

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. 42060 (SUB. NO. 1)

NORTH AMERICA FREIGHT CAR ASSOCIATION

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

MOTION FOR ADOPTION OF PROCEDURAL SCHEDULE

The Board's decision in this proceeding served August 13, 2004 ("August 13 Decision") directed the parties to discuss discovery and procedural matters and propose a joint procedural schedule by September 1, 2004, pursuant to 49 C.F.R. 1111.10. By decision served August 30, 2004, the Board extended the date for the parties to propose a joint procedural schedule until September 30, 2004. This Motion by Complainants North America Freight Car Association ("NAFCA") and 11 of its members¹ is filed in response to the described decisions of the Board and is necessitated because, although the parties did confer as directed and reached certain agreements, there are unresolved disputes re-

¹ NAFCA is an unincorporated association. The 11 NAFCA members who are named in the Complaint include car leasing companies and shippers.

garding the periods of time to be allocated for various discovery phases, as described in more detail below.²

Background

The Complaint in this proceeding was filed on August 29, 2001 and challenges the lawfulness of certain storage charges published by Defendant, The Burlington Northern and Santa Fe Railway Company ("BNSF"), effective in July 2001 for private cars held empty on railroad tracks prior to loading. The Complaint was brought about by a change in BNSF's policies toward the use of private cars. Before July 2001, BNSF's line haul rates included the use of BNSF tracks to hold empty private cars prior to loading. Effective July 2001, BNSF imposed a regime of storage charges applicable in such situations, reaching as high as \$75.00 per car per day after as little as one day's free time, without any corresponding reduction in the freight rates.³ BNSF contended that the goal of its storage charges was to police abusive use of its congested facilities by compelling shippers to find alternate space to hold empty cars prior to loading. At some loading facilities, however, shippers could not construct sufficient additional holding tracks for lack of physical capacity. In those cases, BNSF stated that its policy was to allow the shippers to continue to use BNSF trackage, provided the shippers agreed to payment terms for that trackage.

When the Complaint was filed, it applied only contingently to tank cars, inasmuch as a request then was pending before the Board to regard the BNSF storage charges when

² Although the August 13 Decision directed the parties to propose a joint procedural schedule, Rule 1111.10(a) provides for the filing of either joint or separate procedural schedule proposals. Here, separate proposals are necessary due to the inability of the parties to reach an accord.

³ Subsequently, BNSF altered the structure of its storage charges for cars other than covered hopper cars in grain and sugar service, establishing charges of \$25.00, \$15.00, or \$10.00 per day (subject to free time provisions), with the specific charge depending on geographic location. An additional credit of one day was added if BNSF received a loaded line-haul movement from the car.

applied to tank cars as matters subject to Ex Parte No. 328, Investigation of Tank Car Allowance System, 3 I.C.C. 2d 196 (1986), 7 I.C.C. 2d 645 (1991). The August 13 Decision declined to treat BNSF's tank car storage charge provisions as matters subject to Ex Parte No. 328. Accordingly, the Complaint in this case now addresses all types of private railroad equipment, including tank cars, to which the BNSF storage charges may be applicable.⁴

In general, the Complaint asserts three areas of unlawfulness: (1) that the imposition of a new regime consisting of storage charges for holding empty private cars prior to loading is an unreasonable practice in violation of 49 U.S.C. 10702 and a failure to furnish adequate car service in violation of 49 U.S.C. § 11121(a); (2) that, if not otherwise unlawful, BNSF's storage charge rules are unreasonable under either Section 10702 or 11121(a); and (3) that, when shippers are required to furnish tracks to hold empty private cars prior to loading, they are entitled to an appropriate allowance pursuant to 49 U.S.C. § 10745 because the shippers are assuming an obligation that belongs to BNSF under its freight rates. Each of these is a potentially complex issue, requiring a reasonable factual foundation. The relief sought is an order requiring BNSF to cease and desist from any practices or acts found to be unlawful, and for the payment of damages by BNSF to such of the Complainants as may by proof establish a basis for the payment of such damages.

Shortly after the Complaint was filed, BNSF moved for dismissal. The Board did not respond in any manner to BNSF's motion until issuance of the August 13 Decision, when the Board denied the motion, concluding: "At this point, the Board cannot say there is no possible basis on which NAFCA could prevail."

⁴ When applicable to covered hopper cars engaged in grain or sugar transportation, the charges are denominated by BNSF as "demurrage" provisions. As used herein, the term "storage charges" includes such BNSF "demurrage charges".

Procedural Schedule Disputes

Counsel for NAFCA and counsel for BNSF held several discussions in an effort to agree upon a procedural schedule that could be proposed jointly to the Board as requested by the Board in its decisions. As the discussion process got underway, counsel for Complainants informed counsel for BNSF of the nature of what Complainants thought would be their principal subjects of document requests, with a view toward enabling BNSF to estimate the amount of time required by BNSF to respond to document requests. Subsequently, BNSF's counsel apprised counsel for Complainants of the general scope of discovery that would be pursued by BNSF, making it clear that BNSF intended to serve extensive written interrogatories and document requests, followed by deposition notices, on all 11 named Complainants.

With the scope of the parties' tentatively described discovery in mind, including the multiple parties in Complainants' camp with headquarters, shipping facilities, and record depositories in diverse locations, Complainants attempted to reach a compromise procedural schedule with BNSF. As proposed by Complainants, that schedule is attached as Appendix A hereto and represents what Complainants regard as the bare minimum timeframes within which the described discovery phases can be completed under optimal conditions. The compromise proposed by Complainants involves an elapsed time of 11 months from the issuance of a procedural order through the completion of evidentiary filings and briefs.

Initially, Complainants thought that there was agreement with respect to this proposal. However, counsel for BNSF soon informed counsel for Complainants that BNSF

desired to press for a shorter schedule, and BNSF thereafter proffered a procedural schedule of 240 days' duration.

Complainants believe that the truncated discovery schedule proposed by BNSF to Complainants fails to make adequate allowance for the fact that there are multiple Complainants at multiple locations who keep records in different formats and under other conditions that will differ from company to company. Complainants' proposal is far more realistic given the number of parties to this case and their diverse situations.

Nothing in the Board's rules prohibits multiple parties from participating in litigation; indeed, it may well be more efficient for parties to proceed in that manner than for each to maintain a separate complaint. The joinder of numerous parties in a single complaint, where possible, is bound to consume a lesser quantum of human resources – including those of the government – than a series of individual complaints, even if one assumes that the procedural schedule in a multi-party case of necessity should be longer than a procedural schedule in litigation involving a single complainant and single defendant. An additional 90 days (or even longer) for procedural matters to be completed in a multi-party case still will result in a lesser consumption of pre-decisional days than were the same matters to be litigated separately by two or more complainants, not to mention the even larger number of complainants as involved here.

Additionally, the time periods proposed by Complainants generally are more appropriate than what we understand to be the shorter timeframes offered by BNSF for various discovery phases. Under Complainants' proposal, petitions for a confidentiality order would be due at 0 + 15 (0 being the date on which the Board's procedural order becomes effective). This will allow time for the parties to discuss and, hopefully, agree

upon a joint petition for a confidentiality order, something which may not be possible if less than half that amount of time is allowed for this phase. There is a greater likelihood that the Board will avoid having to resolve a dispute regarding a protective order if the parties are given sufficient time to negotiate such an order.

Complainants next propose an additional 30 days to prepare written interrogatories and document requests. To do so, Complainants need to confer with those consultants who will be asked to analyze much of the data to be sought from BNSF. The timetable proposed by Complainants is reasonable for that purpose.

Complainants propose a 90-day period to object or respond substantively to BNSF's discovery. As indicated previously, counsel for BNSF has apprised Complainants' counsel that BNSF intends to serve extensive written interrogatories and document requests on each entity whose name appears in the Complaint – a total of 11 companies. As a compromise offer, Complainants are proposing that an effort be made to respond to BNSF's weighty discovery requests in what amounts to an average of eight days per Complainant – probably an unrealistic aspiration to begin with, but certainly not a timeframe that bears shortening.

Counsel for BNSF has advised Complainants' counsel that BNSF not only wants to reduce the total period of time for written discovery to 60 days, but to further narrow that phase by requiring that written objections to discovery requests be served within 30 days. Complainants have avoided such a bifurcation of responses because the notion that objections to written discovery should be filed in advance of answers creates an unworkable, unwise, and unusual step in the discovery process. Objections to written interrogatories and document requests often involve burden assessments, normally made

in the process of determining whether, where, and to what extent a party has responsive information. To require a part of that process to be completed in 30 days, as proposed by BNSF, in effect requires that most of the process to be completed in 30 days or even less, if it is assumed that the parties will attempt to negotiate objections before they are filed with the Board.

Complainants have proposed 60 days for the service of deposition notices and the completion of all depositions, and even that may be unrealistically optimistic given the large number of depositions that BNSF has indicated it intends to notice, not to mention the several depositions of BNSF witnesses that Complainants believe at this time to be necessary. The task of scheduling a large number of depositions for persons located in different cities will in itself require many days. An effort to conclude depositions in too short a timeframe will deprive Complainants of the ability to prepare adequately for such depositions.

Following the conclusion of depositions, Complainants propose 45 days for the filing of opening statements of fact and argument. This allocation is based in part on the expectation that not all deposition transcripts will be available on the date set for the conclusion of depositions, even if there were some compelling reason for Complainants to pay premium prices for overnight transcript delivery (and there is no such emergency sufficient to warrant those expensive steps). Additionally, this case is highly likely to generate an extremely large volume of documents and other information that will have to be synthesized and integrated into the parties' arguments. Complainants propose an equal amount of time for BNSF's own statement of fact and argument, followed by 30 days for Complainants' reply.

BNSF's has made it plain from the outset of this case that that it strenuously opposes the joinder of multiple parties for the purposes of this complaint.⁵ However, the goal of a procedural schedule should not be to further BNSF's persistent desire to narrow the number of parties challenging its storage charge regime in a single case, but to arrive at an adequate and reasonable schedule that accommodates the legitimate discovery needs of those who are, in fact, parties to the case. Complainants believe that the discovery schedule attached as Appendix A is a fair effort to reach that accommodation under the circumstances presently known to Complainants.

Complainants recognize that disputes regarding discovery may well arise as this case progresses. Although we are confident all the counsel will make reasonable efforts to resolve such disputes informally, it might be naive to assume that no unresolved discovery disputes will arise. Accordingly, Complainants urge the Board to give consideration to having a designated Administrative Law Judge available to resolve those discovery disputes that may arise.

Counsel for Intervenors National Industrial Transportation League and American Chemistry Council have authorized counsel for NAFCA to represent that they join in this request.

⁵ See, e.g., letter of BNSF to Hon. Vernon A. Williams, October 29, 2002 in this docket ("if BNSF and the shipper cannot resolve a specific dispute, the shipper can take that specific dispute to the Board").

Wherefore, Complainants move the Board to adopt the procedural schedule contained in Appendix A hereto.

Respectfully submitted,

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Dated: September 30, 2004

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Joint Motion for Adoption of Procedural Schedule was served by first-class mail, postage prepaid, this 30th day of September, 2004.

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Appendix A

Complainants' Proposed Procedural Schedule

DAY	EVENT
0	Date on which STB procedural order becomes effective.
0+15	Petition(s) for Confidentiality Order Due.
0+45	Written Interrogatories and Document Requests Due.
0+135	Objections or responses to Written Interrogatories and Document Requests Due.
0+150	Notices of Depositions Due.
0+210	Depositions to be Completed.
0+255	Opening Statements of Complainants and Intervenors in Support of Complainants Due.
0+300	Opening Statement of Defendant Due.
0+330	Reply Statement of Complainants Due.