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PUBLIC VERSION

BEFORE THE

SURFACE TRANSPORTATION BOARD

DOCKET No. 42060 (Sub-No. 1)

NORTH AMERICA FREIGHT CAR ASSOCIATION

v.

BNSF RAILWAY COMPANY

BNSF RAILWAY COMPANY'S REPLY
STATEMENT OF FACT AND ARGUMENT

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Dated: September 16, 2005

214712



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Pursuant to the Board's orders served June 22 and August 2, 2005, BNSF Railway Company ("BNSF") files herewith its Reply Statement of Fact and Argument ("BNSF's Reply") in response to Complainants' Opening Statement of Fact and Argument filed July 29, 2005 ("Complainants' Statement"). Attached in support of BNSF's Reply is the Verified Statement of Douglas W. Langston ("Langston VS").

I. INTRODUCTION AND SUMMARY

This case represents the last vestige of opposition to innovative storage and demurrage programs introduced by BNSF in 2001 as part of a broad effort to address the growing problem of capacity constraints on its system. As the Board well knows, it was and is imperative for the railroads to maximize the efficient utilization of their

infrastructure and assets in order to handle the substantial new traffic, in virtually every commodity group, that has poured onto the railroads' systems in recent years. To its credit, BNSF did not wait for the problem of capacity constraints to become acute before taking action. It instituted numerous operating and pricing initiatives in 2000-2001 designed to free up tracks and equipment and enable its system to remain fluid in the face of the surge in traffic.

One of BNSF's initiatives was a program for assessing storage and demurrage charges against private car shippers who left their empty cars sitting on BNSF's track awaiting loading beyond a reasonable free period. BNSF and other railroads had long assessed demurrage and storage charges against loaded private cars sitting on their tracks awaiting unloading. BNSF also assessed demurrage and storage charges against both empty and loaded railroad-owned or controlled cars. But BNSF (like other railroads) had not assessed charges for holding empty private cars on its track, and the result was that many shippers left their empty cars sitting for long periods on BNSF's track, clogging up yards and sidings and making it more difficult for BNSF to keep its system fluid.

BNSF knew that some shippers at some locations might have difficulty immediately changing their ways in response to BNSF's new empty private car storage program. Accordingly, BNSF gave shippers ample notice before it implemented the program, and it offered to assist shippers where it could with transitional track leases and with offsets against BNSF's charges for costs they incurred if they elected to construct additional track of their own to hold their cars. Nevertheless, when BNSF went forward with its program, a number of shippers and shipper groups initially filed

cases at the Board opposing BNSF's program—primarily on the ground that, as applied to tank cars, BNSF's storage charge tariff constituted an unlawful "departure" from the nationwide allowance regime applicable to tank cars under the Ex Parte No. 328 Agreement.

Settlement negotiations ensued. Once parties recognized that BNSF was prepared to discuss their concerns about the application of its storage and demurrage tariffs at particular locations, most agreed to dismiss their cases without BNSF making any significant changes to its tariffs. Only the North America Freight Car Association ("NAFCA"), representing less than half of its membership, doggedly continued to press its claims against BNSF. The Board in 2004 dismissed the NAFCA Complainants' claims that BNSF's program constituted an unlawful "departure" tariff as applied to tank cars, but the Board permitted the Complainants to continue with discovery and evidentiary proceedings with respect to their claims that BNSF's tariffs constituted an "unreasonable practice" and a violation of BNSF's "car service" obligations.

In the meantime, BNSF's empty private car storage program, along with its other capacity-enhancing operating and pricing initiatives, was demonstrably working. The number of empty private cars being held on BNSF's track beyond the free period plummeted, as did the average time cars were held on BNSF's track from the time they were made available to the shipper to the time they were ordered into the shipper's facility. The overall time that private car shippers took from constructive placement of their cars to release of the loaded car to BNSF for line-haul movement also went down. BNSF's total storage and demurrage charge billings steadily went down from 2001 to 2004 as the efficiency of the shippers' use of their cars increased. Today, BNSF is

handling 27% more traffic than it handled in 2001, with only 2% more cars on its system. BNSF's system remains fluid, and the widely feared railroad service gridlock in the face of unprecedented demand has not materialized.

The NAFCA Complainants nevertheless continue to claim that BNSF's entire program of applying storage and demurrage charges to empty private rail cars sitting on BNSF's tracks beyond a reasonable free period is unlawful. The primary basis for the Complainants' position is their assertion, which is patently erroneous, that BNSF does not assess such charges against similarly situated shippers using railroad-controlled cars. The reason this assertion is wrong is that the only similarly situated shippers using railroad-controlled cars on BNSF's system are those with whom BNSF has **agreements** assigning those cars to those shippers for their **exclusive** use. Those shippers must pay assigned car storage charges of from the first 12:01 a.m. after the assigned car is made available to them until the order date provided by the shipper, after which a \$75 per day demurrage charge is assessed. Unlike private car shippers, they do not receive free time until the second 12:01 a.m. before storage charges begin to accrue, and they cannot avoid storage charges with an order for placement of the car. The Complainants assert that the tiny minority of "C" pool cars, which are "assigned" to shippers for BNSF's convenience, do not immediately accrue such charges. But BNSF is free to give those cars to another shipper if they are not rapidly ordered in or efficiently used. That is why "C" pool shippers who want the same control over a railroad car that a private car shipper has over its cars enter into agreements with BNSF giving them exclusive use of the cars.

The Complainants also make much throughout their Statement about the variability of BNSF's service, ostensibly as a reason why they should not have to pay demurrage and storage charges. But car cycle variability is a necessary element of most single-car and multi-car rail service. The economies of scope and scale that come from a railroad's ability to combine in many different trains the ad hoc shipments of numerous customers—moving between thousands of origins and destinations, through a multitude of different yards—enable the railroad to offer very competitive rates, but also do not permit perfectly scheduled car service. There is nothing new about this and nothing unique about complaints about "bunching" of private cars that is not just as applicable to complaints about "bunching" of railroad-controlled cars. If any of the Complainants or any other shipper believes that it should not have to pay storage or demurrage charges because of BNSF's service "error" or "fault"—and it cannot work out the problem with BNSF—then the solution is for it to demonstrate that "error" or "fault" with respect to the particular movements and locations where it alleges that "error" or "fault" occurred. The solution is *not* to claim that BNSF or any other railroad should not be permitted to assess demurrage or storage charges at all.

One of the Complainants' oddest claims is that it is unreasonable for BNSF to assess a "straight" daily storage charge of \$10, \$15, or \$25 against most empty private cars, depending on location, and an "average" daily demurrage charge of \$50 on covered hopper cars carrying grain, grain products, and sugar. The Complainants suggest that this discriminates against shippers using such covered hopper cars, but the \$50 demurrage charge is the *same charge* that BNSF assesses on railroad-controlled covered hopper cars carrying many of the same commodities. Moreover,

because an "average" demurrage program allows the shipper to offset "debits" for cars that are held with "credits" for cars that are timely ordered in, shippers are frequently better off with an "average" plan with a higher daily demurrage rate than with a "straight" plan that does not allow the shipper to offset charges against individual cars that are not timely ordered in by the shipper. In any event, BNSF could as easily remedy the "discrimination" these Complainants say concerns them by raising to \$50 their daily storage charge on the private cars other than covered hopper cars that they use (e.g., tank cars carrying soybean oil) as by lowering to \$10-15-25 their demurrage charges on covered hopper cars. That is obviously not what they want, but it points up the hollowness of their opportunistic claim for relief from BNSF's "discriminatory" charges.

Another of the Complainants' obviously untenable assertions is that BNSF's readiness to provide transitional assistance to shippers at some locations where they might have difficulty adjusting their operations or expanding their infrastructure is an exercise of "monopoly power." In their zeal to show that BNSF's offer of track leases to ease the shippers' transition at some locations is abusive, the Complainants have asserted that BNSF's track lease rates yield returns to BNSF ranging from 19% to 70%. But their calculations are completely mistaken. They confuse "per foot per year" track rental rates with "per car per day" charges. Properly calculated, BNSF's actual average transitional track rental charge today translates to a "per car per day" charge of \$1.66 per car. Far from abusive, this charge does not even cover the costs of track construction, much less the costs of land and maintenance, or the opportunity costs to BNSF of having its facilities tied up by storage rather than active rail operations. If BNSF had the ability and the intent to exercise "monopoly power," the last thing it would

do would be to offer below-cost track leases to shippers to help them with their transitional issues at some locations.

The Complainants make crystal clear that their real agenda is to foist on BNSF and other shippers, through higher line-haul rates, all of the costs attributable to their own problems with managing their fleets and facilities more efficiently. They criticize BNSF for "only" being prepared to offset its charges during the first year of the program for shippers who decided to expand their facilities to store cars on their own track—on the ground that BNSF should pay for any and all facility expansion they may require. They unabashedly assert that all shippers should bear this burden through their line-haul rates, because all shippers supposedly "benefit" from the freeing up of BNSF's track space.

While it is certainly true that all shippers benefit from a more fluid rail system, it certainly does not follow that all shippers should pay for the problems caused by a relative few. Nor does it follow that BNSF or the other railroads should be barred from applying demurrage and storage charges that give individual shippers incentives to manage their operations, including their private car fleets, as efficiently as possible. No one today would suggest that a railroad could not or should not assess demurrage or storage charges against individual shippers tying up its railroad-controlled cars, or that a railroad should not assess demurrage or storage charges against a shipper using the railroad's track to store its loaded private cars awaiting unloading. In fact, when BNSF **lowered** its daily storage charge for holding loaded private cars on its tracks from \$75 to \$25, many private car shippers complained, because they did not believe the new charge would give receivers (*their* customers) enough incentive not to use those cars

for storage. When BNSF, in response, raised the rate back to \$75, no one complained. And, not surprisingly, none of these shippers suggested that, in lieu of a storage charge on individual shippers, BNSF should saddle all shippers with the cost of building more track to hold as many loaded cars as some shippers and receivers wished to store on BNSF's track.

At bottom, this case is simply about resistance to change—in this case, a new empty private car storage charge regime. With the passage of the Staggers Act of 1980, however, Congress long ago mandated a changed regulatory environment—to encourage railroads to apply separate rates to different rail services, to discourage cross-subsidization and misallocation of costs, and to achieve revenue adequacy. The efficiencies that the railroads achieved, with the ICC's and the Board's encouragement, resulted in tremendous improvements in productivity and considerably lower real transportation rates in virtually every commodity group. But neither Congress's mandate for change nor the railroads' quest for productivity improvements has ended. It cannot end, otherwise the railroads will be swamped by the tide of new traffic that is straining the railroads' available capacity.

Most shippers of most commodities affected by BNSF's empty private car storage program recognize this. They and their associations either never filed protests against BNSF's new tariffs or withdrew their protests once they understood that BNSF would be responsive to their concerns about individual circumstances at some of their facilities. The National Industrial Transportation League ("NITL") and the American Chemistry Council ("ACC") have also distanced themselves from the Complainants' case. Their joint amicus brief filed August 15 affirms that "they support innovative

measures designed to improve the efficiency of the rail network" (NITL-ACC Br. at 1) and asks only that the Board apply certain principles, all of which BNSF's tariffs meet, in reviewing this case.

If the Complainants have parochial concerns about the application of BNSF's tariffs to particular movements at particular locations, and they cannot resolve those concerns in negotiations with BNSF, then they can seek relief in individual proceedings directed to BNSF's charges at those locations. But they cannot succeed in rolling back BNSF's entire empty private car storage program on the ground that individual private car shippers should not be disciplined by the same kinds of programs that the Board, and the ICC before it, have long encouraged railroads to apply to loaded private cars, and to loaded and empty railroad cars.

II. BACKGROUND

In this Background section, we first describe the genesis of BNSF's empty private car storage program in 2000 and 2001, including the other initiatives BNSF took at the same time to enhance the fluidity of its system. We next describe the details of the empty private car storage program and the ensuing Board proceedings, discussions, and tariff adjustments which resolved the concerns of most shippers and shipper associations about the program. We then discuss the proven effectiveness of this and other like programs over the past four years in helping to keep the rail system fluid. Finally, we describe the small fraction of private car interests represented by the remaining NAFCA Complainants, and the nature of the claims they assert in their amended complaint and opening statement.

A. Genesis of BNSF's Empty Private Car Storage Program

BNSF developed its empty private car storage program in 2000 and 2001 as part of a systemwide effort to address the growing problem of capacity constraints on its system. As the Board is well aware, demand for rail services has increased substantially across the country in recent years, "putting significant strains on the freight rail system, and challenging the ability of Class I carriers to provide the necessary crew, equipment and track capacity to carry this freight."¹ BNSF did not wait until the problem became acute to develop a broad array of initiatives to help maintain the fluidity of its system. Among other things, with respect to car utilization in particular:

- BNSF developed new computer-based systems for tracking both loaded and empty equipment and allocating railroad-controlled cars based on equipment requests to the customer destinations on its system with the greatest demand for cars.
- BNSF enhanced its website and electronic tools to make it easier for customers to review their inventory, release and order cars online, and review, dispute, and pay their bills online.
- BNSF further tightened its controls over the utilization of railroad-controlled cars by (i) raising the daily rate for most types of cars from \$50 to \$75, (ii) reducing demurrage credit days ("credits") for both loading (from 2 to 1) and unloading (from 3 to 2) railroad-controlled cars, and (iii) requiring "want" dates from shippers who used rail-controlled equipment and charging demurrage on cars constructively placed for the shipper.
- BNSF endeavored to reduce the incidence of switching and private car storage by (i) raising its intra-terminal switch charges from \$225 to \$300, (ii) increasing the penalties for overloads; (iii) increasing its weighing charge from \$300 to \$500; and (iv) establishing parameters to begin raising its charges for leasing track to hold empty or loaded private rail cars.

¹ June 9, 2004 Letter from STB Chairman Nober to the CEOs of the seven Class I carriers, requesting "Action Plans" from each for dealing with the surge in rail traffic.

- BNSF further determined to institute (i) a new program of storage charges for holding empty private cars awaiting loading beyond a reasonable free period and (ii) a new program of diversion charges for diverting an empty private car or block of cars to a different destination, consignor, or consignee than was shown on the original bill of lading.
- BNSF made great efforts to communicate and educate customers, operations, and the commercial teams of the desired outcomes. This included training materials, Q&A's, informational brochures, public announcements, etc.

Langston VS at 4.

BNSF, like other railroads, has long relied on storage and demurrage charges to encourage the efficient utilization and turnaround of rail cars on its system, to help free up needed track space, and to compensate BNSF for the costs of holding cars on its tracks.² Although BNSF had long assessed demurrage and storage charges on both empty and loaded railroad-controlled cars, and on loaded private cars, historically it had not assessed such charges on empty private cars awaiting loading. The result was that private cars often were left sitting on BNSF's track for long periods of time,³ and BNSF had no ability either to require the shipper to take such cars or to compensate BNSF for

² There has never been any doubt, as a matter of law or policy, that such charges are an invaluable tool for railroads in helping to manage their rail systems. See, e.g., *Railroads Per Diem, Mileage, Demurrage and Storage Agreement*, 1 I.C.C.2d 924 (1985). These charges have both a disciplinary element and a compensatory element. They promote car efficiency by deterring shippers from holding cars beyond a designated free period, and they help compensate railroads for the use of their assets when cars are detained. See, e.g., *South Carolina Rys. Comm'n v. Seaboard Coast Line R.R.*, 365 I.C.C. 274, 277 (1981).

³ For example, on April 30, 2001, there were 2,686 empty private cars sitting on BNSF's tracks that had been at the same location for more than 30 days, taking up over 31 miles of BNSF track space. A total of 1,572 of these empty private cars had been sitting on BNSF's track for over 100 days. Langston VS at 5.

the use of its track to hold the shipper's cars. This was one of the causes of congestion 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 line-haul trains. Sometimes, empty private cars had to be held in yards and on side tracks short of their final destination because there was no room for them in yards already clogged with empty private cars. Accordingly, as part of its overall program to enhance the efficiency of its system, BNSF determined to apply the same kind of storage and demurrage charge regimen to empty private cars that it had long applied to loaded private cars and to loaded and empty railroad cars. Langston VS at 8.

BNSF recognized that the change from its historical practice could create transition problems for some private car shippers at some locations. Thus, BNSF provided ample notice of its private storage charge program, met with shippers to discuss the details of the program and shippers' concerns, and offered to assist shippers in constructing their own track or providing shippers with transitional leases to ameliorate any hardship at specific locations. Some six months before it implemented the program, BNSF began notifying all of its shippers of its new program through the Marketing News feature on its website, as well as faxes and e-mails directly to customers. Thereafter, BNSF held meetings and had conversations with shippers and shipper representatives both in group sessions and one-on-one. Before implementing the program, BNSF conducted two multi-day forums with shipper representatives that were devoted entirely to explaining the program and discussing shippers' questions and concerns about the program. BNSF also made presentations regarding the program to

shippers' representatives on NITL's Railroad Transportation Committee and at meetings of the Pacific Northwest Association of Rail Shippers and the BNSF Customer Advisory Board. Langston VS at 8.

Further, BNSF's Account Managers were charged with contacting their individual customer accounts to explain the new program and respond to individual shippers' questions and concerns. Many met with individual shippers for that purpose, or they held telephone discussions. Insofar as shippers undertook to expand their own facilities by building more track to hold their cars, BNSF offered to waive its charges in the first year to offset their construction costs. Where it had track available, BNSF also offered to enter into transitional leases, at costs far below the charges the shipper would incur under the storage charge regime, to hold the shipper's cars. Langston VS at 8-9.

B. Implementation of BNSF's Empty Private Car Storage Program

1. The Program Implemented on July 1, 2001

BNSF implemented its empty private car storage charge program on July 1, 2001. The program was conservative. By way of comparison, prior to July 1, 2001, BNSF generally assessed demurrage charges of \$75 per day on loaded private and loaded or constructively placed empty railroad cars held on BNSF track. Loaded private covered hopper cars carrying grain, grain products, and sugar and loaded or constructively placed empty railroad-controlled covered hopper cars held on BNSF track were assessed a non-peak demurrage charge of \$25 per day. BNSF provided two free credit days for loaded cars, whether private or railroad cars, and two free credit days for

constructively placed empty railroad cars.⁴ If a railroad car was assigned by agreement to a particular shipper, BNSF assessed assigned car storage charges of \$25 per day, from the first 12:01 am after the car was made available, with a \$75 per day demurrage charge assessed after the "want date" provided by the shipper. Langston VS at 9-10.

Effective July 1, 2001, BNSF amended its storage and demurrage policies for both loaded and empty private rail cars. With respect to most types of private cars, BNSF assessed a \$25 per day storage charge for empty private equipment not ordered in by the shipper before the second 12:01 am after the car is constructively placed, and it reduced to \$25 the previous \$75 charge for holding loaded private cars during the same free period.⁵ BNSF's new storage policies were set forth in BNSF Private Car

⁴ Under the "average" demurrage system BNSF applies to agricultural covered hopper cars, each car is automatically assigned 2 "credits" when it is constructively placed with the shipper (i.e., formally made available for the shipper's use). For each day the shipper does not order in the car, 1 "debit" is assessed. Thus, if only one car were involved, and the shipper ordered in the car within two days, no debits would accrue. If the shipper took three days to order in the car, one debit would accrue, and a demurrage charge would be assessed. Rarely, however, is only one car involved in a particular month. When, as is usually the case, multiple cars are involved, the shipper can take advantage of credits on some cars to offset debits on other cars. Thus, even if it has a number of cars that have accrued debits, if it has sufficient credits available from other cars that were timely ordered in, the shipper may accrue no charges. See Langston VS, Exh. J.

⁵ The storage rules provided that charges begin to accrue on the second 12:01 am, excluding the first Saturday, Sunday, or Holiday after constructive placement, until the car is ordered in by the shipper. The practical effect of this provision is that a shipper may have as much as 4 full days and 23 hours and 59 minutes of free time, or as little as 24 hours and one minute of free time, depending on when the car is constructively placed. Once the car is ordered in by the shipper ("ordered to spot"), the shipper is not charged for the time it takes the railroad to actually place the car at the shipper's facility. Langston VS at 9-10.

Storage Book 6005, and applied to all private equipment held on BNSF track except for private grain, grain products, and sugar covered hopper cars.⁶ Langston VS at 9.

Typically, shippers using private covered hopper cars to carry grain, grain products, and sugar also use substantial numbers of railroad-controlled covered hopper cars to carry those commodities, and BNSF determined that it would be confusing and counterproductive for it to have different charges applicable to private and railroad-controlled cars. Accordingly, in BNSF Demurrage Book 6004-A, BNSF revised its demurrage rules to apply the same rules and charges to private covered hopper cars that applied to railroad-controlled cars. BNSF extended to private cars the same \$25 per day non-peak demurrage charge and the same 2-credit-per-car "averaging" regime that applied to constructively placed empty railroad grain cars held on BNSF track.⁷

Langston VS at 30.

2. The Cases Filed, the Ensuing Proceedings and Settlements, the April 2002 Adjustments, and the Board's Decision in Ex Parte No. 42060

In the immediate aftermath of BNSF's implementation of its new empty private car storage program, a number of complaints were filed at the Board, both with respect to BNSF's program and with respect to a similar program that Union Pacific Railroad

⁶ Also effective July 1, 2001, BNSF published changes to its Diversion Book 6200-A, which established diversion charges of \$150 per car, up to a maximum of \$450 per bill of lading, for changes in the movement instructions applicable to empty private cars. Langston VS at 9.

⁷ Effective August 1, 2001, the demurrage charge for both railroad-controlled and private cars was increased from the \$25 non-peak rate to the \$75 peak season rate. Subsequently, it was lowered to \$50 per car, where it stands today. Langston VS at 11.

("UP") had independently implemented.⁸ The principal claim made by most of the parties, in Docket Nos. 42060, 42061, 42062, 42063, and 42064, was that BNSF's and UP's programs constituted "departure" tariffs which the Board should investigate under the terms of the Ex Parte No. 328 Agreement prescribed in *Investigation of Tank Car Allowance Systems*, 3 I.C.C.2d 196 (1986). In a decision served October 18, 2001, in those five dockets, the Board ordered the parties to engage in industry-wide negotiations about that issue. 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

⁸ 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, NITL, BP Corporation North America, E.I. DuPont, and CPC-Diversified International filed petitions to participate in the proceeding); STB Docket No. 42060 (Sub-No. 1), *North America Freight Car Association v. The Burlington Northern and Santa Fe Railway Company* (NITL, the U.S. Clay Producers, CPC-Diversified International, and ACC 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 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 NAFCa filed petitions to participate in the proceeding).

negotiations. The Board granted that motion, and also granted subsequent requests for extensions of time to continue the settlement process.⁹

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.¹⁰ In statements filed with the Board, several parties recognized that BNSF and UP must be allowed to set tariffs as necessary to address capacity constraints on their systems, so long as the railroads were prepared to discuss, and, if possible, reach agreement with individual shippers concerning their needs at specific locations.¹¹ BNSF agreed to establish a process for

⁹ See Board decisions in STB Docket Nos. 42060, 42061, 42062, 42063, and 42064 served on November 20, 2001, January 8, 2002, February 22, 2002, March 20, 2002, April 12, 2002, and May 29, 2002.

¹⁰ 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).

¹¹ 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

such discussions, and did so. It entered into numerous agreements with shippers involving individual locations, including agreements regarding the waiver of charges to offset shipper costs of building additional track and agreements regarding leases of BNSF track to avoid incurring storage or demurrage charges.¹² Langston VS at 9.

UP independently negotiated with parties and intervenors concerned about UP's tariffs and reached settlements regarding those tariffs.¹³ Significantly, neither UP's nor BNSF's settlements resulted in any significant amendments to their tariffs.

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).

¹² BNSF and UP also independently 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.

¹³ 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 NAFCA (dated August 14, 2002) to Vernon A. Williams, Secretary of the Surface Transportation Board, concerning settlements in Docket No. 42064, *E.I. DuPont de Nemours and Company—Protest and Petition for Investigation*.

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 several adjustments to 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 not ordered in before the second 12:01 am 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. By allowing one free diversion, BNSF endeavored to respond to suggestions that such freedom would help shippers better manage their fleets, despite the added costs that BNSF incurred.
- 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 8005A.
- BNSF reinstated its \$75 per day storage charge for loaded private equipment. See Item 1700, BNSF Private Car Storage Book 6005.¹⁴

Langston VS at 11.

Despite its tariff refinements and its considerable success in settling with most organizations and with individual shippers, BNSF was unable to reach agreement with

¹⁴ BNSF raised the rate back to \$75 in part at the request of shippers who were concerned that the \$25 charge did not provide enough incentive to receivers not to use the shippers' cars for storage on BNSF's track. Langston VS at 10 n.7.

the NAFCA Complainants.¹⁵ NAFCA had filed both a petition for investigation in Docket No. 42060, challenging BNSF's storage charge program as a "departure tariff" under the Ex Parte No. 328 Agreement, and a complaint in Docket No. 42060 (Sub-No. 1), claiming principally that BNSF's storage charge program constituted an "unreasonable practice." BNSF had timely filed motions to dismiss both actions. In October 2002, NAFCA filed a petition in Docket No. 42060 asking the Board to bypass BNSF's motion to dismiss and to proceed with an investigation of whether BNSF's storage charges constituted "departure" tariffs. NAFCA also asked the Board to consolidate the proceedings in Docket No. 42060 and 42060 (Sub-No. 1) and to provide for discovery in the combined proceeding. BNSF timely filed a reply opposing NAFCA's request and urging the Board to rule on BNSF's motions to dismiss in both dockets.

By decision served April 28, 2003, the Board sought additional comments from the parties to assist it in resolving the "departure" tariff issues raised by NAFCA in Docket No. 42060. The Board held in abeyance any decision on the issues raised by NAFCA in Docket No. 42060 (Sub-No. 1). The parties filed the requested comments, and on August 13, 2004, the Board issued a decision denying NAFCA's protest and petition for investigation in Docket No. 42060 and dismissing that action. The Board held that the Ex Parte No. 328 Agreement was not intended to "freeze and immunize

¹⁵ BNSF did meet with many individual NAFCA members, including several of the NAFCA Complainants, concerning issues they had at particular locations; and BNSF entered into agreements with some of them waiving charges where they constructed their own track, or providing transitional track leases to permit them to avoid storage or demurrage charges. Langston VS at 9. Fewer than half of NAFCA's members are represented by NAFCA's counsel in this proceeding.

from change" rate and service practices of the railroads that were not expressly included within the four corners of the Agreement. Slip op. at 8.

That left unresolved only the proceeding in Docket No. 42060 (Sub-No. 1). BNSF had emphasized in its motion to dismiss that NAFCA's complaint took the position that railroads had an obligation to provide track free of charge for holding empty cars awaiting loading. In reply, NAFCA had argued that it was not contending that a railroad must permit shippers to leave their empty cars on BNSF's track indefinitely, and that it needed discovery and the submission of evidence to develop reasonable alternatives. Noting that "motions to dismiss prior to the submission of evidence are generally denied, to insure that participants have a full and fair opportunity to meet their burden of proof," and that "[a]t this point, the Board cannot say there is no possible basis on which NAFCA could prevail," the Board denied BNSF's motion to dismiss and ordered the parties to file a joint procedural schedule. *Id.* at 9. When the parties were unable to agree on the length of the schedule, the Board established the schedule in a decision served January 6, 2005. Board staff assisted in mediating discovery disputes, and discovery terminated on May 20, 2005. The NAFCA Complainants filed their opening statement of fact and argument on July 29, and NITL and ACC filed a joint amicus brief on August 15.¹⁶

¹⁶ Although both NITL and ACC had intervened in Docket No. 42060 (Sub-No. 1), NAFCA had always taken the lead in the case. Neither NITL nor ACC had ever presented any separate evidence or argument. In part to settle questions about the extent to which they would be required to participate in discovery, NITL and ACC agreed to withdraw as parties and to participate only as amici. The Board granted their request to change their status in a decision served August 2, 2005.

3. The Success of BNSF's Capacity-Enhancing Programs Over the Past Four Years

The four years that have passed since BNSF introduced its various capacity-enhancing car utilization initiatives, including its empty private car storage program, have provided time to demonstrate the effectiveness of those programs. And the results have been exactly what was desired. Despite an unprecedented increase in traffic, BNSF has been able to maintain the fluidity of its system. It is carrying considerably more traffic per track-mile and per car than it carried in 2000, and the dire predictions that were made of gridlock at the kinds of elevated traffic levels BNSF is seeing today have proven false. In other words, BNSF's capacity-enhancing initiatives have been a demonstrable success. Langston VS at 12-17.

Overall, both railroad-controlled and private cars are demonstrating significantly greater productivity today than in the past:

- The total time which both railroad-controlled and private cars on BNSF's system spend on average in loading (total "customer time") has decreased by over 17% since 2002—with the average customer component of the cycle for railroad-controlled cars decreasing by 21.7% and for private cars by 15.3%. This **includes** all time for private cars held on BNSF's track for the customer's benefit under lease.
- In May 2001, empty private industrial cars sat on BNSF's track for an average of two days after constructive placement; in July 2005, the average was less than half a day. In May 2001, empty private agricultural cars sat on BNSF's track for an average of one and one-third days; in July 2005, the average was two-fifths of a day.
- BNSF is carrying more loads today than it carried in 2001 with only a marginal increase in the number of cars on its system. Between July 2001 and June 2005, BNSF's average daily loads in all cars rose 26.8%, while the number of cars on its system increased by only 2.4%. The number of loads in private cars rose 31%, while the inventory of private cars increased by only 8.7%.

- BNSF's "inventory-to-load" ratio (i.e., the average number of cars on BNSF's system divided by the number of loads originated annually) improved for all cars (excluding coal and intermodal) from 22.21 to 18.92 between January 2002 and June 2005, and for private cars in the same time period (excluding coal and intermodal) from 26.45 to 21.99.

Langston VS at 12-13.

Not surprisingly, BNSF's billings for empty private cars sitting on its track beyond the allowed free period have dropped consistently every year since it initiated the program

Langston VS, Exh. 15. The great majority of private car shippers are not incurring any bills at all for holding cars on BNSF's track beyond the allowed free period, and those shippers who are incurring bills are doing so only at a relatively small number of their facilities. Langston VS at 15; Ex H. . BNSF continues to work with shippers who have particularized needs at individual locations. Langston VS at 16.

The capacity-enhancing effect of all of BNSF's storage and demurrage charges, including its charges for holding empty private cars awaiting loading, is more important today than ever. The demand for rail services continues to grow, and the railroads' infrastructure is being called upon to handle record amounts of traffic. As recently reported by the Congressional Budget Office in its May 2005 paper entitled "Freight Rail Transportation: A Review of the 2004 Experience" ("CBO Paper") (available at www.cbo.gov/ftpdocs), policymakers, regulators and shippers have expressed concerns about whether the rail freight industry will be able to meet the surge in demand for rail transportation "fueled by an expanding economy, growth in international trade, and bumper grain harvests." CBO Paper at 1. Indeed, Chairman Nober himself wrote to the

heads of each of the seven major freight railroads in both 2004 and 2005 asking them how they planned to meet the unprecedented surge in demand in the fall peak season.¹⁷

In response to these concerns and the ever increasing demand for rail services, the rail industry has undertaken various proactive measures to increase capacity and to improve its ability to handle the traffic. The steps taken have included accelerating hiring and training, acquiring new equipment, instituting systems and technology enhancements, improving rail infrastructure, and modifying operations. CBO Paper at 7-8. The CBO Paper further notes that, in order to dampen demand and better allocate limited capacity, rail carriers have “also raised rates on some commodities and services.” *Id.* at 2. We have already outlined above the steps that BNSF and other railroads began taking as early as 2000 to improve utilization of both railroad-controlled and private rail cars. Taken together, these steps have been successful in relieving congestion and maximizing the utilization of the existing infrastructure, and, as the CBO Paper reports, “the feared ‘meltdown’ of service [has] not materialized.” *Id.*

It bears emphasizing that the steps BNSF took to address the problem of empty private cars sitting on its tracks were conservative. For empty private grain and sugar covered hoppers, the demurrage terms are the same as for railroad covered hoppers, and the \$50 per day charge is less than the normal \$75 per day charge on other railroad cars. For empty private cars other than grain, grain products, and sugar cars, the \$10,

¹⁷ Letters dated June 9, 2004, and June 16, 2005

\$15, or \$25 charge per car is much less than the \$75 per car charge on loaded private cars, and the free period allowed is the same as for loaded private cars.

Another useful comparison is to the charges that BNSF began assessing recently to address the problem of intermodal shippers leaving their containers sitting in terminals beyond a reasonable time. To address that problem, BNSF reduced the shippers' free time to as little as 24 hours at some terminals, and increased the daily storage charge from \$50 per day to as much as \$150 per day, on a "straight" plan that does not permit any "credits" to offset the charges. The effect of this more aggressive storage charge policy was a significant increase in parking capacity within the affected terminals—as much as a 36% improvement between 2004 and 2005—and more fluid intermodal operations. Langston VS at 7.

Not surprisingly, some of BNSF's intermodal customers were not happy with BNSF's more aggressive terminal storage charge policy, just as some of BNSF's private car shippers were not happy even with the conservative empty storage charge policy that BNSF introduced in 2001. Such charges, however, are widely recognized as the fairest and most economic approach to induce efficient behavior by shippers. As one commentator noted with respect to BNSF's intermodal terminal storage charge policy:¹⁸

No one likes to pay more for the goods and services they buy, but in the case of rail intermodal, cutting down on free time and increasing demurrage charges is the right thing to do. On the one hand, it will enhance the carrier's return on investment. On the other hand, it will improve service levels by helping to alleviate congestion in terminals and increasing throughput. . . . In this new age of constrained capacity, railroads—like any other business—are looking closely at

¹⁸ Lawrence H. Kaufman, "No More Free Lunch," *Journal of Commerce* (March 21, 2005), at 19.

their costs and figuring which should be recovered from customers. Now it's the turn of intermodal shippers. The idea is to charge for shipper actions, or inactions, that increase cost or reduce efficiency for the railroads. Reducing free time and penalties for leaving containers and trailers in terminals is a better approach than simply raising rates across the board, which also is occurring. It is a better approach because it more closely aligns charges to those who incur them. Consignees who pick up equipment within the allotted time after notification that it is available don't incur penalties. Only those who choose to use other people's property are being told to pay for it. . . . Improved flow through facilities should benefit shippers by making equipment more available and effectively increasing the railroad's intermodal capacity.

Some ports have similarly determined that capacity constraints can most fairly and economically be ameliorated by assessing charges for those shippers who desire to use the port during peak daylight hours. By keeping the ports open on nights and weekends, and assessing a \$40 per unit charge for those who use the port during the most congested daylight hours, they have induced a significant percentage of shippers to use the ports during off-peak hours and freed up substantial port capacity.¹⁹

Of course, the efficiency and fairness of imposing charges on shippers who tie up valuable railroad assets is not a new concept. Efficient asset utilization has always been "the primary purpose of demurrage and storage charges." *Railroads Per Diem, Mileage, Demurrage and Storage Agreement*, 1 I.C.C.2d 924, 934 (1985). What is new is that the railroads are operating with unprecedented levels of traffic that have made it more important than ever before for railroads and other transportation companies to pay close attention to the opportunities for enhancing capacity by tightening their controls on

¹⁹ Bill Mongelluzzo, "Scheduling Night and Day," *Traffic World* (Aug. 15, 2005), at 48.

the use of their infrastructure. Innovative programs that target as many sources of congestion as possible are critical to the fluidity of the rail system.

It is against this backdrop that the Board is being asked by the NAFCA Complainants to find that BNSF's empty private storage charge program is unlawful.

4. The NAFCA Complainants and Their Claims

Although very large companies, the NAFCA Complainants represent a very small proportion of the shippers on BNSF's system. BNSF has approximately 8000 active shippers using its system, and only seven are here complaining about BNSF's empty private car storage program.²⁰ They do not even represent a majority of NAFCA's 24 members, who have chosen not to participate in this proceeding. Complainants' Statement at 16.

The interests of these Complainants are narrowly focused on tank cars used to transport grain products (e.g., soybean oil) and on covered hoppers used to transport grain, grain products, and sugar.²¹ Tank cars used to transport grain products

²⁰ Those seven are Ag Processing, Inc., Archer Daniels Midland Company, Bunge North America, Inc., Cargill, Inc., CHS, Inc., ConAgra Food Ingredients Company, and Tate & Lyle Ingredients Americas, Inc. (Tate & Lyle does not even originate private car shipments on BNSF. It is participating simply to forestall other railroads from adopting programs like BNSF's. Complainants' Statement at 16.) Three other Complainants are not shippers, but car lessors – Chicago Freight Car Leasing Company, First Union Rail, and GLNX Corporation.

²¹ Although NAFCA claimed that any storage charge applied to an empty tank car constituted a "departure" tariff under the Ex Parte No. 328 Agreement, NAFCA withdrew its protest against UP under the Ex Parte No. 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 NAFCA (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, NAFCA made no claim concerning those

constitute a minority of the private tank cars that operate on BNSF's system (and nationwide). The great majority of private tank cars transport chemicals, petroleum products, and other industrial products, and the great majority of tank car shippers subject to BNSF's private car storage charges ship industrial products. Langston VS at 16. None of those shippers is here challenging BNSF's charges. The total billings to the Complainants under BNSF's \$10-15-25 per car storage tariff represents only about of BNSF's billings to all shippers *Ibid.*.

It should be emphasized as well that BNSF's demurrage billings to all shippers for holding empty private covered hopper cars used to transport grain, grain products, and sugar constitute less than of BNSF's total billings to shippers over the past four years under its empty private car storage program. And its billings to the named Complainants in this case represent only a fraction of that small percentage. Langston VS at 16. Further, although these Complainants operate scores of rail-served facilities on BNSF's system, they typically have only incurred charges at a handful of those facilities.²²

charges. UP's storage charges do not apply to covered hopper cars carrying grain and grain products, and NAFCA made no claim of "unreasonable practice" concerning the application of UP's storage charges to covered hopper cars carrying other products (e.g., plastics).

Yet the NAFLCA Complainants are not here seeking relief with respect to the application of BNSF's charges at individual facilities.²³ Rather, they are seeking to have the entirety of BNSF's empty private car storage program declared unlawful, regardless of the type of car or commodity to which it applies, the shipper to which it applies, or the location at which it applies.²⁴

The NAFLCA Complainants are no longer claiming that there is any *per se* illegality associated with BNSF's storage and demurrage charges on empty private rail cars. Nor are they claiming that the level of BNSF's charges is unreasonably high.²⁵ Instead, their principal claim now is that BNSF has "used" its demurrage and storage tariffs in ways that constitute "unreasonable practices" under 49 U.S.C. § 10702. Complainants' Statement at 42-60. They also asserts that "in the circumstances presented" BNSF's demurrage and storage charges on empty private cars constitute "unreasonable rules and practices on car service" under 49 U.S.C. § 11121(a), and that shippers who build or lease track to hold their cars provide a "service" to a BNSF for

²³ Relief for the application of charges at individual facilities is available, if warranted, in court or Board proceedings addressed to BNSF's operations at those particular facilities. See, e.g., STB Docket No. 42068, *Capitol Materials Incorporated – Petition for Declaratory Order – Certain Rates and Practices of Norfolk Southern Railway Company* (served April 12, 2004).

²⁴ BNSF's diversion tariff is not implicated here. Unlike its "departure tariff" protest and petition for investigation in Docket No. 42060, which challenged both BNSF's storage charges and the provisions of its diversion tariff, NAFLCA's complaint here is limited to BNSF's storage and demurrage charges. The Complainants do not claim that BNSF's diversion tariff is an "unreasonable practice" or otherwise unlawful.

²⁵ The NAFLCA Complainants have neither alleged nor made the showing of market dominance required to challenge a rate as being unreasonably high. See 49 U.S.C. § 10707.

which they must be compensated under 49 U.S.C. § 10745. Complainants' Statement at 60-71.

The NAFCA Complainants do not set forth the damages to which they believe the individual Complainants are entitled. Instead, they ask the Board to defer the question of damages until such time as the Board rules on the merits of the case. Complainants' Statement at 69.²⁶

NITL and ACC filed a joint amicus brief on August 15, 2005 ("NITL/ACC Brief"). It makes no claims and seeks no damages. Instead, it sets forth four "principles" that NITL and ACC suggest the Board should consider in assessing the issues in this case: (1) that the rules and practices of the rail industry should not unreasonably discriminate between private and railroad equipment, (2) that the rules applicable to various types of equipment should be consistent, (3) that owners of private equipment should not be penalized for the effects of a railroad's erratic service, and (4) that the level of the storage or demurrage charges should "fit" the congestion problem at which it is aimed. NITL/ACC Brief at 6-7.

III. ARGUMENT

A. As a Matter of Law and Good Public Policy, BNSF's Use of Storage and Demurrage Charges to Encourage Efficient Car Utilization, Enhance the Capacity of Its System, and Cover Its Costs Is Presumptively Valid

The NAFCA Complainants bear a heavy burden of proof in this proceeding. BNSF's empty private car storage program is no different than the types of demurrage

²⁶ Complainants argue, however, that the issue of whether they can amend their complaint to add their affiliates for purposes of damages is an issue that the Board should resolve now. Complainants' Statement at 70-71.

and storage charge programs that railroads have historically applied both to loaded private cars and to loaded and empty railroad cars. Moreover, Congress in the Staggers Rail Act of 1980 encouraged railroads to price their services independently, so as to deter cross-subsidization and improve track and equipment utilization across their systems. Most recently, the Board has stressed the importance of carrier initiatives to enhance the capacity of their systems, so as to manage the substantial influx of new traffic. Not only is BNSF's measured empty private car storage program working to accomplish Congress' and the Board's goals, but the great majority of shippers affected by BNSF's tariffs have no quarrel either with the tariffs themselves or with their application at particular locations.

Against this backdrop, only the most compelling evidentiary presentation by the Complainants could overcome the presumptive validity of BNSF's tariffs. Nothing in the Complainants' Opening Statement of Fact and Argument comes close to meeting the legal standard.

1. Neither the Board Nor the ICC Has Ever Suggested That Storage and Demurrage Charges Could Not, Or Should Not, Be Applied to Private Cars Held on Railroad Track

Storage and demurrage charges have long been widely applied by railroads, and applauded by the Board and the ICC, as an effective means of encouraging efficient car utilization and helping to cover the railroads' capital costs. See, e.g., *Ex Parte No. 462, Exemption of Demurrage from Regulation*, (served March 29, 1996); *Railroads Per Diem, Mileage, Demurrage and Storage Agreement*, 1 I.C.C.2d 924 (1985); *South Carolina Ry. Comm'n v. Seaboard Coast Line R.R.*, 365 I.C.C. 274, 277 (1981); *Ford Motor Co. v. Chesapeake & Ohio Ry. Co.*, 311 I.C.C. 559, 562 (1960).

Neither the Board nor the ICC has ever suggested that demurrage and storage charges could not, or should not, apply to private cars held on railroad track. See, e.g., *Cities Service Oil Co. v. Soo Line R.R.*, 356 I.C.C. 838 (1977) (applying demurrage and storage charges to loaded private tank cars held on railroad track). Indeed, the only debate historically was whether demurrage charges should be applied to private cars held on **private** track. Significantly, in the context of uniform nationwide demurrage rules, the ICC **rejected** a proposal by the railroads to exempt from demurrage private cars anytime they were held on private track. *Car Demurrage Rules, Nationwide*, 350 I.C.C. 777, 800-801 (1975). The ICC stressed: "The elimination of demurrage charges on private cars [held on private track] would very seriously and adversely affect the utilization of privately owned cars and would thus decrease the savings and car-days that may be gained in the overall national car fleet." *Id.* at 800.

With respect to private cars held on railroad track, railroads have long applied storage or demurrage charges to loaded private cars held on railroad track awaiting unloading. The NAFCA Complainants do not challenge the reasonableness of the free time or the \$75 daily charge that BNSF applies to such loaded private cars. Moreover, these Complainants appear to now concede that there is no illegality **per se** in applying the same kinds of demurrage and storage charges to empty private cars awaiting loading that railroads have historically applied to other cars.²⁷ Instead, the Complainants argue that the "ways" in which BNSF has applied these charges constitutes an "unreasonable practice" or violation of BNSF's car service obligations.

²⁷ See *North America Freight Car Ass'n v. The Burlington Northern and Santa Fe Ry. Co.*, STB Docket No. 42060 (Sub-No. 1) (served Aug. 13, 2004), slip op. at 9.

Complainants' Statement at 42. Since the "ways" BNSF has applied those charges does not differ materially from the "ways" in which railroads historically have applied storage and demurrage charges, the Complainants cannot meet that burden.

2. Congress, the ICC, and the Board Have All Encouraged the Very Kind of Capacity-Enhancing Initiatives Represented by BNSF's Empty Private Car Storage Program

In addition to ICC's historical endorsement of storage and demurrage charges, for private as well as railroad cars, the Staggers Rail Act of 1980 ushered in a new era of independent, market-based pricing. Congress mandated that the government "allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail" and "minimize the need for Federal regulatory control over the rail transportation system." 49 U.S.C. § 10101(1) & (2). Pursuant to that mandate, among other things, the ICC decided to withdraw its historical approval for the railroads' collective determination of demurrage and storage charges, concluding 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." *Railroads Per Diem, Mileage, Demurrage and Storage Agreement*, 1 I.C.C.2d 924, 934 (1985). The ICC emphasized that it expected that this would result in different carriers establishing different storage and demurrage programs to meet their individual circumstances, and that this would promote both the general deregulatory goals of the Act and the specific equipment allocation goals of Section 10746. *Id.* at 934-35.²⁸

²⁸ Section 10746 (then Section 10750) provides that "[a] rail carrier . . . shall compute demurrage charges, and establish rules related to those charges, in a way that fulfills

Railroads proceeded to do exactly as the ICC expected. They established their own programs for storage and demurrage charges that often differed significantly from one another. Langston VS at 7. The NAFCA Complainants make much of the differences between BNSF's empty private car storage program and the storage and demurrage programs of other Class I railroads (Complainants' Statement at 40-41), but to little avail. In the wake of the Staggers Act, different railroads are **expected** to try different approaches to solve the commercial problems they face. Even if only one railroad adopts a particular approach, that provides no grounds for stifling innovation. See, e.g., *The Society of the Plastics Industry, Inc. v. Consolidated Rail Corp.*, ICC Docket No. 40298 (served Oct. 22, 1990) (approving new "multiple independent factor through rate" ("MIFTR") innovation in tariff service), *aff'd sub nom. The Society of the Plastics Industry v. ICC*, 955 F.2d 722 (D.C. Cir. 1992). What works for one railroad may or may not work for another. Different markets and regions of the country often have different needs. Even if a program is demonstrably effective for one or more railroads, others may wait some time before emulating a program – and even then they are unlikely to adopt precisely the same program. Langston VS at 7. There is nothing in the least bit questionable, much less unlawful, about such independent actions.

Nor can the Complainants gain any traction for their "unreasonable practice" or car service claims from the fact that BNSF changed its earlier practice of not charging for holding empty private cars prior to loading. Change and innovation have been the

the national needs related to – (1) freight car use and distribution; and (2) maintenance of an adequate supply of freight cars to be available for transportation of property."

watchwords of the rail industry since passage of the Staggers Act.²⁹ The ICC long since rejected the notion that it is unreasonable for railroads to break out their charges for particular services, just because they had not previously done so. See, e.g., *ACF Industries, Inc.—Petition for Exemption*, ICC Docket No. 40194 (served May 1, 1989), slip op. at 4 (“The [National Rail Transportation Policy] and Congressional mandates expressed in the [4R Act] and the Staggers Act encourage the application of separate rates for distinct rail services, demand-based rates and revenue adequacy and discourage cross subsidization and misallocation of costs.”)

Indeed, NAFCA's earlier “departure tariff” claim in Docket No. 42060 was rejected by the Board for the same reason that the ICC rejected a similar claim in *Charges for Movement of Empty Cars, B&P R.R.*, 7 I.C.C.2d 18 (1990), arising from tariffs that for the first time assessed charges for moving empty cars to repair facilities. The ICC had earlier determined that those tariffs could not be struck down simply because they represented a departure from past practice. *General Amer. Transp. Corp. v. Indiana Harbor Belt R.R.*, 3 I.C.C.2d 599 (1987), *reh’g denied*, STB Docket No. 35404

²⁹ It bears emphasizing that shippers, including agricultural shippers, have benefited mightily from the changes that took place after the Staggers Act. By the Board's own calculation, inflation adjusted U.S. rail rates fell 45.3% in real terms between 1984 and 2000. “Rail Rates Continue Multi-Year Decline,” STB Office of Economics, Environmental Analysis, and Administration (December 2000), available at www.stb.dot.gov/stb/docs/RI.pdf, at 1. Real rates fell significantly in every major commodity group. *Id.* at 18. The Board found that “the productivity gains achieved by railroads since the Staggers Act” was by far the most important factor in the rail rate reductions. *Id.* at 4. “Comparing 1998 to 1980, Class I railroads produced 50 percent more ton-miles using 61 percent fewer employees, 28 percent fewer locomotives, 38 percent fewer track miles, and 23 percent fewer freight cars in service. ***It is this improvement in productivity that has driven the decline in rail rates, and a more efficient rail network is a clear benefit to the public at large.***” *Id.* at 4-5 (emphasis added).

(served Feb. 22, 1988), *aff'd sub nom. General American Transp. Corp. v. ICC*, 872 F.2d 1048 (D.C. Cir. 1989). Significantly, the ICC so held even though it had earlier affirmatively endorsed the practice of not charging for movements to repair facilities. Particularly in light of the mandate of the Staggers Act for more independent and efficient pricing, the ICC held that the complaining shippers had not carried their burden of demonstrating that the new tariffs constituted either an "unreasonable practice" or a violation of the defendant railroad's car service obligations. 3 I.C.C.2d at 610-611.³⁰

In this case, the NAFCA Complainants had no basis for assuming that BNSF or any other railroad might not change their demurrage or storage charge practices with respect to empty private cars. The law is clear that they cannot claim reliance on BNSF's or any other railroad's past practice to carry their burden of proving "unreasonable practice" or a car service violation. This is particularly so in light of the necessity for BNSF and other railroads to address the circumstance in recent years of capacity constraints on their systems. The Board has made it a priority to encourage railroads to adopt new capacity-enhancing initiatives to meet the unprecedented demand for freight rail services from almost every sector of the shipping public. Change is not only expected by the Board, but demanded.

³⁰ The ICC also determined that shippers could not claim special dispensation from a tariff because they may have made capital investments on the assumption that old practices would never change. *General Amer. Transp. Corp.*, ICC Docket No. 35404 (served Feb. 22, 1988), slip op. at 2-3. Even when the practice had been endorsed in prior ICC decisions, the ICC was not persuaded that it should provide relief to shippers who claimed that they were entitled to rely on the perpetuation of such a practice. *Id.*

3. Only the Most Compelling Evidentiary Presentation by the Complainants Could Overcome the Presumptive Validity of BNSF's Storage and Demurrage Tariffs

As just discussed, the NAFCOA Complainants cannot legitimately assert in this case either (1) that there is anything inherently problematic about a railroad applying storage and demurrage charges to empty private cars awaiting loading or (2) that private car shippers could reasonably assume that railroads would not begin to assess such charges. What then is the legal standard by which the Complainants believe that this case could be decided in their favor? "[F]undamentally," the Complainants assert that it is "an unreasonable practice for railroads to insist on unnecessary and costly measures at shipper expense." Complainants' Statement at 43. For this proposition, they rely on the proceedings in *Consolidated Rail Corp. v. ICC*, 646 F.2d 642 (D.C. Cir. 1981), where the court upheld the ICC's decision that railroads' insistence on special train service for carrying Spent Nuclear Fuels was an unreasonable practice. The ICC had found that the railroads had failed to demonstrate that special train service was necessary; accordingly, the substantial additional cost of special train service was unjustified. *Id.* at 648-53.

That the Complainants would cite this singular Spent Nuclear Fuels case as the core authority for their "unreasonable practice" claim simply underscores the weakness of their claims here. In that case, in light of the Department of Transportation's and Nuclear Regulatory Commission's comprehensive safety standards for transporting Spent Nuclear Fuels, the ICC and the court placed the burden on the railroads of demonstrating that "the presumptively valid DOT/NRC regulations are unsatisfactory or inadequate in their particular circumstance." *Id.* at 650. In this case, in contrast, the law

is clear that the "Complainant[s] [have] the burden of establishing by competent evidence that the assailed [demurrage and storage charges on private cars held on railroad track] are unjust and unreasonable." *Cities Service Oil Co. v. Soo Line R.R.*, 356 I.C.C. 838, 842 (1977).

Moreover, the railroads in the Spent Nuclear Fuels case could avoid the cost of special train service by providing regular train service instead, which is what the shippers there wanted. The Complainants in this case, however, do not want BNSF to stop providing track for holding empty private cars awaiting loading. Instead, they want the Board to require BNSF to provide track for holding their empty private cars awaiting loading, beyond the free period, without assessing a charge for that service. The Complainants cannot have it both ways. They cannot insist that BNSF provide a service, yet refuse to pay for it. Nor can they insist that other private car shippers—who manage their cars in most instances without any need for those cars to be held by BNSF beyond the free period—pay through higher line-haul rates for a service that they do not need. The fundamental problem with the NAFCAs Complainants' conception of an "unreasonable practice" regarding BNSF's empty private car storage program is that it would condemn *all* demurrage and storage programs. Any shipper could claim that it was "unnecessary and costly" for a railroad to assess demurrage and storage charges against the shipper, because the shipper did not want to bear the responsibility of managing the cars it uses more efficiently.

That is why the Board and the ICC have placed the burden on shippers complaining about the effect of demurrage or storage charges to provide "specific evidence" of the alleged unreasonable harm. *Capitol Materials Inc.—Petition for*

Declaratory Order—Certain Rates and Practices of Norfolk Southern Ry., STB Docket No. 42068 (served April 12, 2004), slip op. at 7. It is not enough to assert hypothetical problems or to make assertions that are not backed by concrete evidence. *Id.* at 5. Moreover, if a shipper has a complaint about the application of storage and demurrage charges at particular locations, and the shipper can prove that those charges have been unreasonably applied at those locations, the remedy is to deny the railroad the right to recover charges at those locations insofar as they have been shown to be unreasonably applied.³¹ The remedy is **not** to declare the entirety of the railroad's tariff or tariffs to be unlawful.

In this case particularly, the Board should find that the NAFCA Complainants bear an extremely heavy burden of justifying their stated goal of overturning BNSF demurrage and storage tariffs applicable to empty private cars. The great majority of the thousands of shippers affected by BNSF empty private car storage program either never complained about BNSF's program or, as described in Part II.B.2. above, withdrew their protests or complaints once they were assured by BNSF that it was prepared to discuss with any shipper its concerns about the application of BNSF's

³¹ That is what the issue was in both of the cases cited by the Complainants for the proposition that the Board can find railroad demurrage charges or collection practices in violation of Section 10702. Complainants' Statement at 42-43. In *Grain Land Coop v. Canadian Pac. Ltd. and Soo Line R.R. Co., d/b/a CP Rail System*, STB Docket No. 41687 (Dec. 8, 1999), the alleged unreasonable practice was fraud and misrepresentation concerning the provision of railroad-owned cars to grain elevators at particular locations, and in *Ormet Corp. v. Illinois Central R.R. Co.*, 341 I.C.C. 647 (1972), the unreasonable practice was "bunching" of cars at a single location. In neither case was there any suggestion that the Board or the ICC should declare the railroad's tariffs constituted an "unreasonable practice" in their entirety. It was only the reasonableness of the application of the railroads' tariffs at the particular location or locations that was at issue.

charges at particular locations. Neither NAFCAs nor the individual Complainants that remain in this docket can claim to represent those shippers, and they have not submitted evidence regarding those shippers. Yet they seek an order from the Board that would invalidate BNSF's empty private car storage program – or at least require significant revisions to that program – as applied to all shippers. Complainants' Statement at 71-72.

That makes no legal or logical sense. As the Board pointed out recently, "demurrage cases are rare because carriers and shippers are typically able to work out these matters." *Capitol Materials Inc.*, *supra*, slip op. at 2. If a shipper claims that the application of BNSF's storage or demurrage charges is unreasonable at one or more of that shipper's facilities, and BNSF and the shipper cannot work out the problem, then the Board is available to resolve such disputes. *Id.*; see also, e.g., *The Prince Manufacturing Co. v. Norfolk and Western Ry.*, 356 I.C.C. 702 (1978). As a general matter, however, railroads are free to set any tariff charge for a service or set of services that they believe is in their commercial interest. *Capitol Materials Inc.*, slip op. at 5. The Complainants in this case cannot succeed in overturning BNSF's tariffs in their entirety because of their parochial concerns about the application of those tariffs at a few locations.

B. There Was And Is Nothing Unreasonable About the Empty Private Car Storage Program BNSF Established to Address the Problem of Empty Private Cars Left Sitting On Its Track

At pages 44-60 of their Statement, Complainants set forth their reasons why they believe BNSF's tariffs should be struck down, or ordered substantially revised, because

they constitute an "unreasonable practice." We discuss in turn below why none of Complainants' arguments has any merit.

1. There Is No "Abuse of Market Power" Involved in Requiring Those Shippers Who Leave Their Cars Sitting on BNSF's Track to Compensate BNSF

The Complainants' first argument for why BNSF's empty private car storage program constitutes an "unreasonable practice" is that private car shippers are "more likely" to represent a captive market than shippers who use railroad-owned cars, and "[p]rotecting highly captive customers from abusive practices promotes the Rail Transportation Policy." Complainants' Statement at 46. Of course, this puts the rabbit in the hat. Even if all private car shippers were "highly captive," that would not mean that BNSF's tariffs were "abusive." No one has ever suggested that a railroad could only assess storage or demurrage charges against shippers who were not "captive."

In any event, there is no merit to the argument that shippers using private cars require some sort of special protection. Although the Complainants make much of the increase since 1980 in the percentage of cars owned by shippers (Complainants' Statement at 16-18, 45), the fact that a high proportion of cars nationwide, as well as on BNSF's system, are owned by shippers tends to undermine the hyperbolic suggestion that they are all "highly captive." As the ICC and the Board have repeatedly made clear, shippers buy their own cars for a variety of reasons, including their own convenience, marketing needs, and tax benefits. See, e.g., *Allied Corp. v. Union Pacific R.R.*, 1 I.C.C.2d 480, 486-87 (1985); *Lo Shippers Action Comm. v. Aberdeen and Rockfish Ry.*,

4 I.C.C.2d 1, 15 (1987).³² Moreover, the high percentage of private car ownership, including virtually all tank cars, means that BNSF and the other Class I railroads are significantly dependent on private cars to conduct their business. One could as easily say that BNSF is “captive” to many private car owners as the reverse.³³

Further, any suggestion that BNSF could afford to ignore the concerns of its private car shippers is belied by the lengths to which BNSF went to notify those shippers of its new program, to explain that program both in group settings and in one-on-one meetings, to respond to the feed-back that it received, and to make numerous special arrangements with individual shippers regarding locations where they might have transitional problems as a result of BNSF’s new program. The fact that so few shippers are involved in this case at this point is a testament to BNSF’s consistent, and ongoing, commitment to address and remedy shippers’ legitimate concerns.³⁴

These are not the actions of an indifferent carrier with “absolute market power” over its customers. They are the actions of a carrier that takes seriously the need to

³² The NAFFCA Complainants nowhere assert that BNSF has violated Section 11121 or its common carrier obligation by failing to provide cars on reasonable request.

³³ Many private car shippers dwarf BNSF in size and economic clout. The Complainants ADM, AgProcessing, Bunge, Cargill, ConAgra, CHS, and Tate & Lyle are all very large companies with multiple facilities, usually located on several railroads, and capable of being served by truck as well as by rail. Langston VS at 17.

³⁴ The Complainants seize upon a single e-mail from a BNSF sales person which they claim “manifests” that BNSF intended to use its empty private car storage program to “leverage” BNSF into more favorable shipping terms. Complainants’ Statement at 34. That was clearly *not* BNSF’s policy—as the thousands of pages of materials turned over by BNSF in discovery make clear—and even the e-mail cited by the Complainants suggests nothing more than that BNSF attempt to secure some kind of business commitment in exchange for waiving charges at a facility where the shipper had been “putting off [building storage tracks] for years.”

enhance the capacity of its system and is willing to undertake significant initiatives to accomplish that goal, while remaining attentive to the concerns of its customers.³⁵ As explained in Part II.B.3. above, BNSF has not limited those initiatives to tank cars and covered hoppers. All types of rail cars are included, and so are intermodal containers. In fact, the programs applicable to intermodal containers are generally significantly more stringent than those applicable to rail cars. Following the Complainants' logic, that would presumably make BNSF's intermodal traffic the most "highly captive" of all of BNSF's business—when that traffic is deregulated precisely because it is so competitive.³⁶

The simple fact of the matter is that "captivity" has nothing to do with BNSF's empty private car storage program. BNSF consciously applied the same type of program to empty private cars that it had long applied to loaded private cars and loaded and empty railroad cars. As with the other programs, the point is to provide private car shippers with incentives to improve the capacity of BNSF's system and help cover the costs caused by cars that are left sitting on BNSF's tracks.

³⁵ The Complainants assert that BNSF's willingness—in response to concerns some shippers expressed about service variability—to discuss service guarantees in certain lanes was indicative of a desire "to extract concessions from customers" (Complainants' Statement at 34-35), but BNSF can hardly be faulted for being willing to discuss possible solutions to shippers' service concerns. As discussed in Part III.B.6., service variability is a necessary economic feature of most single-car and multi-car rail services. Service guarantees are only possible in certain lanes with minimum traffic guarantees, and shippers can no more complain about the suggestion that they would have to pay different rates for such rail service than could about the Postal Service or UPS differentiating between different levels of service. Moreover, BNSF is always willing to discuss special demurrage contracts to address special traffic conditions at particular locations. Langston VS at 23-24.

³⁶ See *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 731 (1981), *aff'd sub nom. American Trucking Ass'n v. ICC*, 656 F.2d 1115 (5th Cir. 1981).

2. **BNSF's Empty Private Car Storage Program Did Not "Single Out" Empty Private Cars as the Sole Cause of Congestion on Its System**

The Complainants' second argument for why BNSF's empty private car storage program is an "unreasonable practice" is that it allegedly singled out private cars as responsible for all congestion on BNSF's system. Complainants' Statement at 46-47, 48-49. The short answer to this argument is that it is patently false. As described in Part II above, BNSF's empty private car storage program was only one of a number of programs that BNSF instituted in 2000 and 2001 to improve car utilization on its system and otherwise address the capacity constraints that were working against BNSF's ability to handle the increased demand for its services. At the same time it was instituting its empty private car storage programs, BNSF was significantly tightening its controls on utilization of railroad-controlled cars on its system; and it instituted a number of computer-based programs to streamline car ordering, tracing, management, and billing for shippers as well as for BNSF.

Complainants make much of the fact that at the same time BNSF identified a substantial number of "stored, serviceable" empty private cars on its system in 2001, there were also a substantial number of railroad cars identified as "stored, serviceable" on its system. Complainants' Statement at 46-47, 48. BNSF never suggested otherwise. It was, and is, just as attuned to the need to improve the utilization of railroad-owned or controlled cars on its system as to the need to improve the utilization of shipper-owned or controlled cars. And the very report cited by the Complainants, which BNSF provided in discovery for every quarter from 2001 to the present, shows marked and steady improvement in **both** the number of "stored serviceable" private

cars on BNSF's system **and** the number of "stored, serviceable" railroad cars on BNSF's system. Langston VS at 5; Exh. A.

Thus, the Complainants have no basis for asserting that private car shippers were singled out for "blame," or that BNSF neglected to address other sources of congestion. Complainants' real complaint is that charges for holding empty private cars were **included** among the many initiatives BNSF took to help alleviate congestion and cover its costs. BNSF's empty private car storage program addressed the anomaly that empty private cars awaiting loading could sit indefinitely on BNSF's track with no penalty whatsoever. Complainants have provided no sound reason why those cars should have been excluded from BNSF's efforts to tighten its controls on all cars using its track. Nor, as we discuss next, have Complainants provided any sound reason why shippers who manage their cars and their infrastructure so as not to leave cars sitting on BNSF's track should be required to pay for those who do.

3. Storage and Demurrage Charges Are More Economic and Equitable Than General Rate Increases As a Means Either to Induce Efficient Behavior or to Help Pay For the Costs of the Infrastructure Required

The Complainants' third argument for why BNSF's empty private car storage program is an "unreasonable practice" is that it is unreasonable to induce private car shippers who leave their cars sitting on BNSF's track either to manage their car fleets and operations more efficiently or to build or lease track to hold their cars. Complainants' Statement at 49-51. The premise of this argument is that BNSF historically supplied track to hold empty private cars without compensation beyond its freight rates. *Id.* at 50. If more track capacity is needed, Complainants assert, then

BNSF should pay for it out of its freight rates on all shippers. The Complainants suggest that this is appropriate because all shippers benefit from the new capacity. *Id.*

The obvious problem with this argument is that it provides no incentive for the private car shipper to manage its cars or its infrastructure so as to maximize the utilization of BNSF's existing track capacity and minimize the need for added capacity. Further, it places the burden of a relatively few private car shippers misuse of BNSF's track on all shippers. Langston VS at 18-19. The fact that such cross-subsidization may have been tolerated historically provides no basis for allowing it to continue in the future. The ICC and the Board long since rejected the notion that it is unreasonable for railroads to assess special charges for separate services, just because they had not previously done so. See, e.g., *ACF Industries, Inc.—Petition for Exemption*, Docket No. 40194 (served May 1, 1989), slip op. at 4 (Modern railroad law and policy "encourage the application of separate rates for distinct rail services, demand-based rates and revenue adequacy and discourages cross subsidization and misallocation of costs.")

Indeed, Section 10722 makes specific provision for railroads to assess special charges to enhance car utilization:

In order to encourage more efficient use of freight cars, notwithstanding any other provision of this part, rail carriers shall be permitted to establish premium charges for special services or special levels of service not otherwise applicable to the movement. The Board shall facilitate development of such charges so as to increase the utilization of equipment.

In light of this pointed legal mandate for the Board to "facilitate development" of separate charges for separate services, the Board today must treat with particular skepticism the Complainants' position that a railroad may not charge separately from its

line-haul rates for holding a shippers' cars on its tracks beyond a reasonable free period.

The law favoring separate charges for separate services is based on sound economic policy. Railroads, for example, generally charge less for multi-car shipments from a shipper than for single-car shipments. This gives shippers an incentive to pre-block their traffic and limit the amount of industrial switching and railroad yard work required to serve them. Effectively, separate charges for multi-car and single-car services give shippers an incentive to help save railroad resources. If a shipper ships only one car at a time, it cannot complain that it is charged more for the extra per car service required. This is no different than a landlord "unbundling" rental charges to tenants from charges for water and electrical services. By requiring tenants to "internalize" the costs of utilities, the landlord "incentivizes" tenants to conserve. If a tenant uses excess amounts of water and electricity, it pays for it. Other tenants are not required to pay for that tenant's excessive use.

The Complainants argue that separate demurrage and storage charges for holding private empty cars beyond a reasonable free period do not truly represent "unbundling," because BNSF has not reduced its freight rates. Complainants' Statement at 50; Exh. 9 (Borts VS) at 1. But a railroad is not required to reduce its base rates in order to achieve the salutary economic effects of separate charges for separate services. Even before passage of the Staggers Act, the ICC rejected a claim that railroads must reduce their line-haul rates if they wanted to reduce the amount of free time (from 48 hours to 24 hours) provided under a demurrage tariff. *Car Demurrage Rules, Nationwide*, 350 I.C.C. 777, 800 (1975). The incentive for shippers to conserve

railroad resources exists so long as it costs more for extra service, regardless of what happens to the base rate.

The Complainants' suggestion that this constitutes "monopoly pricing" is specious. Complainants' Statement at 51. If a restaurant that offers unlimited free refills on soft drinks finds that some customers are abusing the policy and decides to start charging extra for more than one refill, without lowering the base price for its soft drinks, that is not "monopoly pricing." It is simply good business. Langston VS at 19. In Professor Borts' economic nomenclature (Borts VS at 1), the "economic welfare" of the customer who used to take undue advantage of the old free refill policy may suffer, because now he has to pay extra if he wants more than one refill. But the new policy would not work to discourage excessive refills if it did not have any economic bite. Demurrage and storage charges have a significant penalty element precisely because they are intended to give shippers a significant incentive to utilize cars efficiently.

Private car shippers certainly recognize the value a proper incentive can have. When BNSF **lowered** its charge for holding loaded private cars on its track from \$75 to \$25, a number of private car shippers complained to BNSF, because they did not believe that a \$25 per car charge provided sufficient incentive to their own consignees not to use their cars for storage. No one suggested that raising the charge back to \$75 would constitute any kind of nefarious "monopoly pricing." That the "economic welfare" of the consignee would be more affected by a \$75 charge than by a \$25 charge was precisely the value that private car shippers attributed to raising the charge back to \$75.

It bears emphasizing as well that there is an equitable component to separate charges for separate services, particularly where demurrage and storage charges are

concerned. Why should the shippers who do not require BNSF to hold their cars beyond a reasonable free period pay through higher line-haul rates to construct or maintain track required by those who do require their cars to sit on BNSF's track awaiting loading? The obvious answer is that they should not, and both settled law and good public policy confirm this sensible point.

4. Complainants' Alternative "Solutions" Are Simply Recycled Arguments That BNSF Should Pay for Track to Hold Their Cars

Complainants' fourth argument for why BNSF's empty private storage car program constitutes an "unreasonable practice" is that "BNSF had its own service problems to blame" and that "BNSF could have pursued options other than the July 1 Changes." *Id.* Complainants' Statement at 51. We address the Complainants' "service problems" argument in subpart 6 below. As to the other options suggested by the Complainants, they are simply recycled arguments that BNSF should pay for track to hold the Complainants' cars.

First, the Complainants suggest that BNSF should not have retired nearly 500 miles of yard and switching track between 2001 and 2004. *Id.* But BNSF does not retire track that it believes has a potential to make a contribution to its system. It explores every possible avenue, including making track available to shortline carriers, before retiring any track that could cover its costs. *Langston VS* at 19. The Complainants have not demonstrated that BNSF retired any track that they were prepared to make compensatory. On the contrary, the Complainants argue that they should not have to pay a charge for the use of **any** track occupied by their cars. Complainants' Statement at 50.

Second, Complainants suggest that BNSF should have offered to pay the entirety of the cost for any shipper desiring to construct track on its property. *Id.* at 51. As discussed in Part II.B.1. above, BNSF did offer as a transitional matter to set off the demurrage or storage charges that a shipper would otherwise have paid in the first year of the program against the costs of constructing track at its facility (Langston VS at 9), but to make this offer in perpetuity would effectively impose on BNSF and other shippers all of the costs attributable to the particular car management and infrastructure choices of individual private car shippers. That would largely defeat the purpose of the empty private car storage program to place the costs of holding empty private cars on the shippers who require that they be held. As we discuss in more detail in the next subpart, BNSF has bent over backward to provide transitional relief to shippers affected by its charges, but in the long run those who continue to require that their cars be held awaiting loading must bear the costs.

5. BNSF's Offer of Transitional Track Rentals at Favorable Rates Was and Is a Benefit to Private Car Shippers Who Might Not Otherwise Be Able in the Short Run to Avoid Storage or Demurrage Charges at Particular Locations

The Complainants' fifth argument for why BNSF's empty private car storage program constitutes an "unreasonable practice" is that BNSF has used its tariffs "to bring about increased track rentals at inflated prices." Complainants' Statement at 52-56. This argument appears to be fueled in significant part by a mistake the Complainants made in calculating the return represented by BNSF's targeted transitional track lease rates of \$10, \$20, or \$30 per track foot per year. In their Statement, the Complainants characterize these rates as producing "excessive annual rates of return" of "up to 70 percent." *Id.* at 32, 52. For this conclusion, they cite calculations

summarized in Table No. 3 of the L.E. Peabody verified statement attached to Complainants' Statement as Exhibit 8. As that Table makes clear, however, L.E. Peabody made a calculation of the return represented by a charge of \$10, \$20, or \$30 **per car per day**, not the return represented by a charge of \$10, \$20, or \$30 **per track foot per year**.³⁷

Needless to say, there is a dramatic difference between the returns represented by these two calculations. Messrs. Crowley and Burris in Table 3 calculated the annual revenue that would accrue to BNSF if a shipper left a mile-long string of its cars sitting on BNSF's track for a full year incurring daily storage charges.³⁸ Had they calculated a \$10 per track foot per year track lease cost they would have derived a total of \$52,800 for leasing a mile of track, instead of \$350,381 in storage charges; at \$20 per track foot, the total would be \$105,600, instead of \$700,814; and at \$30 per track foot, the total would be \$158,400, instead of \$1,051,195. Langston VS at 24-25.

³⁷ It appears that L.E. Peabody was also confused, since Messrs. Crowley and Burris attached to their statement as Exh. TC/PB-2 a set of BNSF tables showing the **per foot per year** track lease rates required to cover BNSF's track construction costs at different costs per mile and over different amortization periods, yet in Table 3 they calculate "BNSF's effective return on investment from the \$10, \$20 and \$30 storage charges for one mile of storage track." L.E. Peabody VS at 9. BNSF does not have any \$10-20-30 storage charges. Its storage charges are set at \$10, \$15, and \$25 per car per day.

³⁸ Why Messrs. Crowley and Burns did that is not clear. The Complainants make quite clear that even they believe that it is unreasonable for a private car shipper to leave its cars sitting on a railroad's track for such a long period of time. Complainants' Statement at 65. In fact, the point of penalizing such behavior under BNSF's empty private car storage program is to avoid such abuse, not to earn revenues. If BNSF found that shippers were still leaving substantial numbers of cars on BNSF's track under its \$10-15-25 per car per day storage charge regime, it would likely raise the rates (just as it recently did on intermodal containers) to incent shippers to stop that behavior. Langston VS at 25.

The per foot track lease rates targeted by BNSF certainly do not yield "excessive annual rates of return."³⁹ In fact, they do not even yield compensatory returns. Messrs. Crowley and Burris assume in their Table No. 3 a track construction cost of \$1.5 million per mile. As set forth in their Exhibit TC/PB-2 (Page 2 of 3), at the lowest capital cost (9%), lease rates of \$10 or \$20 per track foot per year do not come close to covering the cost of track construction, and a lease rate of \$30 per track foot only covers the track construction cost if the cost is amortized over a period of 20 years or longer. There is no provision in the calculation for the costs of track maintenance or the cost of land, which added to the cost of track construction render all of the targeted lease rates inadequate to cover BNSF's costs of building and maintaining track for storage, regardless of the amortization period. Langston VS at 25.

This is why the Complainants' argument that BNSF is using its demurrage and storage tariffs "to bring about increased track rentals at inflated prices" is flatly wrong. BNSF has been offering track rentals to shippers where it could for the same reason it offered to bear some of the cost of track construction at shippers' facilities—to provide transitional assistance to shippers who might otherwise have difficulty at some facilities avoiding the payment of storage and demurrage charges. If BNSF simply wanted to augment its revenues, the last thing it would do would be to offer track for lease to shippers at rates well below its storage charge rates. BNSF has no interest in being in

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the track leasing business in the long term. It has too many valuable uses for its track.⁴⁰ That is one of the reasons that its track leasing policy includes a gradual increase in lease charges, to gradually wean shippers off of holding their cars on BNSF's track and provide an incentive for them to build their own track, change their operations, manage their fleet, or take other actions to avoid clogging up BNSF's facilities.

The Complainants argue that BNSF's use of "floating" track leases means "[i]ncreased use by shippers of BNSF yard track under lease" that does not alleviate congestion. Complainants' Statement at 52. But BNSF does not even offer these leases at locations where congestion is most serious. Langston VS at 25. Moreover, in many instances, BNSF's private car storage program and other car utilization programs have freed up space that permit it to offer "floating" leases, and give BNSF the flexibility to move cars when it needs to for operational reasons. In any event, these leases are a short-term compromise meant to provide transitional relief from storage and demurrage charges at some locations to some shippers. If the continued provision of a "floating

⁴⁰ The fact that railroads have been willing in the past to lease track at very low per foot rates does not support the Complainants' suggestion that BNSF's lease rates are "excessive." Complainants' Statement at 32-33. As traffic has grown on the railroads, track space has become more valuable. BNSF has a much better appreciation today of what it costs to construct and maintain track, and the opportunities it passes up when track that could be in active service is clogged up with stored cars. As noted above, the track rental rates BNSF is assessing do not even cover the costs of track construction, right-of-way land, and maintenance costs, much less the opportunity cost to BNSF from having that track tied up in storage service rather than active switching and line-haul operations. Langston VS at 24. To ameliorate this problem, BNSF has largely moved to "floating" leases that do not restrict BNSF to holding cars at particular locations, but permit BNSF to move cars to areas where they cause the least disruption. Also, BNSF reserves the right to cancel the leases on 30 days notice, so that if an area becomes too congested, BNSF is not bound to continue to store cars for the shipper at noncompensatory rates. Langston VS at 25.

lease" becomes a problem at any location, for either party, it can be cancelled on 30 days' notice. Langston VS at 25.

The Complainants also make a convoluted argument that BNSF's empty private car storage program does not "fulfill the objectives of Section 10746 when used to foster substantial new leases of BNSF yard track at elevated rented levels." Complainants' Statement at 54. The objectives of Section 10746 are improved "freight car use and distribution" and "maintenance of an adequate supply of freight cars." 49 U.S.C. § 10746(1) & (2). Both objectives are met when railroads and shippers alike have incentives to make more efficient use of their cars. As discussed in Part II.B.3. above, that is exactly what has happened since BNSF instituted its empty private car storage program and other car utilization initiatives. BNSF is carrying substantially more traffic, including substantially more traffic in private cars, with only a slight increase in the number of cars on its system. Langston VS at 12. There has also been an increase in new "floating" leases, but, as just discussed, those leases are a transitional offering which shippers as well as BNSF can cancel on 30 days' notice.

The Complainants suggest that using the metrics supplied by the railroad industry, including BNSF, and published by the Association of American Railroads, "the July 2001 Changes cannot be said to have been successful in bringing about improved freight car use and rail service on BNSF" (Complainants' Statement at 55), but that is clearly wrong. The capacity constraints on BNSF's and other railroads' systems have certainly made it difficult to improve on-time performance, terminal dwell time, and train speed, but the fact that BNSF is carrying substantially more traffic while maintaining a relatively fluid system and avoiding the kind of gridlock predicted for the industry is

attributable in significant part to the capacity-enhancing initiatives, including its empty private car storage program, that BNSF initiated in 2000 and 2001.⁴¹

The Complainants assert that, even if private car shippers may have been prompted by BNSF's program to take their cars in for loading more quickly, that does not mean that that change in shipper behavior has contributed to the system fluidity (Complainants' Statement at 55), but the impact of BNSF's program has not been limited to reducing the time between the constructive placement of these shippers' cars

⁴¹ Contrary to the Complainants' suggestion, a diminution in train speed does not necessarily imply a diminution in productivity, particularly with respect to car utilization. As Exhibit G to Mr. Langston's Verified Statement demonstrates, between January 2001 and December 2004, car velocity on BNSF's system significantly improved. (Car velocity is a function of the total miles traveled by all cars on BNSF's system divided by their total time on the system. The more miles traveled in less total time, the greater the velocity.) During the period from January 2001 to December 2004, the velocity of all agricultural and merchandise cars on BNSF's system improved by 6.1%. At the same time, BNSF's system unit miles were up by 22%. ("Unit miles" measure length of haul as well as number of units. Thus, one car moving 1,000 miles equals 1000 unit miles, as do 5 cars each moving 200 miles.)

That car velocity may substantially improve even when train speed does not is attributable to a variety of factors. The first is increased train size. The higher the average number of cars on trains on BNSF's system, the higher the effective velocity for the cars involved. Operating larger trains improves effective velocity for cars that would otherwise wait for space on a later train departure. Second, BNSF has over time been successful at lowering the average number of intermediate handlings (train to train connections) required for cars on its system. This both reduces planned dwell time and reduces the opportunity for missed connections that result in more dwell time. Third, the train component of car velocity is a relatively small component of that measurement. Most car time is consumed with handling and dwell time in terminals and shippers' and receivers' facilities, rather than in train movements. Thus, a reduction in train speed has only a minor impact on car velocity. That is why BNSF places such a strong emphasis on minimizing the time that cars sit on its tracks and in customers' facilities. Car velocity on BNSF's system has strongly benefited from BNSF's and customers' efforts to reduce the time that cars sit in constructive placement and in loading and unloading. Langston VS at 14.

and actual placement of those cars. The entire amount of time customers retain their cars, from constructive placement to release back to BNSF for line-haul movement, has been significantly reduced. Langston VS at 12. This in turn has contributed to the improved utilization of those cars, which is precisely what is envisioned by not only Section 10746, but by Sections 10722, 11122, and 10101 of the Act.

6. Both BNSF's Storage and Demurrage Books Account for "Bunching," and Any Shipper That Believes BNSF's Charges Have Been Applied Unreasonably at a Particular Facility Can Seek Relief From Payment of Those Charges In Court or Before the Board

The Complainants' final argument for why BNSF's empty private car storage program constitutes an "unreasonable practice" is that BNSF's tariffs do not make adequate provision for relief from "bunching" or other service failures that are the fault of the railroad. Complainants' Statement at 56. Significantly, the Complainants do *not* claim that any of the Complainants actually *has* a complaint about "bunching" or any other kind of service failure. There is much talk in the Complainants' Statement of Facts about the variability of BNSF's service (*id.* at 19-23), but nowhere do the Complainants state that they are here seeking relief at a particular location for a service failure.

Lest there be any doubt on this point, the law is clear, first, that claims of bunching or other service failures must be supported by specific evidence. *Capitol Materials Inc.*, slip op. at 7-9. Service variability is *not*, in and of itself, a basis for seeking relief. *Id.* at 7. In fact, significant service variability is a necessary part of rail service to and from many shipper locations that cannot support scheduled unit train service. Langston VS at 22. In any one month, BNSF serves approximately 15,000 separate origin-destination movements (i.e., merchandise or mixed-freight traffic only—

excluding intermodal, coal, and grain traffic). Many of those movements involve single-car shipments, or small blocks of a few cars. Some are so sporadic that they may be repeated only a few times within a year.⁴² Obviously, no railroad can economically provide a locomotive and crew to provide customized service for each of these movements. One of the principal reasons that rail service is more economic for many shippers than truck service is that the economies of scope and scale of trains carrying many different shippers' traffic permit railroads to price their services competitively.

Significant service variability often results from the necessity for multiple shippers' traffic to move in common trains. It is not unusual for 50 different shippers' traffic to be represented in a single train, which may have drawn its traffic from dozens of rail yards. Rarely does all of the traffic in a multi-shipper train move between a single origin and destination. Usually, multiple yard operations and several different trains are required to move the traffic from origin to destination. Furthermore, BNSF has little advance knowledge at many locations of either when a shipper will require service or where it will wish its traffic to be moved.⁴³ This limits BNSF's ability to plan crews,

⁴² BNSF recently ran a study of carload traffic which found that although it served approximately 15,000 origin-destination movements in both April and June 2005, only 60% of the origin-destination pairs in April were repeated in June. In other words, 40% of the origin-destination pairs that required service in April did not require service in June, and thousands of different origin-destination pairs took their place. Over the course of a year, on carload traffic alone, BNSF serves over 25,000 different origin-destination pairs. Langston VS at 22.

⁴³ The examples of service variability in the Complainants' Statement of Facts provide a good illustration of the kinds of issues that BNSF must address when it is faced with sporadic car movements.

schedules trains, or otherwise coordinate the myriad parts of its service so as reduce variability.

These points, combined with BNSF's inability to control traffic when it moves off-line, illustrate why service variability per se has never constituted a basis for claiming relief from storage or demurrage charges.⁴⁴ Absent specific evidence of "fault" or "error" at a particular location, there is no basis for a claim of service failure. Moreover, even if

⁴⁴ The Complainants strain to turn an out-of-context quote from Mr. Langston's deposition into a demonstration that BNSF takes an "alarming" position regarding what shippers should do to address service variability. Complainants' Statement at 23-24. As even the portion of the transcript that the Complainants quote makes clear, Mr. Langston was being asked to speculate about all of the things that a shipper could do to address "worsening service on a railroad." In response to that vague hypothetical about a potential service crisis, Mr. Langston understandably responded that there were a lot of potentially "rational" responses the shipper could take, including trucking the traffic, moving the plant, etc. BNSF's demonstrated consideration for any transitional problems that its new empty private car storage program might create for some shippers at some locations belies any suggestion of a cavalier disregard for the impact of its program.

such a claim were made, it would have to be in the context of a request for relief by the affected shipper at a particular location or locations. At most, a claim of "bunching" or other service failure may constitute a basis for storage or demurrage charges being waived at a particular location, or for an order that the particular service failure be remedied. The fact that a shipper suffers hardship from a service failure at a particular location or particular locations cannot constitute the basis for a claim that a railroad's entire storage or demurrage program be overturned.

The Complainants argue that BNSF's storage tariff makes inadequate provision for "bunching" relief, because it does not provide relief for "garden variety inconsistent service producing unpredictable arrival times." Complainants' Statement at 57. As just discussed, however, the short answer to this claim is that there is no legal basis for providing relief for garden variety inconsistent service variability, since no "fault" or "error" is implied by such variability. The provision for bunching relief that is in the storage tariff is appropriate for a true service error by BNSF.

The Complainants also note that BNSF's demurrage tariff fails to make any specific provision for bunching relief. Complainants' Statement at 57. They themselves point out that this is not surprising, since BNSF's demurrage tariff provides for an "average" demurrage calculation that gives the shipper credits that it can use to offset debits incurred for cars that it does not order in within the free time provided by the tariff. *Id.* The availability of this credit system has long been held to offset any requirement for "bunching" relief in an "average" demurrage tariff. *Id.* at 57-58; see also *Capitol Materials Inc.*, slip op. at 3. Citing a 1983 decision, however, the Complainants argue

that a railroad cannot “force” a shipper into an average agreement, but must have the choice of “straight” demurrage.

The fundamental flaw in the Complainants’ argument is that it relies on archaic rules established when demurrage charges were collectively set in “two nationwide tariffs.” *Field Container Corp. v. ICC*, 712 F.2d 250, 255 (7th Cir. 1983). As discussed in Part III.A.2. above, since 1985 railroads have been barred from setting their demurrage and storage charges collectively, and railroads have individually established programs that not only differ significantly from railroad to railroad, but also differ significantly from service to service. BNSF has approximately 17 different programs applicable to different kinds of cars and products. Langston VS at 7. Some of those programs are “straight” programs and some are “average” programs. BNSF also will enter into contractual demurrage arrangements with individual shippers concerning specific movements to cover special circumstances. Langston VS at 30. There are no rigid legal requirements necessitating that a railroad offer a “straight” program for every type of car and product.

Moreover, as a general matter, shippers incur higher charges under “straight” programs than “average” programs. Langston VS at 30. If, for example, BNSF substituted a “straight” demurrage program for empty private grain and sugar covered hopper cars awaiting loading, a private car shipper that incurred demurrage charges could not offset the \$50 daily demurrage charge for cars held beyond the free period with the credits that it receives for the car that it takes within the free period. Under the “average” program that BNSF has applied for the past four years, grain and sugar shippers have been able to avoid storage charges at most locations altogether—in

significant part because of the credits applied to the covered hopper cars they take within the free period. *Id.* at 30. Overall, the charges incurred by grain and sugar shippers on covered hopper cars have been quite small compared to the charges incurred by tank car and other car shippers under the "straight" \$10-15-25 program applied to their cars. *Id.* at 30. Had BNSF applied a "straight" demurrage plan instead, the charges that grain and sugar shippers incurred on private covered hopper cars held beyond the free period would have been significantly higher.⁴⁵

Finally, the Complainants assert that it is a fundamental tenet of demurrage law that demurrage charges should be cancelled if they "accrue[d] solely on account of railroad performance, and the shipper has exercised due diligence." Complainants' Statement at 59 (*citing Ormet and Dana Corporation*). They complain that "[n]either BNSF's Demurrage Book nor its Storage Book make provision for a shipper to raise BNSF service malfunctions as a basis for demurrage waiver." *Id.* But BNSF's tariffs do not purport to be compendia of demurrage law. That is why BNSF encourages shippers to discuss with BNSF any circumstances in which the shipper believes the application of a tariff to particular movements is unreasonable. If BNSF and the shipper are unable to work out the matter, the courts and the Board will assess the reasonableness of

⁴⁵ The Complainants suggest that the appropriate comparison is between the "average" \$50 demurrage charge on grain and sugar covered hopper cars and the "straight" \$10-15-25 storage charge on other cars. Complainants' Statement at 58-59. Even if that were the appropriate comparison, it appears that grain and sugar shippers might well be worse off under a "straight" \$10-15-25 plan than under an "average" \$50 plan. *Langston VS* at 31. But to maintain parity with the \$50 per car demurrage program on railroad-owned and controlled grain and sugar covered hopper cars, a "straight" demurrage program on private covered hopper cars would likely be set at \$50 per car. It is highly unlikely that any shipper would prefer a "straight" \$50 per car demurrage program to an "average" \$50 per car demurrage program.

application of the tariff to those movements under the particular circumstances of the case. See, e.g., *Dana Corporation*, 703 F.2d at 1305 (shippers permitted "to show that, in particular instances, the idle-time for which charges are assessed is attributable to the fault of the carriers"); *Capitol Materials Inc.*, slip op. at 6 (shippers permitted to show that there may be "individual instances, which the record here does not permit the Board to determine, where the imposition of demurrage charges was improper even under the average demurrage rules"). The tariff itself cannot be declared unlawful simply because it does not attempt to describe the factual circumstances under which its application to a particular movement at a particular location may be unreasonable.

C. BNSF's Empty Private Car Storage Program Does Not Discriminate Against Agricultural Shippers or Otherwise Violate BNSF's "Car Service" Obligations

The Complainants seek, first, to have BNSF's empty private car storage and demurrage tariffs set aside in their entirety, on the grounds that they constitute "unreasonable practices." For the reasons just discussed in Part I.A. above, none of the Complainants' "unreasonable practice" claims has any merit. Failing success with their "unreasonable practice" claims, the Complainants seek to have BNSF's tariffs partially struck down and modified, on the grounds that they violate BNSF's "car service" obligations. Complainants' Statement at 60. Complainants' "car service" claims are equally without merit.

1. BNSF's Charges Do Not Unreasonably Discriminate Against Agricultural Private Covered Hopper Cars

The Complainants' first "car service" claim is that agricultural cars are treated "more harshly" under the provisions of BNSF's demurrage tariff applicable to grain and sugar covered hopper cars than other types of cars are treated under the provisions of

BNSF's storage tariff. *Id.* In particular, they claim that the application of a \$50 demurrage charge to covered hopper cars and \$10-15-25 charge to other types of cars that may be on the same track is unreasonable. *Id.* at 61. But this compares apples to oranges. As discussed above, the demurrage tariff is an "average" tariff, while the storage tariff is a "straight" tariff. If a shipper takes an appreciable number of cars within the allowable free period, an "average" tariff with a higher daily rate for cars that are held beyond the free period may be more advantageous than a "straight" tariff with a lower daily rate. *Langston VS* at 30. The reason is that under a "straight" tariff no credit is given for cars that are taken within the free period. The storage charge for holding the car beyond the allowable period runs with the car and cannot be offset. *Id.*

Moreover, BNSF had and has good reason for applying the same demurrage tariff to empty private grain and sugar covered hopper cars that it applies to empty private railroad-controlled covered hopper cars. Most agricultural shippers who own private cars also use substantial numbers of railroad-controlled cars. BNSF believed it would be confusing to shippers for a different demurrage program to apply to empty private covered hopper cars than to empty railroad covered hopper cars. BNSF did not wish to discriminate for or against private covered hopper cars vis-a-vis railroad-controlled cars. It determined to use the same demurrage tariff so as to align the shippers' incentives to use either type of car as closely as possible. *Langston VS* at 30.

Finally, BNSF could obviate the Complainants' concern about the difference between the \$10-15-25 per day charge on the private tank cars they use and the \$50 per day charge on the private covered hoppers they use by raising the rate on tank cars used for agricultural products to \$50 per day. This would eliminate the "discrimination"

about which they complain just as surely as lowering the daily rate on covered hopper cars.⁴⁶ Obviously, that is not what the Complainants want, but there is nothing sacrosanct about the \$10-15-25 rates.⁴⁷ In fact, they are at the low end of the daily rates that BNSF and many other railroads assess to induce more efficient use of cars by shippers. See *Capitol Materials Inc.*, slip op. at 4.

2. BNSF's "Free Time" Provisions Do Not Unreasonably Discriminate Against Private Cars

The Complainants' second "car service" claim is that the "free time" provisions of both its demurrage and its storage tariffs unreasonably favor shippers using railroad-controlled cars. Complainants' Statement at 62. This is a convoluted argument that requires some background to understand. All cars used by a railroad require instructions for where to send the car once it is made empty. Absent other instruction from the owner, empty private cars must be returned by reverse route to their owners. Absent the owners' agreement, railroads cannot use their private cars to transport other shippers' goods. See, e.g., *APL Land Transportation Services, Inc. v. The Burlington*

⁴⁶ The Complainants do not challenge the reasonableness of the level of any of BNSF's charges, so equalizing the rates on tank cars used for agricultural products and covered hopper cars used for covered hopper products could not cause any rate reasonableness concern.

⁴⁷ As discussed in Part II.B.1. above, BNSF initially set the rates on both empty private agricultural covered hopper cars and other types of empty private cars at \$25. The rate for agricultural covered hopper cars rose to \$75 and then dropped back to \$50 as BNSF made seasonal adjustments to its demurrage rates on all agricultural covered hopper cars, whether private or railroad-controlled. The rate on other types of empty private cars was graduated to \$10-15-25 in response to various shippers' requests, including the Complainants. *Langston VS* at 11. It is troubling, to say the least, that the Complainants should harp upon the difference between the lowest \$10 daily rate on their tank cars and the \$50 rate on their covered hopper cars, when BNSF went out of its way to accommodate requests for more graduated storage charges.

Northern and Santa Fe Ry. Co., STB Docket No. 42003 (served July 14, 1999). In contrast, empty railroad-controlled cars that originate and terminate on the home road do not automatically return to the origin from which the load originated. Unless the railroad has an agreement with a shipper assigning the car to that shipper, the railroad may route the empty car to wherever the railroad believes it will get the most productive use. *Langston VS* at 27.

When a railroad's car moves loaded off of its system, instructions are required for the empty return of the car, and to assist the nation's railroads, the AAR for years has helped establish various protocols and transportation/condition codes from which a foreign railroad can determine where to send the car.⁴⁸ Those protocols and codes are contained in the AAR's Umler Data Specification Manual. Among other things, they provide for various "pool" designations to be applied to different cars, from which the foreign road determines what they may do with the car. Those same pool designations may be used by the railroad owner/lessor of the car as a default instruction for where to return the empty car. All pool designations are made by the railroad owner/lessor of the car for its convenience in directing empty cars to be returned to the area, agent, or station where they are most likely to be used efficiently. Railroads can and do change pool designations, and enlarge or reduce the number of cars in a pool, whenever their needs change.

⁴⁸ The empty car need not necessarily be returned to the owner railroad if the foreign railroad has use for the car and the owner does not require its immediate return. Of course, the foreign road must pay the owner per diem on the car while it is in loaded service on the foreign road. *Langston VS* at 28.

One of the half-dozen "pool" designations applied to railroad-owned cars is the "C" pool designation. That is a rarely used designation that applies when the railroad owner wishes as a general matter for the cars in that pool to return to a particular station for the particular use of one or more shippers. Although the cars in the pool are said to be "assigned" to that station and shipper, they are not in fact placed under the control of the shipper unless the railroad has an agreement with the shipper that assigns the car to the shipper for its exclusive use. When BNSF enters into such an agreement with a shipper, the car is treated as if it were a private car. Unless and until the agreement is rescinded, the shipper has a right to exclusive use of the car. It also must pay an assigned car storage charge fee of \$25 per day from the first 12:01 am after the car arrives at the station, continuing until the "want date" triggers the demurrage clock.

Langston VS at 29.

The simple fact is that if BNSF does not have an agreement with a shipper using cars in a "C" pool, the shipper is not entitled to exclusive use of the car. If the shipper does not efficiently use the cars, BNSF can terminate the "C" pool designation. As mentioned, the "C" pool designation applies to relatively few cars, and is used for the railroads' convenience. It applies currently to only approximately 3,000 BNSF cars out of BNSF's fleet of approximately 45,000 cars. It is particularly rarely applied to the types of cars used by the Complainants.⁴⁹ Thus, out of a fleet of approximately 28,600 BNSF-controlled covered hopper cars used to transport whole grain, only 11 are

⁴⁹ It does not apply at all to tank cars like those used by the Complainants, because all of the tank cars on BNSF's system are private cars.

currently in a "C" pool.⁵⁰ With respect to other BNSF-controlled covered hopper cars—used to transport, among other things, grain products (e.g., flour) and sugar—BNSF's fleet of approximately 12,000 cars today includes only approximately 1200 in "C" pools, of which some 500 either belong to another railroad or are used by multiple shippers. Many of the remaining 700 cars are specialty cars used by shippers (including some of the Complainants) with which BNSF has actual agreements giving them exclusive use of those cars.

All of this is relevant only because the Complainants have built an elaborate discrimination argument around an L.E. Peabody study of two 60-car samples of BNSF "C" pool cars from 2001-2002 and 2004-2005, which they contend show that these cars took an average of 3 days to be actually or constructively placed with a shipper in 2001-2002 and an average of 1.8 days to be actually or constructively placed with a shipper in 2004-2005. Complainants' Statement at 62-64; L.E. Peabody VS at 7.⁵¹ The Complainants' argument proceeds from the premise that "C" pool railroad cars are just like private cars, because they are "assigned" to a shipper (Complainants' Statement at

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⁵¹ The reason that Peabody measured the time from car arrival at the last station to either constructive placement or actual placement with the shipper is that the great majority of these "C" pool cars were never constructively placed. They arrived at the last station, were called in by the shipper, were switched out of the yard, and were delivered to the shipper's facility without the intermediate step of being constructively placed. See Peabody VS, Exh. TC/PB-1.

62), to the conclusion that 3 days should be added to the free time available to private car shippers under BNSF's storage tariff (*id.* at 66).⁵²

The most obvious defect in this argument is that its premise is wrong. "C" pool railroad cars are not like private cars, because the shippers that use them have no exclusive right to those cars. That is why a number of shippers who are dependent on the highly specialized cars that make up most of the "C" pool have signed agreements with BNSF that **actually** assign specific cars to those shippers for their exclusive use. Those shippers agree to pay storage charges of \$25 per day from the **first 12:01 am** after those assigned cars arrive at their destination station, and they pay a demurrage charge of **\$75** per day if they do not take a car on its designated "want date." Shippers who use "C" pool cars and do not sign an agreement with BNSF giving them exclusive use of those cars run the risk that BNSF will supply them to another shipper if they do not make efficient use of those cars.⁵³

⁵² Apparently, the Complainants seek to add time to BNSF's storage tariff because they believe that the storage tariff should replace the demurrage tariff for agricultural covered hoppers. Complainants' Statement at 66 n.34.

⁵³ The Complainants assert that 98 percent of the time a "C" pool car on BNSF remains assigned to a specific shipper at a specific origin on a repetitive basis. Complainants' Statement at 63. Given the highly specialized nature of many of those cars, that is not surprising. Langston VS at 28. But the only way a shipper can be assured that those cars will always be available for its use is by entering into an agreement with BNSF that commits the shipper to pay storage charges on terms that, on balance, are more onerous than BNSF requires of private car shippers. (Private car shippers receive until the second 12:01 am after constructive placement of their cars under BNSF's storage tariff before charges begin to accrue, while shippers with true car assignments begin accruing charges after the first 12:01 am. They pay a flat \$25, rather than a graduated \$10-15-25, and they pay \$75 per day if they do not take the assigned cars on their "want date.") Clearly, shippers would not enter into these kinds of agreements if they believed that the mere placement of a car into a "C" pool effectively guaranteed them the exclusive use of those cars. Langston VS at 29.

Moreover, while BNSF cannot vouch for the accuracy of the L.E. Peabody study,⁵⁴ that study itself indicates that the "free time" that shippers using "C" pool cars supposedly enjoy is steadily shrinking. By their own calculation, in just a few years (between 2001-2002 and 2004-2005) the average time between the arrival of empty "C" pool cars at the last station before the shipper's facility and the actual or constructive placement of those cars has been cut nearly in half, from 3 days to 1.8 days. That is a tremendous increase in efficiency. And most of those cars are never even required to be constructively placed. The great majority are actually placed at the shipper's facility in less than two days.⁵⁵ See L.E. Peabody VS, Exh. TC/PB-1. The Complainants are nonsensically arguing that they should have 5 days of free time before they begin to pay storage charges on their cars on the basis of a study showing that most "C" pool cars are actually placed in under 2 days.⁵⁶

⁵⁴ Messrs. Crowley and Burris nowhere explain how they chose their two 60-car samples; thus, no assessment can be made on the face of their report of whether these samples are representative of "C" pool traffic.

⁵⁵ Actual placement in an average of less than two days is quite a good result. BNSF, like other railroads, does not normally switch a shipper facility more than once a day, and often does not perform switches on weekends. *Capitol Materials, Inc.*, slip op. at 8. If a car arrives at a yard after the switch job has left for the day, it cannot be delivered for at least a day, and, in many cases if a weekend intervenes, for at least three days. When all of the other operational variables that affect switching operations in a yard, including the necessity to prioritize different operations when a busy yard is operating at or above capacity, an average of less than two days to place a car is particularly impressive.

⁵⁶ It bears emphasizing that once a shipper orders a car placed at its facility, whether the car involved is a private car or a BNSF-controlled car, the shipper does not incur either demurrage or storage charges for the time it takes BNSF to actually switch and spot the car (unless it is a BNSF-controlled car that has been assigned by agreement to a particular shipper). *Langston VS* at 10. Thus, once they order in a car, the

In an effort to buttress their argument for extra free time, the Complainants argue that BNSF is obligated to hold TTX and Railbox cars empty for 5 days awaiting a loading order. Complainants' Statement at 66. To call this attempted analogy to "free time" misleading is charitable. TTX distributes TTX/Railbox cars to its owner-customer railroads, including BNSF, based on distribution methodologies specific to particular car types.⁵⁷ The owner-customer railroads pay car hire on the cars they use (of which a portion goes back into their pockets as owners). If a car on a specific railroad is deemed by that railroad to be not needed for a period of time, the railroad notifies TTX and the car is placed in a "surplus status" if it has sat idle for 5 days in the same location. The car goes "off-the-clock" and the railroad is not liable for car hire from that point. TTX then looks for other roads that may want that car type. If another railroad requires that car for service on that road, then instructions are issued to move the car to interchange. Alternatively, if no other railroad wants the car, the car remains in "stored surplus." TTX assumes the cost (although, as owners, all of the railroads share in that cost). Langston VS at 29.

Obviously, TTX's per diem arrangements with its owner-customers have nothing to do with how much "free time" a shipper that requests a car from BNSF is allowed

Complainants do not incur any charges arising from any delay that BNSF experiences in getting the car from its yard to the shipper's facility. For all intents and purposes, therefore, the Complainants are seeking to use the average time that BNSF takes to actually place "C" pool cars to give private car shippers more time to leave their cars sitting on BNSF's track **before** they order them in. If L.E. Peabody removed from its study the time spent actually placing "C" pool cars that are never constructively placed, the average "free period" for the shipper would miniscule.

⁵⁷ None of those car types includes the kinds of tank cars and covered hopper cars used by the Complainants. Langston VS at 29.

before the shipper must begin paying demurrage or storage charges. From the shipper's perspective, BNSF treats TTX cars on its system the same as any other car it owns or leases. If the shipper does not make a specific equipment request for a car reasonably in advance of the want date, there may well be no car available for the shipper at all; and if the shipper does not order in a car on its want date, it must pay demurrage. BNSF is not obligated to hold TTX cars for any period of time awaiting a loading order from a shipper. If a shipper does not promptly take that car (or any other BNSF-controlled car), BNSF can send that car wherever on its system it is likely to get the most productive use. Langston VS at 30.

The Complainants' strained effort to draw analogies between private cars, on the one hand, and TTX/Railbox cars and the tiny category of "C" pool cars, on the other hand, only serves to underscore the weakness of their case. The only time that a shipper has the same control over the use of a BNSF-owned or leased car that the shipper has over its own private car is when BNSF has an agreement with the shipper assigning a BNSF-owned or leased car to the shipper for its exclusive use. On balance, the storage charge requirements for cars subject to such agreements are *more onerous* than the charges that BNSF applies to private cars. The Complainants, accordingly, have no basis upon which to complain of discrimination against private cars.

D. BNSF Is Not Obligated Either to Furnish Track for Holding Cars Free of Charge or to Pay Private Car Shippers to Provide Sufficient Track Space to Hold Their Cars Prior to Loading

The last claim that the Complainants make in this case is that it is a violation of Section 10745 for BNSF not to pay an "allowance" to shippers for shippers to hold their

own empty cars prior to loading.⁵⁸ Complainants' Statement at 66-69. The premise of this argument is that tracks on which to hold empty cars prior to loading are "instrumentalities of transportation" that BNSF is responsible to provide, and if a shipper provides that track instead of BNSF, the shipper is performing a "service" for which it is entitled to compensation. *Id.* at 67. Not surprisingly, the cases that the Complainants cite for this proposition pre-date the Staggers Act, because the archaic "instrumentality of transportation" doctrine upon which they rely was discredited long ago.

In fact, it was the "instrumentality of transportation" doctrine that resulted in the "outmoded, impractical, and irrational prohibition against tariff charges for repair movements" that the ICC overturned in *General American Transp. Corp. v. Indiana Harbor Belt R.R.*, *supra*, slip op. at 2. As the ICC made clear there, the issue is not whether the railroads are "responsible" for providing a service, but whether they may charge separately for distinct components of their services. *Id.* The fact that the railroads may at one time have provided empty repairs moves, or reciprocal switching services, or track for holding empty or loaded cars, without a separate charge, does not

⁵⁸ Section 10745 provides: "A rail carrier providing transportation or services subject to the jurisdiction of the Board under this part **may** establish a charge or allowance for transportation or service for property when the owner of the property, directly or indirectly, furnishes a service related to or an instrumentality used in the transportation or service." [emphasis added] While this provision on its face **allows** a railroad to pay an allowance, the Complainants argue that Section 10745 should be read to **require** an allowance to be paid for any activity performed by a shipper that is an integral part of rail transportation. Complainants' Statement at 67.

mean that the industry is consigned forever to either bundling together all charges in a single line-haul rate or paying an "allowance" to a shipper.⁵⁹

The Complainants do not dispute that railroads today are free to set their line-haul rates at whatever levels they require to cover their costs. Thus, even if BNSF could not charge separately for its storage and diversion services, it could raise its freight rates to cover those costs. Of course, as discussed in Part III.B.2. above, this "bundled" approach to ratemaking has the decidedly adverse effect of encouraging wasteful storage and diversion practices by car owners and clogging the rail system with cars held on the railroads' tracks. Langston VS at 19. By giving individual shippers and car owners no incentive to engage in efficient storage and diversion practices, bundled line-haul charges create costs for the entire industry and require shippers that do not create those costs to cross-subsidize those that do. It was precisely to reduce this kind of cross-subsidization that the Staggers Act encourage railroads to unbundle their line-haul rates and set separate charges for separate services.

The Complainants' specific request that they be compensated for constructing or leasing track to hold their cars only underscores the legal and economic bankruptcy of their position. Complainants' Statement at 68. Most shippers are managing their fleets and their facilities so as to avoid imposing on BNSF any costs of holding their empty private cars prior to loading. Langston VS at 15-16. They are not here seeking to be

⁵⁹ The fact that railroads may in some instances **choose** to pay allowances to encourage shippers to perform their own switching or to issue their bills of lading electronically (Complainants' Statement at 68), does not mean that BNSF or any other railroad is **required** to do so. When it comes to electronic bills of lading, for example, a railroad might well decide to charge **extra** to shippers who do **not** issue electronic bills of lading, rather than to pay an allowance to those who do. These are business decisions, not legal decisions.

compensated for the costs they incurred in doing their part to promote a fluid rail system, and they should not be required to cross-subsidize through higher line-haul rates the steps that the Complainants have properly been required to take with their own fleets and facilities.⁶⁰

E. BNSF's Empty Private Car Storage Program Is Completely Consistent with the Precatory "Principles" Articulated by NITL and ACC In Their Amicus Brief

The joint amicus brief filed by NITL and ACC is noteworthy, first, for what it does *not* say. It does not claim that BNSF's storage and demurrage charges are unlawful in any respect. Although filed over two weeks after the Complainants' Statement, the NITL-ACC brief does not endorse any of the Complainants' factual contentions. Indeed, it makes no specific reference to any of the Complainants' arguments.

Instead the NITL-ACC brief articulates four "principles" that it believes the Board should consider as it analyzes the issues in this case: (1) that the rules and practices of the rail industry should not unreasonably discriminate between private and railroad equipment, (2) that the rules applicable to different types of equipment should be reasonably consistent, (3) that owners of private equipment should not be penalized for the railroads' service failures, and (4) that the level of storage or demurrage charges should "fit" the congestion problem at which it is aimed. NITL-ACC Br. at 6-8. None of those principles is supported by any authority; accordingly, they are at best precatory.

⁶⁰ It bears emphasizing as well that it would be virtually impossible to distinguish track that a shipper would have constructed as a result of the natural growth of their facilities from track that allegedly was required only because of BNSF's empty private car storage program.

In any event, however, BNSF believes that its empty private car storage program is completely consistent with these precatory principles.

First, BNSF's charges do not unreasonably discriminate between railroad and private equipment.⁶¹ As discussed in Part III.C.2. above, both the level of BNSF's empty private storage and demurrage charges and the amount of free time provided are comparable to the demurrage charges that BNSF assesses on empty railroad cars. The Complainants attempted an elaborate demonstration that shippers using railroad cars in the tiny "C" class and those using TTX cars were somehow favored over shippers using private cars, but the only shippers using "C" class or TTX cars who are comparable to private car shippers are those with whom BNSF has agreements assigning those cars to those shippers for their exclusive use. Far from being favored, those shippers are subject to more onerous storage and demurrage charges than private car shippers. Thus, the first NITL-ACC principle is easily satisfied here.

Second, BNSF's rules applicable to different kinds of equipment are reasonably consistent. As discussed in Part III.C.1., there is no inconsistency between applying a "straight" \$10-15-25 storage charge to all cars other than grain and sugar covered hopper cars and an "average" \$50 demurrage charge to grain and sugar covered hopper cars. The "average" plan, if anything, may be more advantageous to shippers than the "straight" plan. *Langston VS* at 31. Moreover, the principal reason for the \$50 demurrage charge on private grain and sugar cars was to align the demurrage program

⁶¹ As a legal matter, of course, railroads are permitted to establish rules and practices that favor the use of their own cars over the use of private cars on their systems. See, e.g., *Allied Corp. v. Union Pacific R.R.*, 1 I.C.C.2d 480, 483 (railroads have the "right to use their own cars in preference to private cars in fulfilling [their common carrier] obligation").

on those cars with the demurrage program on BNSF-controlled grain and sugar cars. BNSF cannot reasonably be criticized for establishing different programs for types of private cars when its purpose was to avoid establishing different programs private and railroad-owned cars of the **same** type.

Third, as discussed in Part III.B.6., BNSF's empty private car storage program does not deprive private car shippers of the right to make whatever claims of service failure are appropriate for particular movements at particular facilities. Of course, where an "average" demurrage tariff is involved, the Board must take that into account in addressing any "bundling" claim. Further, BNSF does not understand NITL-ACC's concern about remedies for "erratic" railroad service (NITL-ACC Br. at 7) to extend to simply variable car cycle times. The law is clear that, under the particular circumstances of the case, the complainant must demonstrate a clear service failure that was the fault of the railroad.

Fourth, the level of the storage charges here certainly appear to "fit" the problem to which they are addressed. As discussed in Part II.B.1., they are at or below the level of storage and demurrage charges that BNSF has long assessed for loaded private cars, and for both loaded and empty railroad cars. Moreover, they have succeeded in changing shipper behavior and helping BNSF keep its system fluid, despite an enormous increase in traffic in the last four years.

In sum, none of NITL-ACC's precatory principles is transgressed by BNSF's empty private car storage program. In fact, BNSF's charges are completely consistent with those principles.

F. Neither the Complainants Nor Their Affiliates Are Entitled to Any Damages

The Complainants assert that several of them are entitled to monetary damages or storage charges paid to BNSF, in addition to "allowances" for track they may have constructed or track leases they may have entered into. Complainants' Statement at 69. The Complainants do not, however, offer any proof of the amount of damages to which they assert they are entitled. Instead, they invite the Board to bifurcate the proceedings and "deal with the issue of monetary damages, if appropriate, in a supplemental process of the type contemplated at 49 C.F.R. § 1133.2." *Id.* at 69.

BNSF would not, in principle, oppose the Complainants' suggestion were there any prospect of damages here. However, for the reasons discussed above, BNSF submits that there is no doubt that BNSF's empty private car storage program is entirely lawful, and, even if the Board found that some aspect of the program required modification, it would not follow that the Complainants were entitled to damages.

Second, insofar as the Board has any concern that there are individual movements and locations where an individual Complainant might be able to prove that the assessment of demurrage or storage charges was unreasonable, because there was some kind of service "fault" or "error" on BNSF's part, this is not the forum for that Complainant to seek either to recover damages or to avoid the payment of charges. None of the Complainants has sought to demonstrate any service "fault" or "error" by BNSF. If any wishes the do so, the place for such a demonstration is either in defense of a collection action by BNSF in court or in a individual proceeding at the Board concerning specific charges on specific movements at specific facilities.

Finally, the Complainants seek a ruling from the Board on the question of whether they should be belatedly permitted for damages purposes to add their subsidiaries and affiliates to the list of Complainants in this case by way of an Amended Complaint. Complainants' Statement at 70-71. BNSF addressed this issue at length in a letter filed with the Board on April 1, 2005. Rather than repeat its arguments here, BNSF has attached a copy of that letter for the Board's convenience as Appendix A.

IV. CONCLUSION

For the foregoing reasons, the Board should reject the NAFCA Complainants' claims and dismiss the Amended Complaint in this case in its entirety.

Respectfully submitted,

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Dated: September 16, 2005

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "BNSF Railway Company's Reply Statement of Fact and Argument" was served this 16th day of September 2005, by hand-delivery on:

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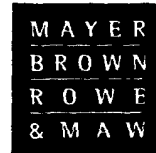
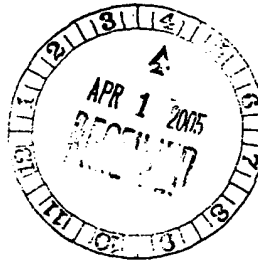
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APPENDIX 1

213663



April 1, 2005

BY HAND

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Re: Docket No. 42060 (Sub-No. 1) – North America
Freight Car Association v. BNSF Railway
Company

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Dear Secretary Williams:

By letter dated March 14, 2005 ("March 14 Motion"), the North American Freight Car Association ("NAFCA") moved to amend its nearly four-year-old Complaint in this proceeding. NAFCA seeks to add numerous affiliates and subsidiaries of the named Complainants as additional Plaintiffs. BNSF Railway Company ("BNSF") opposes NAFCA's Motion.¹

NAFCA first filed its Complaint in this subdocket on August 29, 2001. NAFCA brought its Complaint "on behalf of itself and 11 of its members ('Complainants') listed in Appendix A hereto who seek affirmative relief including damages, if appropriate." Compl. ¶ 1.² NAFCA

¹ NAFCA did not style its letter as a Motion to File an Amended Complaint. As explained in this Reply, because the proposed amendments are not contemplated by 49 C.F.R. § 1111.2, BNSF is treating NAFCA's March 14 letter as a motion. Accordingly, and because the text of the proposed Amended Complaint merely adds new parties to the caption, BNSF is not filing an Answer to the proposed Amended Complaint. To the extent an Answer to the proposed Amended Complaint is required, BNSF incorporates, by reference, its September 18, 2001 Answer in this proceeding as though it was set forth against all of the Complainants identified in the proposed Amended Complaint.

² Appendix A to the Complaint lists the following companies as Complainants: A.E. Staley Manufacturing Company, Ag Processing Inc., Archer Daniels Midland Company, Bunge North America, Inc., Cargill, Incorporated, Cenex Harvest States Cooperative, Chicago Freight Car Leasing Company, ConAgra Trade Group, First Union Rail, GLNX Corporation, and The David Joseph Company. The David Joseph Company is no longer participating in these proceedings, and two companies have changed their names. See March 14 Motion at 1 n.1 (noting that A.E. Staley Manufacturing Company is now Tate & Lyle Ingredients Americas, Inc., and ConAgra Trade Group is now ConAgra Food Ingredients Company).

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explicitly *disclaimed representation* on behalf of any of its "members whose names are not listed in Appendix A." Compl. ¶ 1 n.1. BNSF filed its Answer on September 18, 2001, and shortly thereafter filed a Motion to Dismiss. On August 11, 2004, the Board denied BNSF's Motion to Dismiss and directed the parties to submit a joint procedural schedule. By Order dated January 6, 2005, the Board adopted a procedural schedule that contemplated the completion of written discovery by March 22, 2005 and the completion of depositions by April 25, 2005. NAFCA "and 10 of its individual members" subsequently sought an extension of the procedural schedule. Order, March 18, 2005, at 1. That request was granted by the Board, allowing written discovery to be completed no later than April 15, 2005 and depositions to be completed no later than May 20, 2005. *Id.* at 2.

NAFCA now seeks to amend its Complaint to "clarify that each named Complainant's affiliates and subsidiaries are parties to the Complaint." March 14 Motion at 1. But NAFCA's request is more than a mere clarification of its nearly four-year-old Complaint. If granted, NAFCA's Motion will expand – exponentially – the scope of this case to the extent that the heretofore-unidentified affiliates and subsidiaries become parties to this proceeding and seek to recover damages from BNSF.

NAFCA's motion should be denied for two reasons. *First*, the regulation cited by NAFCA as the basis for its filing of an Amended Complaint does not permit a complaint to be amended to add additional parties. Instead, it explicitly provides that "[a]n amended or supplemental complaint may be tendered for filing *by a complainant* against a defendant or defendants *named in the original complaint*." 49 C.F.R. § 1111.2. Thus, an amended complaint may only be filed by a complainant named in the original complaint who seeks to assert additional claims against a defendant or defendants named in the original complaint; an amended complaint may not be used to add additional complainants who were not named in the original complaint.

Second, the Board's regulation regarding the filing of amended complaints requires that an amended complaint "stat[e] a cause of action alleged to have accrued *within the statutory period immediately preceding the date of such tender*" of the amended complaint. 49 C.F.R. § 1111.2 (emphasis added). *See also South-West Railroad Car Parts Co. v. Missouri Pac. R.R. Co.*, No. 40073, 1988 I.C.C. Lexis 370, at *7-*8 (Dec. 1, 1988) (I.C.C. has "not allowed an amended complaint to relate back to a period beyond the statute of limitations"). But NAFCA is attempting an end-run around that express regulatory prohibition by seeking to assert claims that accrued more than two years before the filing of its motion. *See* March 14 Motion at 4 ("The Amended Complaint obviates any need for the Board to decide at this juncture which parties, if any, are entitled to recover monetary damages or [sic] the period for which such damages are recoverable."). The Board should reject NAFCA's gambit.

As the Board's predecessor has noted, statutes of limitation "afford[] carriers a vital measure of commercial certainty, since they know that beyond a certain time they are not liable for refunds on revenues they have collected. Adequate financial planning requires some degree of certainty. That is a purpose of the statute of limitations." *South-West Railroad Car Parts Co.*,

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1988 I.C.C. Lexis 370, at *7. On that basis, the I.C.C. rejected an attempt to "treat [an] amended complaint as relating far back, to encompass the 2-year period preceding the original complaint" because it would require the agency "to defeat the purpose underlying the statute of limitations and our implementing rule." *Id.* But that is precisely what NAFCA endeavors to do here. By attempting to litigate claims by affiliates and subsidiaries that are now more than two years old, NAFCA is robbing BNSF of commercial certainty and its ability to engage in adequate financial planning.

The older I.C.C. precedent cited on page 3 of NAFCA's Motion actually reinforces the principle that notice within the limitations period is a necessary (though not sufficient) prerequisite to asserting a claim. A critical fact in both decisions is that an informal complaint was filed within the relevant limitations period that identified the precise shipments for which plaintiffs sought reparations, thus providing defendant with notice of the claims. In *Samuel Werner, Inc. v. Director*, the I.C.C. found that an informal complaint filed by consignees seeking reparations tolled the statute of limitations for consignors who were later identified in the formal complaint that was filed after the statute of limitations had run. 107 I.C.C. 363, 365 (1926). Tellingly, the I.C.C. limited its holding to those specific shipments that were identified within the limitations period and *excluded from its holding a shipment that was not previously identified during the limitations period.* *Id.* at 364.³ Similarly, in *International Agricultural Corporation v. Louisville & Nashville Railroad Company*, complainant prepared "complete lists of all shipments with respect to which it claimed reparation" and "which were served upon the defendants." 29 I.C.C. 391, 393 (1914). Only after the two year statute of limitations had elapsed did it appear that the freight for certain of those shipments had been paid by consignees rather than the complainant. *Id.* at 393. But unlike *Werner*, the previous identification of shipments was not enough; the I.C.C. *rejected* complainant's argument that it should be able to recover on behalf of the consignee. *Id.* at 393-95. Here, of course, claims by the newly-identified affiliates and subsidiaries represent entirely new movements for which BNSF had no prior notice. This case is entirely different, then, from *Werner* and *International Agricultural Corporation*, in which the defendant had notice – from day one – of the shipments involved, the scope of the parties' claims, and its potential liability. And because neither case involved the filing of an *amended complaint*, neither speaks directly to NAFCA's attempt pursuant to Section 1111.2 to add new parties.

The Board's unambiguous regulations and clear precedent provide a firm foundation for denying NAFCA's motion. But to the extent the Board needs additional authority to resolve this dispute, the treatment of amended complaints by federal courts reinforces the impropriety of NAFCA's attempt to add new plaintiffs at this late date. Pursuant to Rule 15 of the Federal

³ The agency relationship between the consignor and the consignee was also critical to the I.C.C.'s analysis. *Werner*, 107 I.C.C. at 365-66 (finding that the consignee had a duty "to take the necessary measures to protect in the matter of freight charges not only its own interests but also that of the consignors with whom it shared equally in the profits"). NAFCA has presented no evidence that such an agency relationship exists here.

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Rules of Civil Procedure, an amended complaint seeking to add new plaintiffs relates back to avoid the applicable statute of limitations if a defendant "had notice of the additional plaintiff and [its] claim." *Fleck v. Cablevision VII, Inc.*, 799 F. Supp. 187, 191 (D.D.C. 1992). "A defendant has notice of the claims of an additional plaintiff if it is *aware of the existence of the new plaintiff's claims and of the involvement of the new plaintiff in the original action.*" *Id.* (emphasis added). See also *Leachman v. Beech Aircraft Corp.*, 694 F.2d 1301, 1309 (D.C. Cir. 1983) ("The touchstone once again is whether the defendant knew or should have known of the *existence and involvement* of the new plaintiff.") (emphasis added); *Williams v. United States*, 405 F.2d 234, 238 (5th Cir. 1968) ("Not only must the adversary have had notice about the operational facts, but it must have had fair notice *that a legal claim existed in and was in effect being asserted by, the party belatedly brought in.*") (emphasis added); *Pappion v. Dow Chem. Co.*, 627 F. Supp. 1576, 1580 (W.D. La. 1986) (same). Thus, for example, a plaintiff widow's attempt to amend her complaint and add her children's wrongful death claims after the applicable statute of limitations had run was rejected because the defendant "did not know that [the children were involved in] this action." *Pappion*, 627 F. Supp. at 1581. And in *Fleck*, the court allowed plaintiffs to amend their securities fraud complaint to add a plaintiff. However, in that case "[t]he original complaint allege[d] a harm to the partnership," and the additional plaintiff was a member of that partnership. *Fleck*, 799 F. Supp. at 191-92. On that basis, the court found that the defendants "had notice of [the partner's] potential claim." *Id.* at 192.⁴

Here, BNSF had no notice of the potential claims of the Complainants' affiliates and subsidiaries. Until Complainants broached the subject with BNSF during discovery (March 14 Motion at 2), BNSF was not on notice that NAFCa was asserting claims on behalf of those entities. To the contrary, NAFCa explicitly *disclaimed that it was representing any entity other than those parties listed in Appendix A to the Complaint.* See Compl. ¶ 1 n.1. For that reason, NAFCa's argument that "BNSF has been dealing with Complainants' corporate 'families' on an integrated basis for years" avails them nothing. March 14 Motion at 3. Assuming that statement to be true, mere knowledge of the existence of these subsidiaries is insufficient to impute knowledge that BNSF knew that those subsidiaries had legal claims that they sought to assert against BNSF. See *Leachman*, 694 F.2d at 1309 (requiring knowledge of "existence and involvement" of proposed new plaintiff); *Williams*, 405 F.2d at 238 (requiring notice that a legal

⁴ The court also found that the defendant had adequate notice of the additional plaintiff's claims because the case was originally brought as a putative class action. *Fleck*, 799 F. Supp. at 192. That fact is not relevant here.

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claim was being asserted by proposed new plaintiff). Such knowledge is a prerequisite for an amended complaint to relate back to the filing of an original complaint.

For the foregoing reasons, NAFCA's Motion to Amend the Complaint should be denied.

Sincerely yours,



Robert M. Jenkins III
Counsel for BNSF Railway Company

cc: Andrew P. Goldstein
Sidney L. Strickland, Jr.

APPENDIX 2

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET No. 42060 (Sub-No. 1)

NORTH AMERICA FREIGHT CAR ASSOCIATION

v.

BNSF RAILWAY COMPANY

VERIFIED STATEMENT OF DOUGLAS W. LANGSTON

My name is Douglas W. Langston. I am a General Director for BNSF Railway Company with 16 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 most 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 (along with other efforts to address rail-controlled railcar velocity). I have also been involved in most 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. Today, this includes demurrage, private car storage, switching, storage lease management, exception contracts, intermodal storage and other intermodal-related ancillary charges, 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.

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

A. BNSF's Private Car Storage Policy is Part of an Overall Coordinated Approach to Deal with the Increasing Congestion on BNSF's System

When railroads had excess track capacity, which was the case through much of the post-World War II era, track space was relatively cheap. Maintenance of excess track, however, is not cheap, and railroads generally abandoned underperforming track rather than expend scarce maintenance resources on track that was peripheral to their core systems. Today, BNSF does not have significant excess track. Not only does BNSF incur substantial maintenance costs to maintain existing track, but it incurs substantial opportunity costs if track that could be used for

active switching and through traffic is instead tied up with stored cars. New track costs anywhere from \$1.5 to \$2.5 million a mile (excluding land costs which can be significant, especially in urban areas), depending on location, and it too has significant maintenance costs.

In addition to this lack of excess track, BNSF and other Class I rail carriers have, as has been widely recognized, faced unprecedented surges over recent years in the demand for rail transportation resulting from increases in all segments of our business. Rail traffic has reached all-time highs, and BNSF and other railroads have been challenged to maintain and grow capacity on their systems and to keep their systems fluid. We have even been required for the last two years to file reports with the Surface Transportation Board setting forth our plans for addressing the capacity constraints we face.

In recognition of this need, BNSF has undertaken a number of steps in a multi-faceted approach over the last five years to address the congestion on its system, concerns about equipment velocity, and the overall fluidity of the network. As I detail, these efforts have included steps directed both to BNSF owned or leased cars as well as to private cars.

Specifically, in 2000, BNSF undertook a corporate-wide initiative to address "Customer Time" – *i.e.*, the amount of time rail cars, both railroad-controlled cars and private cars, spend loading and unloading at customers' facilities. To begin, BNSF sought to better educate its customers. We established a team of professionals well versed in our rules and systems. The team's mission was to fix problems and address issues proactively. They were aligned with our operations and commercial teams so that they were afforded a complete picture of all the issues and were able to address those issues.

From the start, we learned that BNSF's storage and demurrage practices were out of line with the practices of other major carriers and that we were unintentionally effectively causing

part of our congestion problem through our lower charges and more lax practices. Shippers were in effect taking advantage of BNSF to store their cars. Thus, we determined to bring our policies more in line with the competition and to encourage beneficial behavior changes. Among other things, with respect to car utilization in particular:

- BNSF developed new computer-based systems for tracking both loaded and empty equipment and allocating railroad-controlled cars based on equipment requests to the customer destinations on its system with the greatest demand for cars.
- BNSF enhanced its website and electronic tools to make it easier for customers to review their inventory, release and order cars online, and review, dispute, and pay their bills online.
- BNSF further tightened its controls over the utilization of railroad-controlled cars by (i) raising the daily rate for most types of cars from \$50 to \$75, (ii) reducing demurrage credit days ("credits") for both loading (from 2 days to 1 day) and unloading (from 3 days to 2 days) railroad-controlled cars and (iii) requiring "want" dates from shippers who used railroad-controlled equipment and charging demurrage on cars constructively placed for the shipper.
- BNSF endeavored to reduce the incidence of switching and private car storage by (i) raising its intra-terminal switch charges from \$225 to \$300, (ii) increasing the penalties for overloads; (iii) increasing its weighing charge from \$300 to \$500; and (iv) raising its charges for leasing track to hold empty or loaded private rail cars.
- BNSF further determined to institute (i) a new program of storage charges for holding empty private cars awaiting loading beyond a reasonable free period and (ii) a new program of diversion charges for diverting an empty private car or block of cars to a different destination, consignor, or consignee than was shown on the original bill of lading.
- BNSF made great efforts to communicate and educate customers, operations, and the commercial teams of the desired outcomes. This included training materials, Q&A's, informational brochures, public announcements, etc.

Taken together, these programs and steps represent a significant undertaking by BNSF as well as by its customers to keep the BNSF system fluid, increase capacity, and reduce unnecessary delays and congestion. In the end, shippers using both rail-controlled and private cars have benefited from this undertaking, and they have also contributed to its success.

B. Purpose of BNSF's Private Car Storage 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 July 2001 private car storage policy, BNSF had an excessive number of empty private cars sitting on its tracks for extended periods of time.¹ 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.²

¹ Over the past two decades, a number of the industries that use private cars to ship their products have experienced tremendous growth in the demand for their products. For example, statistics from the American Chemical Manufacturers show that North American producers of major thermoplastic polymers increased their production capacity of various types of plastics by approximately 12 million metric tons (or approximately 38 percent) from 1994 to the year 2000. Although the plastics industry expanded their plant facilities and increased production to meet this increase in demand, many shippers did not increase the amount of available track space to hold empty private cars when they were not needed for loading. Instead, such shippers took advantage of the fact that BNSF was providing them with free storage service. As a result, these shippers began using up more and more of BNSF's track space to store their empty private cars and the amount of congestion on BNSF's system increased accordingly. Other market segments using private equipment, ranging from grain to intermodal, have experienced similar explosive growth, and all have contributed to the congestion problem.

² Complainants make much of the fact that at the same time BNSF identified a substantial number of "stored serviceable" empty private cars on its system in 2001, there were also a substantial number of railroad cars identified as "stored serviceable" on its system. BNSF never suggested otherwise. It was, and is, just as attuned to the need to improve the utilization of railroad-owned or controlled cars on its system as to the need to improve the utilization of shipper-owned or controlled cars. And the very report cited by the Complainants, which BNSF provided in discovery for every quarter from 2001 to the present, shows marked and steady improvement in both the number of "stored serviceable" private cars on BNSF's system and the number of "stored serviceable" railroad cars on BNSF's system. *See Exhibit A.*

The congestion caused by these empty private cars contributed to 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. BNSF was even forced in some instances 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 destination yard. Such additional movements unnecessarily increased the amount of car handling and time needed to prepare BNSF's line haul trains and forced BNSF to incur additional expense moving them around.³

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 for storage and to keep their cars moving efficiently through the rail system. BNSF approached private car owners at various times to ask for their help in reducing the level of congestion caused by empty private cars sitting on BNSF's tracks. The majority of private car

³ 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, with cars gathered from various shipper facilities in the Houston area that are destined for various receivers' facilities in the west. If a block of cars on that train is destined for the Seattle area, it is unlikely to travel directly to Seattle. Instead, it will be combined with blocks of cars destined for, say, Denver, Colorado, Laurel, Montana, and Pasco, Washington. When the train arrives in Denver, BNSF will switch out the blocks of cars destined for Denver and Laurel and 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 and pick up another block of cars headed for Seattle. Once the train arrives in Seattle, the cars will be switched out of the train and moved to the individual receiver facilities for which they are destined.

"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.

owners did not respond to these requests and essentially left BNSF with two options. We could build or lease track to hold all of these cars and pass along those costs to all of BNSF's customers through an increase in freight rates, or we could adopt a policy that requires those who use BNSF's tracks for storage to pay for that service. BNSF determined that obviously the most efficient, effective, and fair solution was to ask its customers who use its storage service to pay for that service.

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 (and to target the offenders rather than the overall population of customers).⁴ As a general matter, such charges have been successful at encouraging shippers to keep loaded private and loaded and empty railroad owned and controlled cars moving.⁵ BNSF has approximately 17 different programs covering different kinds of cars, loads, empties, commodities, and products. BNSF endeavors to tailor these programs to the traffic and market

⁴ The railroads' storage and demurrage programs often differ significantly from one another. Different markets and regions of the country often have different needs. Even if a program is demonstrably effective for one or more railroads, others may wait some time before emulating a program – and even then they are unlikely to adopt precisely the same program.

⁵ Such charges are not limited to rail cars. Railroads also apply them to intermodal equipment like shipping containers. Recently, in response to particularly acute congestion problems at its intermodal facilities, BNSF significantly tightened its storage programs applicable to shipping containers. Shippers' free time was reduced to as little as 24 hours per day at some terminals, and BNSF increased the daily storage charge from \$50 per day to as much as \$150 per day, or on a "straight" plan that does not permit any "credits" to offset the charges. The result has been a substantial augmentation of BNSF's ability to handle more traffic through its intermodal facilities. Between 2004 and 2005, for example, inbound parking capacity increased by as much as 24% and 36% at BNSF's St. Paul and Los Angeles (Hobart) facilities, respectively.

conditions in each equipment and product area. As conditions change, BNSF adjusts its programs accordingly.

BNSF already assessed demurrage charges on loaded private cars that were left on BNSF's track beyond the 2nd 12:01 a.m. after constructive placement, and, in 2001, we also raised the rates for most of these programs and started charging for constructively placed time for railroad-controlled empties. We decided that a similar program for empty private cars was also needed. BNSF designed a private car storage program to encourage shippers to keep their cars moving and to help BNSF recover the costs associated with storing the empty cars on its tracks. One of the virtues of this approach is that it does not require all private car shippers to pay storage. Like our other programs, it only requires those to pay who do not timely take their cars.

BNSF shared information on its new private car storage policy on numerous occasions well before its proposed effective date. For example, six months before it implemented the program, BNSF began notifying all of its shippers of the new program through the Marketing News feature on its website, as well as faxes and e-mails directly to customers. Thereafter, BNSF held meetings and had conversations with shippers and shipper representatives both in group sessions and one-on-one. Before implementing the program, BNSF conducted two multi-day forums with shipper representatives that were devoted entirely to explaining the program and discussing shippers' questions and concerns about the program. BNSF also made presentations regarding the program to shippers' representatives on the NITL's Railroad Transportation Committee and at meetings of the Pacific Northwest Association of Rail Shippers and BNSF Customer Advisory Board.

Further, BNSF's Account Managers were charged with contacting their individual customer accounts to explain the new program and respond to individual shippers' questions and concerns. Many met with individual shippers for that sole purpose, or they held telephone discussions. Insofar as shippers undertook to expand their own facilities by building more track to hold their cars, BNSF offered to waive its charges in the first year to offset shippers' construction costs. Where it had track available, BNSF also offered to enter into transitional leases, at costs far below the charges the shipper would incur under the storage charge regime, to hold the shippers' cars.

In addition, 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.

C. 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 cars and covered hoppers used to transport grain, grain products, and sugar cars ("grain cars"), held on BNSF tracks.⁶ See BNSF Private Car Storage Book 6005 and BNSF Demurrage Book 6004-A. BNSF published a storage charge for empty private equipment (with the exception of empty private grain cars) held on BNSF track beyond the free period. These storage rules provide that shippers begin to accrue charges beyond 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

⁶ Also effective July 1, 2001, BNSF published changes to its Diversion Book 6200-A, which established diversion charges of \$150 per car, up to a maximum of \$450 per bill of lading, for changes in the movement instructions applicable to empty private cars.

four (4) 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.⁷ Once the car is ordered in by the shipper, the shipper is not charged for the time it takes the railroad to actually place the car at the shipper's facility.

Prior to these revisions, BNSF generally assessed demurrage charges of \$75 per debit day on loaded private and loaded or constructively placed empty railroad cars held on BNSF track. Loaded private covered hopper cars (carrying grain, grain products, and sugar) and loaded or constructively placed empty railroad-controlled covered hopper cars held on BNSF track were assessed a non-peak demurrage charge of \$25 per day. BNSF provided two free credit days for loaded cars, whether private or railroad cars, and two free credit days for constructively placed empty railroad cars.⁸ If a railroad car was assigned by agreement to a particular shipper, BNSF

⁷ Pursuant to the new private car storage policy, BNSF reduced its charge for holding loaded private equipment (with the exception of loaded private grain 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 (their own customers) with enough of an incentive to unload their private cars quickly.

⁸ Under the "average" demurrage system BNSF applies to agricultural covered hopper cars, each car is automatically assigned 2 "credits" when it is constructively placed with the shipper (*i.e.*, formally made available for the shipper's use). For each day the shipper does not order in the car, 1 "debit" is assessed. Thus, if only one car were involved, and the shipper ordered in the car within two days, no debits would accrue. If the shipper took three days to order in the car, one debit would accrue, and a demurrage charge would be assessed. Rarely, however, is only one car involved in a particular month. When, as is usually the case, multiple cars are involved, the shipper can take advantage of credits on some cars to offset debits on other cars.

assessed storage charges of \$25 per day for holding the car before the order date provided by the shipper, after which \$75 per day demurrage charge was assessed.⁹

BNSF has made several changes to its private car storage tariff since its initial adoption to try and reach an equilibrium between changing shipper behavior and the level of charges. These changes were made specifically to respond to concerns raised by shippers and private tank car owners. Thus, 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, non-agricultural empty private cars stored beyond the second 12:01 a.m. 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. Also, BNSF revised its storage tariff to provide one extra credit day for non-agricultural empty private cars that are loaded and shipped via a BNSF revenue line-haul move. *See* Item 1700, BNSF Private Car Storage Book 6005. Finally, in response to the concerns of private car owners that the \$25 charge did not provide enough incentive to consignees loading the shippers' cars to have them timely moved in line-haul service, BNSF reinstated its \$75 per day storage charge for loaded private equipment. *See* Item 1700, BNSF Private Car Storage Book 6005.

It bears emphasizing that the steps BNSF took to address the problem of empty private cars sitting on its on its tracks were conservative. For empty private grain covered hoppers, the demurrage terms are the same as for railroad covered hoppers, and the \$50 per day charge is less than the normal \$75 per day charge on other railroad cars. For empty private cars other than

⁹ Effective August 1, 2001, the demurrage charge for both railroad-controlled and private cars was increased from the \$25 non-peak rate to the \$75 peak season rate. Subsequently, it was lowered to \$50 per car, where it stands today.

grain cars, the \$10, \$15, or \$25 charge per car is much less than the \$75 per car charge on loaded private cars, and the free period allowed is the same as for loaded private cars.¹⁰

D. The Policy Has Been Effective

BNSF implemented its new private car storage policy on July 1, 2001. Now, four years later, it is clear that BNSF's private car storage policy, together with its other capacity-enhancing car utilization initiatives, is working. Overall, both railroad-controlled and private cars are demonstrating significantly greater productivity today than in the past. As shown in Exhibit B, BNSF's "inventory-to-load" ratio (*i.e.*, the average number of cars on BNSF's system divided by the average number of loads originated) improved for all cars (excluding coal and intermodal) from 22.21 to 18.92 between January 2002 and June 2005, and for all private cars (excluding coal and intermodal) in the same time period from 26.45 to 21.99.

In addition, as shown in Exhibit C, the total customer time for both railroad-controlled and private cars on BNSF's system has decreased by over 17% since 2002—with the average customer component of the cycle for railroad-controlled cars decreasing by 21.7% and for private cars by 15.3%. This *includes* private cars held on BNSF's track for the customer's benefit under lease or on spot within the customer's facility. BNSF is carrying more loads today than it carried in 2001 with only a marginal increase in the number of cars on its system. Between July 2001 and June 2005, BNSF's average daily loads for all car types rose 26.8% (from 204,613 to 209,438), while the number of cars on its system increased by only 2.4% (from 21,643 to 27,443). *See* Exhibit D.

¹⁰ Another useful comparison is to the charges that BNSF began assessing recently to address the problem of intermodal shippers leaving their containers sitting in terminals beyond a reasonable time. To address that problem, BNSF reduced the shippers' free time to as little as 24 hours at some terminals, and increased the daily storage charge from \$50 per day to as much as \$150 a day.

Further, as shown by the charts attached as Exhibits E and F, the total average amount of time all empty private cars spend on BNSF's track within customers' control before being moved has declined dramatically since BNSF adopted its private car storage policy. These charts 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.¹¹ The charts clearly show that since the storage policy was first adopted, the average time that private cars are left on BNSF's tracks has decreased by over one full day for industrial privates and by roughly half a day for agricultural privates. *See Exhibits E and F.*¹²

Moreover, the number of empty private cars being left on BNSF's track has decreased significantly as a result of the adoption of the policy. 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.

The fact that there has been no improvement in systemwide train velocity, terminal dwell time, or other measures of operating performance reported by BNSF does not mean, as NAFCA claims, that BNSF's private car storage policy and the other initiatives BNSF has taken to deal with its capacity constraints have not been effective. On the contrary, as described above, they

¹¹ I use the term "industrial" cars to refer here to all private cars other than private agricultural cars.

¹² NAFCA has asserted that BNSF's own cars have contributed more significantly to congestion than have private cars and thus that it is unfair for BNSF to have taken action only against private cars. BNSF has, however, not taken action only with respect to private cars. As described above, BNSF has employed a number of initiatives since 2000 to improve the efficiency of car utilization on cars that it owns or controls, and those initiatives have contributed substantially to the productivity improvements BNSF experienced between 2001 and 2005.

have been remarkably effective. Overall traffic has increased greatly in every traffic category, but BNSF has been able to handle that increased traffic without a substantial increase in the number of cars on its system (*see* Exhibit D) and without a substantial deterioration in its systemwide measure of operating performance.

Moreover, although train velocity has somewhat diminished, car velocity has substantially improved. Car velocity is a function of the total miles traveled by all cars on BNSF's system divided by their total time on the system. The more miles traveled in less total time, the greater the velocity. As shown in Exhibit G, between January 2001 and December 2004, the velocity of all agricultural and merchandise cars on BNSF's system improved by 6.1%. At the same time, BNSF's system unit miles were up by 22%. Unit miles measure length of haul as well as number of units. Thus, one car moving 1,000 miles equals 1,000 unit miles, as do 5 cars each moving 200 miles. For both car velocity and unit miles to have improved to this extent demonstrates a substantial jump in productivity.

Car velocity may substantially improve even when train speed does not due to a variety of factors. The first is increased train size. The higher the average number of cars on trains on BNSF's system, the higher the effective velocity for the cars involved. Operating larger trains improves effective velocity for cars that would otherwise wait for space on a later train departure. Second, BNSF has over time been successful at lowering the average number of intermediate handlings (train to train connections) required for cars on its system. This both reduces planned dwell time and reduces the opportunity for missed connections that result in more dwell time. Third, the train component of car velocity is a relatively small component of that measurement. Most car time is consumed with handling and dwell time in terminals and shippers' and receivers' facilities, rather than in train movements. Thus, a reduction in train

speed has only a minor impact on car velocity. That is why BNSF places such a strong emphasis on minimizing the time that cars sit on its tracks and in customers' facilities. Car velocity on BNSF's system has strongly benefited from BNSF's and customers' efforts to reduce the time that cars sit in constructive placement and in loading and unloading.

As the incentives provided by BNSF's private empty car storage program took hold, the number of cars subject to storage charges began to drop dramatically. As shown on Exhibit H, BNSF's billings for empty private cars sitting on its track beyond the allowed free period have dropped consistently every year since it initiated the program --

The NAFCA Complainants are particularly poorly positioned to complain about BNSF's charges. BNSF met with many shippers, including several of the NAFCA Complainants, concerning issues they had at particular locations, and BNSF has entered into a number of below-cost transitional track space lease agreements with shippers since the policy was implemented.¹³ 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 benefited from this offer by building its own private car storage track and having BNSF waive 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 four

¹³ As discussed below, the track rental rates BNSF is assessing do not even cover the costs of track construction, right-of-way land, and maintenance costs, much less the opportunity cost to BNSF from having that track tied up in storage service rather than active switching and line-haul operations.

years ago before the private car storage policy was implemented, which benefits both BNSF and its customers. BNSF continues to work with shippers who have particularized needs at individual locations.

The interests of the Complainants are narrowly focused on tank cars used to transport grain products (*e.g.*, soybean oil) and on covered hoppers used to transport grain, grain products, and sugar. Tank cars used to transport grain products constitute a minority of the private tank cars that operate on BNSF's system (and nationwide). The great majority of private tank cars transport chemicals, petroleum products, and other industrial products, and the great majority of tank car shippers subject to BNSF's private car storage charges ship industrial products. None of those shippers is here challenging BNSF's charges. The total billing to the Complainants under BNSF's \$10-15-25 per car storage tariff applicable to tank cars constitutes only about of BNSF's billings under that tariff to all shippers.

It should be emphasized as well that BNSF's demurrage billings to all shippers for holding empty private covered hopper cars used to transport grain, grain products, and sugar constitute less than of BNSF's total billings to shippers over the past four years for holding empty private cars under its demurrage tariff. And its billings to the named Complainants in this case represent only a fraction of that small percentage.

Further, Exhibit I illustrates the number of locations at which, individually and collectively, the six Complainants who are private car shippers with facilities on BNSF received empty car storage bills relative to those Complainants' total number of locations.

In addition, I note that many private car shippers dwarf BNSF in size and economic clout. Complainants Archer Daniels Midland Company, Ag Processing, Inc., Bunge North America, Inc., Cargill, Inc., ConAgra Food Ingredients Company, CHS, Inc., and Tate and Lyle all are substantially large companies with multiple facilities, usually located on several railroads, and capable of being served by truck as well as by rail.

II. BNSF's Private Car Storage Policy Makes Sense

BNSF's imposition of storage charges on shippers that require BNSF to hold empty private cars beyond the 2nd 12:01 a.m. free period is completely consistent with its general policy and practice of price differentiation to encourage more efficient car movements. 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.

NAFCA has suggested in this proceeding 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. 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 for separately. It could not have begun charging for storing loaded private cars if 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, and BNSF has shown a willingness to work with customers and modify the program where necessary.

The Complainants assert in this proceeding that since BNSF has provided track for storing empty cars without a separate charge in the past, it should not be permitted to charge separately for that service now without lowering the line-haul rates to those who pay storage charges. This would defeat the purpose of charging separately for storage, since such shippers 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. NAFLA 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. If it did, shippers that did not impose storage and congestion costs on the railroad would still be charged the same amount as those that did. It is not fair for the population of shippers that manages their cars more efficiently to bear

that expense. And shippers that did impose those costs on the railroad would have no incentive to change their ways.¹⁴

Contrary to the Complainants' suggestion that it is "abusive" as a general matter for a company to charge for a service it did not charge for before, companies frequently unbundle their pricing to discharge wasteful practices by their customers. For example, if a restaurant chain that offered unlimited free refills of soft drinks determines that customers are abusing that policy, it may decide to limit the number of free refills to one, and to charge extra for any additional refills. No one could seriously claim that it was abusive for the company to charge extra for excessive refills without lowering the base price for a soda, and it is equally illogical for the Complainants to suggest that BNSF must reduce its line-haul rates in order to charge the Complainants extra for their excessive use of BNSF's tracks.

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.

¹⁴ Complainants also fault BNSF for retiring nearly 500 miles of yard and switching track between 2001 and 2004. BNSF, however, does not voluntarily retire track that it believes has the potential to be economically viable. BNSF actively looks for ways in which noncompensatory track peripheral to its system can be saved, including making that track available to shortline railroads. The Complainants have not suggested that they were prepared to pay to make any such track compensatory. Instead, they have asserted that they should not have to pay any charges for the storage costs they impose on BNSF.

III. Shippers Have Considerable Control Over the Movements of Private Cars

NAFCA has argued in this proceeding 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. 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 as well as the shipper's ability to move cars on and off the system and to direct them to other locations, thereby tying BNSF's hands from a planning and scheduling standpoint.¹⁵ Compounding the problem is the fact that the pattern of customers' shipments is often irregular, and BNSF often has no advance notice of when a customer will release a shipment to move or where the shipment is going.

¹⁵ Over the years, BNSF employees frequently spoke to private car owners regarding the congestion problems BNSF was experiencing due to the excessive number of empty private cars sitting on BNSF's track. On numerous occasions, BNSF representatives discussed with private car owners the need to address the congestion problem caused by empty private cars being stored on BNSF's system. We offered to work with private car owners to help them manage their fleets, but for the most part shippers did not respond to our offers. A significant number of shippers continued to use BNSF's tracks for storage despite our repeated requests that they not do so. There was no economic incentive for them to do so.

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 the shipper's 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. 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,¹⁶ despite NAFCAs suggestions to the contrary.¹⁷

In addition, 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

¹⁶ In fact, BNSF is almost never informed of who is leasing or controlling the cars.

¹⁷ In addition, shippers do have the ability to adjust the size of their private car fleets to avoid incurring storage charges. Shippers can enter into short-term leases that allow them to respond more readily to swings in supply and demand. Shippers can also modify the terms of their existing leases. Finally, if a shipper is unable to reduce their fleet size, they can store the cars inside their facilities, move them to one of many shortlines that often offer the service of storing cars, or lease track if they lack sufficient track space to avoid incurring storage charges.

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 longer than the amount of time it takes for a railroad-owned car.

As mentioned, NAFCA argues that BNSF's inconsistent cycle times have induced shippers to purchase or lease additional private cars as insurance against BNSF's inconsistent service. NAFCA makes the erroneous assumption that variations in cycle times between the same origins and destinations are always due to inconsistent service and that shippers cannot plan for them. However, cycle times from the same origin and destination pairs vary for a variety of reasons, and the variations are not necessarily unexpected. In fact, significant service variability is a necessary part of rail service to and from many shipper locations that cannot support scheduled unit train service. In any one month, BNSF serves approximately 15,000 separate origin-destination movements. Many of those movements involve single-car shipments, or small blocks of a few cars. Some are so sporadic that they may be repeated only a few times within a year. Moreover, shipments from one origin often move to different destinations, so that the origin-destination patterns are not predictable either.¹⁸ Obviously, no railroad can economically provide a locomotive and crew to provide customized service for each of these movements. One of the principal reasons that rail service is more economical for many shippers

¹⁸ BNSF recently ran a study which found that although it served approximately 15,000 origin-destination movements in both April and June 2005, only 60% of the origin-destination pairs in April were repeated in June. In other words, 40% of the origin-destination pairs that required service in April did not require service in June, and thousands of different origin-destination pairs took their place. Over the course of a year, on carload traffic alone, BNSF serves over 25,000 different origin-destination pairs.

than truck service is that the economies of scope and scale of trains carrying many different shippers' traffic permit railroads to price their services competitively.

The examples of service variability in the Complainants' Statement of Facts provide a good illustration of the kinds of issues that BNSF must address when it is faced with sporadic car movements.

In addition, BNSF is willing to make accommodations for special problems at individual facilities, including entering into customized demurrage contracts with respect to particular movements. In general, BNSF is more than willing to assist shippers in managing their fleets more effectively—all the shippers have to do is ask. I note that many shippers have asked for and BNSF has provided such assistance.

IV. BNSF has Worked with Shippers to Help Them Manage Their Cars and Reduce the Need to Store Empty Private Cars on BNSF's Tracks

BNSF shared information on its new private car storage policy on numerous occasions well before the proposed effective date. BNSF had also originally intended to make its new storage policy effective on May 1, 2001, but 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. BNSF also took steps to help private car owners adjust to the new private car storage policy. BNSF also adopted a policy of forgiving storage charges for shippers who built holding track within their facilities during the first year of the policy, and worked with shippers to help them lease track to hold their empty private cars.

The rates which BNSF has targeted for track leases in daily charges per car are far below the charges that shippers would incur under the new storage and demurrage charge program. For example, assuming a 55-foot car, the daily charge per car would be only \$1.51 at a \$10 per foot per year lease rate, \$3.01 at a \$20 rate, and \$4.52 at a \$30 rate. By BNSF's calculation (which is attached at Exh. TC/PB-2 to the L.E. Peabody verified statement), these charges do not even cover the costs of constructing or maintaining track, much less the opportunity cost to BNSF from having that track tied up in storage service rather than active switching and line-haul

operations.¹⁹ To ameliorate this problem, BNSF has largely moved to "floating" leases that do not restrict BNSF to holding cars at particular locations, but enable BNSF to move cars to areas where they cause the least disruption. This also benefits shippers since it ensures they get the full benefit of the lease, no matter where the car sits. It bears emphasizing as well that BNSF does not offer these leases at all where congestion is most serious. Also, BNSF reserves the right to cancel the leases on 30 days notice so that, if an area becomes too congested, it is not bound to continue to hold the cars for the shipper at noncompensatory rates.²⁰ Shippers who no longer

¹⁹ The Complainants' argument that these rates as producing "excessive annual rates of return" of "up to 70 percent" is inaccurate. For this conclusion, they cite calculations summarized in Table No. 3 of the L.E. Peabody VS attached to Complainants' Statement. As that Table makes clear, however, L.E. Peabody made a calculation of the return represented by a charge of \$10, \$20, or \$30 *per car per day*, not the return represented by a charge of \$10, \$20, or \$30 *per track foot per year*. Had they calculated a \$10 per track foot per year track lease cost they would have derived a total of \$52,800 for leasing a mile of track, instead of \$350,381 in storage charges; at \$20 per track foot, the total would be \$105,600, instead of \$700,814; and at \$30 per track foot, the total would be \$158,400, instead of \$1,051,195.

The per foot track lease rates set by BNSF certainly do not even yield compensatory returns. Messrs. Crowley and Burris assume in their Table No. 3 a track construction cost of \$1.5 million per mile. As set forth in their Exhibit TC/PB-2 (Page 2 of 3), at the lowest capital cost (9%), lease rates of \$10 or \$20 per track foot per year do not come close to covering the cost of track construction, and a lease rate of \$30 per track foot only covers the track construction cost if the cost is amortized over a period of 20 years or longer. There is no provision in the calculation for the costs of track maintenance or the cost of land, which added to the cost of track construction render all of the lease rates BNSF has quoted to shippers inadequate to cover BNSF's costs of building and maintaining track for storage, regardless of the amortization period.

²⁰ These facts show that the Complainants' assertion that BNSF's lease accommodations undercut BNSF's argument that its private empty car storage program helps deal with congestion, because the cars often are stored in the same place they were before, is meritless. That is only true if BNSF determines that it is necessary to have the cars at the ready for the shipper when the cars are called into the shippers' facility. BNSF has the ability if necessary to move the cars elsewhere, and, if the area becomes too congested, it can cancel the lease altogether.

need the lease may elect to cancel the lease as well and receive a full refund for the unused time.²¹

V. BNSF's Storage Charges Require Private Car Owners and Assigned Car Shippers to Internalize the Cost of Empty Car Storage and Effectively Manage Their Fleet

NAFCA's assertion that it is unfair for BNSF to charge for storing empty freight cars, irrespective of whether BNSF or another party controls them, is wrong. NAFCA's comparison completely ignores the fact that BNSF controls its own cars and, therefore, controls where they move and where and how long they are stored. In contrast, BNSF does not control the movement of private cars or (the small percentage of) rail cars that have been assigned by written agreement to specific customers ("assigned rail cars"). Many shippers prefer to use private cars or assigned rail cars to transport their products because unlike general use rail-controlled equipment, the equipment is guaranteed to be available whenever they want it. In addition, such shippers take comfort in knowing what product the car previously contained.

BNSF regularly receives equipment requests from various shippers regarding their car needs. BNSF's systems review those equipment requests and size BNSF's fleet to match the projected demands. BNSF then allocates cars around its system depending upon where the demand for the cars is. For example, if BNSF receives an equipment request from a shipper in Denver for 50 covered hopper cars for the next week, BNSF begins planning to have the cars available when needed. If the same shippers reduces its equipment request down to 25 cars, BNSF can take the 25 cars that are no longer needed by the shipper and give them to another shipper. BNSF may also leave the cars where they are or move them to another station where it

²¹ If BNSF found that shippers were still leaving substantial numbers of cars on BNSF's track under its \$10-15-25 per car per day storage charge regime, it would likely raise the rates (just as it recently did on intermodal containers) to incentivize shippers to stop that behavior.

creates the least amount of congestion. BNSF cannot do this with empty private cars or with its own rail cars that have been assigned by agreement to a specific BNSF customer, because it does not control them. Instead, BNSF has to rely on the shipper to control them. BNSF's demurrage, storage, and diversion charges give shippers the appropriate incentives to efficiently manage and use rail cars when the cars are not under BNSF's control.²² Absent the imposition of storage charges, shippers have every incentive to store their cars indefinitely on BNSF's track, where they may congest BNSF's track and increase the costs BNSF incurs providing rail service to all of its shippers. One need only look at the number of empty private cars that were left sitting on BNSF's track before BNSF began charging for empty car storage as proof that this is true.

VI. BNSF's Policy Does Not Discriminate Between Railroad Cars and Private Cars

NAFCA's claim that BNSF's private car storage policy discriminates against such cars in favor of railroad-owned or controlled cars is inaccurate. Private car shippers are most comparable to true "assigned car" shippers who have agreements with BNSF. Shippers who do not have these kinds of agreements have no guarantee that they will get railroad cars, and the railroad may route the empty car to wherever the railroad believes it will get the most productive use. If they order cars by a particular "want date," and BNSF provides the car on that date, then they pay demurrage if they do not timely take the car and load it. If they do not order a car, they may not get one at all when they need it, and, for the vast majority of rail-controlled car types, if a shipper does not order a car, it will not get one. In contrast, private car shippers are guaranteed that all of their cars will return to them, unless they direct that those cars go elsewhere. BNSF

²² I note that private car shippers are now informing BNSF when they have a reduction in demand for their private cars and are working with BNSF to arrange long-term storage of the cars instead of just leaving them sitting in BNSF's yards and on its tracks. This rarely happened before BNSF adopted its private car storage policy.

cannot take them elsewhere, or provide them to another shipper in the same area, if the car owner does not take them.

Thus, Complainants' argument that shippers using the tiny minority of "C" pool cars receive better treatment than they do, because shippers using "C" pool cars do not have to pay for cars until they are constructively placed pursuant to the shippers' "want date" request, is flawed on several grounds. First, shippers using "C" pool cars have no guarantee of receiving any cars at all. If they do not establish a "want date," there may not be any cars for them when they decide they want them. Complainants argue that 98% of the time those cars go back to the origin, but they do that for BNSF's convenience in staging empty cars, not the shippers' convenience.²³ Given the highly specialized nature of many of those cars, that is not surprising. Absent a want date, however, the cars can be provided to other shippers in the area, or they can be taken to another area altogether.²⁴ Second, the "specific station, specific shipper" indication

²³ The "C" pool designation applies to relatively few cars, and is used for the railroads' convenience. It applies currently to only approximately 3,000 BNSF cars out of BNSF's fleet of approximately 45,000 cars. It is particularly rarely applied to the types of cars used by the Complainants. (It does not apply at all to tank cars used by the Complainants because all of the tank cars on BNSF's system are private.) Thus, out of a fleet of approximately 28,600 BNSF-controlled covered hopper cars used to transport whole grain, only 11 are currently in a "C" pool.

With respect to other BNSF-controlled covered hopper cars—used to transport, among other things, grain products (*e.g.*, flour) and sugar—BNSF's fleet of approximately 12,000 cars today includes only approximately 1200 in "C" pools, of which some 500 either belong to another railroad or are used by multiple shippers. Many of the remaining 700 cars are specialty cars used by shippers with which BNSF has actual agreements giving them exclusive use of those cars.

²⁴ The empty car need not necessarily be returned to the owner/lessor railroad if the foreign railroad has use for the car and the owner/lessor does not require its immediate return. Of course, the foreign road must pay the owner/lessor per diem on the car while it is in loaded service on the foreign road.

in the AAR's rules for "C" pool cars places no requirement on BNSF to hold those cars for a particular shipper, or to take those cars to that station. The AAR's rules are primarily designed to provide instructions for *other railroads* regarding how empty cars should be reverse routed. As NAFCA itself notes, there is no requirement that BNSF keep those cars in a "C" pool, and in fact, most cars in its fleet are not in "C" pools. The fact of the matter is that a "C" pool car is really no different today than a "commodity" pool car. There is no "assignment" to a shipper unless BNSF and the shipper have an agreement assigning specific cars to that shipper.²⁵ Third, if there is a true assignment of a railroad car, the shipper is charged \$25 (not \$10 or \$15) from the first 12:01 a.m. after it arrives at the serving yard. And when the "want date" arrives, the shipper goes onto the regular demurrage program

Finally, Complainants' argument that shippers using TTX cars receive 5 days of "free time" is simply false. TTX distributes TTX/Railbox cars to its owner-customer railroads, including BNSF, based on distribution methodologies specific to particular car types (not including the types of tank and covered hopper cars used by Complainants). The owner-customer railroads pay car hire on the cars they use (of which a portion goes back into their pockets as owners). If a car on a specific railroad is deemed by that railroad to be not needed for a period of time, the railroad notifies TTX and the car is placed in a "surplus status" if it has sat idle for 5 days in the same location. The car goes "off-the-clock" and the railroad is not liable for car hire from that point. TTX then looks for other roads that may want that car type. If another railroad requires that car for service on that road, then instructions are issued to move the

²⁵ Shippers would not enter into these kinds of agreements if they believed that the mere placement of a car into a "C" pool effectively guaranteed them the exclusive use of those cars.

car to interchange. Alternatively, if no other railroad wants the car, the car remains in "stored surplus." TTX assumes the cost (although, as owners, all of the railroads share in that cost).

Obviously, TTX's per diem arrangements with its owner-customers have nothing to do with how much "free time" a shipper that requests a car from BNSF is allowed before the shipper must begin paying demurrage or storage charges. From the shipper's perspective, BNSF treats TTX cars on its system the same as any other car it owns or leases. If the shipper does not make a specific equipment request for a car reasonably in advance of the want date, there may well be no car available for the shipper at all; and if the shipper does not order in a car on its want date, it must pay demurrage. BNSF is not obligated to hold TTX cars for any period of time awaiting a loading order from a shipper. If a shipper does not promptly take that car (or any other BNSF-controlled car), BNSF can send that car wherever on its system it is likely to get the most productive use.

VII. BNSF's Policy Does Not Discriminate Between Grain Covered Hopper Cars and Other Private Railroad Cars

NAFCA's claim that BNSF's revised policy unreasonably discriminates between grain cars and other private railroad cars is likewise without foundation. Private grain cars are largely indistinguishable from railroad cars that are subject to "average" demurrage, and BNSF determined that it would be confusing and counterproductive for it to apply a different program to private grain cars than to railroad-owned or controlled grain cars.²⁶ Accordingly, BNSF decided the most equitable and logical thing was to treat them the same.

²⁶ BNSF has both "average" and "straight" storage and demurrage programs. Under an "average" program, "credits" are given for cars that are timely ordered by the shipper and "debits" are applied to cars that are not. If the debits exceed the credits, charges are assessed. Under a "straight" program, a car held beyond the applicable free period incurs a charge regardless of whether other cars are timely ordered in by the shipper. BNSF also will enter into contractual arrangements with individual shippers concerning specific movements.

Complainants' argument that it is unfair for private grain cars to be assessed higher demurrage charges than the storage charges on other cars is unsupported. First, it essentially compares apples with oranges. Indeed, a \$50 demurrage charge under an average plan may be more advantageous to shippers than the \$10 to \$25 storage charges under a straight plan. As Exhibit J shows, when a shipper has two cars constructively placed on Tuesday at 17:00, and orders the cars to spot at 12:00 on Friday and 11:00 on Wednesday, the shipper would pay more under the straight plan than under an average plan. Second, the comparison that makes more sense is to the demurrage charges on railroad-owned cars of the same type, which are exactly the same. Third, since Complainants do not challenge the level of any of the charges, BNSF could raise all of the rates to \$50 per car and eliminate the discrepancy that appears to concern the Complainants.

As a general matter, shippers incur higher charges under "straight" programs than "average" programs. If, for example, BNSF substituted a "straight" demurrage program for empty private grain and sugar covered hopper cars awaiting loading, a private car shipper that incurred demurrage charges could not offset the \$50 daily demurrage charge for cars that are not timely ordered in with the credits that it receives for the cars that are not. Under the "average" program that BNSF has applied for the past four years, grain shippers have been able to avoid storage charges at most locations altogether – in significant part because of the credits applied to the covered hopper cars they timely order in. Overall, the charges incurred by grain shippers on covered hopper cars have been quite small compared to the charges incurred by tank car and other car shippers under the "straight" \$10-15-25 program applied to their cars. Had BNSF applied a "straight" demurrage plan instead, the charges that grain shippers incurred on private covered hopper cars that are not timely ordered in would have been significantly higher.

VIII. 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 attempted to tailor 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 and has made every attempt to make it as fair as possible. 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.

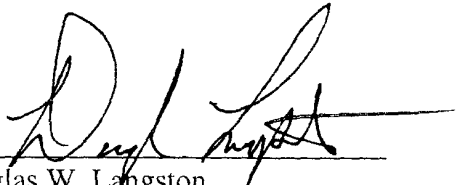
Since BNSF adopted its private car storage policy in July of 2001, the number of empty private cars being stored on BNSF's tracks has declined and the efficiency of BNSF's overall operations has improved. As shown above, BNSF is carrying substantially more traffic while generally maintaining system performance at levels approximating those in 2001. 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.

BNSF's overriding goal with its empty private car storage program is to support an efficient rail system. BNSF has made tremendous expenditures in capital, locomotives, track upkeep, and systems to improve its own network, but cannot do this without efficient shippers as well. 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

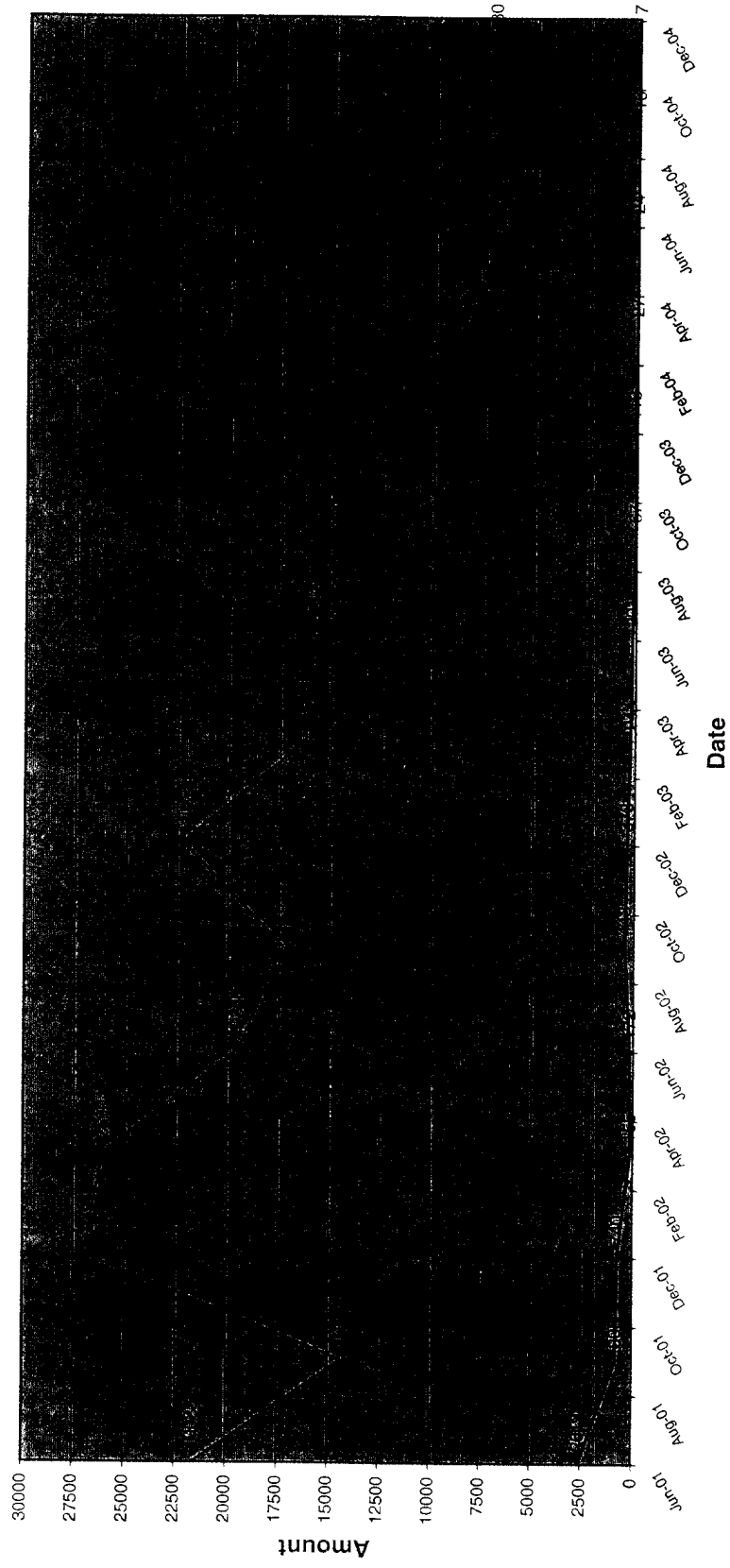
I, Douglas W. Langston, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on September 15, 2005.



Douglas W. Langston

DPR - Totals for Private vs. All Other



	Jun. 30, 2001						Sep. 30, 2001						Dec. 31, 2001					
	Total	Total		Total Cars			Total	Total		Total Cars			Total	Total		Total Cars		
	Stored 1-10 Days	1-10	Days	Stored 1-30 Days	> 30		Stored 1-10 Days	1-10	Days	Stored 1-30 Days	> 30		Stored 1-10 Days	1-10	Days	Stored 1-30 Days	> 30	
Private	\$ 285.00	\$ 485.00	\$ 1,849.00	\$ 2,619.00			\$ 33.00	\$ 87.00	\$ 685.00	\$ 805.00			\$ 165.00	\$ 168.00	\$ 436.00	\$ 740.00		
All Other	\$ 6,839.00	\$ 4,296.00	\$ 7,876.00	\$ 19,022.00			\$ 5,424.00	\$ 2,249.00	\$ 5,868.00	\$ 13,535.00			\$ 9,430.00	\$ 7,193.00	\$ 9,546.00	\$ 26,261.00		

	Mar. 31, 2002				Jun. 30, 2002				Sept. 30, 2002			
	Total		Total		Total		Total		Total		Total	
	Stored 1-10	Stored 1-30	Days	Days	Stored 1-10	Stored 1-30	Days	Days	Stored 1-10	Stored 1-30	Days	Days
Private	\$ 4.00	\$ 6.00	\$ 145.00	\$ 155.00	\$ 46.00	\$ 13.00	\$ 113.00	\$ 172.00	\$ 54.00	\$ 24.00	\$ 365.00	\$ 443.00
All Other	\$ 8,101.00	\$ 5,709.00	\$ 12,094.00	\$ 25,904.00	\$ 7,276.00	\$ 2,802.00	\$ 9,262.00	\$ 19,340.00	\$ 6,214.00	\$ 2,708.00	\$ 7,487.00	\$ 16,841.00

	Dec. 31, 2002				Mar. 31, 2003				Jun. 30, 2003			
	Total		Total		Total		Total		Total		Total	
	Stored 1-10	Stored 1-30	Stored 1-10	Stored 1-30	Stored 1-10	Stored 1-30	Stored 1-10	Stored 1-30	Stored 1-10	Stored 1-30	Stored 1-10	Stored 1-30
	Days	Days	Days	Days	Days	Days	Days	Days	Days	Days	Days	Days
	Total Cars	Total Cars	Total Cars	Total Cars	Total Cars	Total Cars	Total Cars	Total Cars	Total Cars	Total Cars	Total Cars	Total Cars
Private	\$ 61.00	\$ 31.00	\$ 281.00	\$ 373.00	\$ 18.00	\$ 27.00	\$ 199.00	\$ 244.00	\$ 2.00	\$ 20.00	\$ 179.00	\$ 201.00
All Other	\$ 10,801.00	\$ 5,091.00	\$ 5,964.00	\$ 21,856.00	\$ 7,359.00	\$ 2,565.00	\$ 5,976.00	\$ 15,991.00	\$ 6,287.00	\$ 2,514.00	\$ 6,841.00	\$ 15,641.00

	Sept. 30, 2003				Dec. 31, 2003				Mar. 31, 2004			
	Total		Total		Total		Total		Total		Total	
	Stored 1-10	Stored 1-30	Stored 1-10	Stored 1-30	Stored 1-10	Stored 1-30	Stored 1-10	Stored 1-30	Stored 1-10	Stored 1-30	Stored 1-10	Stored 1-30
	Days	Days	Days	Days	Days	Days	Days	Days	Days	Days	Days	Days
Private	\$ 8.00	\$ 4.00	\$ 55.00	\$ 67.00	\$ 33.00	\$ 42.00	\$ 43.00	\$ 118.00	\$ -	\$ 2.00	\$ 25.00	\$ 27.00
All Other	\$ 5,668.00	\$ 1,650.00	\$ 3,577.00	\$ 10,925.00	\$ 7,442.00	\$ 2,949.00	\$ 2,806.00	\$ 13,197.00	\$ 5,054.00	\$ 910.00	\$ 2,633.00	\$ 8,557.00

	Jun. 30, 2004				Sept. 30, 2004				Dec. 31, 2004			
	Total		Total		Total		Total		Total		Total	
	Stored 1-10	Stored 1-30	Stored 1-10	Stored 1-30	Stored 1-10	Stored 1-30	Stored 1-10	Stored 1-30	Stored 1-10	Stored 1-30	Stored 1-10	Stored 1-30
	Days	Days	Days	Days	Days	Days	Days	Days	Days	Days	Days	Days
Private	\$ -	\$ 2.00	\$ 22.00	\$ 24.00	\$ -	\$ 1.00	\$ 15.00	\$ 16.00	\$ 1.00	\$ -	\$ 6.00	\$ 7.00
All Other	\$ 4,347.00	\$ 787.00	\$ 1,325.00	\$ 6,549.00	\$ 3,552.00	\$ 1,248.00	\$ 1,533.00	\$ 7,233.00	\$ 3,862.00	\$ 1,730.00	\$ 1,488.00	\$ 7,080.00

Customer Time

-15.3%

.7.2 .6.9 .6.2 .6.1

-17.1%

.4.1 .3.9 .3.5 .3.4

-21.7%

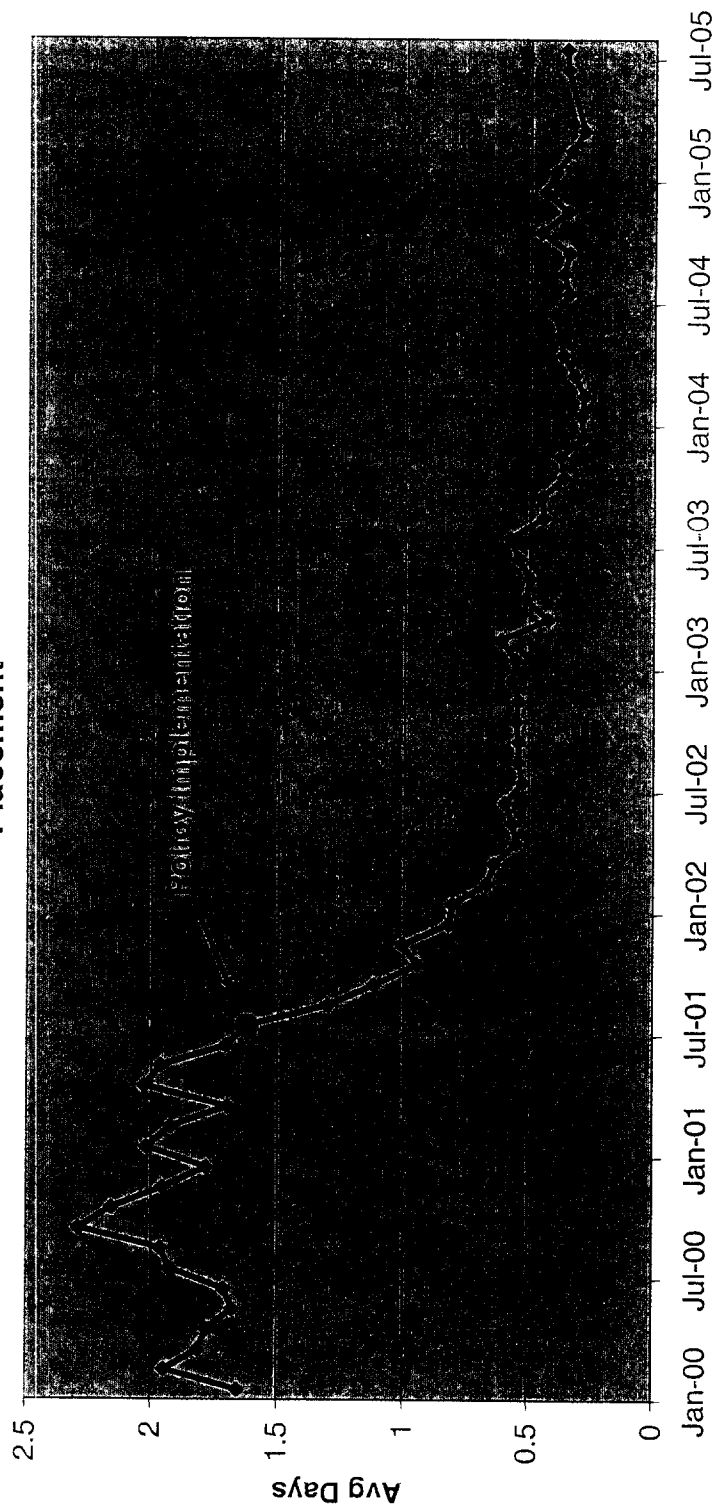
.2.3 .2.1 .1.9 .1.8

.Total .Non-Private .Private

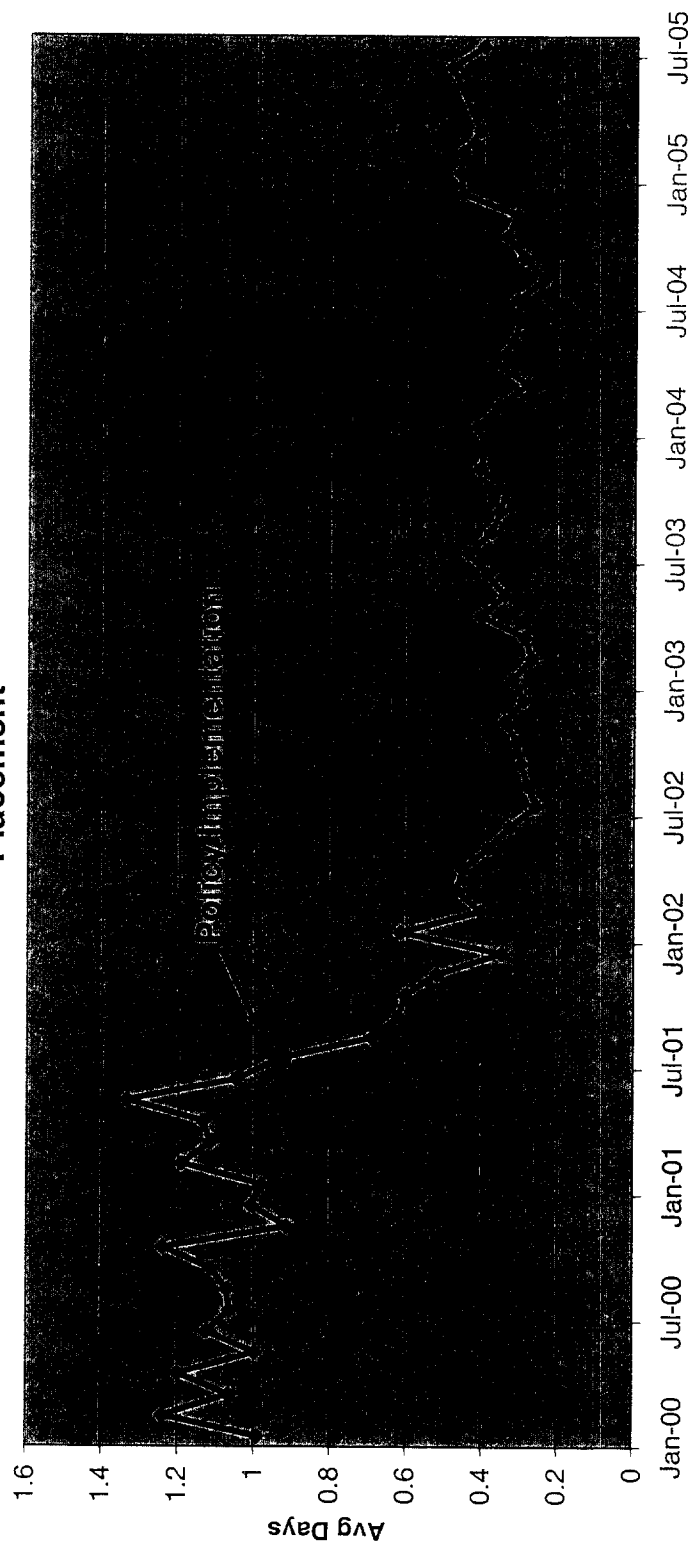
■ .2002 ■ .2003 ■ .2004 ■ .YTD Jul 2005

REDACTED

Empty Industrial Private Cars - Average Time Held After Constructive
Placement

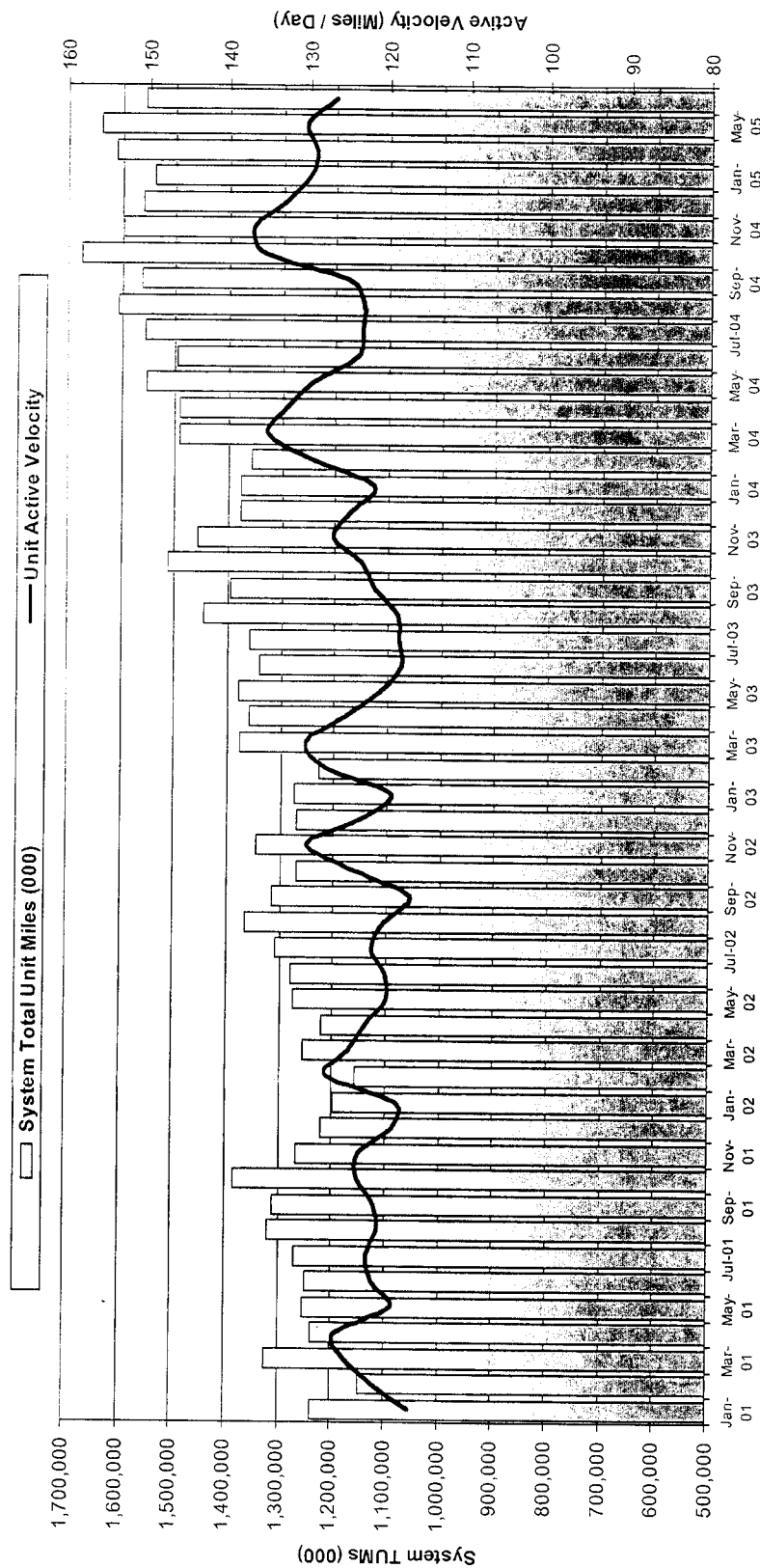


Empty Agriculture Private Cars - Average Time Held After Constructive Placement



BNSF Ag Car Velocity

Merchandise/Ag Car Velocity and System Unit Mile Comparison
Jan 2001 to Jun 2005



From 2001 to 2004, annual merchandise/agriculture car velocity improved by 6.1% to 129.1 miles per day. Over the same time period, unit mile volume on the system increased by 22%.

REDACTED

REDACTED

Differences in Programs and Calculations Under 6004 and 6005

Calculation under 6004 (Private Grain Cars)

- Rate calculated based on \$50 per debit
- Each car automatically given 2 credits
- Debits begin accruing on each car at the 1st 12:01 am after Constructive Placement
- At end of month, debits and credits summed for all cars
- Any "net" debits charged at rate of \$50 per debit

	Time Car is CP'd	Time car is Ordered to Spot	Start counting debits	Debits	Credits
Car # 1	17:00 Tues	12:00 Fri	00:01 Wednesday	3	2
Car # 2	17:00 Tues	11:00 Wed	00:01 Wednesday	1	2
Sum of Debits/Credits				4	4
Net Debits (4 debits – 4 credits)					0
Total Bill (0 Debits x \$50/debit)					\$0.00

Notes:

- Sundays & Holidays are not chargeable
- Bunching not allowed empties
- If car CP'd on Thursday and ordered in by Midnight Sunday, there would be no charge
- If cars CP'd on Friday and ordered in by Monday, there would be no charge

Calculation under 6005 (All Other Empty Privates)

- Rate calculated based on territory (\$10, \$15, or \$25 per day) – Example assumes \$15/day territory
- Charges begin on each car from 2nd 12:01 am after Constructive Placement
- Each car calculated on stand alone basis

	Time Car is CP'd	Time car is Ordered to Spot	First Chargeable Day	Chargeable Days	Net Charge
Car # 1	17:00 Tues	12:00 Fri	00:01 Thur	2	\$30.00
Car # 2	17:00 Tues	11:00 Wed	00:01 Thur	0	\$ 0.00
Total bill					\$30.00

Notes:

- Sundays & Holidays are free if charges have not started
- Bunching is allowed
- If car CP'd on Thursday: Friday, Saturday & Sunday are free. Charges start at 00:01 Monday.
- If car CP'd on Friday: Saturday, Sunday and Monday are free. Charges start at 00:01 Tuesday.