first adopted, the number of empty private cars, including both private tank cars and private covered hoppers, being left on BNSF's track has decreased significantly. On April 30, 2001, shortly before BNSF adopted its private car storage policy, BNSF had 2,686 empty private cars that had been left on its system for more than 30 days. By May 7, 2003, the number of empty private cars being left on BNSF's tracks more than 30 days had decreased substantially, to 991 – a reduction of more than 60 percent in the number of empty cars being held on BNSF's tracks. At the same time the number of empty private cars being stored on BNSF's track was decreasing, BNSF's traffic volume was increasing. BNSF is handling more business with fewer cars. As a result, BNSF's track is less congested than it was nearly two years ago and its ability to provide efficient service to its customers has improved.

The reason for this dramatic reduction is that a significant number of shippers responded to BNSF's new private car storage policy by moving their empty private cars off of BNSF's track to avoid the payment of storage charges. Some moved cars off the system, others elected to hold cars inside their facilities or move them more quickly through their facilities, and others chose to lease track space to store their empty cars when the cars are not in use. BNSF has entered into a number of track space lease agreements with shippers since the policy was implemented. These shippers use the leased track space to store their empty private cars when the cars are not needed. Other shippers have, with BNSF's assistance, built track within their

facility to store their empty private cars. In fact one of NAFCA's individually named complainants built its own private car storage track in exchange for BNSF waiving its storage charges. Still other shippers have used existing track in their facilities to store their empty private cars. As a result of such shipper actions, there are fewer private cars sitting empty on BNSF's system today and the system is less congested now than it was nearly two years ago before the private car storage policy was implemented, which benefits both BNSF and its customers.

The decrease in congestion has enabled BNSF to be more efficient in its operations. BNSF has seen an increase in the number of loaded miles its trains move each day and an improvement in its overall level of on-time performance. While the improvements BNSF has experienced regarding loaded car miles per day and on-time performance are due to a variety of factors, it is clear that the reduction in empty private cars sitting on BNSF's tracks has contributed to these service improvements. In addition, BNSF has seen an overall level of improvement in private car utilization, which benefits both BNSF and its customers.

B. Specifics of the Policy

On July 1, 2001, BNSF amended its policies regarding storage and demurrage charges for empty and loaded private cars, including private tank, grain and sugar cars, held on BNSF tracks. See BNSF Private Car Storage Book 6005 and BNSF Demurrage Book 6004-A.⁴ BNSF added a \$25 per day storage charge for empty private equipment (with the exception of empty private

⁴ BNSF shared information on its new private car storage policy on numerous occasions well before its proposed effective date. BNSF had originally intended to make its new storage policy effective on May 1, 2001. BNSF postponed the effective date of the new policy to July 1, 2001 at the request of several shippers and shipper organizations who wanted additional time to respond to the new policy.

grain and sugar cars) held on BNSF track beyond a two-day free period. As with other charges, these storage charges provide that shippers begin to accrue charges on the second 12:01 a.m. – excluding the first Saturday, Sunday, or Holiday when computing to the second 12:01 a.m. The practical effect of this provision is that a shipper may have as much as four full days and 23 hours and 59 minutes of free time (including weekends), or as little as 24 hours and one minute of free time to request the car to spot, depending on when the car was constructively placed.⁵

Prior to these revisions, with the exception of covered hopper cars used to transport grain, grain products, and sugar (“grain and sugar cars”), BNSF assessed demurrage charges of \$75 per day on loaded private and loaded or constructively placed empty railroad cars held on BNSF track. *See* BNSF Demurrage Book 6004-A. Loaded private grain and sugar cars and loaded or constructively placed empty railroad grain and sugar cars held on BNSF track were assessed a nonpeak season demurrage charge of \$25 per day.

In addition to adopting a new private storage policy, BNSF revised its Diversion Book to assess a charge of \$150 per car, up to a total of \$450 for a block a cars, for diverting empty private cars where the diversion involves a change in destination or routing. BNSF also amended its diversion book to assess a charge of \$150 per bill of lading for a change in the consignor, consignee, weighing instructions, and cancellation of shipping instructions. Diversions occur after a empty private car has been released to BNSF’s custody. *See* Item

⁵ Pursuant to the new private car storage policy, BNSF reduced its charge for holding loaded private equipment (with the exception of loaded private grain and sugar cars) on its track beyond a two-day free period from \$75 to \$25 per day. *See* BNSF Private Car Storage Book 6005. In response to the request of shippers and private car owners, BNSF later increased the charge back up to \$75 per day. The shippers and private car owners were concerned that a charge of \$25 per day would not provide receivers with enough of an incentive to unload their private cars quickly.

1000B, BNSF Diversion Book 6200-A. Prior to this revision, BNSF did not charge for the diversion of empty private cars.

BNSF has made several changes to its private car storage tariff since its initial adoption. These changes are intended to fine tune BNSF's storage policy and were made specifically to respond to concerns raised by shippers and private tank car owners. BNSF's revised storage policy has been carefully tailored to encourage shippers not to leave their empty cars on BNSF's tracks for long periods of time, particularly in areas experiencing the most congestion on BNSF's system. Specifically, in April 2002, BNSF established a three-tier rate structure for storage charges where the rate charged is dependent on both geography and operational constraints. Under the revised storage policy, empty private cars stored beyond the second 12:01 am on BNSF's track are assessed a charge of \$25 per day in areas where track congestion is most likely, a charge of \$15 per day in areas where congestion is likely, and a charge of \$10 per day in areas where congestion is least likely. See Item 1800B, BNSF Private Car Storage Book 6005.

BNSF also revised its storage tariff to provide one extra credit day for empty private cars that are loaded and shipped via a BNSF revenue line-haul move. See Item 1700, BNSF Private Car Storage Book 6005. BNSF's new storage policy also provides relief for bunching caused by BNSF.

In response to the concerns of private car owners, BNSF reinstated its \$75 per day storage charge for loaded private equipment. See Item 1700, BNSF Private Car Storage Book 6005. In addition to the changes to its private car storage policy, BNSF also revised its Diversion Book to provide shippers with one free diversion on empty private cars, where the destination, routing, consignee, or consignor is changed and BNSF revised its Rules Book to waive the \$300 intra-terminal switch charge for cars ordered, placed, and subsequently cancelled

(except for grain and grain products). See BNSF Diversion Book 6200-A, and Item 3000A, BNSF Rules Book 6100-A.

II. Length of Time and Track Used To Hold Empty Private Cars Varies

I understand that the Board has asked for information concerning the amount of time a private empty car is typically held on BNSF's tracks and the length of track that is typically used to hold such cars. See April 28, 2003 Decision at 4. As a general matter, there is no typical amount of time a private car owner stores its car on BNSF's track before loading the car. Nor is there any typical length of track that is occupied by empty private cars stored on BNSF's tracks. The actual amount of time a private car sits empty on BNSF's tracks varies greatly among shippers and is greatly influenced by shipper's business decisions.

Some private car owners have never or rarely left their empty private cars on BNSF tracks to be stored. Other private car owners routinely used BNSF's track as their own personal parking lot before BNSF adopted its new private car storage policy. For example, several plastics shippers routinely left their private cars sitting empty on BNSF's tracks for well over 30 days at a time before the implementation of BNSF private car storage policy. While the situation has greatly improved since the adoption of BNSF's private car storage policy, there are still a significant number of private cars owners that routinely leave their empty tank cars sitting on BNSF's tracks for more than 30 days at a time. Still other private car owners allow their cars to sit empty on BNSF's track for more than 100 days at a time. For example, one of our customers in Kansas City, Kansas routinely allows its empty cars to sit on BNSF's track for more than 30 days at a time. Another BNSF customer in Hutchinson, Kansas has left twelve of its empty cars sitting on BNSF's tracks for well over a year when it has space within its plant to store the empty cars on its own track.

The length of BNSF track taken up by empty private cars also varies greatly depending on the private car owner. The length of track used to store empty private cars is directly related to the number of empty private cars held. Thus, the length of track taken up by private empty cars varies greatly depending on the shipper. For example, the twelve empty cars left for over 100 days on BNSF's track by the shipper in Hutchinson, Kansas took up over 720 feet of BNSF's track, more than one-tenth of a mile. In contrast, a shipper that leaves two cars on BNSF's tracks takes up 120 feet of BNSF's track.

The number of private empty cars being stored on BNSF's tracks has forced BNSF in the past to lease track from shortlines and private rail yard owners. For example, BNSF leased track from Port Terminal Railroad Association (PTRA), a shortline in Houston, Texas. BNSF currently leases track from the Louisiana Delta Railroad, Lafayette, Louisiana.

III. Furnishing of Holding Tracks for Storing Private Cars Is Not Part of BNSF's Line-Haul Service Covered by BNSF's Line-Haul Rates

A. BNSF's Policy and Practice Under Deregulation Has Been to Set Different Prices for Different Services or Components of Services, Both to Encourage Efficient Operations and to Avoid Cross-Subsidization

Setting a single "bundled" price for every level of service encourages inefficiency. Just as "unbundling" charges for water and electrical services from apartment rental charges discourages tenants from wasting water and electricity, so too does "unbundling" charges for different components of a railroad's services encourage customers to make use only of those components for which they are willing to pay. The issue is not whether that component constitutes an independent service – water and electrical services may or may not be considered integral to apartment rental – but whether separate charges for different components will encourage more efficient utilization of the services offered.

Where railroads are concerned, the case for unbundled prices that require customers to consider the costs of the services they desire is particularly strong, because the result of customers not being required to “internalize” those costs can be gridlock. There was a time, for example, when most rail traffic in this country moved under single-car rates that provided no incentive for shippers to pre-block their traffic and thereby limit the amount of industrial switching and railroad yard work required to serve them. The result was congested yards, excessive switching, and unprofitable rail operations. By setting lower rates for multi-car shipments and higher rates for single-car shipments, railroads required shippers to recognize the high rail operating and infrastructure costs imposed by single-car shipments. Shippers increasingly opted to organize their own operations and invest in plant infrastructure to pre-block their shipments to qualify for multi-car rates, which reduced the amount of switching required to serve them, freed up yard space, and improved the railroads’ financial performance.

The general move by the railroads to differential pricing for different levels of service did not go unopposed by some shippers. In the case of single-car versus multi-car rates, for example, shippers that did not want to change the way they did business complained that lower rates for multi-car shipments were “discriminatory” and “unfair.” Over time, however, shippers began to see the benefit of such efficiency-enhancing rate differentiation, as congestion eased and service improved. Those that were willing to make the effort to incur the expenditures required to qualify for the multi-car rates began to see rate differentiation as a positive development, and had no interest in returning to the “one-size-fits-all” approach that would require them to cross-subsidize single-car shippers.

Similarly, when railroads first began charging separately for holding loaded private cars while shippers decided where they wanted those cars to be shipped, some who had grown used to

paying nothing extra for railroads to hold their loaded cars complained vigorously. Although yards and sidings were often full of such cars, they asserted that railroads had always been willing to hold their cars as part of the railroads' line-haul service, and that the costs of holding those cars was included in the line-haul charge. The short answer to this was that times had changed. Railroads were no longer willing, nor able, to allow shippers to use the railroads' tracks to hold their loaded cars without paying for it. They simply could not continue to provide this service for free and operate efficiently. They no longer held themselves out to provide this service for no extra charge, and the line-haul service no longer could be viewed as encompassing storage of loaded cars. Shippers initially complained about the new policy and argued that the railroad had previously held their cars as part of their line-haul service. The shippers, not surprisingly, eventually began to provide shipping instructions much more quickly or to make arrangements for holding loaded private cars on their own track or on rented track. Here again, over time, the shippers and car owners themselves began to see the benefit of the incentive for efficient car utilization provided by BNSF's and other railroads' separate charges for holding loaded private cars. In fact, when BNSF lowered its charge for holding most types of loaded private cars from \$75 per car to \$25 in July 2001, it received complaints from shippers and car owners that the lower charge did not provide sufficient incentive for those unloading the cars to move them out expeditiously. As a result, in July 2002, BNSF restored the \$75 per car charge, with virtually no complaints.

B. Separate Charges for Holding Empty Private Cars Prior to Loading Is Completely Consistent with BNSF's Policy and Practice of Price Differentiation for Different Services and Components of Services

BNSF's imposition of storage charges on shippers that require BNSF to hold empty private cars beyond a two-day free period is completely consistent with its general policy and practice of price differentiation to encourage more efficient car movements. As with BNSF's

imposition of storage charges on loaded private cars, the imposition of storage charges on empty private cars initially generated opposition from shippers and car owners who had grown used to the ability to use BNSF's tracks to store their empty cars, but that opposition soon began to fade as shippers and car owners focused on the fact that such charges were only imposed on those who were unwilling or unable to take their cars when they became available. BNSF worked closely with any shipper that could demonstrate a hardship that might result from the transition, including waiving charges where shippers committed to constructing their own track to hold their cars. The number of empty private cars being held on BNSF's track dropped significantly, which reduced congestion on BNSF's sidings, yards, and main track, and improved the flow of traffic to all shippers.

NAFCA suggests that some of its members had a right to expect that BNSF would continue in the future to hold empty private cars on its track at no extra charge because BNSF had done so in the past. But by this reasoning BNSF would never be able to charge separately for any service, or component of a service, that it had not previously charged separately for. It could not have begun charging for storing loaded private cars, because it had not done so in the past. It could not have set higher rates for single-car service and lower rates for multi-car service, because it had not done so in the past. It could not differentiate its rates to take account of the fact that the growth in rail traffic had absorbed much of the capacity on its system, and the problem of congestion and costs of storage had risen apace. It could not favor those shippers that moved their cars efficiently and helped eliminate congestion, but must require all shippers to bear the congestion burden caused by the unwillingness of some shippers to deal with the problem created by their refusal to take their cars when they are ready for delivery.

Needless to say, BNSF does not believe that an exception should be made for some shippers and car owners from the general proposition that under deregulation railroad price differentiation is not simply permitted, but strongly encouraged, where it improves the efficiency of the railroad's operations and avoids cross-subsidization. Far from discriminating against shippers who cause the storage costs, and the congestion that results, BNSF's storage charges properly assign those costs to those that cause them.

C. BNSF's Line Haul Charges Do Not Include Storage Charges

One of NAFCA's more curious, though often repeated, assertions is that BNSF's line haul charges already include the costs of furnishing holding tracks; accordingly, NAFCA implies, shippers that pay both line haul charges and storage charges are "double-billed." There are a couple of obvious problems with this assertion.

The first problem with NAFCA's argument is that BNSF's line haul charges cover only the service that BNSF offers under the specific conditions offered. For example, say that BNSF had a single charge to carry widgets from Chicago to all points in Southern California, then BNSF decided to differentiate its charges to different points in Southern California. A shipper that had to pay more than it had paid before could not claim that it was being "double-billed" because previously it had paid the same amount as all other Southern California shippers. By the same token, if BNSF had a line haul charge to carry widgets in private cars, and offered weighing of those cars without any additional charge, it could not be accused of "double-billing" if it determined to start charging separately for weighing. Certainly, weighing had been part of the line haul service that was offered, and it continued to be part of the service offered in the future, but the fact that shippers would now be charged separately for the service would not mean they were "double-billed." It would simply mean that BNSF had changed its billing approach to charge separately for weighing. Similarly, the fact that BNSF begins to charge

shippers extra for storing their cars does not mean that they are being “double-billed.” It simply means that they are being charged in the future for a service that they were not charged separately for in the past. Moreover, NAFCA’s “double-billing” suggestion completely ignores the fact that BNSF bases its line-haul rates on market demand rather than the costs of the individual components of its service. Of course, BNSF must ensure it covers the minimum direct variable costs of its services, otherwise it would lose money on its shipments. Once those costs have been covered, however, BNSF determines its rates based on the demands and requirements of the market place, rather than by any particular cost formula.

The second problem with NAFCA’s argument is that it seems to rest on the assumption that any shipper that had to pay for storage charges should have its line haul rate lowered commensurately (to avoid “double-billing”). Of course, this would defeat the purpose of charging separately for storage, since the shipper would have no monetary incentive to avoid storage. The cross-subsidization involved in such an approach would be obvious, since shippers who did not impose storage costs and congestion on the railroad would pay higher line-haul charges than those that did. NAFCA might claim that the cure for this obviously inequitable and inefficient approach is not to charge separately for storage at all, but this does not alter the cross-subsidization one bit. Shippers that did not impose storage and congestion costs on the railroad would still be charged the same amount as those that did. And shippers that did impose those costs on the railroad would have no incentive to change their ways.

At bottom, NAFCA’s assertion that BNSF’s line-haul charges include the furnishing of holding tracks simply begs the question of whether BNSF can begin charging separately for a service, or component of a service that BNSF did not charge separately for in the past. Under deregulation, BNSF and other railroads have consistently been encouraged to price differentiate

so as to encourage efficient operations and avoid cross-subsidization. That should include the right to set separate storage charges on private cars, whether loaded or empty, so that shippers and car owners that want such storage are required to internalize their costs. Insofar as BNSF and other railroads are permitted that pricing freedom, their line-haul charges, by definition, do not (and should not) include the furnishing of holding tracks beyond the free period established in their tariffs.

IV. Empty Private Car Diversions

BNSF explained in its October 29, 2002 Petition for Clarification in this proceeding that its diversion charges were not “directed at the costs of excess empty mileage,” but rather at the cost BNSF incurs “switching out cars or blocks of cars that a shipper in mid-shipment diverts to a new location.” See BNSF Petition for Clarification at 14, n.15. The Board in its April 28, 2003 Decision asked whether there were other situations to which BNSF’s diversion charges would apply. See STB’s April 28, 2003 Decision at 4.

As discussed above in Section II. B. BNSF implemented a new policy for empty private car diversions in April 2002. Under the new policy, private car owners may divert a car or a group of cars one time for free. If the private car owners wish to divert that same car or group of cars again, BNSF charges the shipper \$150 per car or bill of lading, up to a maximum of \$450 for a block of cars, if the diversion involves a change of destination or routing. See Item 1100B, BNSF Diversion Book 6200-A. Nearly all second, as well as the majority of first, diversion requests require BNSF to switch or move cars out of one block and into another block in order to accomplish the diversion. Charging shippers for second diversion requests helps BNSF cover the cost it incurs to handle the diversion. In some instances, it is possible that a diversion can be accomplished before a car has been classified into a block, but BNSF still incurs administrative

costs changing the routing instructions for the car after it has been released empty, and usually some operating costs as well getting the car repositioned for a new destination.

As a general matter, railroads automatically return empty private tank cars to their point of origin after they have been unloaded unless they have been directed to do otherwise on the bill of lading. For example, if a shipper loads a tank car with liquid fertilizer at its plant in Houston, Texas and sends it to its customer in Bozeman, Montana, the car will automatically return empty to the shipper in Houston once it is unloaded unless the bill of lading directs the railroad to transport the empty car to another location. A diversion occurs when a customer decides to change the bill of lading, for example, to direct the car to be delivered empty to Baton Rouge, Louisiana after the car is released empty in Bozeman. The diversion could occur anytime after the car has been released empty to BNSF. If the customer decides to redirect the car to Baton Rouge before it is released empty, no diversion occurs.

Most empty private car diversions occur after a car or group of cars have been “classified” by BNSF and switched into a block with a group of other cars that are moving in the same direction. For example, BNSF may receive an empty car at a shipper’s plant in Los Angeles, California, where the bill of lading provides that it is to be returned “reverse empty” to Seattle, Washington. BNSF will take the car from the shipper’s plant, move it to its staging yard in Barstow, California, where it will switch the car into a block of cars headed for Seattle, Washington. The shipper may then decide to change the bill of lading and divert the car to Houston, Texas instead of Seattle. The shipper can do this at any point after BNSF has pulled the car from the plant in Los Angeles until BNSF delivers the car to Seattle. No matter when the shipper does this, however, BNSF is required to perform additional operational and

administrative services, such as re-switching, reclassifying, and regrouping the car, to effect the diversion.⁶

For example, if the car has been classified and blocked in the Barstow yard with other cars headed for Seattle and the shipper changes the bill of lading to divert the car to Houston, BNSF will have to reclassify the car and switch the car out of the Seattle block and into a block of cars headed for Houston. If BNSF has not yet inserted the Seattle block into a freight train headed for Seattle, BNSF may be able to switch the car or group of cars out of the block before the train leaves for Seattle. If, however, the shipper diverts the car after BNSF has already placed the Seattle block into a line haul train headed for Seattle, BNSF may have to wait until the diverted car moves all the way to Seattle in its original classification group before it can switch it out and send it to Houston in order to avoid delaying all of the other cars moving in that train to Seattle.

BNSF adopted its diversion policy for empty private cars to achieve three main objectives. First, BNSF wanted to discourage shippers from unnecessarily making multiple diversions on empty private tank cars which can result in delays and reduce the efficiency of BNSF's operations.⁷ Allowing shippers one free diversion and charging them for all subsequent

⁶ A diversion involving a change in consignee can also require BNSF to perform switching and related operations even if the diversion may not technically involve a change in destination. For example, if BNSF has constructively placed in Houston a block of empty private cars consigned to Sunoco on the PTRAs and a shipper changes the bill of lading to make the consignee Exxon on the PTRAs, BNSF must switch the cars out of the Sunoco block and move and switch them into the Exxon block to effect the diversion.

⁷ Shippers have at least two opportunities to provide BNSF with proper reverse routing instructions for the private empty car and completely avoid a diversion and any attendant delays. Using the above example, if the shipper does not want the empty car to return reverse route to Seattle, it can direct BNSF on the original bill of lading for the loaded move to return the car to Houston after it is unloaded. The shipper may also change the bill of lading to direct the car to

(cont'd)

diversions encourages shippers to avoid unnecessary diversion requests and enhances the efficiency of both BNSF's and shippers' operations.

BNSF also wanted to recover some of the operational and administrative costs it incurs fulfilling shippers' diversion requests. These costs include the operational costs BNSF incurs switching out and moving cars or blocks of cars that a shipper diverts to a new location. (e.g., crew time, engine power time, backhaul costs, etc.) as well as the administrative and record keeping costs associated with changing a shipper's bill of lading. As discussed above, BNSF's diversion book provides its customers with one free diversion on empty tank car moves. Thus, a private car owner is only assessed a diversion charge if it diverts an empty car or block of empty cars more than once. Because a second diversion is more likely to require BNSF to switch an empty car or block of cars out of a line haul train, charging shippers for a second diversion helps to ensure that BNSF recovers some of its switching costs.

The third objective of BNSF's diversion policy was to prevent private car owners from using the diversion process to circumvent BNSF's new storage policy for empty private cars. Previously, private car owners on BNSF's system could divert an empty private car an unlimited number of times at no cost. BNSF was concerned that once its new private car storage policy became effective and it began charging for storing empty private car, some shippers would try to avoid incurring storage charges simply by diverting their empty private cars more than once on

(... cont'd)

return to Houston instead of Seattle at any time after the car leaves Seattle and before the car is released empty to BNSF at Los Angeles. If the shipper fails to take advantage of either of those opportunities to redirect the car, BNSF will have to perform a diversion. Under BNSF's diversion policy, shippers are not charged for the first diversion. Thus, the shipper can still redirect the car to Houston without incurring any charge.

BNSF's system. BNSF determined that providing shippers with one free diversion and charging them for all second diversions would deter shippers from using the diversion process to avoid paying storage charges.

It must be remembered that unnecessary diversions reduce the efficiency of both BNSF's and shippers' operations. In addition to consuming BNSF's administrative and operational resources, empty private car diversions consume valuable time. BNSF strives to run an efficient rail operation; it cannot do so if its shippers lack incentives to operate efficiently. While BNSF recognizes that diversions sometimes cannot be avoided, it also believes that shippers should use them only when necessary. BNSF believes that its diversion policy provides shippers with the right incentives to effectively and efficiently manage their empty car fleets. BNSF believes that charging shippers for diverting more than once an empty private car or group of cars encourages shippers to be more efficient by giving them the incentive to avoid unnecessary diversions.

V. Number of Private Cars Needed to Serve Any Shipping Location Is Mainly Due to Business Needs and Decisions of Shipper

The Board has also asked the parties to comment on NAFCA's assertions that because BNSF controls almost the entire movement cycles of private cars the number of private cars needed to serve any shipping location is largely subject to BNSF's actions. See STB's April 28, 2003 Decision at 4. NAFCA's claims are simply incorrect.⁸ The number of private tank cars

⁸ I understand that in its June 26, 2001, filing in this proceeding NAFCA claimed that "BNSF declines to furnish tank cars to its customers." See *North American Freight Car Association—Protest and Petition for Investigation—Tariff Publication of the Burlington Northern and Santa Fe Railway Company*, Docket No. 42060 (June 26, 2001) at 2. This simply is not true. In the past, BNSF has offered to provide tank cars to shippers, and shippers have generally declined such offers. Shippers elected to purchase their own private tank cars for a variety of business reasons.

required to serve any particular location is driven primarily by the business needs and decisions of a particular shipper.

A. Shippers Purchase and Use Their Own Cars To Accommodate Their Own Business Needs

Tank cars are highly specialized equipment that are used to ship a wide variety of goods from food stuffs, such as edible oils and liquid sugars (e.g., soy bean oil and syrup), to industrial products, such as kaolin clay and porcelain, to chemicals, such as chlorine gas and liquid fertilizer. As a general matter they cannot be readily interchanged to transport the products of different shippers or even different products of the same shipper. This is because the characteristics of the products they are used to transport makes it extremely difficult and expensive to share tank cars.

First, different types of tank cars are required to transport different products. For example, some products must be transported hot or cold and require an insulated tank car. Other products, including many types of chemicals, must be transported in tank cars that are equipped with special linings and high pressure valves that ensure the safe transportation of the product. Shippers of such products cannot simply use any tank car to transport their product, but must ensure they have the appropriate type of tank car to ship their product.

Second, even where the same type of tank car can be used to transport different products, the cost of using it to transport different products is generally cost prohibitive. For example, a manufacturer of high grade lube oil cannot ship its product in a tank car that has just transported a lower grade of lube oil unless the tank car is first thoroughly cleaned and all of the low grade lube oil residue is completely eliminated from the car. This is because the residual low grade lube oil will mix with the higher grade lube oil and lower the quality and grade of the higher grade lube oil. The cost incurred thoroughly cleaning a tank car is very high. Unlike a hopper

car which can be swept clean, a tank car requires special machinery, cleaning methods, (e.g. steam vs. cold) and cleaning agents. The average cost to clean a general service tank car is around \$650, however, the cost for cleaning more specialized tank cars is approximately \$1,000 (or more). It simply is not cost effective to clean tank cars between every load so that they can transport different types of products back to back, even for the same shipper. This is why, for example, shippers will maintain discrete tank car fleets to transport different grades or qualities of the same general product. For example, a company that produces lube oil will maintain a fleet of tank cars to transport its grade "A" lube oil and another fleet of tank cars to transport its grade "B" lube oil. In this way, the company can ensure the integrity of both its grade "A" and grade "B" lube oil.

Finally, even where sharing is possible between producers of the same type of product, the desire of most shippers to control and protect the integrity of their products makes them unwilling to share tank cars. For example, different shippers of corn syrup generally do not want to share the same tank cars to transport their individual products. Most tank car shippers are extremely concerned with ensuring the integrity of their product and prefer to have complete control over the use, repair, cleaning, and maintenance of cars. Shippers simply do not want to risk their product being contaminated by the presence of other products that were previously transported in the tank car. As a result, tank cars cannot readily be interchanged and used to transport the same commodities for different shippers or different commodities for the same or different shippers. Instead, they must generally be used to transport the same product for the same shipper over and over again.

The number of tank cars required to serve particular locations is also heavily influenced by a shipper's business cycle and the shipper's desire to meet peak demand for its product rather

than any action or inaction on the part of BNSF. The demand for some particular products, such as liquid fertilizer or liquid propane gas (LPG), is cyclical in nature and the producers and shippers of such products generally elect to purchase enough tank cars to handle peak demand. As a result, these shippers and producers generally have a surplus of empty tank cars available during times of low demand. For example, the demand for LPG is generally higher in the summer and winter months. During such times, shippers of LPG generally use their entire private tank car fleet to transport their product. In the Spring and Fall, the demand for LPG is generally lower and shippers of LPG generally have an excess number of empty private tank cars on their hands. Thus, it is the peak demand for the particular shipper's product rather than any action or inaction on the part of BNSF that largely determines the amount of empty private tank cars a shipper requires to serve its facility.

B. Shippers Have Considerable Control Over The Movements of Private Tank Cars

I understand that the Board has also asked the parties to comment on NAFCA's claim that "BNSF controls almost the entire movement cycles of private cars, and that the number of private cars necessary to serve any shipping location is largely subject to BNSF's actions." April 28 Decision at 4. NAFCA is essentially arguing that shippers have virtually no control over the movement of their private cars and have been forced to purchase extra private cars as insurance against poor and inefficient service by BNSF. NAFCA concludes that BNSF is therefore obligated to store their idle empty private cars for free for as long the shippers choose to leave them there. As a general rule, the length of time it takes rail traffic to move is inversely related to the amount of traffic congestion on the rail system at any given time. In short, traffic moves more quickly and cycle times improve as congestion on the rail system decreases, and traffic moves more slowly and cycle times increase as congestion increases. Therefore, rather than

supporting the elimination of storage charges, NAFCA's own argument would appear, if anything, to support the assessment of additional efficiency-inducing charges. Moreover, while it is true that the efficiency of BNSF's operations affects a private car's cycle time, NAFCA's claim completely ignores the fact that a private car's cycle time is significantly influenced by the efficiency of a shipper's own operations and its business decisions.

While BNSF controls the amount of time it takes to move any rail car, be it rail owned and controlled or private, from its origin to its destination, the shipper controls where the private cars move to and from and the amount of time a private car sits empty or loaded in BNSF's yard or outside its facility on BNSF's track. The receiver of the load controls and influences when a loaded private car is called in to be unloaded and how long the receiver takes to unload the private car. The shipper also controls when an empty private car is called in to be loaded and the amount of time it takes a shipper to load the car. As discussed above, car providers have the ability to direct cars to different destinations or to change the routing of the car, and shippers frequently do so. All of these decisions are within the influence or control of the individual shipper, receiver, or private car owner and all of these decisions affect a private car's cycle movement time. Shippers have the ability to influence whether their cars are used efficiently and to determine the number of private cars needed to serve a particular facility. They are not at the mercy of BNSF with respect to this issue, despite NAFCA's suggestions to the contrary.

Private car owners and shippers have the ability to charge shippers and receivers demurrage when their private cars are held loaded or empty on private track. As a general matter, charging demurrage in this situation reduces the amount of time private cars are held on private track and reduces a private car's overall cycle time. As a result, the same car can be used more often to transport a shipper's products. As a general rule, most private car owners have not

elected to charge shippers and receivers demurrage for holding their empty or loaded private cars on private track beyond a certain amount of free time. As a result, the amount of time a receiver takes to unload and return a private car and the amount of time a shipper takes to load and ship a private car is generally longer than the amount of time it takes for a railroad owned car.

BNSF has discussed this problem with many of its shippers who use private cars to transport their products and has encouraged them to assess demurrage on loaded and empty private cars held on private track inside shippers' facilities. A few shippers have chosen to do so and their private cars are now turned around more quickly. Consequently the cycle times on their cars have been reduced and they are able to make more trips with fewer cars. As a result, fewer private cars are needed to serve their facilities.⁹

VI. Vast Majority of Tank Cars Operating on BNSF's System Do Not Receive An Allowance Under The Ex Parte No. 328 Tank Car Allowance Formula

The tank car allowance formula prescribed in Ex Parte No. 328 has become less and less relevant over time. Less than five percent of the tank cars operating on BNSF's system receive an allowance based on the mileage allowance formula contained in Ex Parte No. 328. Today, over 94 percent of the tank cars operating on BNSF's system today are zero rated, meaning that BNSF does not pay any mileage allowance on the individual tank cars and the mileage allowance is instead reflected in the freight rates. Moreover, a significant number of the tank cars operating

⁹ Another factor that accounts for the reduced cycle time of railroad owned and controlled cars is that unless those cars have been assigned to a particular shipper, BNSF can offer these cars to anyone who needs them as soon as they are clean and empty. Unlike private cars, BNSF does not need to wait for instructions from the private car owner as to where to send the car. BNSF can make that decision itself and from the demand information it receives from its customers. In addition, unlike railroad owned and controlled cars, private cars also spend a considerable amount of time returning reverse empty to their point of origin because, unlike railroad owned or controlled cars, they typically move 100 percent empty return. This too, adds to a private car's cycle time.

on BNSF's system for which BNSF still pays an allowance are covered under an individually negotiated allowance rather than under the Ex Parte No. 328 tank car allowance formula.

The main reason most tank cars do not receive a mileage allowance under the Ex Parte No. 328 prescribed formula is because the formula is so complicated to administer. The amount of the allowance paid under the Ex Parte No. 328 prescribed formula is specific to the individual tank car. For example, the allowance due for the use of tank car "A" may be \$0.50 per actual (loaded) mile while the allowance due for the use of tank car "B" may be \$1.00 per actual mile. When establishing freight rates for particular movements, BNSF has to consider the mileage allowance costs of the particular move. If BNSF establishes a freight rate based on the use of tank car "A" and the shipper uses tank car "B", BNSF will earn less revenue on the move than it would if the shipper used tank car "A". BNSF has a couple of choices in this situation. BNSF can establish a complicated freight system of rates and charge shippers different rates for the same movement depending on the tank car used and the car's mileage allowance amount. Such a system is cumbersome for both BNSF and its shippers. Alternatively BNSF can build, and in most cases has built, the allowance amount into the freight rate and charge shippers one rate for the same movement regardless of the particular tank car used. As a general matter, both BNSF and the majority of private tank car shippers have preferred to pay the same rate for the same movement irrespective of the particular tank car used in the move.¹⁰ Only a few shippers, primarily those who qualify for certain Federal and state tax deductions on their products, prefer

¹⁰ BNSF will generally offer a shipper the choice between a fully rated rate (one that includes the payment of a mileage allowance) or a zero rated rate (one that excludes the payment of a mileage allowance rate). The zero rated rate is always lower than the fully rates rate because BNSF will not be paying a mileage allowance on the tank car. Most shippers prefer to pay the lower freight rate rather than receive a separate mileage allowance payment.

to pay the higher fully rated rate and receive a separate allowance payment because the level of the tax benefit they receive is related to the level of the freight rate they pay; the greater the freight rate paid, the lower the amount of tax they pay on the particular product.

VII. Conclusion

BNSF implemented its private car storage policy in response to a growing problem it had with some private car owners using its track to hold their empty rail cars. BNSF has carefully tailored its private car storage policy to ensure that shippers who store their empty cars on BNSF's track, particularly in areas where congestion is greatest, pay for that service. The number of empty private cars left on BNSF's tracks caused significant congestion on BNSF's system and impaired BNSF's ability to operate efficiently. Every indication is that BNSF's private car storage policy is working.

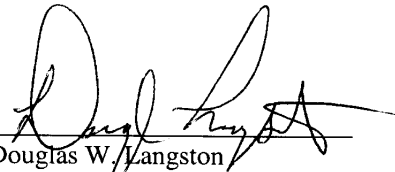
Since BNSF adopted its private car storage policy in July of 2001, the number of empty private cars being stored on BNSF's tracks has declined and the efficiency of BNSF's overall operations has improved. Moreover, the amount of days private cars sit empty in on BNSF or private track has also declined, indicating that private cars are being used more efficiently. This is good news not only for BNSF, but for private car owners as well.

One of BNSF's overriding goals is to run an efficient rail system. BNSF cannot do this without efficient shippers. BNSF's new storage and diversion charges for empty private cars encourage shippers build and improve efficiencies within their own fleets. All evidence to date indicates that these charges are effective and have helped BNSF improve the efficiency of its rail operations. A more efficient rail system is good for BNSF, its shippers, and the American public.

VERIFICATION

I, Douglas W. Langston, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on June 9, 2003.



Douglas W. Langston

Exhibit A

Exhibit A

Empty Industrial Private Cars – Average Time Held After Constructive Placement

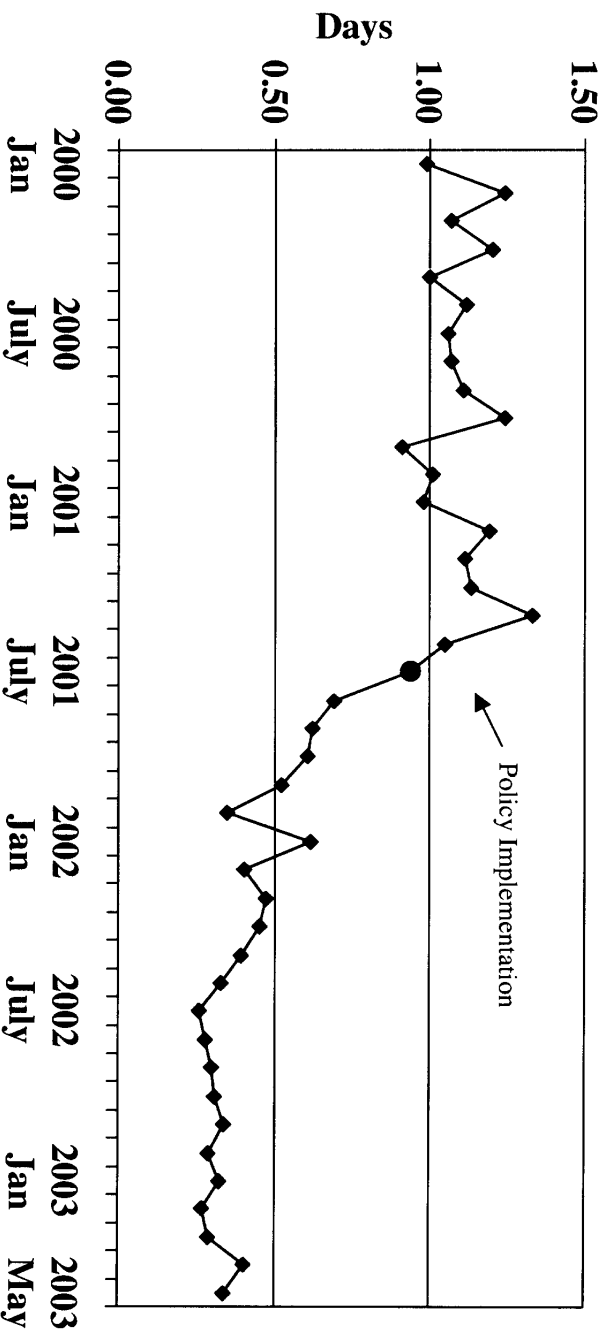


Exhibit B

Exhibit B

Empty Agricultural Private Cars – Average Time Held After Constructive Placement

