

PUBLIC VERSION

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BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. 42060 (SUB-NO. 1)

NORTH AMERICA FREIGHT CAR ASSOCIATION, ET AL.

v.

BNSF RAILWAY COMPANY

REBUTTAL STATEMENT OF COMPLAINANTS

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This Rebuttal Statement is filed by Complainants¹ in response to the Reply Statement of Fact and Argument ("Reply") of Defendant, BNSF Railway Company ("BNSF"). Attached hereto are the Rebuttal Verified Statements of Dan Mack ("Mack Rebuttal V.S."), Complainants' Exhibit No. 10; Randy Neumayer ("Neumayer Rebuttal V.S."), Complainants' Exhibit No. 11; Terry J. Voss ("Voss Rebuttal V.S."), Complainants' Exhibit No. 12; Darrell R. Wallace ("Wallace Rebuttal V.S."), Complainants' Exhibit No. 13; Frank Sims ("Sims Rebuttal V.S."), Complainants' Exhibit No. 14; Richard Seymour ("Seymour Rebuttal V.S."), Complainants' Exhibit No. 15; and the Joint Rebuttal Statement of Thomas D. Crowley and Philip H. Burris ("Crowley/Burris Rebuttal V.S."), Complainants' Exhibit No. 16.

It is clear that the primary purpose of BNSF's Reply is to alarm the Board into believing that BNSF and other carriers will be "swamped by the tide of new traffic that is straining the railroads' available capacity" unless the assailed practices are left totally undisturbed. Reply at 12.² See, also, Reply at 6 (claiming that the July 2001 Changes are part of an "imperative" for BNSF "to remain fluid in the face of the surge in traffic"), and

¹ North America Freight Car Association; Ag Processing Inc; Archer Daniels Midland Company; Bunge North America, Inc.; Cargill, Inc.; CHS, Inc.; Chicago Freight Car Leasing Company; ConAgra Food Ingredients Company; First Union Rail; GLNX Corporation; Tate & Lyle Ingredients Americas, hereinafter individually referred to by appropriate short titles consistent with those employed in Complainants' Opening Statement of Fact and Argument ("Opening Statement"), and collectively referred to as "Complainants."

² The assailed practices, summarized at pages 2-4 and 5-7 of the Opening Statement, are new demurrage and storage provisions applicable to empty private cars while on BNSF track prior to placement for loading, and are referred to in the Opening Statement, as well as hereinafter, as the "July 2001 Changes." Prior to the institution of these provisions, BNSF held empty private cars on BNSF track as part of the shipper's freight rate. The July 2001 Changes reduced unrestricted use of BNSF track to as little as one day. The assailed practices are viewed by Complainants as unreasonable practices in violation of 49 U.S.C. § 10702, inadequate and unreasonable rules and practices on car service in violation of 49 U.S.C. § 11121(a), a violation of the demurrage provisions of 49 U.S.C. § 10746, and a violation of 49 U.S.C. § 10745 because they have the intended and accomplished effect of requiring shippers to furnish facilities of transportation without full and adequate compensation.

Reply Verified Statement of BNSF's Witness Douglas W. Langston ("Langston Reply V.S.") at 3.

BNSF is ringing a false alarm. It is certainly laudable that BNSF has been able to meet increasing traffic opportunities, but its ability to do so exists independently of the July 2001 Changes, having been brought about by the introduction of larger cars capable of handling more goods and containers, increased use of shuttle trains, and other factors unrelated to those Changes. BNSF's doomsday suggestion that BNSF and the railroad industry will fail in meeting the "tide of new traffic" without the July 2001 Changes is even more overreaching than the July 2001 Changes themselves, which ostensibly were instituted because "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" (Reply at 6). But the July 2001 Changes went far beyond any effort to curtail the alleged abuse of BNSF track "for long periods." Instead, using "long term" abuse of its tracks as a pretext, BNSF instituted provisions penalizing shippers if their private cars were held empty on BNSF track for as little as one day.

BNSF praises the July 2001 Changes as being part of its own initiative "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." Reply at 6. But there is utterly no support for the suggestion that BNSF knew, in 2000 or 2001, that it was facing a "surge in traffic" that did not, in fact, begin in earnest until 2003. Most certainly, BNSF has experienced significant traffic growth within the past two years; but there is no evidence that, when the July 2001 Changes were conceived in 2000, BNSF knew or informed its customers that such a "surge" was imminent.

Indeed, one of BNSF's avowed purposes in adopting the July 2001 Changes was to bring about a reduction in the number of private cars operated by BNSF's customers.³ If BNSF knew in 2000 that a surge of new traffic was imminent, it was doing a huge disservice to a major segment of its existing customer base by not so informing them and instead attempting to reduce the number of private cars available to handle that surge. It is far more realistic to conclude that the significant traffic surges beginning in 2003 have been adopted by BNSF as a *post hoc* rationalization for extreme actions that were overreaching when instituted and remain unreasonably extreme today.

Even if one overlooks BNSF's fanciful rationalization attempts, and simply assesses the July 2001 Changes in relation to current traffic, they have not been explained adequately or justified by BNSF, despite a specious attempt by BNSF to offer "proof" that the empty car charges succeeded in their mission.

The lynchpin of BNSF's inept effort to tie the July 2001 Changes to improved operating performance is its assertion that the July 2001 Changes have been "effective" because "BNSF is carrying more loads today than it carried in 2001 with only a marginal increase in the number of cars on its system."⁴ This attempt to connect the July 2001 Changes to performance is unsupported both substantively and logically.

BNSF's argument is substantively baseless for several reasons. The record in this proceeding establishes that, in 2001, there were nearly 16,000 more serviceable cars stored "on line" on BNSF than in 2005. Seymour Rebuttal V.S., ¶ 7. In other words,

³ See Opening Statement at 33-34 and record citations thereat.

⁴ Douglas W. Langston is the only BNSF witness to testify in this proceeding. Mr. Langston has provided three Verified Statements. The first two are described in the Opening Statement, fn. 3. Mr. Langston's most current Verified Statement is attached to the BNSF Reply and is herein referred to as "Langston, Reply V.S." See, in this instance, Langston Reply V.S. at 12, 14. See, also, Reply at 58, where BNSF states that declining operating performance metrics are insignificant due to more traffic being handled without gridlock.

even though there was only a marginal increase in total cars counted as "on line" between 2001 and 2005, a large number of those cars were in "mothballs" in 2001, and they were placed back in active service as traffic demands grew in succeeding years. Between 2001 and 2005, BNSF's statistical fleet on line may have increased only marginally, but its active fleet increased substantially. At the same time, increases in per car carrying capacity and the use of shuttle trains were producing improved car utilization. Seymour Rebuttal V.S., *inter alia*. Add to that the fact that, when business improves, cars are loaded and unloaded more rapidly because production facilities work longer hours. Neumayer Rebuttal V.S., ¶ 7. Those measures led to BNSF's ability to handle increased traffic volumes without seeming to increase cars on line proportionately. There is no evidence of any significant contribution from the July 2001 Changes.

The logical flaw in BNSF's position is reliance on fallacious inferences. BNSF correctly posits the existence of the July 2001 Changes. Next, it states that there was an improvement in car loadings handled in relation to cars on line, hoping the Board will accept that the second event is a consequence of the first event merely because it occurred after the first event – a classic example of the "post hoc ergo propter hoc" fallacy. BNSF has failed to provide evidence establishing that the first event – the July 2001 Changes – caused the second event – the handling of more freight. Using BNSF's faulty syllogistic approach, one could just as easily contend that an undisputed deterioration in BNSF's operating metrics, such as the decline in on-time performance,⁵ likewise should be attributed to the July 2001 Changes simply because worsening on time performance chronologically followed the July 2001 Changes.

⁵ See Opening Statement at 29.

The absence of any demonstrated causal nexus between the July 2001 Changes and the operating performance improvements alleged by BNSF to flow from them is underscored by a comparison of BNSF's operating performance with that of Norfolk Southern Railway ("NS"). NS did not have any program of empty private car demurrage or storage charges. Nevertheless, between September 2004 and August 2005, average train speed on NS held its own, while average train speed on BNSF worsened by approximately three miles per hour, or 11 percent. Mack Rebuttal V.S., ¶ 14. A carrier *without* an empty private car penalty program performed more steadily than BNSF *with* its July 2001 Changes. Such data hardly sustain BNSF's efforts to suggest, without any proof of causation, that the July 2001 Changes must be responsible for improved operating performance and instead help expose the greatly exaggerated nature of BNSF's claims.

As fully discussed below, the other indicia of "success" attributed by BNSF to the July 2001 Changes also fail to hold water. Confronted with proof that increased "velocity," a stated BNSF goal for the July 2001 Changes, had not been achieved, BNSF decided to ignore velocity as traditionally measured in terms of "train" velocity (which is the velocity measure used when BNSF and other carriers report "velocity" performance as part of normal operating metrics). BNSF now suggests that "car" velocity is a more appropriate measure of operating performance. Langston Reply V.S. at 14. Mr. Langston's Exhibit G purports to show selective "improvements" in car velocity, but nowhere does BNSF explain why car velocity is a better measure of operating performance and should replace train velocity, especially considering that cars attain velocity only when moving in trains. At best, this attempted data switch establishes BNSF's ingenuity in extracting and reshaping information from its vast stores of computerized data.

Langston Reply V.S. Exhibits B and D chart monthly comparisons of cars on line with car loadings. They are offered as proof that the July 2001 Changes succeeded, but are nothing more than a re-warmed version of the unpersuasive "we are carrying lots more traffic with not many more cars" argument discussed above.

The Langston Reply V.S. Exhibits B and D charts, like his Exhibit G chart portraying certain car velocity and unit mile data, are also highly suspect as reliable indicia that the July 2001 Changes "succeeded." No such charts were produced by BNSF in its discovery responses earlier this year after BNSF expressly was requested to furnish all documents "which, in BNSF's opinion, reflect the impacts of the July 1 Changes on BNSF operating performance from July 1, 2001 to the present." In other words, BNSF had not even created the Exhibits B, D, and G charts and was not utilizing them to analyze the impacts of the July 2001 Changes as recently as April 2005. Faced with Complainants' indisputable and undenied evidence that BNSF's service deteriorated when measured by the metrics normally used by the Board and others to assess railroad performance, BNSF obviously cobbled together new measurements that prove nothing.

BNSF's reply is noteworthy not only for its many strained arguments, but also for what BNSF chose not to contest or contend. For example:

- BNSF does not debate the fact that its July 2001 Changes were intended produce investments by private car shippers in additional track infrastructure. Use of those private tracks will, by removing private cars from the BNSF system, result in expanded infrastructure for those BNSF customers who use railroads cars, even though private car shippers continue to pay for

the infrastructure dedicated to railroad-car shippers. BNSF simply contends that it is proper to make private car shippers pay for both their own empty car holding tracks *and* BNSF track used by shippers receiving empty BNSF cars. If BNSF believes, as it professes, that only those who use an asset should pay for it and that those who do not use an asset should not pay, then the July 2001 Changes violate those principles because private car shippers, forced by the July 2001 Changes to lease or construct holding tracks, are being required to pay for both those assets they use, and holding track on BNSF they do not use but is now utilized by shippers loading BNSF equipment.

- BNSF does not quarrel with proof that it retired hundreds of miles of yard and siding track at the very time it was alleging that it had insufficient infrastructure on which to hold empty cars; BNSF instead lamely asserts that it had good reasons for retiring those tracks.
- BNSF does not dispute Complainants' proof that BNSF's service is inconsistent and erratic and that such service has become a leading cause of additions to the private car fleet, about which BNSF now complains. BNSF simply pleads that inconsistent service is inherent in rail operations and argues that its consequences should become costs for private car shippers to

bear, an untenable proposition. But the inferior service suffered by private car shippers is far more a product of deliberate BNSF decisions than it would have the Board believe. Tank cars and specialty covered hopper cars – the bulk of the private car fleet – normally are handled in BNSF "manifest" trains that have average speeds over 30 percent slower than the intermodal trains moving over BNSF. Having for better or worse made the decision to concentrate its assets on attracting and providing preferred service for intermodal traffic, BNSF is simply handling private cars more slowly than it otherwise could and, through the July 2001 Changes, seeking to impose the costs of that inferior service on private car shippers.

Failing to justify the July 2001 Changes on the grounds heralded when they were imposed, BNSF turns to a form of negative campaigning. It endeavors to label Complainants as unrepresentative of their own group – NAFCA – and as a small group of malcontent shippers who stand apart from all other private car users; and it says that NAFCA's members "dwarf" BNSF and actually have economic power over it. Reply at 46. BNSF should know that it is wrong on both counts. This Complaint is being prosecuted both by several individual shippers and by NAFCA as a Complainant. Moreover, NAFCA's position clearly is supported by two leading organizations of railroad shippers, The National Industrial Transportation League ("NITL") and the American Chemistry Council ("ACC").

The BNSF effort to somehow justify the July 2001 Charges by claiming that the shipper members of NAFCA overwhelm BNSF in economic power approaches the absurd. Some NAFCA members may have larger revenues than BNSF, while others decidedly do not. But, no matter how large a shipper's revenue, the shipper cannot harm BNSF, while BNSF obviously can harm its customers, large or small.

BNSF can put a rail-reliant facility that it alone serves out of the market by a simple, selective rate adjustment or service downgrade, regardless of the economic size of the shipper who owns that facility. So long as another shipper of the same commodity is available to replace the targeted facility (and there normally are multiple originations of the same commodity), BNSF need lose not one carload from such a tactic, regardless of the revenues or size of the shipper whose facility has just been decimated. However, no shipper, regardless of size, can put BNSF out of business, or even place a single, profitable line of BNSF out of business, through any form of traffic diversion. Railroads today have more business than they can handle, and threats to remove business from a railroad are seen by railroads as idle, even in those rare instances where alternative routings might be available. A railroad carries many commodities and easily can replace the loss of one origin's traffic, while a shipper facility usually has just one function and cannot survive if that function is impaired by a carrier whose service is essential.

The July 2001 Changes place private car shippers in an inferior position to shippers using railroad cars. Complainants' Opening Statement demonstrates that shippers relying on BNSF cars can order those cars for loading on specified dates, allowing those shippers to take advantage of what amounts to two to three additional free time days while BNSF holds the cars awaiting a shipper placement order, whereas empty private

cars are not subject to a "want date" ordering system and enter the demurrage or storage process as soon as they reach the shipper's loading station. The result is that shippers relying on assigned BNSF cars have a total of four to five "free" days on average (days while the car is held by BNSF awaiting an order plus free time after the demurrage process commences), while private car shippers subject to the July 2001 Changes have as little as one day.

BNSF asserts that Complainants did not compare like to like because the "C" pool assigned cars whose movement data was examined by Complainants are not, BNSF says, comparable to private cars. BNSF asserts that a private car must be returned to its owner-shipper for loading, but a "C" pool assigned car can be removed from the assignment by BNSF or the shipper unilaterally. BNSF argues that the only valid comparison between private cars and assigned carrier cars is one limited to those assigned carrier cars that are subject to a mutual contract between BNSF and a shipper, guaranteeing the cars to the shipper's use and subjecting the shipper to demurrage penalties if the shipper does not accept the cars for loading as soon as they return empty.

BNSF, of course, ignores the previously demonstrated fact that over percent of its "C" pool cars make repetitive empty trips to the same shipper at the same origin for loading, despite BNSF's claimed ability to operate otherwise. Such cars are operated pursuant to Association of American Railroad rules, which *require* cars with "C" pool designations to be returned to a specific shipper at a specific origin unless and until the car is removed from that pool designation. Plainly, there are sound reasons why these assigned cars are not removed from "C" pool status by BNSF and return repeatedly to the same

shipper and origin, and why BNSF treats these assigned cars exactly as it handles empty private cars, repeatedly returning empties to pre-designated loading points.

Just as BNSF claims it can (although as a practical matter it overwhelmingly does not) alter a non-contractual "C" pool assignment, shippers can elect to end the use of their private cars on BNSF altogether, or at any particular BNSF location, even though they may seldom exercise that right. Both "C" pool cars and private cars are technically subject to unilateral relocation, but are seldom relocated, which is one of the characteristics they have in common. And when these similar groups of cars are analyzed, it is clear that those controlled by BNSF receive the equivalent of two to three days' free time while BNSF holds them at the loading station awaiting a placement order from the shipper in addition to free time available after those cars are ordered and enter the demurrage system. Neither the pre-placement free time nor the total free time available on BNSF cars is available for private cars.⁶

Another distinction must be drawn between cars subject to the July 2001 Changes and other cars. BNSF strains to characterize its empty private car charges as similar to demurrage charges. However, there are major distinctions between the empty private car charges and BNSF's pre-existing demurrage program.

⁶ BNSF misconstrues or misstates Complainants' study of "C" pool empty car holding days on BNSF track. In an overzealous exercise in polemics, BNSF avers that "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." Reply at 73. Complainants' study (Opening Statement, Exhibit 8) shows that "C" pool cars were held empty by BNSF free of charge prior to placement for about 3 days at the time the July 2001 Changes were instituted. If those free holding days are added to free time applicable to railroad-owned empty cars *after* those cars are placed for loading, total unbilled holding time approaches 5 free days on all empty carrier cars at almost all times. Even if the July 2001 Changes were not unreasonable on other bases detailed by Complainants, BNSF's charges are clearly unreasonable to the extent that they discriminate against private cars with respect to free days.

BNSF demurrage charges on loaded cars of both private and railroad ownership apply equally in all respects while the loaded cars are on BNSF trackage. The same is not true with respect to empty cars. Demurrage on empty cars of railroad ownership, except for those few contractually-assigned cars, does not begin unless and until a shipper orders the railroad car for loading on a specified "want" date and fails to accept it on that date, but begins on private cars as soon as they arrive at the station serving the shipper and are not accepted for loading. This method is especially problematic because erratic BNSF service makes it difficult for shippers to assimilate empty private cars that arrive on no predictable schedule. The charges contained in the July 2001 Changes would have an altogether different impact if BNSF gave private car shippers the same "order in" option that applies to BNSF cars and did not begin the demurrage process unless the car was delivered on or after the want date and was not accepted for loading.

The BNSF Reply makes few if any inroads on the picture of the July 2001 Changes that emerges from the Opening Statement of Complainants. As there shown, BNSF claimed that the July 2001 Changes were essential to remove "congestion" brought about by empty private cars kept on BNSF track for long periods of time, notably for 30 days or more, and to improve train velocity. In the course of discovery, BNSF was compelled to concede that no empty private car conceivably can be more responsible for the undefined term "congestion" than any empty railroad car. And the record now establishes that there were many times more empty railroad cars held on BNSF track, both for 30 days or more and for shorter periods, than private cars. The central basis for the July 2001 Changes thus was shown to lack any credibility. BNSF's only answer is to now claim that there has been a reduction in the number of both private and railroad empty

cars held on BNSF track, but this cannot provide a credible foundation for the July 2001 Changes in the first instance.

What largely was behind the July 2001 Changes was the sea change in freight car ownership, brought about by BNSF and other railroads, that has resulted in the Class I railroad share of car supply dropping from 68 percent to 37 percent since 1980 while the private car share has increased from 26 percent to 53 percent. The July 2001 Changes act in significant part to impose on private car owners the cost of additional infrastructure that would have been a BNSF cost had it, rather than its customers, continued to supply most of the cars necessary for BNSF to earn the very substantial freight revenues flowing from those cars. It also acted to increase its ancillary revenues from track rentals and from the additional "lever" over its customers provided by the July 2001 Changes.

BNSF naturally denies any such motives, arguing that, if increased dollar receipts had been its goal, it could merely have retained the initial July 2001 Changes without offering to lease BNSF trackage to shippers as an alternative to demurrage or storage charges, while pointing out that billings for empty private storage have declined from \$ during the first six months of 2001 to \$ in 2004. Langston Reply V.S. Exhibit H. But what BNSF neglects to mention is that "billings" by no means equate to revenue. BNSF historically collects only percent to percent of demurrage billed.⁷ Further, by 2004, BNSF had placed miles of track under lease to shippers, providing BNSF with lease rentals of over \$ per year, based on a rental rate of \$20.00 per year per foot, which is the median of the rentals that BNSF states it set about

⁷ See Appendix A hereto, a document produced by BNSF in discovery, showing demurrage and storage billing and collection rates for 1999 through 2002.

to charge.⁸ Track rentals, unlike demurrage charges, are not subject to collection defaults and predictably have overtaken the July 2001 Changes as a revenue source for BNSF. Ironically, those assured, lucrative track rentals do nothing to alleviate the "congestion" initially claimed by BNSF to have been one of its major concerns, as all of the private cars residing on leased track are, as previously demonstrated, continuing to occupy the same BNSF track space as they did prior to institution of the July 2001 Changes.

BNSF's position regarding the law and applicable legal standards is as far off target as its factual claims. Where BNSF does deign to discuss a specific legal issue, it glosses over the terms of the relevant statutory provision⁹ or ignores completely the fact that there is a controlling statute.¹⁰ One of BNSF's principal legal arguments is that Complainants cannot prevail unless they meet their "heavy burden of proof," "extremely heavy burden," or present only the "most compelling evidence" to overcome the "presumptive validity" of BNSF's tariffs (Reply at 34, 41, 43). Of course, BNSF does not and cannot cite any case authority to support its invention of new legal standards or assertion that the law requires the Board to so raise the bar as an obstacle to this particular Complaint.

BNSF's misguided outlook toward the controlling legal standards also seems tied to its assertion that Complainants "now concede that there is no illegality *per se* in applying the same kinds of demurrage and storage charges to empty private cars awaiting load-

⁸ Those track rentals are in the process of being increased. See Wallace Rebuttal V.S., ¶ 9.

⁹ See, e.g., Reply at 58, where BNSF devotes all of one sentence to any sort of substantive legal argument responding to Complainants' contention that the July 2001 Changes fail to meet the requirements of the demurrage statute, 49 U.S.C. § 10746.

¹⁰ See, e.g., BNSF's response to Complainants' assertion that 49 U.S.C. § 10745 requires BNSF to pay an allowance to shippers who furnish instrumentalities of transportation such as freight cars or, in this instance, tracks on which to hold those cars prior to loading. BNSF devotes over two pages of its Reply (pages 75-78) to what amounts to a statement that Section 10745 is "discredited" and its observance voluntary by railroads, notwithstanding cases cited in the Opening Statement to demonstrate that Section 10745 requires the payment of such allowances.

ing that railroads have historically applied to other cars," (Reply at 36, emphasis in text). BNSF accordingly argues that its storage and demurrage provisions cannot be attacked except as disputes arise over specific demurrage or storage bills. According to BNSF, all of Complainants' evidence regarding unreliable, erratic BNSF service should be regarded as irrelevant except in proceedings brought by individual shippers to contest particular demurrage bills.

Just what BNSF means by the term "illegality per se" is unclear. If BNSF means that Complainants concede that the Board cannot set aside the specific July 2001 Changes in their entirety, BNSF is incorrect. It has been Complainants' position from the outset that the Board in this proceeding can find the July 2001 Changes to be unlawful in whole or in part.¹¹ Moreover, as shown, infra, the case principally relied upon by BNSF to support its claim that a shipper's only recourse against a demurrage tariff is on an as-applied basis is inapposite.

The extensive and compelling evidence produced by Complainants to disclose the erratic and undependable service provided by BNSF for traffic involving private cars is, contrary to BNSF's views, entirely germane to this case. It undercuts BNSF's assertion

¹¹ In an attempt to support its claim that Complainants concede no per se illegality "in applying the same kinds of demurrage and storage to empty cars awaiting loading that railroads have historically applied to other cars," BNSF cites the Board's decision of August 13, 2004 in this proceeding, slip op. at 9. There, discussing BNSF's unsuccessful motion to dismiss the complaint, the Board noted that the motion contained BNSF's assertion that the "complaint amounts to an overly broad claim that 'it is unreasonable per se to assess charges at any level at any time period to hold empty private cars on its lines'." (Emphasis in BNSF motion and in the Board's decision). The Board then proceeded to state: "NAFCA, however, denies it is seeking a ruling that a railroad must 'furnish unlimited holding tracks for unlimited periods of time at no charge,' citing Complainants' November 5, 2001 Reply to BNSF's Motion to Dismiss the Complaint, at p. 7. In that Reply, Complainants stated that 'the Board can find, that either any refusal of BNSF to continue to furnish holding tracks for empty private cars prior to loading is improper, or that the free time limitations and demurrage calculation provisions presently in the BNSF tariffs are improper and should be altered.'" (Emphasis in text). Complainants' Reply continued: "It is categorically untrue that the Complaint compels the Board to choose between dismissal or a finding that BNSF must furnish unlimited holding tracks for unlimited periods of time at no charge. The Complaint clearly allows for other reasonable alternatives."

that private car shippers are responsible for overloading its system with "excessive" numbers of private cars and that such shippers may therefore be forced to pay additional charges for car storage or track construction or leases. If BNSF had not asserted that the July 2001 Changes were necessary to correct "congestion" brought about by an excess of empty private cars being stored by shippers for long periods of time on BNSF track, it would not have been necessary for Complainants to demonstrate that BNSF itself has been a material contributor to the conditions it now asserts to justify the expenses imposed on shippers by the July 2001 Changes.¹²

In their Opening Statement, Complainants urged the Board to adopt the straightforward test of reasonableness approved by the D.C. Circuit in Consolidated Rail Corp. v. ICC, 646 F.2d 642, 648 (D.C. Cir. 1981), where the Court stated:

The safety measures for which expenditures are made must be reasonable ones, which means first, that they produce an expected safety benefit commensurate to their costs; and second, that when compared with other possibly safety measures, they represent an economical means of achieving the expected safety benefit.

This is a common sense test of reasonableness that should not be controversial, regardless of whether the benefit claimed by the defendant railroad is safety, as argued by Conrail, or "fluidity," as argued by BNSF. BNSF rejects the test, contending (1) that

¹² Ironically, were the Board to accept BNSF's argument that its demurrage and storage charges can be challenged only on an as-applied basis, undependable and erratic BNSF service even then would be viewed by BNSF as irrelevant. Its demurrage tariff does not *allow* challenges based on bunching or other forms of service irregularities, and the bunching relief allowed under the storage tariff is limited to circumstances when BNSF *purposefully* accumulates empty cars and delivers them in a group. BNSF would contend that storage charges resulting from inconsistent service that does not involve purposeful "bunching" would not be subject to relief under its storage tariff. In effect, therefore, BNSF seeks a system under which empty private car demurrage charges cannot be attacked at all (except, presumably, for clerical error) and empty private car storage charges can only be attacked if falling within the limited bunching provisions of the BNSF tariff.

Consolidated Rail Corp. is distinguishable factually from this case, and (2) that it is not possible legally for the Board to declare BNSF's tariffs unlawful. Reply at 41-43.

BNSF's effort to distinguish the two cases is notably weak. It is based initially on the fact that Consolidated Rail Corp. involved radioactive materials subject to DOT safety jurisdiction. But that is an unmeritorious distinction. The Court in Consolidated Rail Corp. was enunciating a "reasonableness" test to be applied by the Interstate Commerce Commission, just as this case involves a standard of reasonableness to be applied by the Board under Sections 10702 and 11121. BNSF also argues that in Consolidated Rail Corp. the railroads had the option of transporting spent nuclear fuel in regular trains, while neglecting to mention that the dispute in that case arose from the railroads' refusal to offer that less expensive alternative to their costly and unnecessary special train service, giving rise to the ICC's finding that the railroad had insisted on a course of action that was overkill. Here, as there, a common issue exists as to whether the July 2001 Changes are necessary and overly burdensome.

BNSF contends that the Complainants in this case, unlike the complaining nuclear fuel shippers in Consolidated Rail Corp., are not seeking an alternative to the service proposed by the carrier, but instead want the use of holding track "beyond the free period, without assessing a charge for that service." BNSF goes on to argue: "Complainants ... cannot insist that BNSF provide a service, yet refuse to pay for it." Reply at 42. But Complainants most obviously do not seek "free" service in the form of BNSF holding track use. Complainants historically have been paying for that BNSF track through their freight rates, and continue to pay for the same BNSF holding track now as before, inas-

much as BNSF has not reduced its freight rates despite insisting that shippers additionally supply private car holding track at their own expense.¹³

Other than contending, as discussed above, that the only recourse available to Complainants are as-applied challenges to the private car demurrage and storage charges, BNSF asserts that there is no available remedy. It claims that application of the Consolidated Rail Corp. test would "condemn **all** demurrage and storage programs" (Reply at 42; emphasis in text). Once again, the doomsday argument surfaces as BNSF repeats its greatly overstated theme that any infringement on the July 2001 Changes would bring disaster to itself and all other railroads by thwarting their efforts to improve efficiency.

BNSF's challenged tariffs can be set aside or modified without destroying the U.S. railroad system. Moreover, BNSF's citation of an arguably worthwhile goal, efficiency, cannot alone establish that the July 2001 Changes are reasonable. As the D.C. Circuit also stated: "The mere assertion of safety [or efficiency] as a justification for any particular expenditure by a railroad company is not conclusive upon the Commission's judgment of the reasonableness of that expenditure or a tariff based upon it." 646 F.2d at 648. As Complainants demonstrate, the July 2001 Changes have not achieved the efficiency benefits they allegedly were designed to achieve. Nor has BNSF shown that the new alleged benefit of "more traffic with hardly any more cars" resulted from the July 2001 Changes.

BNSF maintains that "this case is simply about resistance to change." Reply at 12. To the contrary, this case *results from change* in the balance of car supply responsibility transferred by railroads to shippers. If BNSF and other railroads supplied every single freight car, there would be no question about their right to establish reasonable

¹³ Not only has BNSF not reduced its freight rates, it has increased them. *Sims Rebuttal V.S.*, ¶ 15.

demurrage rules applicable when their cars were held for unreasonably long periods as loads at origin or destination. Conversely, however, there would be no doubt that BNSF could not charge its customers demurrage or storage for empty railroad equipment unless and until those cars were ordered for loading by a shipper.

Until the July 2001 Changes came about, empty cars of railroad and private ownership were treated equally prior to loading, in each case with the originating carrier holding empty cars on its track at no additional charge to the shipper. Thus, contrary to BNSF's claims, there have not always been universal demurrage distinctions between all railroad and private cars. The July 2001 Changes have brought about those distinctions for the first time based on the totally invalid excuse of removing "congestion" to which private cars contributed, if at all, far less than BNSF's own cars.

Complainants continue to believe strongly that the July 2001 Changes were instituted for the unlawful purpose of compelling BNSF's customers to make infrastructure investments, through track construction or lease, which properly should reside largely with BNSF itself, and to produce ancillary benefits such as track rentals and levered business arrangements as discussed in the Opening Statement.¹⁴ Complainants have presented evidence indicating that the July 2001 Changes constitute unreasonable car service because they discriminate between private and railroad cars, giving the former less free time than the latter, and discriminate between classes of private cars through the application of different rules to different types of cars for the same practices at the same time and place. These unlawful activities can be remedied by finding the July 2001 Changes to be unlawful in whole, or in part. Complainants' filings also show that, so long as the

¹⁴ It should be reemphasized that BNSF now receives more in collectable track rentals than it expected to actually recover in demurrage and storage charges, and that track rentals are on the increase.

July 2001 Changes remain in effect and are utilized to compel shippers to furnish holding tracks that are an essential component of rail service, without full or adequate compensation, BNSF will continue to violate the provisions of 49 U.S.C. § 10745. BNSF's attempts to rebut Complainants' evidence and arguments rest on non-sequiturs and bluster. The need for remedial action by the STB is clear.

II. ARGUMENT

A. Publication of the July 2001 Changes and the Lack of Resulting Benefits

BNSF has experienced a traffic surge within the past two or so years. That surge, the biggest component of which is intermodal traffic, has been welcomed by BNSF and has produced record earnings for BNSF. It is widely recognized that BNSF now is or is about to become "revenue adequate" as a result of imposing some of the most significant rate increases in memory to take advantage of new traffic demand. NAFCA members do not in the least begrudge BNSF a healthy measure of economic success and are pleased that increased traffic on BNSF was not accompanied by a service "melt down" of the type experienced by BNSF and other railroads following their last round of mergers.

However, the Board should not allow itself to be misled by BNSF into concluding that increased traffic volumes on that railroad were handled and a "melt down" averted only, or even largely, because of the July 2001 Changes. In fact, the Board should recognize that BNSF actually is not providing improved or even satisfactory service to shippers using private cars.

Most private cars, tank cars and specialty covered hopper cars are handled in BNSF "manifest" trains that move 32 percent more slowly than BNSF intermodal trains and even more slowly than the average of all trains on BNSF. Mack Rebuttal V.S., ¶ 13

and Appendix A. The disadvantageous handling of manifest trains on BNSF is decidedly more pronounced than on at least one other Class I railroad, NS. Ibid. BNSF has downgraded the handling it accords private cars in manifest trains, but does not want to reap what it has sown in the form of more private cars becoming necessary to handle traffic. Making private car shippers pay more in storage charges and/or track construction and lease charges compounds the adverse impact of BNSF's decision to favor its intermodal or other customers.

Contrary to BNSF's claims, there is nothing in the history of the July 2001 Changes to indicate that they were developed and instituted in 2000-2001 because BNSF foresaw the surge in traffic that began in 2003 or that they were merely one facet of a broad initiative to "enable [BNSF] to remain fluid in the face of the surge in traffic." Reply at 6. In reality, an avowed purpose of the July 2001 Changes at the time of their announcement in February 2001 was to "improve asset utilization ... and effectively expand [BNSF] capacity without additional capital outlays." BNSF Marketing News, Complainants' Exhibit No. 1, Appendix A. Later, in June 2003, BNSF submitted the Verified Statement of Douglas W. Langston¹⁵ to the Board in Docket No. 42060 in opposition to the then pending request for investigation of the July 2001 Changes pursuant to Ex Parte No. 328. There, BNSF asserted that the "purpose" of the July 2001 Changes was to relieve system congestion exemplified by 2,686 empty private cars that had been sitting on BNSF track at the same locations for 30 days or longer.

It is thus crystal clear that a principal purpose of the July 2001 Changes was to cause private car shippers to provide the track infrastructure necessary to hold that part of

¹⁵ Contained in Complainants' Opening Statement in this proceeding, Volume II.

the empty car fleet on BNSF comprised of private cars, with contemporaneous "congestion" providing a convenient pretext..

BNSF now claims that the July 2001 Changes were part of a "broad array of initiatives" necessary to meet "significant strains on the freight rail system" brought about by increased traffic. Reply at 14. As proof of these "significant strains," BNSF cites a letter of June 9, 2004 from Board Chairman Nober requesting "Action Plans" from each Class I railroad for dealing with anticipated seasonally increased traffic volumes. Precisely how BNSF could have managed to develop the July 2001 Changes in 2000-2001 to meet traffic surges not perceived by Chairman Nober until June 2004 is, of course, unexplained by BNSF. And, regardless of why the July 2001 Changes were instituted, it remains that they have no demonstrated, positive impact on today's BNSF operations.

To further its effort to make the July 2001 Changes magically appear to be part of a "broader initiative," BNSF lists other elements of this "initiative," but without supplying the dates on which these other elements were adopted. As recited by BNSF, they included routine personnel, equipment, and information programs (Reply at 28); adjustments to demurrage provisions (which railroads periodically make); increased intra-terminal switch charges, penalties for overloads, and weighing charges (which appear to be nothing more than revenue-enhancing changes); and "great efforts to communicate and educate customers." Reply at 14-15. At least in the case of the individual shipper Complainants, however, these "great efforts" did not occur before the July 2001 Changes were announced. Neumayer Rebuttal V.S., ¶ 12; Mack Rebuttal V.S., ¶ 27; Wallace Rebuttal V.S., ¶ 2. Although BNSF Witness Langston testified that these steps, including specifically the July 2001 Changes, were undertaken to bring BNSF "policies more in

line with the competition," Langston Reply V.S. at 4, at the time BNSF instituted the July 2001 Changes, no Class I railroad had a comparable program of empty private car holding charges. Voss Rebuttal V.S., ¶ 8.

BNSF proclaims that "its various capacity-enhancing car utilization initiatives, including its empty private car storage program, have been an unmitigated success, because: "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." Reply at 26.

Whether or not BNSF's "capacity-enhancing initiatives" have been successful has little to do with the July 2001 Changes. According to BNSF, "success" is measured by the fact that BNSF is "carrying considerably more traffic per track-mile and per car than it carried in 2000." If true, those characteristics have no demonstrated connection whatsoever with the July 2001 Changes. Increased per car traffic volumes are explainable by increased car-carrying capacity while more traffic per track mile is a function of increased business levels. To say that improvements in either of those areas is due to the July 2001 Changes is mere sophistry.

It is BNSF's position that "both railroad-controlled and private cars are demonstrating significantly greater productivity today than in the past." Reply at 26. When the measures of this increased productivity advanced by BNSF are examined, however, it readily is seen that they are either false measures or totally unrelated to the July 2001 Changes.

The first of these measures is a decrease in total "customer time." Ibid. "Customer time" includes private cars held on track leased from BNSF, which is track considered by BNSF to be the equivalent of private track. It includes cars held on industry track "on spot" (i.e., either after constructive placement or never having been constructively placed) that are not subject to demurrage or storage charges; loaded cars at origin; and even loaded cars at destination.¹⁶ Thus, the claim of "reduced customer time" can, for all BNSF has shown, have occurred at destination or when private cars are otherwise not subject to the July 2001 Changes. It is just not possible to conclude that any reduction in total "customer time" is attributable in any material way to those Changes.

BNSF next points to a reduction in the amount of time that empty private cars sat on BNSF's track after constructive placement. Here, again, BNSF has demonstrated no nexus between the facts asserted and the result claimed. In this instance, BNSF claims that empty private industrial cars (cars other than agricultural, coal, or intermodal) sat on BNSF track for an average of two days after constructive placement in May 2001, but for less than half a day in July 2005. Over the same time span, BNSF asserts, empty private agricultural cars sat on BNSF's track for an average of 1.3 days in May 2001, but for only .4 days in July 2005. Reply at 26; Langston Reply V.S. at 13; Langston Exhibits E and F.

BNSF's data does not establish that a reduction in the time between the commencement and termination of constructive placement actually resulted in a commensurate reduction in the time that empty private cars sat on BNSF track. Mr. Langston states that his Exhibits E and F show time that private cars "have sat empty on BNSF's track before being moved by the shipper." Langston Reply V.S. at 13. Charts of the Exhibit E and F type, purporting to show the termination of constructive placement, actually show

¹⁶ See Langston Dep. Tr. Vol. I, pp. 110, 119, attached as Appendix B hereto.

the time when BNSF was notified by the shipper to remove the car from its track and place it on industry track.

However, BNSF does not necessarily remove an empty private car from BNSF track and place it for loading as soon as, or even on the same day as, BNSF receives the shipper's placement order. At many shipper facilities, BNSF provides switching service fewer than 7 days a week, in some cases as little as 3 days per week. *Sims Rebuttal V.S.*, ¶ 9; *Voss Rebuttal V.S.*, ¶ 5; *Wallace Rebuttal V.S.*, ¶ 10. A shipper could order an empty private car removed from BNSF track on Monday afternoon, following that day's regular switch, and the car might not physically be removed by BNSF for nearly 48 hours if it is a three switch a week facility. In those circumstances, the fact that a shipper might as a consequence of the July 2001 Changes provide slightly accelerated notice to BNSF to remove the empty car from BNSF track would relieve the shipper of demurrage or storage liability as of the time of that notice, but would do nothing to alter the physical location of the car or relieve "congestion." In the case of empty agricultural private cars, the reduction in post-constructive placement time on BNSF track between 2001 and 2005 amounts to 12 hours, which is not sufficient to assure more prompt physical removal of the car from BNSF track even where BNSF provides daily switching. *Ibid.*

BNSF actually confirms the conclusion that a reduction in constructive placement time does not result in contemporaneous removal of a car from BNSF track. See Reply, fn. 55, where BNSF explains that infrequent or even once-a-day switching keeps private cars on BNSF track after they are released from constructive placement.

The most frequently advanced claim by BNSF to show that the July 2001 Changes enabled its system to remain fluid is the claim that average daily loads in all cars

rose 26.8 percent between July 2001 and June 2005, while the number of cars on line increased by only 2.4 percent over the same span. Reply at 26.

There are an array of persuasive reasons why these results have nothing whatsoever to do with the July 2001 Changes and why BNSF can continue to expect similar results even if the July 2001 Changes are cancelled in their entirety.

First, although cars on line as counted by BNSF increased only slightly between 2001 and 2005, *active* cars on line increased substantially due to the fact that nearly 16,000 cars were removed from storage status and placed in active service between 2001 and 2005. These cars enabled BNSF to materially increase loadings without appearing to increase cars on line. Seymour Rebuttal V.S., *inter alia*.

Second, there was a greatly expanded use of shuttle trains during these same years. Neumayer Rebuttal V.S., ¶ 4. Increased use of grain shuttle trains alone between 2001 and 2005 is expected by BNSF to allow it to handle an 11 percent increase in grain traffic with a decline of 12 percent in cars. Seymour Rebuttal V.S., ¶ 6.

Third, there has been a rapid increase in BNSF intermodal loads (i.e., containers and trailers) that can be handled without a corresponding increase in intermodal rail cars due to changes in intermodal traffic mix and increases in the size of the rail cars. Seymour Rebuttal V.S., *inter alia*. Indeed, the fact that so much of BNSF's expanded traffic volume consists of intermodal "loads" is itself a reason to expect an increase in loadings without a corresponding increase in cars. Intermodal "loads" are not counted by the car, but by the trailer or container. An intermodal freight car often handles more than one "load." The size of intermodal cars has been increasing, providing additional capacity to handle more "loads" per car. With intermodal traffic the fastest growing traffic segment

on BNSF, it is to be expected that "loads" of intermodal traffic will increase more rapidly than the number of cars necessary to handle those loads. Ibid.

Fourth, business conditions generally improved in the years immediately preceding 2005, creating a greater demand for rail cars. Shipper facilities worked longer hours, produced more moveable traffic, and required empty cars for loading more quickly than normally. These conditions were responsible for a higher level of car utilization. *Neumayer Rebuttal V.S.*, ¶ 7.

BNSF points in vain to one final study said by it to demonstrate the success of the July 2001 Changes: a study showing a reduction in BNSF demurrage and storage billings for empty private cars between 2001 and 2004. *Reply at 27 and Langston Reply V.S. Exhibit H.* A decline in BNSF empty car demurrage or storage billings, however, is entirely to be expected because empty private cars on track leased by shippers from BNSF do not accrue demurrage or storage while on that leased track. Between 2001 and 2004, the amount of BNSF track leased to shippers increased substantially and steadily,¹⁷ reaching 1,000 miles by 2004 and inversely mirroring the decline in BNSF's billings for empty private car demurrage and storage. The decline in demurrage and storage billings accordingly fails to prove that the July 1 Changes brought about a reduction in demurrage and storage billings, and simply shows how BNSF has undertaken to substitute assured, lucrative track rentals for demurrage and storage billings that BNSF has found it difficult to collect, as demonstrated above.

The extent to which BNSF has struggled to make it appear as if the July 1 Changes are responsible for BNSF's ability to handle increased traffic volume is evident. And so is the reason *why* BNSF has felt compelled to make its strained arguments.

¹⁷ See Opening Statement at 33.

BNSF service overall, although short of a "meltdown," actually has *worsened* since the July 2001 Changes were placed into effect, as measured by the types of carrier operating metrics recognized by the Board and the railroad industry. Opening Statement at 29-30. As discussed previously, BNSF has made a weak, unpersuasive effort to offer some substitute metrics, but has not explained why they are more valid than the normally accepted metrics of railroad performance. It is also noteworthy that BNSF, originally having advanced "congestion" allegedly caused by empty private cars as a principal reason for the July 2001 Changes, has dropped its claim that private cars are almost solely responsible for any such congestion.

In short, there is no reliable, reasoned or sustainable basis on which to conclude that the July 2001 Changes either were aimed at removing a "congestion" problem created by empty private covered hopper cars or that they brought about improved operating conditions on BNSF.

B. BNSF Mischaracterizes the Status of the Complaining Parties and the Position of the Amicus Parties

As noted, BNSF seeks to portray Complainants as a small, uniquely dissatisfied group of shippers whose opposition to the July 2001 Changes has no support in the shipping community at large. See Reply at 31, *et seq.* The purpose of this misplaced characterization is obvious. Having endeavored to convince the Board that the July 2001 Changes should be seen as critical to the success of BNSF and the railroad industry, BNSF next set about to suggest that a small group of shippers should not be allowed to impair BNSF's alleged operating success. Just as BNSF's claims of operating successes tied to the July 2001 Changes are misplaced, so are its efforts to mischaracterize the nature and extent of the opposition to the July 2001 Changes.

BNSF asserts that this Complaint is being maintained by only seven shippers, less than a majority of NAFCA's members, most of whom have chosen not to participate in this proceeding. Reply at 31. That is an incorrect statement. The Complaint was brought by NAFCA and 10 of its individual members, who determined to pursue the Complaint in their individual capacities. NAFCA as an organization was and remains a committed Complainant. Mack Rebuttal V.S., ¶¶ 2-4.

Nor are NAFCA and the individually-named Complainants the only parties to object to the July 2001 Changes. NITL and ACC initially intervened in support of the Complaint. As a result of BNSF's burdensome discovery requests, those parties sought and were granted leave by the Board to change their status from that of Intervenor to *Amici*. It is as plain as anything can be, however, that the steps taken by NITL and ACC to avoid a protracted discovery dispute with BNSF should in no way be confused with a change in the position of those two organizations. They remain opposed to the July 2001 Changes and have made it plain in their excellent *Amicus Curiae* joint brief that they disapprove of the July 2001 Changes.

C. BNSF's Demurrage and Storage Charges Are Not Presumptively Valid

In effect treating demurrage and storage charges in any shape or form as a railroad birthright of sorts, BNSF asserts that its use of those charges as applied to empty private cars is "presumptively valid." Reply at 34-44. The foundation for this legally unsubstantiated claim of "presumptive validity" appears to be BNSF's unfocused reliance on a handful of demurrage decisions. Properly applied, those decisions do not support BNSF's position and, indeed, highlight the distinction between the empty private car rules and

charges of BNSF, on the one hand, and the historical purpose and use of demurrage charges, on the other.

BNSF begins its effort to justify the July 2001 Changes as "presumptively valid" with the statement: "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." Ibid at 35. One of the cases cited by BNSF to support its statement is Railroads Per Diem, Mileage, Demurrage and Storage Agreement, 1 I.C.C. 2d 924 (1985). As explained in that decision, at 933: "Demurrage and storage charges are assessed by railroads against shippers or receivers for undue detention of equipment. These charges ... are primarily a penalty to deter undue car detention and, to a lesser extent, compensation to the railroad for expenses incurred."

Demurrage charges historically were focused on "equipment" because most cars traditionally were furnished by railroads, and undue detention of the cars would both deprive the railroads of the use of a capital asset and deprive other shippers of access to railroad cars. Plainly, neither of those purposes applies directly to private cars. Railroads do not invest their capital in private cars and a shipper's detention of its own private car will not deprive other shippers of the use of that car. For those reasons, demurrage basically was designed to discourage the undue detention of *railroad* cars for loading or unloading. Storage charges were not even applicable to cars held *to be* loaded or unloaded, but were aimed at *loaded* railroad cars that shippers left with railroads after release by the shipper. Railroads Per Diem, Mileage, Demurrage and Storage Agreement at 933.

There is no basis in case law for the application of storage charges to empty private cars, and BNSF has pointed to no case in which storage charges were assessed against empty private cars. It does cite a case in which demurrage was applied to *loaded* private cars held on railroad track, Cities Service Oil Co. v. Soo Line R.R., 356 I.C.C. 838 (1977), as well as a decision in which "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)." In that decision, however, the ICC's attention was focused on *loaded* private cars, as made clear from the following statement:

* * * failure to charge demurrage on private cars would lead to greater discrimination possibilities that [sic] allegedly exists. Railroad-owned cars that are subject to demurrage charges would be unloaded before private cars that are to be exempted. In addition, consignees receiving private cars would be apt to delay unloading and use the cars for warehouses without penalty.

350 I.C.C. at 801 (emphasis added). BNSF has not established that similar considerations have ever been regarded by the ICC or the Board as justification for demurrage charges applicable to empty private cars.

The fact that demurrage charges have applied to loaded private cars does not justify the application of demurrage to empty private cars awaiting loading. Demurrage charges against loaded private cars are not discriminatory; they apply equally to railroad and private cars when on railroad track. Ibid. On the other hand, if demurrage charges are established with respect to empty private cars held on railroad track prior to loading, a distinction will have been drawn for the first time between railroad cars and private cars. Empty railroad cars awaiting loading will continue to be held by the serving carrier free

of charge until such cars are ordered by a shipper for placement on a specified "want" date, are tendered on or after that date, and are rejected by the shipper. Private cars, on the other hand, are allowed no such surcease under the BNSF July 2001 Changes. For the first time, private car shippers will not be treated in the same way BNSF treats shippers receiving rail cars for loading, who have the benefit of a car supply for which they pay no empty holding charges. As the decision in Car Demurrage Rules suggests, discrimination in the application of demurrage rules is to be avoided.

Moving beyond its assertion that empty private car holding charges are acceptable, BNSF next claims that they are virtually mandated by Congress and the Board. Reply at 37. Were this claim not such obvious hyperbole one would have to pause and ask how, if BNSF is correct, it can justify having ignored such a mandate until now.

BNSF professes that the era of independent pricing and innovation ushered in by the Staggers Act is a warrant for the July 2001 Changes. Reply at 37. The question, however, is not whether BNSF acted independently, but whether it acted lawfully. Moreover, the claim that the July 2001 Changes gain a boost as an "innovative" step is ludicrous given BNSF's conflicting and inaccurate testimony that the July 2001 Changes were implemented because BNSF's "storage and demurrage practices were out of line with the practices of other major carriers" and were intended to "bring [BNSF's] policies more in line with the competition." Langston Reply V.S. at 3, 4.

The BNSF Reply is rife with inaccurate restatements of Complainants' arguments; BNSF often restates such arguments because it finds it easier to contest an argument that Complainants did not make than one that it did. An example of this tactic is BNSF's endeavor to make it appear as if it is Complainants' position that BNSF's tariffs should "be

struck down simply because they represented a departure from past practice." Reply at 39. Of course, that is not at all what Complainants contend. BNSF, like other railroads, indisputably has furnished holding track for empty private cars as part of the freight rate paid by BNSF's customers, whether they use private or railroad cars. Before that practice is altered, the alteration should be justified; and Complainants contend that neither the complete termination of that practice nor the specific rules adopted by BNSF have been justified by BNSF.

Somehow, BNSF appears to believe that its arguments set the stage for it to contend that "only the most compelling evidentiary presentation by the Complainants could overcome the presumptive validity of BNSF's storage and demurrage tariffs." Reply at 41. BNSF has things backwards. It is BNSF, not Complainants, that is the proponent of a new application of demurrage and storage. If there is any "presumptive validity" in this proceeding, it should attach to the practices that satisfied BNSF and all major railroads until BNSF took the lead in transforming demurrage and storage provisions into profit centers and sources of capital investment by unwilling private car shippers.

As indicated previously, BNSF's weak chain of "presumptive validity" arguments ultimately leads to the point where BNSF absurdly asserts that Complainants "would condemn *all* demurrage and storage programs" as unreasonable practices. Reply at 42. BNSF's table-pounding cannot conceal the weakness of its position. This time, BNSF is seeking to conjure the illusion of a railroad industry totally deprived of demurrage charges because Complainants have assailed the specific empty private car rules and practices published by BNSF and its baseless justifications for those rules and practices.

BNSF offers the Board's decision in Capitol Materials Inc. – Petition for Declaratory Order – Certain Rates and Practices of Norfolk Southern Ry., STB Docket No. 42068 (April 12, 2004) as authority for the proposition that only "specific evidence" regarding the "application of storage and demurrage charges at particular locations" can support shipper challenges to carrier demurrage or storage provisions. Reply at 42-43. Capitol Materials, however, does not present a bar to Complainants' claims of unreasonable practices or unreasonable car service. That case came before the Board as a court referral to resolve three specific, narrowly defined issues: "(1) whether NS's demurrage **charge** as contained in its applicable tariff is itself unreasonable; (2) whether the **method by which NS calculates** the demurrage charge is unreasonable; and (3) whether NS's practice of assessing the demurrage charge **in the circumstances at bar** represents an unreasonable practice" (emphasis added).

As BNSF acknowledges, Complainants are not here assailing the level of BNSF's storage or demurrage "charges." Nor are Complainants questioning the "method by which {BNSF} calculates" its demurrage charges. Lastly, Capitol Materials addresses unreasonable practices only in the context of the "circumstances at bar" in that case. Those "circumstances" did not involve the institution of a new definition of demurrage or storage never before considered by the ICC or STB.

Insofar as Capitol Materials did address unreasonable practices, it involved two assertions by the shipper. The first assertion contested NS's "insistence that Capitol submit written claims for the disputed demurrage charges." No such unreasonable practice issue is involved here. The second assertion involved a series of "specific circumstance" issues: "bunching"; providing a single switch time per day on specified days of the week;

failure to maintain consistent switching times; failure to timely remove released rail cars; failure to follow standing placement instructions; and assessment of demurrage based on constructive rather than actual placement. The Board concluded that bunching claims must be decided on an as-applied basis. Assuming that conclusion was correct in the context of Capitol Materials, it does not support the July 2001 Changes. Complainants' bunching issue with BNSF's tariffs is that they do not allow bunching to be raised *at all* with respect to demurrage and define it far too narrowly with respect to storage. In other words, BNSF's tariffs *preclude* the type of as-applied bunching challenges contemplated in Capitol Materials.

Nor does this case involve an assertion that the July 2001 Changes produce unreasonable practices because of BNSF's switching failures or misuse of constructive placement. However, if the Board is inclined to regard Capitol Materials as being of any particular precedential value to this proceeding, then three aspects of that case deserve comment.

First, Capitol Materials reinforces the conclusion that demurrage is intended to "compensate the railroad for the extended use of its railcar." Slip op. at 2. Demurrage, in other words, is not primarily a tool to police the use of private cars, which are not railroad assets. Demurrage on private cars should, therefore, be carefully tailored to apply where necessary to avoid discriminatory treatment as between private and railroad equipment.

Second, the case reinforces the fact that average agreements are bilateral agreements between a railroad and a shipper, contrary to BNSF's unilateral imposition of average agreement terms under its Demurrage Book.

Third, Capitol Materials looked to "other [railroads'] demurrage tariffs" to validate the level of the demurrage charges assessed by NS. Slip op. at 4. If the practices of other railroads determine demurrage lawfulness, then it is appropriate to observe that no other railroad maintains system-wide demurrage or storage provisions comparable to those of BNSF. If Capitol Materials is precedent, then BNSF's demurrage and storage charges should be set aside to the extent they compare unfavorably with those of other railroads. See Opening Statement, Exhibit No. 1, ¶¶ 29-33 for a review of how other railroads treat empty private cars.

It is ironic that BNSF has chosen not only to try to foreclose Complainants' challenge to the July 2001 Changes, but in effect has chosen to argue that it is improper for Complainants to make that challenge because they represent only "parochial concerns about the application of [BNSF's] tariffs at a few locations." Reply at 44.

In part, the basis for that argument appears to be Exhibit I to Mr. Langston's Verified Statement, an exhibit that purports to show that each of the shipper Complainants served by BNSF incurred charges under the July 2001 Changes at only a minute fraction of their facilities. Mr. Langston's Exhibit I, however, distorts the impact of the July 2001 Changes on the complaining BNSF customers by comparing the number of their facilities at which empty private car holding charges were incurred with the total number of each shipper's facilities, regardless of whether they originate private car shipments. The individually complaining shippers, like other agricultural shippers, originate certain grain shipments at places such as country elevators utilizing cars furnished by BNSF. Most private cars, on the other hand, originate shipments at facilities that process corn, soybeans, or other agricultural raw materials. The July 2001 Changes in fact have had a sub-

stantial impact on those private car loading facilities, for some companies at 100 percent of such facilities. Mack Rebuttal V.S., ¶ 6; Neumayer Rebuttal V.S., ¶ 8; Wallace Rebuttal V.S., ¶ 11; Sims Rebuttal V.S., ¶ 5. Complainants have a very substantial stake in the outcome of this proceeding.

It is especially inappropriate for BNSF to question the standing of Complainants to attack the July 1 Changes on the grounds that Complainants seek too great a remedy in proportion to their allegedly small stake in the outcome. Complainants represent the views of NAFCA and also of many additional shippers, such as those who are members of NITL and ACC. Contrary to its assertion that the adjustments that it made to the original July 2001 Changes reflected and met the concerns of its customers (Reply at 23), BNSF refused to agree to maintain those adjustments or to enter into a settlement agreement with NAFCA and insisted on making only unilateral adjustments to the original July 2001 Changes that BNSF can reverse or modify at will. BNSF now asserts that it may elect to do precisely that by raising the \$10.00-\$15.00-\$25.00 levels of its storage charges. Mack Rebuttal V.S., ¶ 7; BNSF Reply at 67.

Complainants' first choice of remedy was not protracted litigation. On numerous occasions, representatives of Complainants approached senior BNSF officials to seek a negotiated resolution of differences between BNSF and NAFCA. BNSF's consistent refusals to discuss differences with NAFCA left Complainants with no choice but to pursue this Complaint. Mack Rebuttal V.S., ¶ 8.

D. BNSF Offers No Convincing Reasons Why the July 2001 Changes Should Be Regarded As Reasonable

It comes as no surprise, given its intransigence, that BNSF disagrees with Complainants' request that the Board find that the July 2001 Changes are unreasonable practices. To support its position, BNSF makes a series of failed arguments. Reply at 44-66.

1. Market Power

The first of these failed arguments begins with an effort to reframe Complainants' position to make it appear as if Complainants believe that BNSF's extreme market power over private car traffic by itself supports a finding of unreasonable practice. Reply at 45. This, of course, misconstrues the relevance of BNSF's market power. Complainants believe that BNSF's market power over shipments moving in private rail cars warrants *intervention* by the Board as a matter of policy pursuant to 49 U.S.C. § 10101(6) and (12). Complainants stated: "BNSF's extremist position is ... symptomatic of a carrier totally confident that it has absolute market power over those of its customers targeted by the July 2001 Changes." Opening Statement at 48.

Of course, BNSF then proceeds to deny that it has market power over private car traffic. Relying on cases long since outmoded because they were decided at a time when railroads supplied the vast balance of freight cars, BNSF dusts off the old saw that shippers buy their own cars for their own convenience, marketing needs, and tax benefits. Reply at 45. It is telling, though, that BNSF offers not one sentence of evidence to refute Complainants' proof that shippers now supply private cars because BNSF, like other railroads, has been turning over the majority of car supply to shippers and because transfer-

ring much of the car supply obligation to shippers is an economically sensible choice for BNSF. See Mack V.S., Complainants' Exhibit No. 1, ¶¶ 2-8.¹⁸

At \$65,000 to \$95,000 per car, shippers are relieving BNSF of huge expenditures even though freight cars are not where shippers would prefer to employ their capital. BNSF claims that its actions were not those of a carrier with market power. It points to the "lengths to which BNSF went to notify ... shippers of its new program" (Reply at 46). In truth, those meetings, at least with the Complainant shippers, took place only after BNSF announced the July 2001 Changes.

A number of other indicia of BNSF's market power are not contested factually and are simply sloughed over by BNSF. In response to a BNSF internal email document showing that BNSF intended to use the July 2001 Changes to lever long-term contracts, BNSF denies that leveraging of that type was its policy (Reply, fn. 34) and claims (Reply at 46) that "thousands of pages of materials turned over by BNSF in discovery make clear" that BNSF had no such policy. BNSF has produced in evidence not one of these thousands of pages to show that it had no such policy and has offered no testimony that the salesperson who generated the email message was ever contradicted, reprimanded, or corrected.

Another occurrence illustrates that BNSF attempted to use its market power and the July 2001 Changes to extract shipping concessions from its customers after the July

¹⁸ As indicated above, BNSF has also made the somewhat amusing argument that its shippers are capable of making BNSF "captive" to them. Reply at 46. It should be added to what Complainants have already stated in response to that claim that every product sold by BNSF's customers is subject to competition from multiple vendors. This makes BNSF's shippers highly vulnerable to BNSF, which has the power to downgrade the ability of any shipper to meet its competition by raising the rates to that shipper. In stark contrast, where BNSF is the sole railroad serving an origin or destination and is handling bulk shipments not readily susceptible to truck competition, which are the types of shipments moving in private cars, BNSF has no vulnerability to its customers, regardless of their size. This is especially true at present in light of reduced railroad capacity. Today, carriers do not seek additional "manifest" traffic. Neumayer Rebuttal V.S., ¶ 9; Sims Rebuttal V.S., ¶ 3.

2001 Changes were announced. At meetings with its customers in 2001, BNSF proposed new contract rate structures if freight volumes were guaranteed to BNSF at premium rates. Opening Statement at 34-35. BNSF now endeavors to portray those efforts as benign, routine marketing tactics. Reply, fn. 35. Yet they surfaced only after the July 2001 Changes were announced and, as discussed in the Opening Statement, were offered as part of a *quid pro quo* to relieve shippers of any burdens that the July 2001 Changes might impose.

In short, there is every reason to accept Complainants' conclusion that BNSF has substantial market power over shipments moving in private cars and relied on that market power in implementing the July 2001 Changes.

2. Singling Out Private Cars

In Complainants' view, the July 2001 Changes improperly singled out the owners and users of private cars to bear the economic burden of creating additional infrastructure for empty cars through track construction or lease, even though stored empty railroad cars outnumbered stored empty private cars by a ratio of 10-to-1 when the July 2001 Changes were conceived. See Langston Reply V.S. Exhibit A.

BNSF, of course, denies any such disparate intentions on its part. It asserts that the July 2001 Changes were only "one of a number of programs that BNSF instituted in 2000 and 2001 to improve car utilization." Reply at 48, where BNSF references its new work-a-day information technology and routine demurrage adjustments discussed, supra, as well as certain other steps, such as the purchase of new equipment and hiring of employees, taken to sustain ongoing operations. That BNSF kept its railroad running

through routine maintenance and improvements does not justify singling out private cars as being responsible for “congesting” its system.

BNSF's initial argument that the minority of empty private cars held on the BNSF system for 30 days or more were causing "congestion" was an obvious attempt to blame private cars for a problem that was due more to BNSF's track storage of its own empty cars. Disingenuously, BNSF now claims that it "never suggested" that empty carrier cars stored by BNSF on its tracks bore no responsibility for congestion. BNSF argues that, because there now are fewer empty cars of both railroad and private ownership stored on its line, it is clear that BNSF did not single out private cars for any purpose. Reply at 48, 49. But the improved utilization of both private and carrier cars results from an upswing in business in the face of a car surplus. See, e.g., Crowley/Burris Rebuttal V.S., ¶ 12-17. If anything, the reduction in total empty cars stored on BNSF establishes that car utilization improvements have no connection with the July 2001 Changes. Those Changes have no application whatsoever to railroad cars; yet utilization of railroad cars improved over the same time span as did utilization of private cars. Business conditions, improved car technology, and increased reliance on shuttle trains are what resulted in improved car utilization, and not the July 2001 Changes.

3. The Economic Posture of the July 2001 Changes

BNSF's next argument addresses a significant issue. As presented by BNSF, the issue has become Complainants' alleged assertion that "it is [an] unreasonable practice to induce private car shippers who leave their cars sitting on BNSF's track either to manage their fleets and operations more efficiently or to build or lease track to hold their cars."

Reply at 49. Despite the fact BNSF has obviously twisted Complainants' position, this issue gets to the heart of some of the problems with the July 2001 Changes.

First, the July 2001 Changes do not represent a genuine "inducement" as much as they represent coercion. Genuine inducements take the form of actions that reward changes in behavior undertaken voluntarily by a shipper. Examples of such inducements offered by BNSF, and discussed in the Opening Statement, are allowances paid to shippers who furnish private cars, allowances paid to shippers who provide electronic billing to replace manual documentation formerly issued by BNSF, and even multiple car rates. BNSF has in fact induced customers to invest heavily in expensive grain shuttle train loading and unloading facilities by offering substantial per car incentive payments for rapid loading and unloading. BNSF, like other railroads, also has offered inducements to shippers who upgraded their grain loading facilities to handle 25 or 50 car units through lower rates that made those investments more attractive.

Coercion comes about when a railroad, such as BNSF, with market power over a customer imposes new requirements that exceed what the customer would agree to in an arm's length bargain. Coercion more aptly describes the July 2001 Changes.¹⁹ BNSF could have, but did not, approach the Complainant shippers with proposals to compensate them if they could and would build additional track on which to hold private cars. BNSF instead imposed a punitive regime of demurrage and storage charges²⁰ even though BNSF is itself largely the cause of the conditions at which its demurrage penalties are

¹⁹ BNSF's own documents show that BNSF intended to use the July 2001 Changes to "incent corrective behavior" from its customers; in other words, to compel them to take steps BNSF did not believe the customers would take voluntarily. See Mack V.S., Complainants' Exhibit No. 1, Appendix C.

²⁰ Demurrage charges "embrace two distinct elements, namely compensation for use of the car and a penalty element, Ormet Corp. v. Illinois Central R. Co., 341 I.C.C. 647 (1972). Of the two elements, the penalty portion is by far the greater. See Railroads Per Diem, Mileage, Demurrage and Storage Agreement, supra.

aimed. Erratic service by BNSF – which BNSF does not dispute – and slower speeds for the trains in which private cars typically move are major contributors to any increase in the private car fleet over optimal levels that may exist. Shippers, faced with a choice between adding cars to compensate for poor carrier service or closing facilities, understandably elected to add cars. BNSF has not demonstrated in the slightest that shippers have managed their private cars inefficiently. With cars costing from \$65,000 to \$95,000 each, shippers have more than sufficient incentive to avoid inefficient car management practices that would require even more cars.

BNSF goes on to complain (Reply at 50) that Complainants' position allegedly provides no incentive for private car shippers to manage their cars or infrastructure so as to maximize the utilization of BNSF's existing track capacity. According to BNSF, the result is cross-subsidization of private car shippers by other shippers.

BNSF harbors an odd conception of cross-subsidy. Before the July 2001 Changes were instituted, the rates paid to BNSF by both railroad car and private car users included storage of empty cars on track furnished by BNSF. As proposed by BNSF, private car users would continue to pay those same rates and, in addition, be compelled to construct and maintain private car holding track, largely at the shipper's own expense, or to lease track from BNSF. Shippers using BNSF cars would be paying for just one set of holding tracks; private car shippers would be paying for two. It is more accurate to say that the private car shippers would be cross-subsidizing the balance of BNSF's customers.

Complainants presented expert economic testimony explaining and supporting the views of cross-subsidization explained just above. BNSF has presented no contrary expert testimony. Instead, it relies on two remarkable statements.

The first is Mr. Langston's claim that BNSF, by imposing new charges on private car shippers, is acting acceptably to deter wasteful practices by those customers. His reasoning is that, "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." Langston Reply V.S. at 19. Apparently, BNSF and Mr. Langston must be under the impression that restaurant customers and BNSF customers stand in the same position with respect to market choices. However, if a restaurant's customers do not like the changes to its pricing policy they can go next door to another restaurant. So can customers who think that they are being required to cross-subsidize other customers in a free market. BNSF does not operate in an open, competitive marketplace, at least insofar as bulk traffic is concerned. Its private car customers have no competitive alternatives when they are forced to cross-subsidize those BNSF customers continuing to use the holding track for which private car shipper still pay. BNSF can and does tell its customers how and where they must use their assets and those of BNSF, and it is BNSF, rather than an open, competitive marketplace, that is in a position to dictate that the use of its assets be cross-subsidized by private car shippers.

Equally astonishing is the nature of the support relied upon by BNSF for its claim that charges such as those imposed to a July 2001 Changes are the "fairest and most economic approach to induce efficient behavior by shippers." Reply at 29. The authority offered by BNSF for its position is an article by Lawrence H. Kaufman, a newsletter columnist with no known economic credentials, and certainly none to match those of Complainants' expert. See Reply at 29. Mr. Kaufman's views are set forth verbatim in the Reply. Unfortunately, however, BNSF neglects to advise the Board that Mr. Kaufman is

far from unbiased. Mr. Kaufman has been employed by the railroad industry. In fact, he is the author of an “official history of BNSF,” according to Rail Business, October 4, 2004. Complainants understand, further, that Mr. Kaufman has been receiving compensation from BNSF while he was preparing that history. Those facts are disclosed neither by BNSF in its Reply nor in Mr. Kaufman’s March 21, 2005 Journal of Commerce article reproduced in part by BNSF in its Reply. Mr. Kaufman cannot be regarded as a credible source of economic opinion in support of BNSF.

The fact of the matter is that the July 2001 Changes do not even represent true price “unbundling.” As explained by Complainants’ expert economist, economically beneficial unbundling occurs when a buyer is given an option that offers a lower price for a product that features fewer components. See Opening Statement at 50. There is no evidence that any BNSF customer has been offered such a choice.

Woven into BNSF’s claim that the July 2001 Changes reflect sound economic principles is the argument that the July 2001 Changes are justified by the provisions of 49 USC § 10722, which provides:

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 services not otherwise applicable to the movement. The Board shall facilitate development of such charges so as to increase the utilization of equipment. (Emphasis supplied).

The July 2001 Changes do not qualify for protection under Section 10722. BNSF points to no “premium charges for special services or special levels of service” arising from the July 2001 Changes. The charges involved are instead demurrage and storage charges and in that respect are governed by 49 USC 10746. The “special services or spe-

cial levels of service” contemplated by Section 10722 were intended to consist of rapid, guaranteed transportation service in return for premium rates. That purpose is made clear by the legislative history by Section 10722, which contains the following statement:

Senate Bill – The Senate Bill created a new section 10732 of the Interstate Commerce Act. This section provides that rail carriers are free to establish a special elective tariff which contains premium freight rates for special services or levels of services that may be requested by a shipper. Throughout Senate hearings on rail regulatory reform, testimony was submitted by many shippers who advised that they were prepared to pay a higher rate for a higher level or a more expeditious service. This amendment will give those shippers that option and, in turn, allow the rail carriers to increase the utilization of their cars.

Essentially, this subsection allows carriers to provide a more specialized service to shippers who choose to pay the premium rate, but the common carrier obligation is not abrogated in any way. This will insure that the shipper is still guaranteed the same level of service that you receive today. This subsection is simply another option for the shipper and the rail carrier.²¹

The legislative history of Section 10722 shows that BNSF has taken a statutory provision intended to make a rate option available to shippers when they elect to pay for a more expeditious service, and converted it into a warrant to impose higher costs on unwilling shippers in return for nothing approaching expeditious service; in fact, for receiving inferior service.

BNSF next argues that the July 2001 Changes are no different than destination demurrage charges which, according to BNSF, private car owners prefer to see at higher levels to create a better incentive for a prompt release for the cars. BNSF provides no details about when, if ever, private car operators made such requests. Actually, it is

²¹ H.R. Conf. Rep. 96-1430, 1980 U.S.C.C.A.N. 4110, 4150. Section 10732 of the Interstate Commerce Act subsequently was renumbered as Section 10722 of the Interstate Commerce Commission Termination Act.

unlikely that BNSF raised destination demurrage to \$75 per car per day at shipper request. BNSF destination demurrage stayed at the \$75 level for just one day before being reduced to \$50. Wallace Rebuttal V.S. ¶ 3, 4. There is an inconsistency between BNSF's suggestion that demurrage was raised to \$75 in order to satisfy the concerns of private car owners that there be an adequate incentive for the prompt return of private cars, and the reduction of that demurrage just one day later to \$50. Further, destination demurrage and empty car holding charges are totally dissimilar in that those consignees who incur destination demurrage are not paying twice for the same BNSF facility, as are private car owners who pay BNSF to maintain holding track for *all* cars on the system, railroad or private, and are then impelled to pay additional "incentives" so that their own cars do not use the very track for which they have just paid through their freight charges.

4. Track Rentals

BNSF stridently defends its program of leasing track to private car shippers requiring an alternative to the July 2001 Changes. BNSF believes that Complainants' dissatisfaction with the track lease program stems in significant part from a mistake made by Complainants in calculating the return represented by BNSF's track lease rates. Reply at 54, 55.

The major mistake that Complainants made, however, was in accepting at face value BNSF's use of return rates for newly constructed track. BNSF in fact has such a surplus of yard and switching track of the type used to hold empty private cars as to allow it to have retired some 500 miles of that type of track between 2001 and 2004. The Complainant shippers have testified, moreover, that the track they have leased from BNSF consists of existing yard track, rather than newly built track. The best way, accordingly,

to assess the return being realized by BNSF on the yard track that is occupied by empty private cars is in terms of existing yard and similar track.

When BNSF's track lease rates of \$10.00, \$20.00 and \$30.00 per foot per year for storage track are applied to the value of the existing track that BNSF uses for empty private car storage, those rentals yield a return on net investment ranging from 36.8 percent to 115.3 percent. See Crowley/Burris Rebuttal V.S., ¶¶ 8, 22, and Table No. 1. These are extremely attractive returns.

BNSF's program of "floating" track leases, with private cars being held in the same BNSF yards as before, is plainly at odds with BNSF's professed goal of removing congestion. Accordingly, BNSF now seeks to portray its track lease program in a new light. Formerly, it was described by BNSF as a step to assist and provide relief to customers, particularly if they otherwise would have to reduce the size of their private fleets to avoid the impact of the July 2001 Changes or did not have land on which to construct additional industrial track. We now see, however, BNSF repeatedly referring to the track lease program as "transitional" (e.g., Reply at 54, "BNSF has bent over backward to provide transitional relief to shippers affected by its charges"; Reply at 56, "BNSF has been offering track rentals to shippers ... to provide transitional assistance to shippers who might otherwise have difficulty at some facilities avoiding the payment of storage and demurrage charges"). And BNSF asserts that track leases are not offered "at locations where congestion is most serious," suggesting that BNSF will exercise the 30-day cancellation clause in these leases should their continued use become a problem at any location. Ibid at 57-58.

BNSF does not explain exactly how its track leases are "transitional." Are they a transition between \$10.00-\$20.00-\$30.00 lease rates and a much higher level of lease rates? Are they a transition from the past practice of empty car holding tracks supplied by BNSF to a time when BNSF will provide neither its own holding tracks nor leased holding tracks, thereby forcing customers to divest themselves of private cars unless they can (and many shippers cannot) construct additional track at their own facilities?

In either case, BNSF has not advanced its cause. If the transitional nature of the track leases will lead to increased rentals, then BNSF must concede the track lease program to be a revenue program, rather than an anti-congestion measure. If, on the other hand, the track lease program is a transition to a point in time when BNSF will curtail or eliminate the program entirely, the July 2001 Changes are revealed as a draconian measure that will place many private car facilities out of business. See Voss Rebuttal V.S., ¶ 16.

Responding to Complainants' contention that the July 2001 Changes are inconsistent with the demurrage provisions of 49 U.S.C. § 10746, BNSF makes a brief argument that the objectives of that statute are met "when railroads and shippers alike have incentives to make more efficient use of their cars." The July 2001 Changes have met those goals, BNSF argues, because it is carrying substantially more traffic with only a slight increase in the number of cars on its system. Ibid.

The dual goals of Section 10746 are, as BNSF notes, improved "freight car use and distribution" and "maintenance of an adequate supply of freight cars." BNSF believes that those goals are met by the July 2001 Changes merely because it is "carrying substantially more traffic ... with only a slight increase in the number of cars on its sys-

tem." Ibid. That position crumbles, however, unless it can be shown that there is a causal connection between the July 2001 Changes and the "more traffic with only a slight increase in cars" scenario. As demonstrated repeatedly above, there is no causal connection.

In fact, one of BNSF's avowed goals is that the July 2001 Changes cause shippers to reduce their private car fleets regardless of whether the shippers' transportation needs can be met with fewer private cars. The July 2001 Changes have led directly to "floating" leases of BNSF track now described by BNSF as "transitional" leases. As noted, BNSF states that it will begin to terminate those leases where it finds them operationally inconvenient, a step that will cause shippers to remove private cars from areas where they are now used. To the extent the July 2001 Changes will result in curtailed private car supply, they also will curtail car supply in general on BNSF because it does not supply cars sufficient in type or number to replace private cars. That result is inimical to Section 10746.

It does not, however, require speculation to determine whether the July 2001 Changes have resulted in improved freight car use and distribution. BNSF's own normally maintained operating metrics show a marked decline in those metrics since 2001. BNSF's pat answer is once again to claim that it is carrying more traffic with relatively fewer cars. Ibid. As noted, however, BNSF's ability to handle increased traffic volumes has come about from clearly identified causes that are totally unrelated to the July 2001 Changes. Likewise unpersuasive and unavailing is BNSF's resort to substitute metrics and claims that shippers are releasing private cars more quickly. Reply at 59-60.

It bears repeating that the BNSF evidence purporting to demonstrate that total customer car retention time has decreased rests on a study, Exhibit C to Langston Reply V.S., that mixes together empty private cars subject to the July 2001 Changes, empty private cars immune from those changes because they are held on leased track, loaded railroad cars, loaded private cars, car time held at origin, and car time held at destination. So long as BNSF's statistical data involves so much freight car activity that has nothing whatsoever what to do with the July 2001 Changes, that data can not be said to reflect outcomes attributable to the July 2001 Changes.

5. Service Failures

BNSF defends the absence of provisions in the July 2001 Changes for service failure relief essentially by asserting that such relief is unnecessary to any greater extent than the minimal "bunching" relief afforded under the Storage Book. Reply at 60. The BNSF defense argument begins with the observation that Complainants have not claimed a specific BNSF service failure at any specific point, which is the only basis, according to BNSF, to advance a service failure claim. Ibid.

As is obvious from the Complaint and the Opening Statement, Complainants have not set about to establish specific service failures. Nor do Complainants quarrel with BNSF's contention that service failure arguments generally are situation specific. As stated previously, Complainants' problem with the July 2001 Changes is that they preclude or unreasonably limit the ability of shippers to make those arguments even when they are warranted in specific circumstances.

BNSF argues that the inherent vagaries of rail service are such that "there is no legal basis for providing relief [from demurrage] for garden variety inconsistent service

variability, since no 'fault' or 'error' is implied by such variability." Reply at 61-63. However, the vagaries of BNSF's service are not brought about by force majeure events. BNSF is not as nearly in the blind regarding the service demands that will be made upon it as its argument attempts to convey. Most of the private tank car traffic handled by BNSF moves under contract or point-to-point tariffs with specified origins and destinations obviously known to BNSF. Other private car traffic moves via BNSF to repetitive markets, and empty private car return movements are predetermined. Mack Rebuttal V.S., ¶ 11; Sims Rebuttal V.S., ¶ 10. BNSF is not being overwhelmed by unforeseen traffic demands.

While shippers do not expect that every empty private car will make the trip from a specific unload point back to the shipper's loading point in exactly the same number of days in each instance, nor should BNSF expect that shippers can predict how long BNSF will take to move cars under its control or demand that shippers facilities be able to accommodate empty cars accumulated for delivery by BNSF as a result of operating decisions made for its convenience. When demurrage provisions are applicable, the door must be left open for adjustments due to carrier operating inconsistency.²²

BNSF actually maintains that it is not required to provide service failure relief in connection with demurrage charges because they have been presented in the form of an average agreement containing "credits" that can be used to offset debit days. But the Board should not conclude that the mere availability of an average agreement supersedes any requirement for situational demurrage relief. As Complainants have noted, the case

²² As Complainants previously have argued, BNSF service variances are relevant not merely to the issue of whether the July 2001 Changes are unduly restrictive in terms of as-applied challenges, but also to the fundamental consequences of inconsistent service, such as increased fleet size necessary to handle plant production in the face of unpredictable BNSF operating performance.

law with respect to average agreements was developed in consideration of the *choices* provided to shippers by railroad tariff between "average agreement" and "straight" demurrage plans. Under a straight plan, relief for service failure is recognized; under an average agreement, it is not. Traditionally, shippers were able to choose between the two types of demurrage plans and could not be deprived, against their will, of access to demurrage relief based on service failure.

BNSF defends its unwillingness to make an election between "average" or "straight" demurrage available by describing the traditional choice of demurrage plans as based on "archaic rules established when demurrage charges were collectively set" by railroads. Reply at 64. However, the procedural mechanics of setting demurrage charges are not determinative of the rights available to shippers who must observe those charges. When railroads' antitrust immunity for collective discussions of demurrage was terminated, each railroad was expected to promulgate its own demurrage rules but not licensed to adopt rules depriving customers of lawful options.

BNSF is arguing that it should be permitted to tailor its demurrage programs to its traffic marketing programs. However, no court decision has overruled Field Container Corp. v. ICC, 712 F.2d 250 (7th Cir. 1983), a post-Staggers Act decision holding that shippers are entitled to choose between average and straight demurrage plans, and that a railroad cannot properly insist on the imposition of an average agreement where it has not been selected by the shipper. In this case, BNSF has established two separate demurrage plans – one in its Demurrage Book and the other in its Storage Book – applicable to empty cars to be loaded at the same facility on the same day. Each of those plans has different consequences.

Contrary to BNSF's claims (Reply at 64), it is untrue that the straight plan provisions arising under the Storage Book can be always expected to be more favorable to shippers than the average agreement provisions arising under the Demurrage Book. Because the daily demurrage charge is \$50.00 per car, as opposed to \$10.00, \$15.00, or \$25.00 under the Storage Book, it is common sense to expect that, over time, demurrage charges will be higher than storage charges notwithstanding the two credit days available under the average agreement. That obvious conclusion is illustrated in Appendix B to Mack Rebuttal V.S., which restates Langston Rebuttal V.S. Exhibit I by altering the assumed constructive placement date of a car by only one day. That simple adjustment launches a significant change in demurrage and storage outcomes and illustrates how easily a demurrage plan with an average agreement can become more onerous to a shipper than the storage provisions subject to a straight plan.

The unavoidable conclusion is that BNSF has imposed different car detention regimes on the same shippers at the same locations with adverse consequences that will fall randomly and be more burdensome on some customers than others similarly situated, without any demonstrated basis in need.

E. Car Service Obligations

BNSF is obligated to maintain reasonable practices on car service pursuant to 49 U.S.C. § 11121(a). In some respects, those duties overlap BNSF's responsibility to observe reasonable practices pursuant to Section 10702. Illinois Central Railroad v. South Tec. Development Warehouse, et al., 1990 WL 519042 (N.D. Ill.) Some issues, therefore, addressed in the foregoing section of this brief are also addressed in this section.

1. **Discrimination Against Agricultural Private Covered Hopper Cars**

The July 2001 Changes apply "average agreement" demurrage provisions to covered hopper cars handling agricultural products and sugar, while applying "straight" plan storage provisions to all other empty private cars. Shippers are given no choice between an "average agreement" and a "straight" plan.

As demonstrated above, the "average agreement" is bound to be more costly to shippers the longer empty private cars remain on BNSF track. And, in any event, it is indisputable that the two plans, demurrage subject to an average agreement and storage subject to a straight plan, will produce disparate results even though they apply to the same shipper's cars at the same loading point at the same time.

BNSF's excuse for maintenance of these disparate holding charge plans is that most agricultural shippers who operate private covered hopper cars also use substantial numbers of railroad-controlled cars, and BNSF believed it would be "confusing to shippers" to have different demurrage programs applicable to private and railroad cars. Reply at 67. Shippers do not agree. *Sims Rebuttal V.S.*, ¶ 12. Moreover, while it may be true that there are shippers who use both private and railroad-owned covered hopper cars for agricultural traffic, it is not likely that they will do so for the same type of traffic at the same facility. BNSF-owned covered hopper cars are employed extensively in grain shuttle service, which mainly handles unprocessed grain such as corn and wheat, while private covered hopper cars are largely specialty cars used for the transportation of grain products that are unlikely to originate where whole grains originate.

BNSF concludes its discussion of discriminatory aspects between agricultural covered hopper cars and all other private cars with a thinly veiled retaliatory threat to

raise the daily storage rate on agricultural tank cars (but apparently no other tank cars) to \$50.00 per day, the same daily debit rate as is applicable to agricultural covered hopper cars. Reply at 67 ("BNSF could obviate the Complainants' concern ... by raising the rate on tank cars used for agricultural products to \$50.00 per day"). BNSF contends that "there is nothing sacrosanct about the \$10-15-25 rates" applicable as storage charges under the straight plan, and BNSF makes clear that it regards Complainants as ingrates for having the temerity to question the two holding charge regimes, stating: "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." Ibid at 68.

If BNSF is suggesting that Complainants sought a reduction only in BNSF's storage charges but not its demurrage charges, BNSF is mistaken. Complainants' position was that neither set of charges should be instituted; but, if instituted, should be maintained on a different basis than proposed by BNSF. Complainants at no time took separate positions for BNSF's demurrage charges and storage charges, and at no time requested that only the storage charge rates be reduced, any more than Complainants requested additional "free time" for one, but not the other, of the two BNSF regimes. BNSF chose to make adjustments to its storage charges, but not to its demurrage charges. In criticizing and threatening retaliation against Complainants for taking the position that the demurrage charges compare unfavorably with the storage charges, BNSF in effect is saying that Complainants should gratefully accept BNSF's storage charge adjustment even though it was not what Complainants sought.

BNSF's response makes a mockery of the reasons given by BNSF for the institution of the \$10-15-25 tiered levels of storage charges, which BNSF said were to reflect varying levels of "congestion" on the BNSF system. BNSF testified that it was comfortable that those three tiers of charges, instituted after a determination of areas where "congestion" levels vary on the BNSF system, reliably reflected an appropriate response to the concerns BNSF claimed to be the reason for the charges in the first place.

Complainants' criticism of BNSF's position obviously should not be taken as an endorsement of the July 2001 Changes in any respect. But if use by BNSF of empty car holding charges survives Board scrutiny, those charges should not be arbitrary. If an empty private tank car is causing a minimal amount of congestion and warrants only a \$10.00 per day storage charge, an empty agricultural private covered hopper in the same location cannot conceivably be causing any greater degree of congestion, let alone up to five times as much congestion, and should not warrant any higher daily demurrage charge. Complainants disagree with BNSF's assertion that, should maintenance of two conflicting plans by BNSF be found to be unreasonable, the Board can merely require BNSF to remove the disparity, leaving BNSF free to retaliate against Complainants by raising the Storage Book daily rates to the \$50.00 daily Demurrage Book level. The three tiers of Storage Book charges are established on the basis of a "congestion" study; the Demurrage Book charges were not and should not prevail.

2. Favoritism Given to Railroad Cars

BNSF strenuously resists Complainants' proof that BNSF *can and does* determine to treat *any number* of its own cars differently and preferentially to the way in which all private cars are treated under the July 2001 Changes.

As the Opening Statement establishes, BNSF is bound by AAR rules requiring BNSF to observe operating categories for all carrier equipment on its system. One such category in which BNSF presently has placed approximately 3,000 cars (but could place any number it wanted) is the "C" pool category, denoting cars assigned to a specific shipper at a specific loading point. The AAR rule controlling this particular pool designation requires such cars to be returned empty after each load to the specified shipper at the specified location. These "C" pool cars, in other words, operate in a manner indistinguishable from private cars, which also are normally returned to a repetitively specified origin for loading.²³

A fundamental rule of car distribution and service must be emphasized at this point, even though it is ignored by BNSF. Empty railroad cars controlled by BNSF are not placed for loading until requested by a shipper for a specific "want" date. Consequently, empty railroad cars routinely are moved and positioned by BNSF to staging or holding areas awaiting loading requests from shippers. Although BNSF may not in all cases know precisely where those empty cars will be placed for loading, or may only have a general idea, it moves its empty cars to positions where they will be available when requested for loading by a shipper and holds them there, free of charge, until the loading requests are made.²⁴ BNSF cannot run its railroad without using staging tracks to hold its empty cars awaiting placement for loading.

²³ BNSF attempts to make the point that hardly any BNSF-controlled covered hopper cars used to transport whole grain are currently in a "C" pool, suggesting that "C" pool cars are not especially relevant to Complainants. Reply at 70-71. However, the reason that whole grain transportation seldom is accomplished in "C" pool cars is because so much of that transportation takes place in grain shuttle trains. As BNSF concedes, when it comes to single car shipments or smaller unit shipments of grain products, approximately 10 percent of the BNSF fleet is in "C" assignments. BNSF can add to that number as it chooses.

²⁴ See Langston Dep. Tr. Vol. I, pp. 170-174, attached as Appendix C hereto.

The July 2001 Changes represent an unreasonable demand by BNSF that private car users must operate their fleets with more precision and efficiency than BNSF brings to the management and operation of its own cars. Although BNSF recognizes the need for car days at staging areas or on other tracks until shippers order BNSF cars for loading, private car shippers get no such latitude. BNSF instead demands that empty private cars, which are returned directly by BNSF to each car's designated loading point, be accepted immediately upon arrival by the shippers, without any grace period to account even for the unpredictability of BNSF service. Private car shippers have no opportunity to have their cars held by BNSF until a loading order is placed, and face demurrage or storage charges almost as soon as the cars arrive at the loading station, while BNSF holds its own cars for however many days are necessary to await a loading order and assesses no charges against its customers for doing so.

The most available illustration of how BNSF builds free "holding" time into its distribution of its own cars occurs with respect to "C" pool cars. Complainants' Opening Statement demonstrates that, at the time the July 2001 Changes were instituted, BNSF was holding empty "C" pool cars on BNSF track for nearly 3 days while awaiting a shipper request to place the cars for loading. Private cars receive no similar "cushion" before BNSF's demurrage or storage provisions take hold.

Complainants' analysis of how "C" pool cars are handled is not disputed by BNSF,²⁵ which also does not contest Complainants' statistical conclusions regarding free holding time for those cars. Instead, BNSF asserts that "C" pool cars are not properly comparable to private cars because BNSF is at liberty to terminate the "C" pool designa-

²⁵ BNSF fleetingly mentions that there is no disclosed basis for the sampling choices made by Crowley/Burris. Reply, fn. 54. See, however Crowley/Burris Rebuttal V.S., ¶¶ 21-23, explaining that their sampling method was noted in the Opening Statement and adding to that explanation.

tion for any car and deprive its "assigned" shipper of the use of the car. That argument is pure sophistry because BNSF does not exercise that prerogative 98 percent of the time. Empty railroad cars in the "C" pool designation are returned to the same loading point, no doubt for sound operating reasons, with essentially the same consistency as empty private cars.

BNSF attempts to defend the disparity between its treatment of empty private cars and the way in which it handles empty carrier equipment by claiming that empty carrier cars now spend about one day less on BNSF track prior to ordering than those cars did three years earlier. Reply at 73. Assuming this claim is correct, it does not rebut Complainants' showing that BNSF is demanding more expedited and responsive empty car handling from shippers than BNSF provides for its own cars. In addition, any improved utilization of BNSF's own cars may simply reflect greater demand for equipment. It certainly did not result from storage charges, since those apply only to private cars.

Additional proof of the disparate treatment accorded railroad versus private cars comes from BNSF's treatment of TTX cars. BNSF agrees that empty TTX cars must be held by BNSF for up to five idle days before TTX can be requested to direct alternative disposition for the cars. Reply at 74. Although it certainly is true that these five idle days are not directly credited to any shipper as "free time," it likewise is certainly true that they represent an agreed holding period by BNSF for empty cars awaiting a load order from a shipper. At any time during or after the five day period (assuming that TTX has not instructed BNSF to relocate the car to another carrier after the five-day period has expired), BNSF can place the car for loading and the shipper receives the benefit of BNSF having held the car empty at no charge for those days pending a placement order.

BNSF's arrangements with TTX, and the holding of empty TTX cars for up to five days awaiting a shipper placement or a TTX car relocation directive, provide another example of how BNSF is ready and willing to provide free temporary storage for cars of railroad ownership (which includes cars of TTX ownership, as TTX is a railroad industry subsidiary), but not for private cars. The July 2001 Changes thus deprive private cars of virtually all pre-constructive placement free holding by BNSF, while carrier cars of any stripe continue to receive those privileges.

F. Compensation

Section 10745 (49 U.S.C. § 10745) requires that compensation be paid to a shipper who "furnishes a service related to or an instrumentality used in the transportation or service" normally provided by that carrier. BNSF maintains that it is not required to pay any Section 10745 compensation to a private shipper because the "instrumentalities of transportation" doctrine "was discredited long ago," citing General American Transp. Corp. v. Indiana Harbor Belt R. R., ICC Docket No. 35404, slip op. February 29, 1988. Reply at 76. It is BNSF's position that the requirements of Section 10745 now are entirely optional for railroads to observe, if they wish, based entirely on their business judgment. Reply at 76-78. BNSF is wrong as a matter of law.

In General American Transp., the ICC reached the narrow conclusion that, "in moving cars for repairs, the railroad is performing a distinct rail service for which a tariff charge should be made under the provisions of 49 U.S.C. 10728 and 49 C.F.R. 1137.2, et seq." Slip op. at 2. Section 10728 authorized "separate rates for distinct rail services" for certain specified purposes, but that section was repealed by the ICCTA. 49 C.F.R. 1137.2, et seq. has been cancelled by the Board.

General American Transp. did not overrule either federal Courts of Appeal decisions or decisions of the U.S. Supreme Court holding that, despite the precatory appearance of Section 10745, it actually is mandatory for railroads to compensate shippers who in fact furnish "a service related to or an instrumentality used in ... transportation or service" normally provided by a railroad. Bud Antle, Inc. v. U.S., 593 F.2d 865, 872 (9th Cir. 1979), citing General American Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422, 431 (1940).

BNSF does not quarrel with Complainants' position that, in furnishing tracks upon which to hold empty cars prior to placement for loading, BNSF is "providing transportation or service subject to the jurisdiction of the Board," within the meaning of Section 10745. It is impossible to deny that such facilities are an integral part of rail transportation. Accordingly, shippers who construct or lease storage tracks are furnishing services or instrumentalities BNSF would otherwise supply. Compensation is required by law.

BNSF argues that, without the July 2001 Changes, individual "shippers and car owners [would have] no incentive to engage in efficient storage and diversion practice," and BNSF reasserts its misplaced claim that it is simply pursuing a wise economic policy of unbundled rates.²⁶ To the contrary, it is BNSF that lacks any compelling incentive to operate more efficiently under the July 2001 Changes. Complainants' evidence shows that BNSF has made a deliberate set of business decisions to provide better service to certain classes of its traffic than it provides in the movement of private cars in "manifest" trains. Further, Complainants have shown that the service they receive is erratic and un-

²⁶ Reply at 77. As observed in the Opening Statement by Professor George H. Borts, Complainants' expert economic witness, the July 2001 Changes are not economically recognized "unbundling," and BNSF has offered no respectable evidence to the contrary.

dependable. If the July 2001 Changes are sustained in their present form and BNSF is not required to make Section 10745 payments, BNSF will have no incentive whatsoever to improve the inferior car service being provided with respect to many, if not most, private car shipments.

BNSF has been accorded substantial freedom to raise its rates. That freedom was deemed sufficient by Congress to repeal the "distinct rail service" statute and doctrine upon which General American Transp. was predicated. Consistent with the intent of Congress, BNSF could raise its rates to recover whatever additional costs, if any, it incurs in meeting its duty to provide holding track for empty cars.²⁷ BNSF has been raising its rates steadily and rapidly for the past few years. When BNSF elects instead to force private car shippers to expand system car storage capacity, the railroad becomes subject to the requirements of Section 10745.

The last gasp of opposition offered by BNSF to its liability under Section 10745 is a reiteration that Complainants represent the few BNSF shippers who have failed to manage their fleets efficiently enough to avoid empty car holding charges. Reply at 77. That claim is both untrue and irrelevant. The only question under Section 10745 is whether Complainants are furnishing, at either the behest or with the approval of BNSF, facilities that are part of BNSF's transportation obligation. Having announced publicly that the July 2001 Changes were designed to impel its customers to construct additional infrastructure at their cost and expense to replace infrastructure that BNSF otherwise would

²⁷ As noted, BNSF does not contend that it actually has constructed any new track to hold empty cars. If additional track had been necessary, BNSF would not have retired hundreds of miles of track during the past four years. It is unlikely that any rate increase would be required in order for BNSF to construct new track to handle additional empty cars.

have to provide, BNSF cannot deny that shippers who have furnished additional holding track at their expense squarely qualify for an appropriate allowance under Section 10745.

G. NITL and ACC Opposition to the July 2001 Changes

In its Reply at 78-80, BNSF claims that the July 2001 Changes meet the "principles" that ACC and NITL advocated in their joint *amicus* filing.

NITL and ACC, as noted previously, initially intervened in this proceeding in support of Complainants, but changed their status from Intervenor to *amici* to avoid disputes raised by burdensome BNSF discovery requests. As *amici*, NITL and ACC quite properly chose to express their views by stating principles, rather than engaging in an adversarial evidentiary debate.

BNSF attempts to ascribe "neutrality" to NITL and ACC based on their alleged failure to "endorse" Complainants' position. However, the joint NITL-ACC position cannot reasonably be read as either antagonistic to the views of Complainants or as an endorsement of BNSF's position.

The balance of BNSF's discussion of the NITL-ACC brief is devoted to a claim that each of the principles advanced by the *amici* has been met substantively by BNSF. Complainants will not reiterate the numerous reasons discussed above that show why BNSF's position is unavailing. Suffice it to say that BNSF would not have devoted a single sentence in its Reply to the *amici* brief had BNSF not recognized that the *amici* position on brief supports the views of Complainants, and not those of BNSF.

H. Damages

In the Opening Statement, certain individual Complainants submitted evidence to indicate that they had incurred monetary damages. Complainants proposed, however,

that the Board not undertake at this time to resolve individual damage claims but, instead, permit those claims to be quantified pursuant to 49 C.F.R. § 1133.2 to the extent that any shipper is deemed by the Board to have a viable claim.

BNSF states that it has no objection in principle to the use of a 49 C.F.R. § 1133.2 procedure, although BNSF naturally contends that no shipper is entitled to prevail in any respect except by demonstrating facility-specific service faults on the part of BNSF.

An issue has been raised by BNSF regarding the time period for which such damages are available to subsidiaries or affiliates of the individual company Complainants named in the original Complaint. Consequently, although regarding BNSF's position, raised for the first time in discovery negotiations, as being contrary to case law and totally without merit, Complainants filed an Amended Complaint on March 14, 2005 to expressly embrace damage claims on behalf of subsidiaries or affiliates of named shipper Complainants. With that amendment, there should be no doubt that damages can be recovered by affiliates or subsidiaries of named Complainants commencing from a period of two years preceding the date of the amendment. See Appendix D, Complainants' letter to the Board of March 14, 2005 that accompanied the Amended Complaint.

BNSF has submitted, as Appendix 1 to its Reply, a letter to the Board dated April 1, 2005 expressing BNSF's opposition to the Amended Complaint. Complainants, in turn, apprised the Board by letter dated April 8, 2005 of the reasons why the Board should reject the views expressed by BNSF in its April 1 letter. Complainants' April 8 letter is attached as Appendix E.

As the parties' exchange of correspondence illustrates, there does not appear to be a dispute as to the basis for determining eligibility for an award of damages. Both parties

seem to be in agreement that it is a fact-based test. The facts in this instance meet the requirements for extending damage eligibility to subsidiaries and affiliates of the originally-named Complainants, even without amendment of the Complaint. See Opening Statement at 70.

If damages are deemed by the Board to be appropriate, there is adequate evidence in the Opening Statement to enable the Board to identify the relevant damage issues and eligible parties, and the Board should make appropriate findings in that regard. However, as indicated, specific quantification of damage issues is a matter that should be pursued under 49 C.F.R. § 1133.2.

III. CONCLUSION

This case does not present run-of-the-mill challenges to specific railroad demurrage bills rendered pursuant to long-standing demurrage tariffs – the type of challenges which, according to BNSF, are the only types of demurrage complaints the Board should entertain. Rather, this case questions an entirely new use of demurrage (and storage) tariffs published to bring about a wholesale transfer of railroad service and infrastructure obligations to shippers supplying private cars.

This case would not have arisen if BNSF and other railroads continued to supply more than 70 percent of the freight cars, as they did prior to 1980. Today, Class I railroads supply well under 40 percent of all cars. In hard numbers, they now supply 467,000 cars as opposed to 1,168,000 in 1980.

Freight cars obviously are integral and essential to rail service, and so are the tracks necessary to hold those cars. To the extent railroads have supplied freight cars, they *never* attempted historically to assess system-wide, customer-specific charges for the

use of railroad-owned track necessary to hold empty cars prior to placement for loading. Such tracks have been in the past, and are today, a part of railroad infrastructure necessary to the maintenance of each railroad's business, no different from classification yards, bridges, or other property that is part of a railroad system.

Railroads such as BNSF save billions of dollars a year in capital investment when they succeed in transferring freight car ownership obligations to their customers. At the same time, BNSF in particular realizes extremely substantial freight revenues from the private car fleet. Looking for ways to increase earnings even more, BNSF decided to use its tariff-publishing authority to impose new demurrage and storage charges on empty private cars on BNSF track awaiting loading.

The ostensible reason given for the institution of these charges was to eliminate "congestion" brought about by an asserted excess number of empty private cars that BNSF was "forced" to store for "long periods" of time. BNSF cited statistics showing the number of private cars stored on BNSF for 30 days or more. The record in this proceeding demonstrates, however, that empty private cars, if contributing to "congestion" at all, represented only about 10 percent of all stored cars when the July 2001 Changes were conceived, while 90 percent of stored cars were under BNSF control. The July 2001 Changes ultimately proved not to lead either to lessened "congestion" or improved BNSF service; BNSF's service metrics in fact worsened. Absolutely no causal nexus was shown to tie the July 2001 Changes to BNSF's handling of increased traffic volumes, and the Changes go far beyond any measures needed to reduce long-term (30 days or more) storage on BNSF tracks.

The evidence shows that a major purpose behind BNSF's empty private car demurrage and storage rules was to shift infrastructure costs to private car shippers, to compel them to lease substantial yard trackage from BNSF, or to enter into new freight transportation arrangements with BNSF on terms highly favorable to that railroad. The use of demurrage or storage charges for such purposes should be found by the Board to constitute an unreasonable practice.

BNSF has claimed throughout this proceeding that private car shippers brought about the need for BNSF to resort to its empty private car holding charges by having acquired too many cars. It is, however, incontrovertible that BNSF itself is, if not *the* leading cause, then a major contributor to any "excess" of private cars (that is, cars above the number that would have suffice to meet shipping needs under optimal use conditions) on BNSF. BNSF freight transportation schedules between any origin-destination pair vary substantially from day to day of each week. If shippers were to use only the most expeditious BNSF timetable service, they would have to limit their plant production to those one or two days of the week when faster schedules were published by BNSF.

Putting schedules aside, actual BNSF performance between any two points also is all over the lot. And this is not due merely, as BNSF contends, to inherent variances in railroad operations. Most private car traffic is comprised of tank cars, specialty covered hopper cars, or other single-car units normally moving in "manifest" trains. Those trains consistently receive the slowest train service provided by BNSF and move with nowhere near the expedition accorded to favored intermodal traffic. BNSF's private car customers have been forced to acquire additional cars to compensate for the inferior BNSF service, and it is both an unreasonable practice and unreasonable car service for BNSF to use de-

demurrage as a penalty against shippers who have acquired cars necessary to keep their facilities operating in the face of declining BNSF service.

Railroads have extensive (many would say excessive) freedom with respect to rates, charges, rules, and practices under the Act. However, their freedom is not unlimited. Applicable case law establishes that railroad practices are unreasonable where they involve shipper costs and burdens which are excessive when compared to the benefits achieved, or where the same benefits can be achieved through less costly and burdensome measures. Not only do the July 2001 Changes fail to satisfy these tests, but BNSF has not demonstrated any congestion reduction as a result of those Changes. Accordingly, the July 2001 Changes in their entirety represent an unreasonable practice in violation of the Act, and must be rejected.

If the Board is not prepared to order BNSF to rescind the July 2001 Changes, it can and should order BNSF to mitigate the unreasonableness of the Changes. At a minimum, the Board should require the following modifications.

First and foremost, empty private cars should be accorded more free time to reduce the preferential treatment given railroad cars and their users under the July 2001 Changes now in effect. Shippers relying on BNSF-furnished equipment face no demurrage charges for empty cars prior to loading unless and until they request an empty car for loading on a specific date and refuse to accept the car if it is tendered on or after that date. Until such a request is made, BNSF holds its own cars in accessible positions awaiting shipper requests. Indeed, it is not conceivable that BNSF can run its railroad without repositioning empty railroad cars to points adjacent to anticipated origins and holding them

(free of charge to a shipper) awaiting a loading request, and BNSF should do no less for private cars.

Complainants' study of BNSF cars assigned to specific shippers at specific origins in AAR-designated "C" pools – cars operated in an identical manner to private cars – shows that BNSF accorded such cars approximately three free days empty holding time in 2001 prior to placement over and above free time applicable under demurrage provisions that take effect upon placement. At the same time, BNSF was imposing the July 2001 Changes limiting private cars to as little as one free day before charges accrued. This is an unreasonable practice. BNSF cannot demand more precise private car planning and use than BNSF requires or delivers for its own cars.

A reasonable amount of pre-placement empty car holding time is both essential and commonplace to rail service; BNSF even holds intermodal cars for up to five days awaiting shipper loading requests. If the July 2001 Changes are not rejected in their entirety, private car shippers should receive a total of five free days per car before incurring any charges. BNSF's avowed goal of curbing "long term" storage of empty private cars on BNSF track clearly can be satisfied with five days' free time.

Second, private agricultural covered hopper cars must not be treated more severely than other private cars. BNSF says that it established a \$25-\$15-\$10 tiered level of storage charges based upon a thorough analysis of varying congestion levels on its system. The same reasoning proves the unreasonableness of a separate regime of \$50 per day demurrage charges for agricultural covered hopper cars. The Board should require BNSF to treat all empty private cars under the present Storage Book regime (i.e., the \$25-\$15-\$10 tiered levels), adjusted for additional free time days as discussed above.

Third, any storage charge and demurrage charge system BNSF is allowed to maintain must provide full relief for railroad service failures, including bunching.

Fourth, when a shipper furnishes a transportation service in lieu of a carrier, the shipper is entitled to compensation from the carrier for that service. The Board must therefore order BNSF to comply with the provisions of Section 10745 (49 U.S.C. § 10745). Shippers who have constructed holding track on their property as a result of the July 2001 Changes are entitled to their full construction and ongoing maintenance costs, and those who otherwise have furnished holding tracks as a result of the July 2001 Changes are entitled to compensation as well. If disputes arise regarding the appropriate amounts of such compensation that cannot be resolved between the parties, the Board should make itself available to resolve those disputes.

Finally, to the extent BNSF's July 2001 Changes are found to be unlawful, the Board should require payment of damages by BNSF to Complainants, their subsidiaries, or affiliates, subject to specific damage showings under 49 C.F.R. § 1133.2.

WHEREFORE, the Board should grant relief as request by Complainants or take such other action as is just and reasonable in the circumstances.

Respectfully submitted,

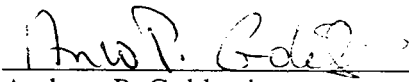


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has, this 7th day of November, 2005, been served on all parties of record, by first class mail, postage prepaid.



Andrew P. Goldstein

Appendix A

REDACTED

1 meaning all tank car and all covered hoppers.

2 Q. Okay.

3 A. And that includes CP time and on spot time.

4 Q. And on spot is when it is on the customer's
5 facility and --

6 A. Not being charged.

7 Q. Not being charged. That's what the term
8 customer time means, it includes CP time and on spot
9 time?

10 A. And even lease time. So there's lease time
11 where they've leased track from us. That's considered
12 customer -- customer -- within customer control.

13 Q. Because it's the customer equivalent of CP
14 time?

15 A. It's not CP, and we're not charging for --

16 Q. I understand, but it's the private track
17 equivalent of it?

18 A. Yes, it's like it's a railroad track we
19 effectively turned into a private track, so it's...
20 Those would be the big buckets I think there's some
21 smaller ones like release not billed, things like that.

22 Q. Got you.

23 A. Hold for billing.

24 Q. Okay.

25 A. But the big ones are on spot, CP, hold lease.

1 then on the -- on the destination end, it's the
2 unloading piece. I think that's where we're confused.
3 You're saying -- I think what -- Well, I don't know what
4 you're saying, but --

5 Q. I'm glad you brought that up. What you're
6 saying is that the ag customer time here is not ag
7 customer time for empty private cars waiting load. It's
8 ag customer time for all cars including loads at
9 destination?

10 A. Yes.

11 Q. Oh, very good.

12 A. Yes.

13 Q. Thank you.

14 A. I'm sorry. That's where I was getting
15 confused --

16 Q. My mistake, too, because I made what an
17 assumption --

18 A. Yeah, and that's what I --

19 Q. -- talking about -- that we were talking
20 about --

21 A. -- at what point does it become a load.

22 Q. That's correct, and --

23 A. Right. No.

24 Q. Well, it's a little more than that. Let me
25 see. Exhibit -- I believe this goes to a question we

1 Mr. Kurtz's statement the same one that's been marked
2 here as Exhibit 20, the one you saw before?

3 A. Page eight or Interrogatory 8?

4 Q. No. The bottom of page eight --

5 A. I'm sorry. I'm reading 6A. Forgive me. Let
6 me get to 6. I remember reading Gary's comment. I just
7 haven't... Yeah.

8 Q. Generally -- Well, my question was, you believe
9 that's the statement that you had in mind when you said
10 on page eight "Mr. Kurtz's statement generally provides
11 for an accurate description"?

12 A. Of how BNSF manages its own rail --

13 Q. Yes. Yes.

14 A. -- car fleet?

15 Q. That's right.

16 A. Yes.

17 Q. And it is correct that BNSF must sometimes
18 store its own empty cars on its tracks when they are not
19 needed?

20 A. That's correct.

21 Q. And you agree with that. Let's take a look,
22 please, at paragraph number four of Exhibit Number 20.

23 A. Okay.

24 Q. Now, is that an accurate description of how
25 cars that are made empty that are under BNSF control are

1 handled?

2 A. No.

3 Q. In what respect is it not accurate?

4 A. Let's just go through it. When a free running
5 car of BNSF ownership, a freight car that is not subject
6 to mutual agreement between BNSF and a shipper regarding
7 the next load or loading point is made empty at a
8 destination, the BNSF car management system searches its
9 car order files to determine whether or not there is --
10 cars needed for a new load. That's correct. If it is,
11 the car is dispatched to the new loading point where
12 there's a -- where there's an equipment request to match
13 up to that car.

14 Q. So the next sentence you're saying is correct
15 too?

16 A. It's a loading point, but it won't go to a
17 loading point or it shouldn't go to that customer. When
18 you say "loading point" --

19 Q. It says that the car is dispatched in the
20 direction of the new loading point.

21 A. That's correct, it is dispatched in ^a ~~the~~
22 direction.

23 Q. Okay. So that sentence is --

24 A. Okay. If the car's not needed for a new load,
25 then it's designated for either long-time storage flows

1 or short-term storage flows on BNSF. I don't believe we
2 have short- and long-term storage flows any longer. I
3 mean, Gary -- Gary -- Let me say it a different way.
4 The practice for distribution before we had our new
5 systems was to designate flows of cars. We don't do
6 that any more. Haven't done it in a number of years.

7 Q. Well, what happens then if --

8 A. When there's no demand?

9 Q. -- the cars are not needed? Pardon me?

10 A. Well, if the car's not needed for -- there's no
11 demand for that car, it'll be staged. It'll be staged
12 either at a designated staging location -- I'm going to
13 get a little -- I'm going to carry this out to the
14 extreme. If it's not needed for loading, we'll make a
15 determination and probably send it to a staging point
16 where it will sit. If it sits too long, we'll make
17 decisions on whether to start turning back leases or
18 getting rid of cars or matching up to the forecasts that
19 we get from the commercial team, so...

20 Q. What's a staging point?

21 A. A staging point is any place where operations
22 told us that they can hold cars while we wait for demand
23 to increase.

24 Q. Is the car sent there if you think there may
25 not be a need for it just for a day or two or do you

1 send it to a staging point because you think that the
2 car may be idle for a longer period of time?

3 A. The way it works is that we have a lot of cars
4 moving in the system and we're matching it up to demand
5 around the system. And when we see that there's not
6 enough demand, we'll peel out a few cars and send them
7 to storage, staging points. So it's not like we make
8 the determination on every single car, and I'm probably
9 answering your question in a roundabout way. But we
10 don't look at every single car.

11 We look at total demand across our system
12 for that fleet of cars. And if we determine that
13 there's not enough demand for that car, we'll start
14 peeling off cars to go to those staging points. So,
15 yes, we will do that sometimes wherever we can get a
16 place to put the cars.

17 There's no steadfast rule. The other
18 reason I didn't agree with this, there's no longer a
19 steadfast rule -- or I don't know that there ever really
20 was when Gary worked for me, long-term storage for more
21 than 30 days. It was a rule of thumb. I remember those
22 discussions, but there was no policy.

23 Q. So are you saying that a car then that's not
24 needed for a new load when it's unloaded is sometimes
25 stored for a day or sometimes stored for ten days or 30

1 days?

2 A. Yeah.

3 Q. Yes. And where it's stored depends on where
4 the operating department tells you is the best spot for
5 that car?

6 A. Right.

7 Q. And I suppose they consider in making that
8 selection where they think that car is ultimately going
9 to end up if it is loaded, right?

10 A. Part of the decision process, yes.

11 Q. You know, if the car is made empty let's say at
✓ 12 the ~~BMW~~ ^{BMW}, the staging point for that car might be in the
13 upper midwest if you think the car is going to be loaded
14 in North Dakota, Minnesota and it might be someplace
15 else if you think it's going to be loaded in Nebraska --

16 A. That's -- That's correct. We generally try to
17 get the car back to the general area where we think
18 there's going to be a demand for that car.

19 (Deposition Exhibit Number 21 was marked
20 for identification.)

21 Q. (BY MR. GOLDSTEIN) What's been marked as
22 Exhibit 21 for the most part is Bates 012963 through
23 986. It's a multipage report entitled "Stored
24 Serviceable Equipment." And the first page is just a
25 graph which shows system wide storage requirement.

213546
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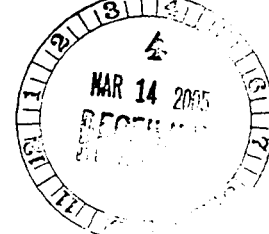
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March 14, 2005

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

ENTERED
Office of Proceedings

MAR 14 2005

Part of
Public Record

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

Dear Secretary Williams:

We are filing herewith an Amended Complaint pursuant to 49 C.F.R. § 1111.2. The primary purpose of the amendment is to clarify that each named Complainant's affiliates and subsidiaries are parties to the Complaint. This filing is necessary because of issues raised by Defendant BNSF Railway Company ("BNSF") in its discovery Objections served on February 15, 2005, and in discussions between the parties' counsel since then.¹

The Board's rules contain no time limitation for amendment of complaints. Nevertheless, even though this case has been before the Board for approximately 3½ years, amendment of the Complaint for the limited purpose stated above will not cause any delay in the case, broaden the issues, or cause any discernable harm to BNSF.

The Complaint in this case was filed with the Board on August 29, 2001. On October 5, 2001, BNSF filed a motion to dismiss. Not until August 13, 2004 did the Board deny that motion.

¹ The Complaint was filed on behalf of North America Freight Car Association ("NAFCA") and 11 individually-named members of NAFCA (collectively "Complainants"). Initially, 11 members of NAFCA were named as individual Complainants, but one (the David Joseph Company) no longer is participating in that capacity. The Amended Complaint also reflects name changes of two of the original Complainants. A. E. Staley Manufacturing Company is now Tate & Lyle Ingredients Americas, Inc., and ConAgra Trade Group is now ConAgra Food Ingredients Company. These alterations have been discussed with BNSF, which has no objections.

On January 6, 2005, the Board issued a procedural order. Pursuant to that order, Complainants and Defendant jointly submitted a proposed confidentiality agreement which was adopted, as modified, by the Board on January 28, 2005. The parties exchanged written interrogatories and document requests on February 7, 2005 and exchanged objections to those discovery requests on February 15, 2005, also pursuant to the Board's procedural order.

The Board's procedural order provides that the parties may notify the Board of a discovery "impasse." The date for doing so originally was February 25, 2005, but that date was extended by the Board to March 4, 2005. On March 4, BNSF, with the concurrence of Complainants' and Intervenor (the National Industrial Transportation League and the American Chemistry Council) notified the Board that there is an "impasse" regarding discovery. The Board has been requested to contact the parties in order to help resolve that impasse, possibly through mediation.

Meanwhile, Complainants and BNSF have continued to discuss discovery issues and have continued to make progress toward resolving and narrowing areas of dispute or uncertainty. Because BNSF and Complainants recognize that it is in their mutual interests to continue those efforts, and because of the volume and complexity of information requested in discovery, Complainants and BNSF are today filing a joint request for adjustment of the procedural schedule. Under that request, the date for responding to discovery would be postponed from March 22, 2005 to April 15, 2005.

The Amended Complaint filed herewith arises as a result of positions expressed by BNSF in its Objections to Complainants' written discovery requests and since. In its written interrogatories and document requests to BNSF, each of the Complainants is defined to include all of its corporate subsidiaries and affiliates. BNSF objected to this definitional statement, although it apparently proceeded to set forth its objections regarding Complainants' discovery, including offers to make reasonable inquiries for responsive data, as if no such objection had been made. Complainants since have been in detailed discovery negotiations with BNSF, as indicated above, but this issue has not been resolved.

BNSF's positions regarding the standing of affiliates and subsidiaries of named Complainants to participate in this proceeding has resulted in some uncertainty regarding the standing of the parties and their discovery obligations. In a conference on February 25, counsel for BNSF informed counsel for Complainants that BNSF did not regard discovery obligations as attaching to any subsidiary or affiliate of a named Complainant. In a memorandum dated March 2, 2005, from BNSF's counsel to Complainants' counsel, BNSF stated that "[a]dding corporate affiliates, parents, and subsidiaries of the named Complainants to the Complaint at this late date, even if you stipulated that they would not seek damages, could substantially enlarge not only your discovery burden but also BNSF's. BNSF wishes to see this case litigated as expeditiously as possible. Adding new parties at this point would only encourage delay – for no apparent reason."

However, Complainants pointed out to BNSF that it had taken the position that it nevertheless expected subsidiaries and affiliates of named Complainants to respond to BNSF's discovery if the named Complainants expected to introduce any evidence pertaining to their subsidiaries and affiliates. BNSF then replied in a March 10

memorandum to Complainants' counsel: "Where you have asked for relevant information about BNSF's storage charge program, we have not objected on the grounds that you are only entitled to information concerning BNSF's dealings with the named Complainants. We have been willing to provide, and have been working hard to gather, information about BNSF's dealings with the entire shipping community...."

That being the case, if monetary damage questions are put aside for the moment, this most recent statement of BNSF suggests that treating the Complaint as applicable to all subsidiaries and affiliates of the named Complainants will not increase or delay BNSF's discovery burdens.

Nor will the Amended Complaint itself cause Complainants to seek a delay in the completion of discovery. Each Complainant that has corporate affiliates and subsidiaries will, subject to stated objections, make reasonable efforts to provide responsive answers and documents from those subsidiaries pursuant to existing discovery requests of BNSF. If any subsequent adjustment of the procedural schedule is sought by Complainants, or if BNSF considers Complainants' discovery responses to be incomplete, it will not be on account of the amendment to the Complaint because, as indicated in Complainants' Discovery Requests to BNSF, Complainants have always considered their subsidiaries and affiliates to be within the scope of each party's discovery requests and obligations.

That leaves only the question of whether, assuming Complainants establish unlawful activities on the part of BNSF, the amendment would improperly increase BNSF's exposure to claims for damages.²

Under decisions of the Board's predecessor, where the operation of affiliated companies is not separate and distinct from the parent and where the initial party complainant was not "an entire stranger" to the party technically in possession of a claim for damages, equity allows the Board to treat the complaint of a parent or subsidiary as embracing the claims of the affiliate for purpose of calculating entitlement to damages. See, e.g., International Agricultural Corporation v. Louisville & Nashville Railroad Company, 29 I.C.C. 391, 393 (1914); Werner v. Director General, 107 I.C.C. 363, 365 (1926) (authority of one person to bring complaint as agent of another for damages may be implied from the facts).

BNSF has been dealing with Complainants' corporate "families" on an integrated basis for years as an ordinary and routine business matter, basically treating the corporate parents, their affiliates and their subsidiaries as one company for many transportation purposes. For example, BNSF recently served a demand letter on "Craig Huss, President, ADM Transportation Division, ADM Company," asserting an indebtedness by "ADM Company" to BNSF for ADM's corporate subsidiaries. Indeed, the claim asserted by BNSF was for the very types of private car storage charges at issue in this proceeding.

As another example, BNSF routinely negotiates and discusses transportation issues pertaining to both Cargill, Incorporated and its subsidiaries on a unified corporate

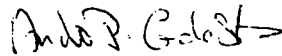
² BNSF's discovery requests to Complainants contain both interrogatories and document requests that seek facts supporting any claim advanced for monetary damages. Complainants intend to respond to those discovery requests on behalf of any entity seeking damages.

basis. Cargill, Incorporated, a presently named Complainant, in fact pays BNSF's freight bills for transportation services rendered to Cargill's subsidiaries, including bills for empty private car storage and demurrage charges of the type at issue in this case.

Whether viewed as agents of their subsidiaries and affiliates, or under the type of fact test suggested in International Agricultural Corporation, Complainants would be entitled to recover damages on behalf of corporate subsidiaries and affiliates to the same extent as Complainants themselves, and Complainants will, if necessary, assert that position at an appropriate time in this proceeding

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 the period for which such damages are recoverable. However, without any waiver of Complainants' argument, and merely from an abundance of caution resulting from BNSF's positions regarding the identities of the parties in this case, the Amended Complaint is appropriate to establish that, at a minimum, corporate subsidiaries and affiliates of named Complainants, who might not otherwise be entitled under BNSF's theory to recover damages, can press claims for damages commencing no later than a period beginning two years prior to the filing of the Amended Complaint. See 49 U.S.C. 11705(c).

Sincerely,



Andrew P. Goldstein
Attorney for Complainants

cc: All Parties

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April 8, 2005

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1925 K Street, N.W.
Washington, DC 20423

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

Dear Secretary Williams:

On April 1, 2005, BNSF Railway Company ("BNSF") filed a letter with the Board purporting to be a reply to a "motion" filed by North America Freight Car Association, et al. ("NAFCA" or "Complainants") on March 14, 2005. In plain fact, NAFCA filed no "motion" with the Board. On March 14, NAFCA filed with the Board an Amended Complaint which, under 49 C.F.R. 1111.2, can be tendered as of right and without prior leave of the Board, accompanied by a letter of the same date explaining the reasons for the complaint amendment.

A tendered amended complaint arguably is subject to objection. BNSF's April 1 "reply" to the Board is, in fact, BNSF's affirmative effort to convince the Board to "deny" Complainants the right to amend the Complaint. The moving party before the Board therefore is BNSF, and Complainants are entitled to make this reply by the provisions of Rule 1104.13(a).

BNSF has taken great pains to obscure the purpose of the Amended Complaint. The Amended Complaint adds "subsidiaries and affiliates" to the named complainants and was filed because BNSF took the position during discovery exchanges that each of the individual companies named as Complainants could not be defined to include their affiliates and subsidiaries despite the fact that BNSF, as explained in more detail below, was on notice through commercial relationships with the named Complainants that they represented their affiliates and subsidiaries. BNSF stated, during the course of discovery exchanges, that, although it expected subsidiaries and affiliates of named Complainants to respond to BNSF's discovery requests if the named Complainants expected to intro-

duce any evidence pertaining to their subsidiaries and affiliates, BNSF would resist the recovery of monetary damages by any entity other than a named Complainant.

From the moment BNSF first objected to an inclusive definition of a named Complainant to include subsidiaries and affiliates, BNSF has offered inconsistent explanations for its position. As noted in Complainants' March 14 letter to the Board, on March 2, 2005, counsel for BNSF stated that "[a]dding corporate affiliates, parents, and subsidiaries of the named Complainants to the Complaint at this late date, even if you stipulated that they would not seek damages, could substantially enlarge not only your discovery burden but also BNSF's." After Complainants pointed out to BNSF that it had taken the position that it nevertheless expected subsidiaries and affiliates of named Complainants to respond to BNSF's discovery, on March 10 BNSF changed its position, stating in a memorandum to Complainants' counsel: "Where you have asked for relevant information about BNSF's storage charge program, we have not objected on the grounds that you are only entitled to information concerning BNSF's dealings with the named complainants. We have been willing to provide, and have been working hard to gather, information about BNSF's dealings with the entire shipping community...."

At a conference held with members of the Board's staff to resolve discovery "impasses" on March 28, 2005, BNSF agreed with Complainants that the Amended Complaint would have no practical impact on discovery inasmuch as Complainants had always taken the position that their discovery obligations were inclusive of subsidiaries and affiliates, including discovery related to monetary damages. But in its April 1 filing, BNSF attempts to contradict these earlier positions by asserting that an inclusive definition of the named Complainants "will expand – exponentially – the scope of this case." This vacuous assertion is unsubstantiated and is contrary to BNSF's earlier acknowledgements that its discovery requests are broad enough in scope to require Complainants to set forth all of their damage claims, including those on behalf of subsidiaries and affiliates.¹ In truth, treating the named Complainants as inclusive of their subsidiaries and affiliates will not expand, exponentially or otherwise, the scope of this case, and BNSF certainly has not shown that any such expansion would occur.

The BNSF April 1 filing takes great pains to obfuscate the very plain purposes of the amended complaint and its accompanying March 14 letter. Those purposes are:

1. Case law makes clear that an agent has standing to recover damages on behalf of a principal, and that one member of a corporate family has standing to recover damages on behalf of another. The facts in each in-

¹ BNSF claims in its April 1 filing that it "had no notice of the potential claims of the Complainants' affiliates and subsidiaries [until] Complainants broached the subject with BNSF during discovery," even though BNSF does not deny that it had been dealing with Complainants' corporate families on an integrated basis for years. April 1 filing, p. 4. BNSF cites paragraph 1, n. 1 of the Complaint as evidence that "NAFCA explicitly disclaimed that it was representing any entity other than those parties listed in Appendix A to the Complaint." However, all that Appendix A to the complaint contains is a list of the named complainants. Footnote 1 to paragraph 1 of the Complaint is not a disclaimer of an inclusive definition of the named Complainants, but simply a statement that those NAFCA members not named in the complaint did not elect to join in the Complaint. Subsidiaries and affiliates of NAFCA members are not separately listed in the NAFCA membership list.

stance will determine if these principles apply. Those Complainants whose subsidiaries and affiliates intend to seek monetary damages will introduce relevant facts as part of their proof in this case. Where the facts show that these subsidiaries and affiliates of a named Complainant have standing to recover monetary damages, the standing of subsidiaries and affiliates would be no different than that of a named Complainant. However, it is not necessary for the Board to resolve these issues at this time.

2. Amendment of the Complaint was necessitated by BNSF's disagreement with Complainants' view of standing issues with respect to damage claims. As indicated, if the Board resolves the question of whether any damage claims of the named complainants' subsidiaries and affiliates can be entertained under the original complaint, issues involving the Amended Complaint may be mooted. In any event, the Amended Complaint is entirely proper, contrary to BNSF's arguments which rest upon a misinterpretation of 49 C.F.R. 1111.2 and a tortured view of case law. If the Amended Complaint becomes a relevant issue later in this case, the Board can then determine the period of time for which monetary damages are available to the "amended in" Complainants.

Barely any part of BNSF's April 1 letter addresses the first of the above issues; and, to the extent BNSF does so, its argument discloses agreement with Complainants that the question of whether an agent can assert damage claims on behalf of the principal, or a parent on behalf of a corporate subsidiary or affiliate, is a question of fact. See fn. 3 to the BNSF filing, acknowledging that an agency relationship suffices to allow damage claims to be asserted on behalf of a principal, but alleging that "NAFCA has presented no evidence that such an agency relationship exists here." Indeed, NAFCA has presented no evidence whatsoever, since the evidentiary phase of this case has not yet been reached. When it is reached, those individual Complainants seeking recovery of damages on behalf of subsidiaries or affiliates will address that issue.

Nor is there any merit to BSNF's claims that it had no notice whatsoever that allegations in the Complaint made by the named Complainants applied to any of their affiliates or subsidiaries. In the first place, that assertion is contradicted by BNSF's own actions.² This is not a case which will turn on proof of individual shipments, but one which challenges the reasonableness and lawfulness of an ongoing tariff provision. BNSF has taken steps to defend not only against challenges to those tariff provisions, but also against claims for damages asserted by the named Complainants and their corporate

² See NAFCA's letter of March 14, 2005, pointing out that BNSF made a demand against Archer Daniels Midland Company ("ADM"), a named Complainant, for payment of empty private car storage charges alleged to have become accrued and owing by ADM's subsidiaries and affiliates, and pointing out that Cargill Incorporated ("Cargill"), another named Complainant, routinely pays private car storage and demurrage to BNSF on behalf of Cargill's subsidiaries and affiliates.

family members by posing broad discovery requests that, by BNSF's own admission, were aimed at any entity intending to offer evidence, including evidence of monetary damages. No specific demonstration has been made by BNSF of how it has been harmed by "lack of notice," and it is glaringly apparent that it has not been harmed due to the breadth of its discovery and Complainants' agreements to substantiate all damage claims.

BNSF attempts to resist amendment to the Complaint on the grounds that 49 C.F.R. 1111.2 "does not permit a complaint to be amended to add additional parties." April 1 letter at 2. Rule 1111.2 states: "[A]n amended ... complaint may be tendered for filing by a complainant against a defendant or defendants in the original complaint, stating a cause of action alleged to have accrued within the statutory period immediately preceding the date of such tender, in favor of complainant and against the defendant or defendants." BNSF would read this rule to mean that the phrase "named in the original complaint" applies to "a complainant" rather than modifying the phrase "defendant or defendants" that immediately precedes "named in the original complaint." This construction would rewrite the rule to in effect read: "An amended ... complaint may be tendered for filing by a complainant named in the original complaint against a defendant or defendants named in the original complaint" But that is not how the rule reads.

Nor is BNSF's position consistent with practices regarding amendment of complaints under federal court case law, including the very cases cited by BNSF. For example, in Beck v. Cablevision VII, Inc., 799 F. Supp 187 (D.D.C. 1992) and Leachman v. Beech Aircraft Corp. 694 F.2d 1301 (DC Cir. 1983), additional plaintiffs were added by amendment. As BNSF notes, the "touchstone ... is whether the defendant knew or should have known of the existence and involvement of the new plaintiff." Leachman, 694 F.2d at 1309. BNSF has not denied that it knew or should have known that corporate subsidiaries and affiliates of named Complainants, including Archer Daniels Midland Company and Cargill Incorporated, were incurring, were being billed by BNSF, and were either refusing to pay or paying, the charges at issue in this case; nor does BNSF deny that it treated these corporate affiliates on a unified basis. BNSF has no valid claim of surprise arising from the inclusion of subsidiaries and affiliates.

The violations of law set forth in the Amended Complaint are alleged to have commenced on July 1, 2001 and to have continued since then, meeting the requirement of Rule 1111.2 that an amended complaint state a "cause of action alleged to have accrued within the statutory period immediately preceding the date" on which the amended complaint is tendered. The only genuine question that may arise in connection with the amended complaint (assuming, arguendo, that the initial complaint does not encompass claims of the subsidiaries and affiliates), is whether the amendment relates back to the filing of the initial complaint or relates back only for two years prior to the Amended Complaint. BNSF asserts that NAFCA is trying an "end run" to evade a prohibition against complaint amendment that relate back to the original complaint. But there is no such blanket prohibition; the facts determine how far back a complaint amendment relates. See, e.g., Williams v. the United States, 405 F.2d 234 (5th Cir. 1968) and other cases cited by BNSF. This, too, is a matter to be resolved through evidence at an appropriate time. It is not, however, a question which requires resolution at this point.

The Board should not grant BNSF's motion to deny the amendments to the Complaint.

Respectfully submitted,

Andrew P. Goldstein
Attorney for Complainants

cc: All Parties

REBUTTAL VERIFIED STATEMENT

OF

DAN MACK

ON BEHALF OF CHS, INC.

1. My name is Dan Mack. I am Vice President – Transportation for CHS, Inc. ("CHS"), and am the same Dan Mack whose Verified Statement was submitted as Exhibit No. 1 to Complainants' Opening Statement of Fact and Argument. As with my prior statement, I submit this statement not only on behalf of CHS, but also on behalf of North America Freight Car Association ("NAFCA"), of which I am President.

2. Initially, I respond to the incorrect assertion of BNSF Railway Company ("BNSF") that a majority of NAFCA's members do not support this Complaint (BNSF Reply at 7). Both the Complaint and Amended Complaint in this proceeding pointedly were filed on behalf of NAFCA, as an unincorporated association, "**and**" specified NAFCA members, rather than on behalf of merely 10 individual NAFCA members, as BNSF would have it. As an organization comprised of *all* of its members, NAFCA was and remains a party complainant and is firmly opposed to BNSF's singularly draconian empty private car program provisions.

3. Many NAFCA members are car manufacturing or leasing companies with no facilities whatsoever at which freight shipments are originated and thus did not see fit to become individual Complainants. Within the car leasing segment of NAFCA members, there were some who concluded that, because of their particular private car lease portfolios, the BNSF program nevertheless warranted participation in the case by their

companies individually, as well as participation through NAFCA. Some shipper members of NAFCA have no facilities served by BNSF at which private cars are originated, and they did not elect to participate in the Complaint other than as a NAFCA member. The NAFCA members participating individually in the Complaint are, with one exception, those shippers who load private cars at facilities served by BNSF, those who thought they might wish to seek a refund of empty car holding charges found to be unlawful, and those car leasing companies who, because of their particular leasing portfolios, regarded the BNSF program as especially threatening. There is not a shred of truth to BNSF's suggestion that only a minority of NAFCA members support this Complaint.

4. A related claim by BNSF is that, by opposing BNSF's empty private car holding charges and rules, the Complainants – repeatedly characterized by BNSF as a minority of dissatisfied agricultural shippers – have set themselves apart from the remainder of the shipping community. BNSF claims in its Reply, at 32, 43-44, that "billings to the named Complainants in this case represent only a fraction of [a] small percentage" of all BNSF billings under the empty private car program that took effect in July 2001 (the "July 2001 Changes"), and that this small group of shippers, allegedly responsible for only a fragment of BNSF's empty private car charges, should not be heard to speak for the entire BNSF shipping community or influence the application of the BNSF program on a system-wide basis.

5. Such claims by BNSF are incorrect. The position of the Complainants in this proceeding is supported by large numbers of shippers acting through their trade organizations, National Industrial Transportation League ("NITL") and American Chemistry Council ("ACC"), which filed a joint brief as *amici curiae*. They initially intervened

in this case in support of the Complaint and in opposition to BNSF, but switched to *amici* status as a result of a contentious discovery dispute with BNSF, and not because of an affinity with BNSF's views. Despite BNSF's effort to assert that the joint NITL/ACC filing places those organizations in BNSF's camp, no realistic assessment of the NITL/ACC filing conceivably could lead to that conclusion. NITL and ACC are openly critical of the types of practices being pursued by BNSF with respect to empty private cars. The fact that some trade organizations initially opposed the July 2001 Changes and then withdrew does not undercut Complainants' position, as those groups had extremely limited interests, such as storage charges that applied outside of car repair shops.

6. As part of its effort to suggest that the Complainants have no meaningful axe to grind because they have suffered only minimally from the empty private car holding charges instituted by BNSF, BNSF tries to portray, in Exhibit I to Mr. Langston's Reply Verified Statement ("Langston Reply V.S."), the subset of each shipper's facilities at which empty car charges were incurred as being only an inconsequential percentage of all facilities served by BNSF. With respect to CHS, BNSF concludes that CHS incurred charges at only 5 percent of its "total locations." I have reviewed the list of CHS "total locations" upon which that BNSF claim is based, and I see that it is not by any means confined to points where CHS loads **private** cars. In fact, the overwhelming number of CHS points included in BNSF's underlying list are not points at which CHS private cars normally are loaded. If BNSF's comparison were confined to such points, the result would be that CHS has incurred empty private car charges from BNSF at approximately 25 percent of those facilities at which private cars normally are loaded. BNSF's claims are grossly erroneous.

7. BNSF's attempt to chastise and demean the Complainants as ingrates who, at best, represent only a fraction of the agricultural shipping community is all the more egregious considering the repeated efforts made by NAFCA to resolve our differences with BNSF. Even before the Board denied BNSF's motion to dismiss the Complaint, NAFCA's counsel met with BNSF representatives to conduct negotiations pursuant to the Board's directive in Docket No. 42060. Although BNSF asserts that it made numerous adjustments to its original set of July 2001 Changes to accommodate objections raised by BNSF customers, what BNSF neglects to mention is that BNSF flatly refused to enter into a settlement agreement of any nature with NAFCA, stating that it would deal with individual shippers only. BNSF elected to make only *unilateral* changes to the original program so that it would retain the ability, unhampered by a settlement agreement, to undo any such changes and to make the empty car charges and rules even more onerous in the future. In fact, BNSF now asserts that it may elect to do precisely that by raising the \$10-\$15-\$25 levels of its storage charges to the \$50 per day demurrage charge level (BNSF Reply at 67).

8. Moreover, as President of NAFCA, I personally conveyed to both the former and present BNSF Ag Products Group Vice Presidents and to BNSF's Executive Vice President/Chief Marketing Officer NAFCA's willingness to negotiate differences. As recently as April 2005, I and representatives of three other NAFCA agricultural members met with two current BNSF officials to determine whether BNSF was interested in pursuing discussions. All such overtures were rebuffed. If BNSF genuinely believed that the Complainant shippers, as agricultural shippers, were really atypical of BNSF's customer base, BNSF had more than ample opportunity to treat NAFCA as the distinguish-

able minority of customers that BNSF now seeks to portray NAFCAs as being, by resolving its differences with NAFCAs just as Union Pacific did when it reached agreement with NAFCAs and, as related in Complainants' Opening Statement, made its empty private car program inapplicable to all cars handling grain and grain products. BNSF now grouches that the Complainants are too small and unrepresentative a group to be allowed to assail the July 2001 Changes, yet BNSF, by its refusals to reach a compromise, left Complainants with no alternative but to do so.

9. As indicated in my prior statement, I attended the February and April 2001 BNSF forums convened to discuss the July 2001 Changes and various related projects on BNSF's agenda. At the first of those meetings, BNSF raised the issue of destination demurrage on loaded cars, and BNSF suggested that private car shippers could improve car utilization by noting on their bills of lading that the loaded car would be subject to destination demurrage when on consignee industry track. This subject, however, was not pursued at length because it involved actions of competitors who were present at the time. In any event, an effort by an individual shipper to place its private cars on destination demurrage while on a customer's industry track would be almost certain to fail because the customer would threaten any shipper so acting with the diversion of business to another shipper who had not taken the same step. In my opinion, the only way to effectively control destination demurrage is through uniform rules applied by the delivering railroad.

10. The BNSF Reply contains a number of erroneous statements all stemming from BNSF's refusal to take any responsibility for those of its own actions and failings that contributed to the growth in the private car fleet. One such inappropriate disclaimer

by BNSF is the assertion that erratic service is beyond its control because BNSF does not know either who owns the private cars that operate on the BNSF system or where those cars will be directed. Langston Reply V.S. at 20-21.

11. It is difficult for me to believe that BNSF is making those claims. The entirety of the nation's tank car fleet consists of private cars. Until approximately one year ago, just about all tank car movements were performed under contract with BNSF and other railroads. Even now, although BNSF and other railroads are phasing out their reliance on contracts for some tank car and other transportation, many tank car movements remain under contract. As a result, BNSF, as a party to the contracts, is fully aware beforehand of tank car destinations as well as origins. Where contracts are being phased out, BNSF is replacing them with point-to-point tariff rates that apply between those specific origins and destinations where BNSF has been advised traffic will move. As to grain, the majority of the traffic moves in shuttle trains, which operate from a limited number of origins to a limited number of destinations, all known beforehand to BNSF. Where traffic other than tank car shipments or grain shuttle trains is involved, such as soybean meal moving in covered hopper cars, or wheat moving in non-shuttle unit trains, there are clear movement patterns that dominate the market, and of which BNSF is aware. For example, eastbound wheat from North Dakota or Minnesota moves almost entirely to BNSF gateways, mainly at Chicago although also at St. Louis or Duluth/Superior. Corn, soybeans, and wheat all are major export crops, resulting in recurring shipments of these commodities to a limited number of ports. Where shipments move to domestic consignees, in most cases the shipments display a repetitive pattern from almost any given origin. Finally, the empty return movements of all private cars is

predetermined. BNSF's effort to suggest that it lacks sufficient information with which to foresee patterns of traffic movement is unrealistic.

12. Even to the extent that BNSF may not know in advance each specific origin-destination pair for all traffic it will handle, there is no demonstrated connection between BNSF's asserted lack of prior movement information and the extreme variances in transit times between two given points on the BNSF system. For instance, as pointed out in Complainants' Opening Verified Statements, the BNSF website will display anticipated transit times between origin and destination pairs, and those transit times often vary, sometimes substantially, from day to day of the week. Such pre-planned variances in schedules indicate that transit time inconsistencies are a matter of scheduling choices or performance, rather than purely a result of surprise when BNSF is tendered a car for shipment.

13. It is obvious that slow and inconsistent service experienced by many private car shippers, resulting in the operation of more private cars than would be necessary under more optimal operating conditions, results directly from deliberate choices made by BNSF. Most private cars are either tank cars or specialty covered hopper cars, and move in "manifest" trains. According to BNSF performance data supplied by the Association of American Railroads ("AAR") and available on its website, BNSF manifest trains during the past year averaged approximately 22 miles per hour, while intermodal trains were operated at average speeds of approximately 33.5 miles per hour. BNSF manifest trains were operated more slowly than every category of train on BNSF (there are five categories) with the exception of one. This disparity is not explained away by the fact that intermodal trains may require no intermediate switching, while manifest

trains do. BNSF coal trains and grain shuttle trains operate at average speeds far slower than BNSF intermodal trains and much closer to the slow speed of manifest trains, even though both coal and grain shuttle trains move in 100-plus car units that, like intermodal trains, require no intermediate switching.

14. I have also compared average train speed data for BNSF and that of Norfolk Southern Railway ("NS") between September 2004 and August 2005. This comparison is attached as Appendix A. I selected NS to compare with BNSF because, as pointed out in my earlier statement, Exhibit No. 1, NS had no program of empty private car charges during the past year. Appendix A shows that BNSF average train speed worsened by approximately three miles per hour over the course of the year, while NS, although experiencing a temporary decline in average train speed, overall just about held its own. Additionally, although Appendix A shows that intermodal trains receive the highest service preference on both BNSF and NS, the gap between intermodal train performance and the performance of both manifest trains and "All Trains" is greater on BNSF than on NS, disclosing that BNSF gives worse service comparatively to manifest trains than NS.

15. Those data demonstrate that BNSF can make a choice in how quickly or slowly traffic on its system moves, and does decide which types of traffic are to be given the highest movement priorities. Unfortunately, those priorities do not go to the types of trains in which private cars most often are handled, manifest trains. The slow transit times assigned to trains carrying private cars are a major contributor to increases in the size of an industry's private car fleet.

16. It is noteworthy that BNSF does not take issue in the least with the explanation offered by me and other witnesses for Complainants of why shippers are required

not merely to acquire private cars, but to acquire private cars to the levels of current car ownership. Rather than disputing our testimony to the effect that undependable and unpredictable BNSF service adds cars to the private fleet, BNSF instead pleads that inconsistency is inherent in rail service. Whether the fault lies with BNSF or is simply a part of rail service is not the point where the issue is the size of the private car fleet. In either case, the conclusion must be reached that BNSF, like other railroads, contributes substantially to the conditions that add cars to the system. If BNSF and other railroads had not pursued a studied policy of turning car supply over to shippers, as the data indisputably shows to be the case, and if railroads had remained the primary source of car supply, they would have to assume the financial consequences of those of their actions that contribute to operating inefficiencies and add cars to the fleet. Just because the cars are now supplied by shippers does not mean that BNSF no longer contributes to swollen fleets or should be relieved of responsibility for those extra cars.

17. BNSF claims that this case is about "resistance to change" (BNSF Reply at 12). To the contrary, shippers have responded to the changes brought about by the unwillingness of carriers such as BNSF to continue to supply the majority of freight cars. At great expense to shippers, but with highly remunerative consequences for BNSF and other railroads, shippers now supply most cars. Complainants are not resisting change; we are resisting the use by BNSF of overreaching tariff provisions to compel private car shippers to assume the track infrastructure obligations that are a necessary part of rail service, and that BNSF provides without additional charge to those customers receiving BNSF cars.

18. Other related issues that must be addressed are the disparities between the treatment of covered hopper cars versus other types of private cars under the BNSF July 2001 Changes, and the disparities between the treatment of private cars and BNSF system cars.

19. In my opening statement, I observed that BNSF's "average agreement" demurrage provisions applicable to covered hopper cars carrying grain or grain products differ in several significant respects from the storage provisions applicable to tank cars and other private cars besides the agricultural hoppers. Although BNSF does not dispute that both its rules and rates differ as between the two categories of cars, it does appear to be asserting that the "average agreement" applicable to agricultural hopper cars under the Demurrage Book, with a rate of \$50 per chargeable day, is less costly to shippers than the Storage Book program, with rates of \$10, \$15, or \$25 per day. Langston Reply V.S. at 31.

20. To support its claims, BNSF has introduced sample calculations of demurrage and storage charges pursuant to its two tariffs. See Langston Reply V.S., Exhibit J. Under BNSF's suppositions, the Demurrage Book is postured as leading to lower empty car charges, even with chargeable days at \$50 per car, than the Storage Book, assuming a \$15 per day charge.

21. Of course, the primary difficulty with BNSF's calculations, and with its claims in general that average agreements are more favorable to shippers than the Storage Book program, is that BNSF ignores the obvious fact that, at \$50 per car per chargeable day, the Demurrage Book is **bound** to lead to higher charges than the Storage Book if cars remain on constructive placement for more than just a few days. I have restated

BNSF's calculations to demonstrate how easily such a result can come about, and my re-statement is attached as Appendix B to this statement. It shows that, if constructive placement time for an empty private car is extended just one day beyond the days assumed in Mr. Langston's Exhibit J, the average agreement produces higher demurrage charges than the Storage Book.

22. A review of Mr. Langston's Exhibit J highlights another flaw in BNSF's assertions. At page 60 of BNSF's Reply, BNSF claims, in large bold print, that both its "Storage and Demurrage Books Account for 'bunching.'" As Mr. Langston's Exhibit J discloses, "bunching" is not recognized for empty private grain cars under the Demurrage Book. Although "bunching" is recognized under the Storage Book, it is defined very narrowly and would not include, for example, cars bunched on account of erratic and inconsistent BNSF service.

23. BNSF next argues that, if demurrage or storage charges are accrued on account of poor BNSF service, shippers can challenge those bills in those specific instances. However, BNSF fails to explain how a shipper successfully can attack demurrage charges arising under a tariff that expressly excludes all defenses to demurrage charges except for those expressly allowed by the tariff – and poor service is not an allowed defense.

24. In the final analysis, it is true that a comparison between results arising under the Demurrage Book and the Storage Book is difficult to make, but that is exactly the point: they are different programs. Covered hopper cars carrying grain and grain products are not treated in the same manner as are all other empty private cars. Yet BNSF maintains that the July 2001 Changes were designed to cope with precisely the

same perceived (or misperceived) problem of "congestion," regardless of the type of private car involved, in which event the charges for causing "congestion" should be equal no matter what type of car is involved. BNSF claims to have made a specific study to determine that its alleged need to cope with "congestion" could best be met through the \$10-\$15-\$25 Storage Book structure; there is no similar basis for BNSF's empty car Demurrage Book charges, and no basis for equalizing demurrage and storage by raising the storage charges.

25. Great pains are taken by BNSF to try to distinguish its rules for handling empty private cars from its practices in handling empty railroad cars. BNSF insists that no comparison can be made between the two types of cars for the reason that all railroad cars (with the exception of a limited number subject to bilateral assignment agreements) are under railroad control at all times, even if subject to AAR pool assignments, whereas private cars are not subject to railroad control. This distinction, for some reason not clear to me, is said by BNSF to justify BNSF's July 2001 Changes as applied to empty private cars prior to loading, while no similar charges apply to empty railroad cars held prior to loading.

26 Shippers escape demurrage or storage charges on empty *railroad* cars because, under BNSF's rules, the shippers are under no obligation to take those cars from BNSF at any given time or place and are not required to become responsible for the cars until a car is ordered to be placed at a shipper facility. BNSF accordingly holds empty *railroad-owned* cars at various points throughout its system, *at no extra charge*, including the station at which the intended shipper's loading facility is located, until a shipper elects to order the car spotted for loading. BNSF refuses to provide a similar option to private

car shippers, and starts the demurrage or storage clock as soon as an empty private car reaches the station where the next load will occur. This, again, is an example of how BNSF is taking advantage of the transfer of car supply obligation from railroad to shipper. If BNSF were supplying all freight cars, no shipper would be under any involuntary obligation to pay empty car holding charges unless and until the car was ordered for loading and the shipper failed to accept it on the specified want date. To say that a private car should be treated differently because BNSF is not at liberty to divert the car to its own use is an illusory distinction, since all railroad cars are intended for loading at some origin and must be held by the railroad at one point or another, if not multiple points, before tendered for loading at that origin. Holding empty cars prior to loading is an indispensable part of a railroad car cycle, regardless of who controls the car, and should no more be a cause for holding charges on private equipment than on carrier cars.

27 Last, I must comment on BNSF's claim that it requested its customers to refrain from keeping large numbers of empty private cars on BNSF track, but that its requests were ignored. No such request was made of CHS.

VERIFICATION

Dan Mack, being duly sworn, deposes and says that the foregoing is true and correct, to the best of his knowledge, information and belief.

Dan Mack

Subscribed and sworn to before me this 17th day of October, 2005.

Nanci L. Lilja
Notary Public

My commission expires 1/31/10.



BNSF Average Train Speed- Week Ending

	9/24/04	10/29/04	11/26/04	12/31/04	1/28/05	2/25/05	3/25/05	4/29/05	5/27/05	6/24/05	7/29/05	8/26/05
Intermodal	34.2	33.4	32.4	33.6	32.1	31.8	31.6	32.9	34.1	33.1	31.5	31.3
Manifest	23.2	23.0	23.2	21.4	22.1	21.7	21.2	21.3	22.2	20.7	19.6	20.2
All Trains	25.6	25.3	24.7	23.7	24.3	24.6	23.8	23.5	24.5	23.0	22.7	22.7
Manifest % Slower than Intermodal	32%	42%	24%	36%	31%	32%	33%	35%	35%	37%	38%	35%
All Trains % Slower than Intermodal	25%	30%	24%	29%	24%	23%	25%	29%	28%	31%	28%	27%

Norfolk Southern Average Train Speed- Week Ending

	9/24/04	10/29/04	11/26/04	12/31/04	1/28/05	2/25/05	3/25/05	4/29/05	5/27/05	6/24/05	7/29/05	8/26/05
Intermodal	28.2	28.6	29.2	32.0	27.7	28.5	29.2	28.4	28.9	28.2	28.9	28.6
Manifest	21.2	20.8	21.4	23.7	19.6	19.5	20.9	21.3	21.5	20.9	21.9	21.9
All Trains	22.1	21.9	22.6	25.0	19.0	21.3	18.7	22.2	22.6	21.8	22.6	22.5
Manifest % Slower than Intermodal	25%	27%	27%	26%	29%	32%	28%	25%	26%	26%	24%	23%
All Trains % Slower than Intermodal	22%	23%	23%	22%	31%	25%	36%	22%	22%	23%	22%	21%

Differences in Programs and Calculations Under 6004 and 6005
(Langston Exhibit J Restated)

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 Mon.	12:00 Fri.	00:01 Tues.	4	2
Car # 2	17:00 Mon.	11:00 Wed.	00:01 Tues.	2	2
			Sum of Debits/Credits	6	4
			Net Debits (6 debits – 4 credits)		2
			Total Bill (2 Debits x \$50/debit)		\$100

Notes:

- Sundays & Holidays are not chargeable
- Bunching not allowed empties
- If car CP'd on Tuesday 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 Mon.	12:00 Fri.	00:01 Wed.	3	\$45.00
Car # 2	17:00 Mon.	11:00 Wed.	00:01 Wed.	1	\$15.00
				Total bill	\$60.00

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

REBUTTAL VERIFIED STATEMENT

OF

RANDY NEUMAYER

ON BEHALF OF ARCHER DANIELS MIDLAND COMPANY

1. My name is Randy Neumayer. I am Senior Vice President, Transportation, of Archer Daniels Midland Company ("ADM"). I am the same Randy Neumayer who submitted a prior Verified Statement in this proceeding on behalf of ADM, identified as Complainants' Exhibit No. 2. The purpose of this rebuttal statement is to respond to certain claims advanced in the Reply of BNSF Railway Company ("BNSF") and the Verified Statement of Douglas W. Langston ("Langston Reply V.S.") attached to that Reply.

2. Several BNSF claims struck me as being exaggerated, but none more so than the assertion that the empty private car demurrage and storage charges instituted on July 1, 2001 ("July 2001 Changes") are responsible for the ability of BNSF to move higher levels of traffic with disproportionately smaller increases in cars. See, for example, Langston Reply V.S. at 12. Whether the July 2001 Changes have actually brought about a noticeable reduction in the amount of time that empty private cars awaiting loading reside on property owned by BNSF (including BNSF trackage leased by shippers) is questionable. But, even if there has been some reduction in that part of the car cycle movement, it has been small and inconsequential in relation to other factors that have brought about better utilization of cars on BNSF and other railroads.

3. From ADM's perspective, far and away the most significant factor in improving car utilization between 2001 and the present time has been increased use of grain shuttle trains and larger capacity loads. Grain shuttle trains are units of 100 to 110 covered hopper cars which can be booked for up to twelve months' continuous, dedicated use. The shipper that has committed to use the shuttle train selects the origin and destination pairs for each trip. Shuttle origins and destinations are equipped with expensive high-speed load and unload equipment and over a mile of uninterrupted track to allow the train to be moved through the elevator with power attached. As an incentive for these investments, BNSF pays \$100 or more per car if the train is loaded or unloaded within 15 hours, and shuttle trains (as opposed to mere unit grain trains) employ these speedy origin and destination loading techniques. Because BNSF offers lower rates in shuttle trains than for other types of grain movements, shuttle origins attract increasingly large volumes of grain, generally at the expense of non-shuttle grain elevators.

4. ADM's own experience substantiates the tremendous growth of grain shuttle trains since 2002. In 2002, ADM shipped grain shuttle trains. In 2003, ADM shipped grain shuttle trains. In 2004, ADM shipped grain shuttle trains. Over the same time span, ADM's grain shipments in non-shuttle trains grew by approximately , a number that would have been significantly higher but for the shuttle trains..

5. The growth in the shuttle train use by ADM is mirrored by BNSF's own public data, which show more than a 33% increase in shuttle carloads between 2002 and the beginning of 2005. Because grain shuttle trains employ coupled power and continuous moves, they produce significantly more trips per month per car than BNSF obtains

from cars employed in non-shuttle grain service. According to BNSF public data, grain shuttle trains annually make about 2.7 times the trips made by non-shuttles.

6. According to AAR data, on January 1, 2002, BNSF operated 41,386 covered hopper cars over 4,000 cubic foot capacity, which are the types of cars used to transport grain. On December 31, 2004, BNSF operated 35,884 similar cars. In 2002, BNSF handled approximately 425,000 carloads of grain. In 2004, it handled approximately 500,000 such carloads. Over the last several years, BNSF has added thousands of large cube grain cars to its fleet, each of which carries at least 10 percent more grain than the older, smaller covered hoppers. Its fleet of cars capable of handling grain decreased while its grain carloads increased. If one were to assume, as BNSF suggests, that these types of unit productivity increases are due to the July 2001 Changes, then BNSF and many of its customers, including ADM, wasted their very substantial investments in grain shuttle facilities.

7. ADM's experience also contradicts BNSF's claim that empty private cars move more quickly into industry track after arriving at the station serving an industry facility purely as a result of the July 2001 Changes. ADM's experience is that one primary driving force behind private car utilization is business demand and a second is carrier performance, which either facilitates or impedes car efficiency. This is especially true at grain processing facilities, where higher volumes are produced in response to market demand, keeping plants running for longer hours and producing a higher demand for empty cars to load. If a carrier is providing efficient service, the number of private units necessary to meet increased business demand will not be as great as when the carrier is operat-

ing inefficiently. Similarly, even if business demand remains level, but carrier performance deteriorates, more private units are necessary.

8. BNSF would like the Board to believe that none of the Complainant shippers, including ADM, have a particularly significant stake in the July 2001 Changes because they apply to only a small proportion of our facilities served by BNSF. Langston Reply V.S., Exhibit I. At least in the case of ADM, BNSF is incorrect on two counts. First, BNSF has inaccurately maximized the ratio of total ADM facilities served by BNSF to those at which ADM has incurred empty car charges (Exhibit I). By counting ADM facilities where no private cars are loaded, it is made to appear as if ADM can easily absorb the impact of a relatively few facilities at which the BNSF charges apply. ADM actually has incurred empty private car holding charges at all of its facilities served by BNSF where private car shipments have been originated since 2001.

9. BNSF would like the Board to believe that, because some BNSF customers “dwarf” BNSF in size, those customers actually have more market power over BNSF than BNSF has over the customer. Langston Reply V.S. at 17. It is hard for me to imagine a more inept argument. BNSF serves scores, if not hundreds, of monopoly markets – those requiring rail service where only BNSF serves the origin, the destination, or both origin and destination. By contrast, every product or commodity produced or sold by ADM in the United States is subject to competition from multiple vendors, and every customer has a choice of supplier. Because ADM faces intense competition, we are especially vulnerable to our serving railroads. Through rate or service actions, BNSF can shut our captive facilities out of the marketplace. ADM does not have the power to foreclose BNSF from a single market.

10. Contrary to BNSF's claims, the July 2001 Changes posed a substantial economic threat to ADM. ADM not only accrued empty car charges, but also was compelled to construct additional industry track (without full compensation from BNSF) and to lease track from BNSF.

11. Another BNSF assertion is that the July 2001 Changes succeeded in removing from the BNSF system empty private cars that were an obstacle to "fluidity" as measured by the fact that the dollar amount of those charges which have accrued since 2002 are on the decline. Langston Reply V.S. at 15. Considering the leases of BNSF yard track that shippers, like ADM, have been required to enter into as a result of the July 2001 Changes, it would be amazing if the demurrage and storage charges collected under that program have not declined. Demurrage and storage charges have been replaced by lease payments, but our private cars continue to occupy the same areas of BNSF yard track as prior to 2001.

12. I will end this statement by saying that, despite the fact that ADM operates a private car fleet larger than the entire car fleet operated by the Kansas City Southern Railway Company, a Class I railroad, and despite the fact that BNSF claims that it was compelled to institute the July 2001 Changes because its customers would not respond to requests that they voluntarily make other arrangements for their empty cars, BNSF at no time asked ADM to make such other arrangements except, of course, by publishing the July 2001 Changes.

VERIFICATION

Randy Neumayer, being duly sworn, deposes and says that the foregoing is true and correct, to the best of his knowledge, information and belief.

Randy Neumayer

Subscribed and sworn to before me this 3 day of November, 2005.



Rebecca A. Voigt
Notary Public

My commission expires 6-7-09.

REBUTTAL VERIFIED STATEMENT

OF

TERRY J. VOSS

ON BEHALF OF AG PROCESSING INC

1. My name is Terry J. Voss. I am Senior Vice President, Ag Processing Inc. ("AGP") I am the same Terry J. Voss who furnished a Verified Statement earlier in this proceeding, identified as Complainants' Exhibit No. 3. I have reviewed the Reply statement of BNSF Railway Company ("BNSF"), including the Reply Verified Statement of Douglas W. Langston ("Langston Reply V.S.").

2. I am somewhat astonished by BNSF's efforts to claim that the empty private car demurrage and storage rules and charges instituted in July 2001 ("July 2001 Changes") not only brought "fluidity" to the BNSF system, are an indispensable reason why BNSF claims that it has been able to handle increased traffic volumes without any significant increase in freight car supply.

3. Just how BNSF makes a casual connection between the July 2001 Changes, on the one hand, and the movement of increased traffic volumes without corresponding increases in fleet size, on the other, is not explained anywhere that I have been able to find in the BNSF Reply or in the Langston Reply V.S. One is left to infer that, because BNSF handled increased traffic volumes, the 2001 Changes had to have been, if not the indispensable link then, at least a significant contributing link to increased traffic volumes. As someone who lives and deals with rail service on BNSF day in and day out,

beginning well before July 2001, I think that BNSF's claim is fanciful for reasons such as those I discuss below.

4. First, let's examine Exhibit F to the Langston Reply V.S., which purports to show that empty agricultural private cars were on average held after constructive placement for approximately .9 of the day (around 22 hours) as of July 2001, but only for .4 of a day (approximately 10 hours) as of July 2005, a difference of 12 hours.

5. Exhibit F to Mr. Langston's Verified Statement comes nowhere near showing that empty private cars actually were removed from BNSF track more quickly than prior to the July 2001 Changes. At best, Mr. Langston's exhibits show that constructive placement time has been reduced. Constructive placement ends when the shipper notifies the carrier that the empty private car should be spotted on industry track for loading, but that is a far cry from actual movement of the car. At two of AGP's three processing facilities switched by BNSF, it is in fact likely that a reduction in constructive placement time would have little or no effect on the actual movement of AGP's empty private cars from either BNSF or leased track to AGP's industrial track. At those two processing facilities, switching is provided only three times weekly. Under those circumstances, when AGP notifies BNSF to place an empty private car for loading, it is doubtful that the car will be moved within 48 hours, even though it will come off constructive placement far sooner. And, even where switching is provided on a daily or near-daily basis, (we have a location with two facilities where switching is provided to one part of the facility six days a week), it is normally provided just once a day, so that a 12 hour reduction in constructive placement time by no means provides assurance that a car will be

switched more promptly than if constructive placement time had not been reduced by 12 hours.

6. It has been my experience that, all things being equal, private cars tend to be loaded more frequently as business increases, at least at grain processing facilities. There has, in fact, been an increase in demand for ethanol and soybean products over the past two or three years. As that demand occurs in the marketplace, AGP (and our competitors) respond by expanding production capacity where possible, and AGP has done precisely that. In addition to expanded capacity, production facilities work longer hours. These conditions result in the speedier demand for empty cars to load, and would have that result without the July 2001 Changes.

7. Another thing that occurs when business increases is a reduction in the number of serviceable cars that are stored. A graph attached to Mr. Langston's Verified Statement as Exhibit A claims that there were over 26,000 carrier-controlled serviceable cars stored on BNSF as of the beginning of 2002, and only about 7,000 at the end of 2004. The same graph shows that, while there were fewer than 1,000 serviceable private cars stored on BNSF at the beginning of 2002, even those few cars no longer were in storage by the end of 2004. Over that same period of time, BNSF experienced approximately a 30% increase in system unit miles, according to Mr. Langston's Exhibit G. These facts demonstrate to me that, as business demands grow, idle cars cease being idle, which goes a long way toward explaining why BNSF seems to have handled an increase in business without a corresponding size in the fleet; the fleet was there when business was slow and simply came out of mothballs as business improved.

8. I see where Mr. Langston asserts that the July 2001 Changes were put into place because BNSF's "storage and demurrage practices were out of line with the practices of other major carriers." Langston Reply V.S. at 3. To the contrary, BNSF was the first Class I Railroad to establish a system-wide regime of demurrage and storage charges for empty private cars. Contrary to Mr. Langston's claim that the July 2001 Changes were necessary to "bring [BNSF's] policies more in line with the competition" (Langston Reply V.S. at 4), the fact is that the "competition" did not have the practices that BNSF instituted.

9. Mr. Langston attempts to portray BNSF's July 2001 Changes as part of a broader effort to improve car utilization, and he points to a number of elements of this broader policy. Langston Reply V.S. at 4. The first of these is the development of new computer-based systems for tracking loaded and empty equipment and the second is a change in website and electronic tools. As far as I can determine, these two items are simply a restatement of one change, which was improved computerization. Not to disparage improved information technology, but it is something that all companies are required to pursue in today's marketplace. Moreover, improved information technology is something for which all of BNSF's customers pay.

10. Mr. Langston next points to increases in BNSF demurrage rates, a reduction in demurrage credits, and requiring "want" dates from shippers for loading railroad-controlled equipment as evidence that BNSF is making broad efforts to improve service. Ibid. This is the first time BNSF has claimed that requiring a "want" date improves car utilization. In fact, BNSF does not allow "want" dates for empty private cars and insists that such cars go directly to a shipper facility or be held on railroad track under construc-

tive placement. AGP would be pleased if BNSF would institute a system of “want” dates for empty private cars with no demurrage until after an empty car was rejected following the want date.

11. Other interesting aspects of the so-called BNSF “improved car utilization” program include increased intra-terminal switching charges, penalties for overloads, and higher weighing charges. I cannot see, and BNSF does not explain, how any of these changes improves car utilization.

12. Mr. Langston notes that BNSF “[raised] fixed charges for leasing track to hold empty or loaded private rail cars.” Langston Reply V.S. at 4. I certainly agree that BNSF increased its charges for leasing trackage on which to hold private cars, but those increases did nothing to improve car utilization on BNSF; they simply increased BNSF’s revenues while allowing private cars to continue to occupy the same track before it was placed under lease to a shipper.

13. Mr. Langston testifies that “BNSF designed a private car storage program to encourage shippers to keep their cars moving.” Langston Reply V.S. at 8. Shippers, including AGP, do not need encouragement from BNSF to keep private cars moving. Private cars are a huge, and decidedly unwelcome, expense for AGP and other shippers. At \$65,000 to \$90,000 per car, the fewer private cars we operate the better we like it. If BNSF truly is interested in keeping private cars moving, it can provide more consistent service and stop giving preference to intermodal trains.

14. It is with some amusement that I note BNSF’s claim (Langston Reply V.S. at 17) that AGP, among other companies, “dwarfs” BNSF in size and, presumably, in economic power. In 2004, AGP had earnings of \$29 million; BNSF earned \$660 million.

AGP is highly vulnerable to BNSF's market power; our company has facilities that BNSF can put out of business through rate or service adjustments that are unfavorable to AGP. I cannot think of one business adjustment that either AGP or any other single shipper can make that would put BNSF or even a single BNSF mainline out of business.

15. BNSF is fully aware of its market power. Before it instituted the July 2001 Changes, it made no efforts to reach agreements with AGP on the handling of empty private cars. All conversations between BNSF and AGP regarding that subject took place after BNSF announced the July 2001 Changes.

16. One of BNSF's stated goals in instituting the July 2001 Changes was to bring about a reduction in the size of individual customer private fleets. If that goal is reached and AGP is forced to reduce the size of its private car fleet, then, because BNSF does not provide comparable cars, the result will be a reduction in AGP's business. BNSF may consider such a loss inconsequential because of its successful efforts to attract new intermodal traffic. AGP, however, does not have alternative business lines. Unlike a railroad, over which many different commodities can move, a soybean processing facility or a corn processing facility can only do the limited things they were constructed to do. If deprived of the ability to ship their goods to market, those facilities lose their value. BNSF not only "dwarfs" AGP in economic size; BNSF dwarfs AGP and other shippers in economic power, regardless of comparative size, because BNSF can single-handedly destroy or deplete the value of the shipper's investment in facilities and rail equipment by reducing car supply or access to cars, as well as bringing about market dislocations through rate adjustments. That is the threat implicit in the July 2001 Changes as published. AGP voluntarily has invested millions of dollars to expand production fa-

cilities, including new industrial track, and will make additional trade investments where physically possible and properly incentivised. However, BNSF should not be permitted to use its market power to impose changes that benefit other BNSF customers at AGP's expense or that threaten a reduction in the use of our facilities.

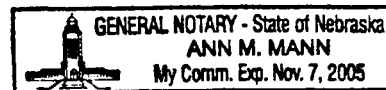
VERIFICATION

Terry J. Voss, being duly sworn, deposes and says that the foregoing is true and correct, to the best of his knowledge, information and belief.

Terry J. Voss

Subscribed and sworn to before me this 21st day of October, 2005.

Ann M. Mann
Notary Public



My commission expires 11-7-2005

EXHIBIT NO. 13

REBUTTAL VERIFIED STATEMENT

OF

DARRELL R. WALLACE

ON BEHALF OF BUNGE NORTH AMERICA, INC.

1. My name is Darrell R. Wallace. I am Vice President – Transportation for Bunge North America, Inc. (“Bunge”), and am the same Darrell R. Wallace who submitted a verified statement earlier in this proceeding, identified as Exhibit No. 4 to Complainants’ Opening Statement of Fact and Argument. The purpose of this rebuttal statement is to respond to various assertions made by BNSF Railway Company (“BNSF”) in its Reply Statement of Fact and Argument, including the verified statement of BNSF witness Douglas W. Langston in his reply verified statement (“Langston Reply V.S.”).

2. Mr. Langston suggests (Langston Reply V.S. 4, 6, 7) that BNSF’s customers were taking advantage of BNSF by using BNSF tracks as private car storage yards, and that its customers refused BNSF requests to remove empty private cars from BNSF tracks. I’ve held my present position with Bunge as Transportation Vice President since 1998, and if any request by BNSF had been made to Bunge to remove empty private cars from BNSF tracks, those requests would have been made to me, as I am in frequent contact with BNSF representatives on behalf of Bunge. I can state without hesitation that at no time since I joined Bunge has BNSF ever requested Bunge to remove empty private cars from BNSF tracks or accused Bunge of taking advantage of BNSF. In fact, prior to instituting its empty private car charges on July 1, 2001 (the “July 2001 Changes”), BNSF did not complain to or consult with Bunge regarding any reduction in either the

size of Bunge's private fleet or the then-prevailing practice of using railroad trackage to hold empty private cars prior to placement for loading.

3. BNSF argues that increased demurrage or storage charges on cars are recognized by shippers as an effective method to promote the prompt release of equipment and that shippers actually requested BNSF to raise its demurrage charges on loaded private cars while on railroad track from \$25.00 to \$75.00 per chargeable day (Langston Reply V.S., fn. 7). Mr. Langston states that BNSF responded to those requests by raising the demurrage charge for railroad-controlled and private cars to \$75.00 per chargeable day effective August 1, 2001, acknowledging, however, that the charge later was lowered to \$50.00 per car per day, where it stands today (Langston Reply V.S., fn. 9). Some comments regarding these claims are appropriate.

4. First, Mr. Langston neglects to mention that the \$75.00 demurrage rate allegedly requested by unnamed, unidentified shippers actually remained in effect for all of one day; the \$50.00 rate took effect on August 2, 2001, the day after the \$75.00 rate was made effective. I certainly am not aware of any BNSF customer who requested a \$75.00 per day demurrage rate, and BNSF's actions in maintaining such a rate for just one day hardly support a claim that there was a surge of customer requests for increased demurrage rates.

5. I do recall discussions of destination demurrage which took place at a BNSF forum in Fort Worth in either February or April of 2001, after BNSF had announced the July 2001 Changes and was endeavoring to overcome shipper opposition. Several shippers, myself included, who knew that BNSF customarily raised its demurrage rates on loaded grain cars for the fall harvest season beginning August of each year, may

have requested BNSF to remit a part of any increased demurrage rate collected on private equipment to the private car owners, to compensate the private car owners for their car ownership expenses. I know that such requests were made to BNSF during this general time frame, if not at the specific forums mentioned, because, when private cars are not actually moving under load, they entail no car ownership expense to the handling railroad since mileage compensation for private cars accrues only on loaded miles traveled. Retention by BNSF of all demurrage charges on stationary private cars while on railroad tracks provides a windfall benefit to the railroad. BNSF may have mistaken shipper requests for participation in demurrage receipts as a request for an increase in demurrage rates. In any event, it has declined to remit any portion of its private car demurrage receipts to car owners, thereby reducing any incentive for private car owners and operators to support increased destination demurrage charges.

6. I recall BNSF making it a point to say, at one of the two 2001 shipper forums, that shippers could instruct BNSF to place loaded private cars on demurrage while those cars were on private tracks belonging to a consignee other than the shipper itself. In the room at the time that BNSF made that suggestion were numerous companies who competed for the sale of various grain products, and BNSF was informed by the shippers that specific competitive sales policies were not to be discussed in a collective setting among competitors. We also reminded BNSF that our customers in fact have competitive choices regarding vendors of agricultural products, and are in a position to resist any demurrage imposition by a single vendor.

7. Another part of BNSF's argument consists of the claim that BNSF cannot adequately plan its car movements, and thus is burdened with unwelcome inefficiencies,

because BNSF is not informed of who leases or controls private cars and has no advance notice of where private car shipments go. At least insofar as Bunge's private cars are concerned, those claims totally lack creditably. The owner of every private car is listed in a tariff known as Official Railway Equipment Register, regardless of whether the owner is a car leasing company or a shipper. BNSF not only knows the identity of each private car's owner, but also where each empty private car will next be loaded, due to the fact that, as Mr. Langston recognizes, each empty private car is returned to its prior loading point automatically, and goes to a different point only if the railroad is given notice of the new loading point before the car is made empty. In this respect, BNSF actually has more information about private car loading patterns than about many of its own cars, which BNSF complains it must operate without prior notice of next origin. Once loaded, cars naturally do not go to the same destination in all instances, but most grain processing facilities tend to bill loaded cars to a limited number of repetitive destinations. That is certainly true in the case of Bunge, whose loads from specific processing origins normally go to a limited number of customers at a limited number of destinations approximately 75% of the time.

8. In my earlier Verified Statement, I testified regarding the rates paid by Bunge to BNSF for "floating" track leases entered into at Crete, NE and Emporia, KS shortly after the July 2001 charges took effect. Because of increased business, Bunge recently found it necessary to request additional track lease space from BNSF at Emporia to accommodate additional tank cars. The new "floating" track lease rate at Emporia quoted by BNSF to Bunge is the level of the lease rate made available to Bunge right after the July 2001 Changes were instituted. Property values at Emporia

have not in the past three years. Nor has BNSF constructed any new tracks at Emporia to use as “floating” track.

9. One of BNSF’s exhibits (Langston Reply V.S., Ex. F) purports to show a reduction in average time held after constructive replacement for empty agricultural private cars beginning with the July 2001 Changes through July of 2005. The chart seems to show a reduction in post constructive placement time between July 2001 and July 2005 of about 12 hours. I have no idea whether these claims are supported factually by any set of records, but I will assume, purely for the sake of discussion, that a reduction of 12 hours did occur after July 2001 in the average time an empty private car was held on BNSF track after constructive placement and up to the shipper’s order to spot the car for loading. Even so, it does not follow that empty private cars were in fact removed from BNSF track any more quickly, or especially 12 hours more quickly, following implementation of the July 2001 Changes.

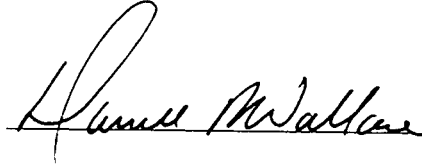
10. There are two basic reasons for having to question BNSF’s assumption that a reduction in constructive placement hours necessarily means a reduction in empty car dwell time on BNSF tracks. The first is that not all shipper facilities are switched seven days a week. Bunge’s facilities at Crete are not normally switched by BNSF on Saturday or Sunday. If BNSF is requested on a Friday or Saturday to spot an empty private car to our Crete facility for loading, the order to spot may remove the car from constructive placement status, but does not mean that the car physically has been removed from BNSF track at the same time. In fact, in this example, the car would sit for one or two days on BNSF track even though the chart attached as Exhibit F to Mr. Langston’s Verified Statement treats the car as a reduced time car. Similarly, even where switching

is provided on a daily basis, switching normally occurs only once a day. Accordingly, a notice to BNSF to spot an empty private car for loading may not result in actual movement of the car for as much as a day after notice to spot the car is given, and receipt of notice to spot by BNSF 13 hours earlier than prior to the July 2001 Changes may be neutralized by lack of switching more than once daily.

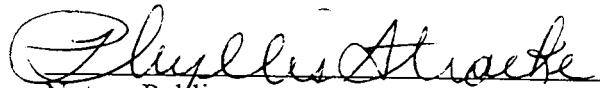
11. In connection with Mr. Langston's Exhibit I, purporting to show the number of BNSF-served stations of Bunge at which the July 1 Changes were accrued since they took affect. BNSF did not get the total number of Bunge loading points correct and accordingly misstated the ratio of loading points that incurred storage charges to total Bunge loading stations. Moreover, Mr. Langston's exhibit fails to take into account that one of the reasons why Bunge had only a few loading points that incurred empty car charges was that Bunge either constructed or leased holding tracks.

VERIFICATION

Darrell R. Wallace, being duly sworn, deposes and says that the foregoing is true and correct, to the best of his knowledge, information and belief.

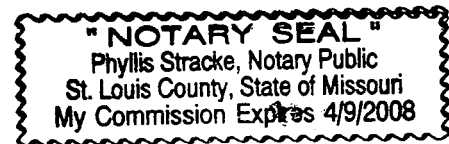


Subscribed and sworn to before me this 3rd day of October, 2005.



Notary Public

My commission expires 4/9/2008.



REBUTTAL VERIFIED STATEMENT

OF

FRANK SIMS

ON BEHALF OF CARGILL, INCORPORATED

1. My name is Frank Sims. I am Corporate Vice President, Transportation and Logistics, for Cargill, Incorporated ("Cargill"), and am the same person who submitted a statement, identified as Complainants' Exhibit No. 5, earlier in this proceeding on behalf of Cargill and its subsidiaries. I have reviewed the Reply of BNSF Railway Company ("BNSF"), including the Reply Verified Statement of Douglas W. Langston ("Langston, Reply V.S.") and have the following comments.

2. BNSF attempts to imply that it lacks market power over the Complainant shippers, presumably including Cargill, because they "dwarf" BNSF in economic size. BNSF Reply at 46. I have seen this argument made by railroads before, and it is nothing more than a smokescreen to mask the true nature of railroad economic power over their customers who, like Cargill, are shippers of bulk commodities that cannot feasibly move by truck.

3. Cargill is, indeed, a large company with multinational operations. But Cargill's operations in Europe, Asia, or Latin America fail to insulate Cargill from the economic power of U.S. railroads, such as BNSF, where Cargill must rely on those railroads to handle traffic in the United States. A railroad's market power, like that of any business, is judged by the extent to which there is effective competition in any relevant market. That measurement has nothing to do with the size of a monopoly victim's pock-

etbook. If two companies, one small and local, and the other large and international, are making shipments in the United States from point A to point B, where the service of only one railroad is available, each shipper will be equally subject to that railroad's market power. The fact that one shipper may be able to earn income in another country does not in the least soften or diminish the market power of that railroad over the movement between points A and B. When railroads had surplus capacity, some shippers able to reproduce shipment patterns over alternative rail systems sometimes could threaten to remove traffic from one railroad in favor of another routing. But those days disappeared years ago when all major railroads lost their surplus capacity. U.S. railroads are not particularly interested in new traffic and there is little or no bargaining power attached to whatever small volume of traffic has theoretical routing alternatives.

4. BNSF makes several attempts to demean the significance of the Complainant shippers' opposition to the BNSF empty car program ("July 2001 Changes"). One of these involves a comparison of each shipper's total facilities with those impacted by the July 2001 Changes (Langston Reply V.S. at 16 and Exhibit I).

5. I have reviewed the Exhibit I supporting data furnished by BNSF insofar as Cargill is concerned. It is clear to me that BNSF has based its claims on an inaccurate or irrelevant calculation of Cargill's facilities. BNSF has failed to separate Cargill facilities where private cars are loaded from those where they are not, and in that way has erroneously portrayed the July 2001 Changes as having only a minimal impact on Cargill's BNSF-served facilities. As indicated in my Opening Verified Statement, Complainants' Exhibit No. 5, Cargill has incurred substantial amounts in charges under the July 2001

Changes and has had to lease track from BNSF in order to avoid a continuing accumulation of those charges.

6. Another theme of the BNSF statement is that the July 2001 Changes have brought about a more prompt release of empty private cars by shippers from BNSF trackage (or from leased trackage) for placement on industry track, thereby contributing to what BNSF asserts are improved efficiencies in its operations. Before commenting further on this theme, I should observe that Cargill, certainly no less than BNSF, recognizes the importance of achieving and maintaining operating efficiencies, as Cargill seeks to do in managing its own business units. However, Cargill, apparently unlike BNSF, attempts to avoid doing so at the expense of our customers through the unilateral imposition of revisions in marketing terms. Indeed, because Cargill invariably faces competition for the sale of its products, we are not in the position to force changes on our customers, as is BNSF through its market power and monopolization of many markets. In this respect, I find it ironic that BNSF attempts to draw analogies between unregulated, competitive industries, such as restaurant chains (Langston Reply V.S. at 19) and itself, failing to recognize that there is no real similarity because the marketplace that BNSF professedly seeks to emulate is competitive, whereas BNSF is imposing the July 2001 Changes in captive environments.

7. Graphs sponsored by BNSF Witness Langston (Exhibits E and F to his Reply V.S.) purport to show a decrease in the amount of time that empty industrial private and agricultural cars were held on constructive placement following implementation of the July 2001 Changes. To be sure, the threat of demurrage or storage charges is taken

into account by Cargill whenever possible in determining empty car movement practices. However, it is not controlling, because it cannot be controlling.

8. Shipper loading facilities do not have infinite track capacity, nor do they have the ability to expand and contract production according to the number of empty cars that may be available for loading on a given day. Production, especially at facilities that process corn and soybeans, requires raw materials, which must be purchased in advance and for which there is limited storage capacity at a processing facility. Our customers in turn make forward plans, resulting in forward commitments to sell and ship processed commodities. Some products have cyclical, or seasonable, uses. The logistics of empty private car placements, to the extent within Cargill's control, is determined more by the foregoing considerations than by demurrage or storage charges, even though we attempt to avoid those charges where possible. Interestingly, the fact that Mr. Langston included in his Exhibit C, portraying a reduction in "customer time," data for empty private cars held on tracks leased by its customers from BNSF supports my view. While cars are on leased track, they incur no demurrage or storage charges, yet BNSF asserts that there was a drop in the number of hours private cars were held on leased tracks following the July 2001 Changes. That had to have been because considerations other than demurrage and storage charges were driving car use decisions.

9. Even if I assume, for the sake of this discussion, that BNSF's demurrage and storage charges to some extent provided an incentive for us to order in empty private cars for loading more promptly than previously, it does not follow that these more prompt orders resulted in more prompt movement of the cars from either the BNSF yard track or yard track leased by shippers into the shipper's facility. At 17 of the facilities where Car-

gill originates private car shipments on BNSF, switching is provided by BNSF (or its switching carrier) on only five or six days of the week. Obviously, an order to spot an empty private car for loading made after the last switch on any given day will have no effect until the next switch, which might be as much as three days later, or, perhaps, just 24 hours later. The "improvements" claimed by Mr. Langston are based simply on orders received for placement. But it obviously does not follow that even earlier ordering necessarily would result in earlier physical removal and placement of private cars from allegedly "congested" BNSF tracks.

10. BNSF defends its erratic service by claiming, among other things, that it has little or no advance notice of its customers' shipping patterns and that many of the shipments it handles do not move continuously between repetitive origin-destination pairs (Langston, Reply V.S. at 22). Although not every shipment made by Cargill from a given origin is to a single, repetitive destination, BNSF has far more information regarding customer shipping patterns than it would like any reader of its Reply to believe, and that is particularly true where private cars are used. Each empty private car returns to a loading point that is determined before the car is made empty. Shipments moving in tank cars, specialty covered hopper cars, and shipments of processed commodities originate at a limited number of origins. Many shipments move under contract or under tariffs containing point-to-point rates published as a result of requests made to BNSF for rates between specific origins and destinations. Contracts not only name specific origins and destinations, but usually contain minimum volume requirements. Making plans for consistent rail service involves far less guesswork than BNSF admits.

11. I notice that BNSF contends that its efforts to make its system more efficient have been aimed at all BNSF customers, and BNSF makes special note of increased demurrage charges imposed recently on intermodal customers. Langston, Reply V.S. at 7. Because Cargill makes some intermodal shipments, I am familiar with those charges. They have little or nothing to do with service on actual rails. The increased demurrage charges imposed by BNSF on intermodal shipments apply only to **loaded containers** either delivered to an intermodal terminal before the scheduled date or not picked up promptly. Such equipment does not reside on railroad tracks, but in yards or other property perhaps adjacent to railroad tracks. Shippers and consignees of these loaded containers need only hire a local trucker to deliver or retrieve them, which is far from the burden of relocating a railroad car that cannot leave steel rails. Accumulations of loaded intermodal containers may have adverse economic impacts on the parties that own those containers or the land on which the containers are stored but will not block rail tracks, as BNSF claims with respect to empty private cars. Steps taken by BNSF to alleviate the storage of loaded intermodal containers are totally incomparable to the imposition of demurrage or storage charges on empty private cars awaiting loading.

12. A similar confusion of purpose arises in connection with BNSF's claim that it made agricultural covered hopper cars subject to its Demurrage Book, rather than to the lower charges in the Storage Book, because it would have been "confusing" to BNSF customers to have one set of rules applicable to empty private covered hopper cars and another applicable to empty railroad cars. BNSF Reply at 67. However, empty private cars and empty railroad cars carrying agricultural commodities are often handled differently, so identity of treatment for those cars is far from a constant BNSF goal. For in-

stance, demurrage charges do not begin to accrue on empty cars of railroad ownership unless or until they are ordered for loading on a specified want date, while, under the July 2001 Changes, empty private cars begin to accrue demurrage or storage charges as soon as they arrive at the station where the car is next to be loaded. If BNSF wants to be consistent, and have identical rules applicable to empty private cars and empty cars of railroad ownership, BNSF should then not impose demurrage or storage charges on empty private cars until, like empty railroad cars, they are ordered to be spotted for loading on a shipper facility.

13. BNSF contends that the July 2001 changes have disciplined inefficient shipper use of railroad trackage as evidenced by the fact that shippers assertedly are requesting BNSF to provide long-term storage for empty private cars, whereas shippers formerly stored those cars on BNSF trackage without BNSF's consent. BNSF does not, however, identify those shippers allegedly seeking long-term car storage in lieu of short-term use of BNSF trackage. Cargill certainly is not one such shipper. Nor is Cargill a shipper to which BNSF has complained regarding improper use of BNSF trackage for private car storage. If inducing shippers to use long-term storage for surplus private cars is a BNSF objective, then its empty private car holding provisions easily can be tailored to penalize genuine long-term use of BNSF yard tracks by starting the imposition of penalties after "long term" abuses of say, 10, 20, or 30 days have occurred, and not after 24 hours.

14. A recurring theme in the BNSF Reply is the argument that the July 2001 changes merely seek to hold responsible for the correction of "congestive" conditions on BNSF those shipper parties that cause the congestion, and that it is far preferable to as-

sign responsibility to those parties (i.e., private car owners) than to charge all BNSF customers for the cost of trackage on which to hold empty private cars. BNSF's assumption that private car owners are responsible for "congestion" on the BNSF system is a totally unsupported assumption, given the fact that no idle private car is any more responsible for "congestion" than an idle railroad car, of which there have been many at times.

15. BNSF's assertion that it is preferable to assess only private car owners for the cost of storage track rather than levying those costs against all users of carrier storage track is a foolish assertion because BNSF is forcing private car owners to pay for both their own track and BNSF track used by its customers who rely on BNSF cars. The July 2001 Changes, as BNSF admits, were intended to make private car shippers assume a large share of the costs for empty private car holding tracks. At the same time, as BNSF also concedes, rates for shipments in private cars have not been reduced, so that private car shippers not only are now called upon to pay for holding tracks specific to their own cars, but also to continue to pay BNSF for its own yard infrastructure being vacated by private cars as a result of the July 2001 Changes and left to the nearly exclusive use of shippers who use BNSF cars. If BNSF's pricing economics are based on the belief that those who use an asset should pay for it, and those who do not use an asset should not have to pay for it, then the July 2001 Changes violate those principles because private car shippers are being required to pay for both assets they use (their own holding tracks) and those they do not use (carrier yards from which empty private cars have been removed). Moreover, no shipper of which I am aware actually is paying less today for rail transportation than when the July 2001 Changes were instituted. Empty private car holding charges have not been accompanied by freight rate reductions. In fact, although BNSF is

claiming that it instituted the July 2001 Changes to avoid increased freight rates for its entire customer base, increased freight rates are exactly what have been levied against all BNSF customers. Today, BNSF is reaping the benefits of the July 2001 Changes in the form of track rentals and transferred infrastructure expenses at the same time it is collecting the very increased freight rates that it claims are not necessary as a result of the July 2001 Changes.

VERIFICATION

Frank Sims, being duly sworn, deposes and says that the foregoing is true and correct, to the best of his knowledge, information and belief.

Frank L. Sims

Subscribed and sworn to before me this 24 day of October, 2005.

Cheryl D. Nikko
Notary Public

My commission expires 1-31-2010

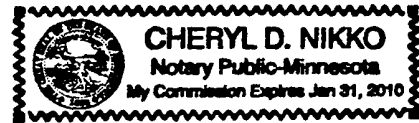


EXHIBIT NO. 15

REBUTTAL VERIFIED STATEMENT

OF

RICHARD SEYMOUR

ON BEHALF OF FIRST UNION RAIL, INC.

1. My name is Richard Seymour. I am Vice President of Marketing and Sales of First Union Rail, Inc. ("First Union"), a subsidiary of Wachovia Bank. First Union is a member of North America Freight Car Association ("NAFCA") and is the owner or manager of over 77,000 rail cars of all types. I have 28 years' experience in railroad car supply.

2. I have reviewed BNSF's Reply Statement, including the Reply Verified Statement of Douglas W. Langston ("Langston Reply V.S."). It is my understanding that Mr. Langston and BNSF indicate that the empty private car storage charges instituted by BNSF on July 1, 2001 (the "July 2001 Changes") have been a huge success because BNSF's average daily loads for all car types rose 26.8 percent between July 2001 and June 2005, while the number of cars on line increased by only 2.4 percent. Mr. Langston implies that the July 1 Changes are largely responsible for the ability of BNSF to handle greatly increased loads with a car inventory that barely grew. Langston Reply V.S. at 12. I would suggest that there are numerous reasons why loads handled by BNSF grew faster than cars on line, and those reasons stem from changes in freight car mix and technology, better car management practices, and the utilization of cars that previously were "on line" but surplus, rather than the July 2001 Changes.

3. Freight car utilization – by which I mean the number of cars necessary to transport a given number of loads – improves as a result of many influences that would have little or no relationship to empty private car storage. For example, on BNSF, both capacity and use patterns have changed in a way that allows more grain to be handled with fewer cars. New covered hopper cars being added to the BNSF fleet have a capacity in excess of 5,100 cubic feet, up from the 4,750 cubic foot car that was in heavy use through the late 1990s. The older cars are 263,000 pounds gross weight on rail (“GWR”), which results in a maximum lading weight of some 201,500 pounds. The larger, newer cars are 286,000 pounds GWR and can carry approximately 228,700 pounds of grain, an increase of about 22,200 pounds, or 11 percent, over the 263,000 GWR car. With greater carrying capacity, fewer cars are needed to meet any increase in market demand.

4. Another influence on improved BNSF fleet productivity is grain shuttle trains, which have had a huge impact on increasing average monthly loads per car. Attached as Appendix A is a bar graph utilized by BNSF at a September 21, 2005 North American Railroads Customer Forum. It shows a dramatic shift on BNSF from single car and smaller unit train grain shipments to shuttle trains between 2001 and 2005. In 2001, shuttle trains originated approximately 160,000 grain carloads, or 35 percent, out of a total of 460,000. In 2005, BNSF estimates that shuttle trains will account for approximately 310,000 grain carloads, or 61 percent, out of a 510,000 grain car total.

5. Increased use of large capacity grain cars in shuttle trains and improved shuttle transit times will account for a substantial improvement in car productivity on BNSF. Appendix B is another BNSF bar graph from the September 21 forum. It shows

that shuttle trains make about 32 trips per year while smaller units achieve about 12 trips per year. Appendix C is a line graph utilized by BNSF at the September 21 Forum. It confirms the view that shuttles led to improved car performance, concluding with the statement:

SHUTTLE PROGRAM LEADS TO FLEET EFFICIENCIES AND HIGHER CARRYING CAPACITY

6. From the data mentioned above, it is possible to quantify the increased volume of grain traffic being handled by BNSF with a smaller number of cars. Using BNSF's figure of 32 trips per shuttle train per year, in 2001, when BNSF handled 160,000 shuttle car loads it required 5,000 shuttle cars. In the same year, BNSF handled 300,000 non-shuttle cars of grain and its non-shuttle fleet averaged 12 trips per year per car, requiring 25,000 cars. Shuttle and non-shuttle car requirements in 2001 equaled 30,000 cars. In 2005, using the same number of shuttle and non-shuttle trips per year, shuttle requirements come to 9,688 cars and non-shuttle requirements come to 16,667 cars, for a total of 26,355 cars. In 2005, BNSF believes it will carry 510,000 total grain cars, or 11 percent more than in 2001. It expects to handle this 11 percent increase in traffic with a decline of 12 percent in cars (30,000 in 2001 versus 26,355 in 2005). This improved car productivity was not brought about by the July 2001 Changes.

7. A major influence on the car utilization data presented by BNSF is the use of serviceable cars stored on line. BNSF's data show a decline in stored, serviceable cars from 21,532 in April 2001 to 5,810 in March 2005,¹ a net drop of 15,722 cars. Because BNSF's claim of handling a 26.8% increase in loads with an increase of 2.4% in cars on

¹ The source of these numbers is aggregated data from Langston Dep. Exhibit No. 21, which is included in Vol. II of Complainants' Opening Statement. BNSF has released aggregated data in that exhibit from Highly Confidential status.

line applies to all cars, it is appropriate to examine all stored cars on BNSF, which are part of its “cars on line” count. By taking cars out of the stored serviceable fleet and placing them in active service, BNSF in effect augmented the active fleet by 15,722 cars between July 2001 and March 2005 while avoiding having to count these cars as additions to “cars on line.” The addition of cars to the active fleet produces additional load capacity of nearly 16,000 cars per month, if one assumes an average of just one load per car per month, without any increase in the cars on line count. That amounts to an increase of some eight percent of the approximately 200,000 cars normally on line (according to BNSF data on the AAR web site), and goes far toward explaining how BNSF can claim to have increased “loads” without a corresponding increase in cars on line.

8. The grain fleet is by no means the only type of freight car to have undergone technological advancement or have increased use in shuttle train type service over the last several years. All newer car types, including intermodal, tank, coal cars, gondolas and box cars, are being marketed to carry larger, heavier loads on the major railroads. These characteristics make fewer cars necessary.

9. Although some intermodal rail cars are capable of being loaded with only a single trailer or container, others can be loaded with up to 10 containers, depending on container size, mix, and railcar type. New intermodal cars are being built to hold more containers. From 2001 to the present, both TTX and BNSF acquired material numbers of new intermodal flatcars. If trailer or container “loads” increase, it does not necessarily mean that there must be an identical increase in the number of intermodal cars used to handle those incremental loads. A change in the mix of the intermodal cars which the BNSF is using and their maximizing the loading capacity of this fleet will allow them to

handle an increase in loads without a comparable increase in intermodal cars on line. BNSF's intermodal business was the fastest growing part of its business between 2001 and 2004, when intermodal trailers and containers loaded increased from 3.04 million to 4.09 million units, an increase of 35 percent. It should not be assumed that intermodal cars on line thus had to increase by 35 percent, all other matters being equal.

10. I believe the term "loads," refers to all traffic, including intermodal traffic. Data concerning intermodal traffic loads is not normally published on a carload basis, but on a "unit" basis, meaning as a count of trailers and containers loaded on intermodal rail cars. All other rail traffic "loads" are counted on a per car basis. Mr. Langston does not otherwise define "loads." Further, it's my understanding that container or trailer owners/users sometimes pay railroads such as BNSF a freight rate to return or position an empty container or trailer toward a next loading point. These empty trailer or container moves can often be counted as revenue "loads." Likewise, empty freight cars moving under freight charges are also counted as "loads." As intermodal business increases, as it has over the past three years, so will the shipment of "empty" revenue loads.

11. In my opinion, it is likely that a number of factors including increased car capacity, unused car capacity in July 2001 that was subsequently converted to active and better utilized capacity, and increased use of shuttle trains for grain (or similar techniques for some other commodities) are responsible for any apparent improvement in BNSF car utilization, rather than the July 2001 Changes.

VERIFICATION

Richard Seymour, being duly sworn, deposes and says that the foregoing is true and correct, to the best of his knowledge, information and belief.

Richard Seymour

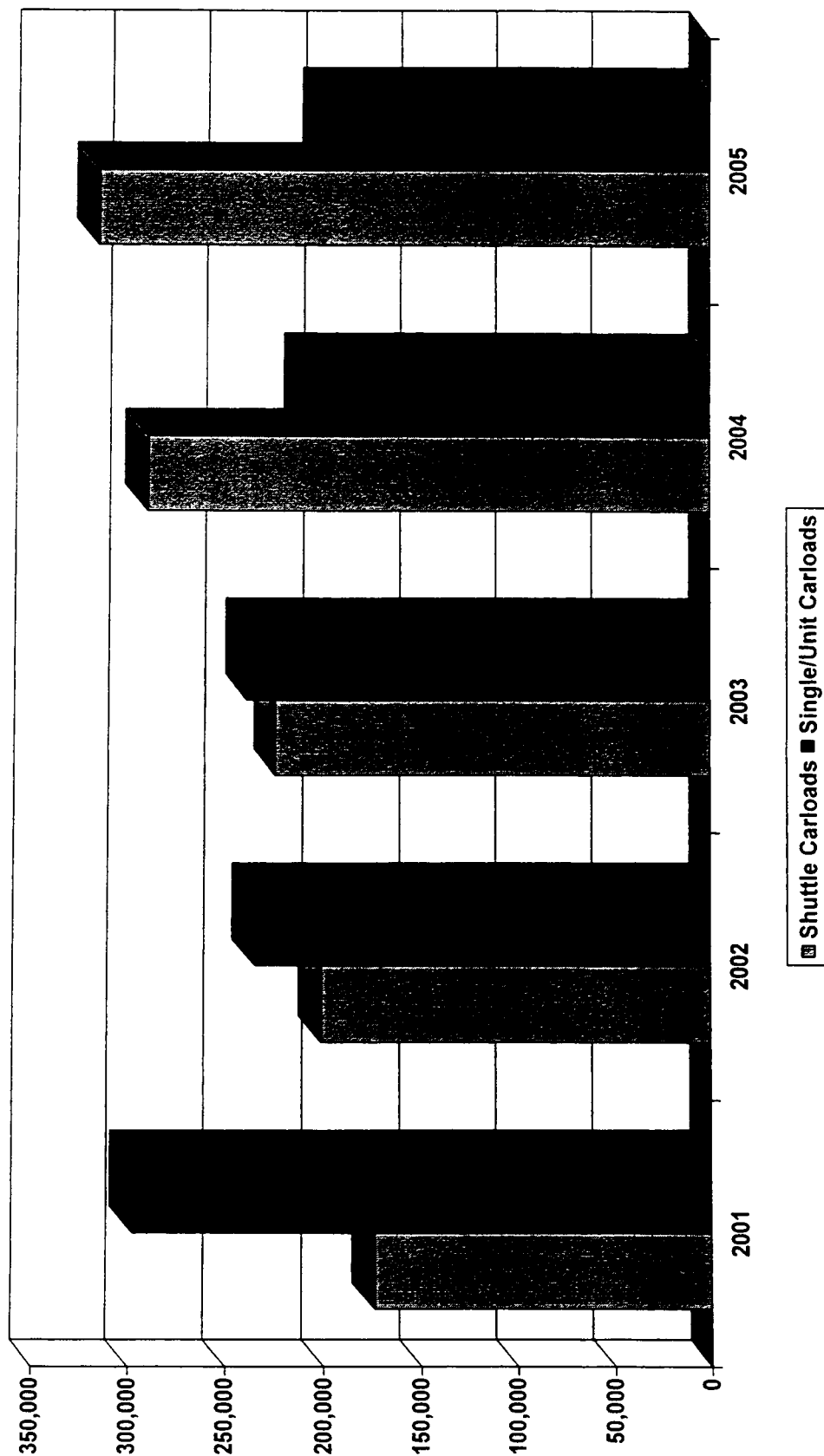
Subscribed and sworn to before me this 19TH day of October, 2005.

Barbara A. Unger
Notary Public

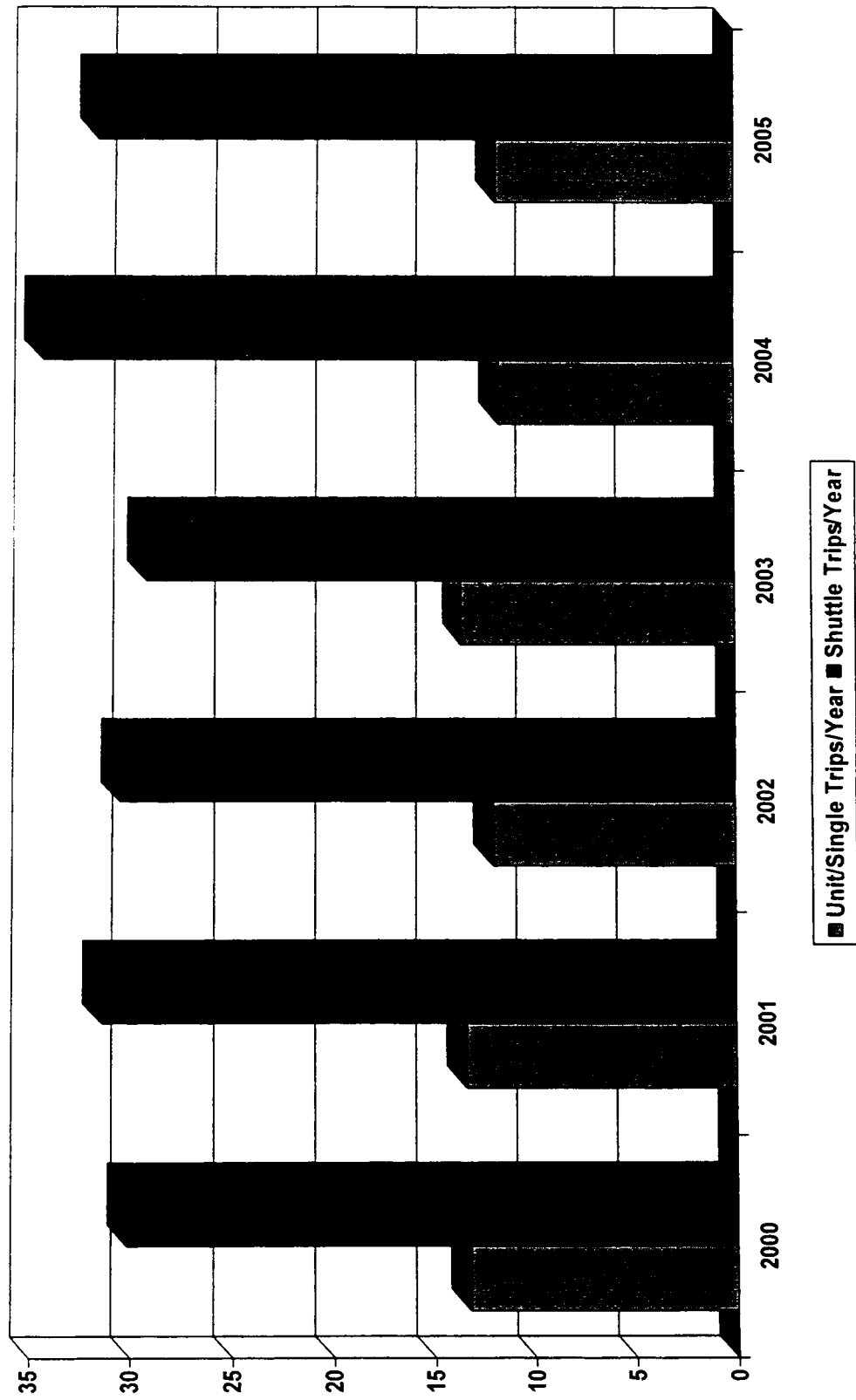
My commission expires 3/10/06



Market Demand Drives Service Offering Sizing

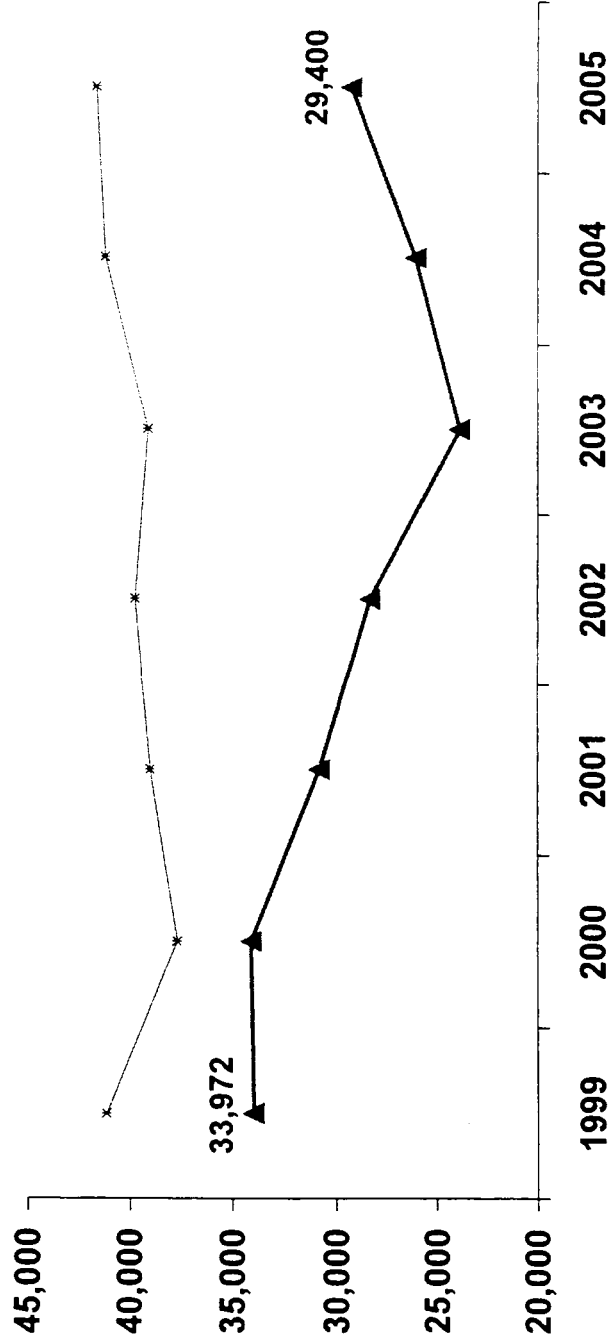


Trips per Year



Grain Covered Hoppers

Fleet Size vs. Total Loads
1999-2005



▲ Average Fleet Size * Average Monthly Loads

- Shuttle program leads to fleet efficiencies and higher carrying capacity

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**NORTH AMERICA FREIGHT
CAR ASSOCIATION,
Complainant**

V.

**THE BNSF RAILWAY COMPANY,
Defendant**

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) **Docket No. 42060 (Sub-No. 1)**
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I. INTRODUCTION

1. We are Thomas D. Crowley and Philip H. Burris. Mr. Crowley is an economist and President of L.E. Peabody & Associates, Inc. Mr. Burris is Senior Vice President of L. E. Peabody & Associates, Inc. The Firm's offices are located at 1501 Duke Street; Alexandria, Virginia, 22314. We are the same Thomas D. Crowley and Philip H. Burris that submitted a joint verified statement on July 29, 2005 in this proceeding.
2. North America Freight Car Association ("NAFCA") has requested that we review and respond to BNSF Railway Company's ("BNSF") September 16, 2005 Reply Statement of Fact and Argument. Specifically, NAFCA asked us to address BNSF's claim that its imposition of demurrage and storage charges at issue in this proceeding have resulted in

reduced empty car shipper times for private cars, the differences in BNSF's handling of private and railroad provided cars and the return on investment BNSF earns from its track lease rates.

3. The balance of our statement is organized as follows:

II. Summary of Evidence

III. BNSF's Demurrage and Storage Charge Program is Not the Cause of Reduced Empty Cycle Time for Private Cars

IV. Handling of Railroad and Private Cars

V. Sampling Methodology

VI. Return on Investment from Track Lease Rates

VII. Conclusions

II. SUMMARY OF EVIDENCE

4. BNSF makes repeated claims throughout its September 16, 2005 Reply evidence that the demurrage and storage charge program it imposed on empty private cars in July 2001 has resulted in a reduction of the empty private car post constructive placement time. BNSF makes this statement repeatedly in hopes that if stated often enough that the Board will accept it as fact. BNSF, however, has provided no factual support for its contention, rather it has only demonstrated coincidental support, showing that average time after constructive placement for private cars has decreased since the imposition of its demurrage and storage charges.
5. The reduction in empty private car time after constructive placement between July 2001 and the present is a result of many factors, including a significant increase in rail traffic due to improved economic conditions in the U. S. economy combined with excess capacity in the car fleet

available to BNSF. The substantial increase in rail traffic has reduced the amount of time that all railcars (private and railroad provided cars) sit empty while waiting for the next available load.

6. BNSF's evidence demonstrates a significant increase in BNSF's rail traffic during this period, and Complainants' Opening evidence and this Rebuttal evidence demonstrate that there has been a reduction in the empty time for *all* cars on BNSF's system, not just private cars. For example, as discussed infra, empty pre-placement time for BNSF system cars assigned just to specific commodities ("P" pool cars) decreased { } percent between 2001/2002 and the 12 month period of March 2004 through February 2005, even though these cars are not effected by BNSF's private car demurrage and storage charge program. That indicates, contrary to BNSF's argument, the reduction in empty holding time is due to the increased demand for rail service, not BNSF's demurrage and storage charge program for empty private cars.
7. BNSF argues that Complainants' position that "C" pool cars are treated more favorably than private cars is inaccurate, because the availability of "C" pool cars is not guaranteed and because the AAR rules do not require "C" pool cars to be held for a specific shipper or at a specific station.^{1/} BNSF states that the handling of private cars cannot properly be compared to the handling of "C" pool cars. BNSF's statements are not correct. First, as shown in our July 29, 2005 verified statement, "C" pool cars return to the same origin for reloading { } percent of the time. As a practical matter, "C" pool cars, assigned to a specific shipper and a specific location under AAR rules, are handled just as private cars are assigned to specific shipper and location. Neither a private car nor an assigned "C" pool car must operate repetitively from the

^{1/} Langston VS at 28-29.

same origin for the same shipper, but both categories do.

8. Finally, BNSF argues that its track lease rates do not yield compensatory returns and do not cover its opportunity costs of having track tied up in storage rather than used in active switching service. BNSF provides no basis for this statement and does not attempt to quantify “compensatory returns” or opportunity costs.
9. Based on information contained BNSF’s 2004 Annual Report Form R-1, we find that BNSF’s average net book value for yard and way track equals \$137,261 per mile. BNSF’s track lease rates of \$10, \$20 and \$30 per foot per year for storage track yield a return on this net investment ranging from 36.8 percent to 115.3 percent based on a 10 year amortization schedule. These are more than compensatory returns on BNSF’s net investment.

III. BNSF’s DEMURRAGE AND STORAGE CHARGE PROGRAM IS NOT THE CAUSE OF THE REDUCTION IN EMPTY CYCLE TIME FOR PRIVATE CARS

10. BNSF makes repeated claims throughout its September 16, 2005 Reply evidence that its imposition of demurrage and storage charges on empty private cars in July 2001 has resulted in a reduction of the empty time for private cars.²¹ For example, BNSF witness Langston states at page 13 of his verified statement,

“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.... since the storage policy was first adopted, the average time that private cars are left on BNSF’s tracks has decreased over one full day for industrial privates and by roughly half a day for agricultural privates.”

In addition, a Mr. Langston states at page 15,

“As the incentives provided by BNSF’s private empty car storage program took hold, the

²¹ See BNSF Reply Statement of Fact and Argument at pp. 7, 26 and 58-59 and the Verified Statement of Douglas Langston at pp. 12, 13, 14 and 15.

number of cars subject to storage charges began to drop dramatically. As shown in 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."

11. BNSF has provided no factual or causal support for its statement that the demurrage and storage charges applied to private cars has resulted in a reduction in empty private car holding time, rather BNSF has provided coincidental support, showing that the timing of the reduction in empty time for private cars has coincided with increased traffic levels and the imposition of its demurrage and storage charges.
12. The reduction in private car empty holding time is in part a result of a significant increase in rail traffic due to improved economic conditions. There is no dispute that BNSF's traffic has increased dramatically, particularly from 2003 through mid-year 2005. In fact, BNSF identifies the increase in traffic on numerous occasions in its Reply evidence. For example, at page 14 of his verified statement, Mr. Langston states, "Overall traffic has increased greatly in every traffic category." and at page 12, Mr. Langston states, "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 percent, while the number of cars on its system increased by only 2.4%."
13. Exhibit D to Mr. Langston's verified statement also demonstrates a significant increase in BNSF's rail traffic during this period. Exhibit D shows that average loads per day handled on BNSF's system have increased { } percent in 4.5 years from { } in January 2001 to { } loads per day in June 2005.
14. Further, Exhibit B to Mr. Langston's statement also shows that the average loads per day in "true" private cars (excluding intermodal and coal traffic) have increased { } percent in only

the past 3.5 years from January 2002 to June 2005. During this same period, the private cars on BNSF's system increased only { } percent.^{3/} If the number of loads per day increases faster than the cars available to handle the loads the average cycle time per car *must* decrease.^{4/} Further, this means that a reduction in time will occur in the amount of time that the car spends empty waiting for a new load.

15. Complainants' Opening evidence also demonstrates that there has been a reduction in the empty time from arrival at the last station prior to loading and actual placement or constructive placement for BNSF system cars in assigned service. Table No. 2 of our July 29, 2005 verified statement shows that empty BNSF system cars moving in assigned service (i.e. "C" Pool cars) has declined. For example, the time from arrival at the last station prior to loading to the time the empty car is constructively placed or actually placed for loading decreased { } days from { } days per car to { } days per car between the 2001/2002 time period and the March 2004 through February 2005 time period.^{5/} This { } day reduction in private empty car cycle time is the same as the reduction claimed by BNSF for industrial private cars and more than double the reduction claimed by BNSF for agricultural private cars. As stated by Mr. Langston at page 13, "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."

^{3/} See, Langston Exhibit B, private cars on line in June 2005, divided by private cars on line in January 2002 { }.

^{4/} As discussed below, the empty time for BNSF system cars assigned to specific commodities decreased by { } percent from 2001/2002 to the March 2004 through February 2005 time period and empty time at the last station before being placed for loading for these same cars decreased { } percent.

^{5/} See, Crowley/Burris July 29, 2005 joint verified statement at p 7.

16. The reduction in empty time for BNSF system cars that are assigned to “commodity” service (i.e. “P” pool cars) is even greater.^{6/} Using the car movement records information provided by BNSF in discovery, we examined the amount of time from released empty to constructive placement or actual placement for “P” pool cars for both the 2001/2002 time period and the March 2004 through February 2005 time period. This comparison shows that the total empty time from release of the BNSF empty “P” pool car to actual placement decreased by { } percent, or { } days per car from { } days to { } days during this period. Further, the time from arrival at the last station prior to loading until the time the car is constructively placed or actually placed for these cars decreased by { } percent, or { } days from { } days to { } days.^{7/} These cars are not effected by the change in BNSF’s imposition of demurrage and storage charges on private cars. However, the utilization of these BNSF cars is greatly affected by the demand for rail service and the increase in loads available to BNSF. It is clear that the change in demand for rail traffic has a substantial impact on the time a rail car is empty waiting for to be positioned for the next load.
17. BNSF would have the Board believe that somehow its private car demurrage and storage charge policies have reduced the private car empty time on its system. The reality is however, that the substantial increase demand for rail traffic “in every category” has reduced the amount of time that all railcars (private and railroad provided cars) sit empty on BNSF’s system while waiting for reload. Clearly the increase in demand contributed greatly to any reduction in the amount

^{6/} “P” pool cars are defined in the UMLER data specification manual as “A pool comprised of equipment assigned to accommodate a specific commodity.”

^{7/} These calculations are shown in the attached Exhibit_(TC/PB-3). Exhibit_(TC/PB-1) and Exhibit_(TC/PB-2) are attached to our July 29, 2005 verified statement.

of empty time private cars wait for loads, rather than the imposition of demurrage and storage charges.

IV. HANDLING OF RAILROAD AND PRIVATE CARS

18. BNSF argues that Complainant is wrong that “C” pool cars are BNSF system cars that can be compared to its handling of private cars. BNSF also argues that “C” pool cars are not treated more favorably than private cars, because, unlike private cars, the availability of “C” pool cars are not guaranteed and because the AAR rules do not require “C” pool cars to be held at specific locations. BNSF also states, “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”^{8/} BNSF states that for these reasons and because the “C” pool cars constitute a tiny minority of cars on BNSF’s system, the handling of private cars cannot correctly be compared to the handling of “C” pool cars.
19. BNSF’s position is not correct. As shown in our July 29 verified statement, “C” pool cars return to the same origin for reloading { } percent of the time, unlike “P” pool cars, but very much like private cars. As a practical matter, “C” pool cars are assigned to a specific shipper and a specific location, just as private cars are assigned to specific shipper and location. The lack of a “guaranteed availability” is a technical but not a realistic reason for BNSF system cars to be provided favored handling vis-a-vis private cars.
20. To put the { } percent return for reloading in perspective, we examined a sample of “P” pool cars (those in commodity pools) for the 2001/2002 and March 2004 through February 2005 periods. Our study showed that these “commodity” pool cars returned to the same location for

^{8/} See Langston VS at 29.

reloading only { } percent and { } percent of the time for these two periods. Contrary to BNSF's statement that "C" pool cars are no different than commodity pool cars, the fact that "C" pool cars return to the same origin station for reloading nearly { } percent of the time and "P" pool cars return to the same origin for reloading only { } to { } percent of the time demonstrates that there is a very distinct difference in the handling of "C" pool cars and "commodity" cars. The "C" pool cars are handled in a similar manner as private cars in that private cars also return to the same location for reloading virtually { } percent of the time. For these reasons BNSF's treatment of system "C" pool cars can be compared to its handling of private cars

V. SAMPLING METHODOLOGY

21. We note that BNSF makes a passing suggestion at page 73, footnote 54 of its Argument, that our sampling methodology is unexplained and thus, no assessment can be made of whether these samples are representative of "C" pool traffic. The short answer to BNSF's comment, is stated at page 8, paragraph 25 of our Opening statement, where we state that the calculation of the 95 and 99 percent confidence intervals around the average time from arrival to constructive placement or actual placement demonstrate the statistical significance (representativeness) of our samples.^{9/}
22. The long answer is that we used a "cluster" sampling technique and the two 60 car samples represent { } cycles and { } cycles for the 2001/2002 and March 2004 through February 2005 time periods, respectively. The number of cycles for each of the two 60 car samples and

^{9/} We also note that BNSF never requested workpapers supporting our sampling method or an explanation of our sampling methodology.

the confidence intervals are shown both in Table No. 2 of our Opening statement and in Exhibit_(TC/PB-1) attached to our Opening statement.

23. Finally, review of the values shown for the confidence intervals at the bottom of both sheets of Exhibit_(TC/PB-1) shows that even if one used the least favorable results, i.e. the lowest values, the conclusion remains the same, i.e., BNSF provides a cushion for empty “C” pool cars from the time they arrive at the last station prior to constructive placement or actual placement. Using the lowest values available from the confidence intervals shows that in the 2001/2002 period this cushion was { } days and in the March 2004 through February 2005 period the cushion was { } days.

VI. RETURN ON INVESTMENT FROM TRACK LEASE RATES

24. BNSF’s position that its rates for track leases do not cover BNSF’s opportunity cost of having the track tied up in storage service rather than active switching service.^{10/} BNSF also states that the per foot track lease rates do not yield compensatory returns.^{11/}
25. This is not correct for two reasons. First, BNSF provided no support or showing that the track lease rates do not cover its opportunity costs or that they do not yield compensatory returns. Among other things, an opportunity cost analysis would have to take into account the freight revenue BNSF would lose if it did not provide lease track for private cars. It is doubtful that BNSF could find an alternative use for its yard track investment that would overcome lost freight revenue were yard track not provided. Second, based on data contained in BNSF’s 2004 Annual Report Form R-1, we determined that BNSF’s average net book value for yard and way

^{10/} Id. at 24.

^{11/} Id. at 25, note 19.

track equals \$1,169 million or an average of \$137,261 per mile for its 8,521 miles of yard and way tracks. BNSF's annual lease rates for storage track equal \$10, \$20 or \$30 per foot.^{12/} These lease rates yield annual revenues of \$52,800, \$105,600 and \$158,400 per mile of track.^{13/} As shown in Table No. 4¹⁴ below, BNSF's return on net investment for a mile of storage track ranges 36.8 percent to 115.4 percent assuming a 10 year, 15 year and 20 year amortization of the these annual revenues.¹⁵

Table No. 4 Return on BNSF Net Investment in Storage Track <u>Yielded by BNSF Track Lease Rates</u>			
	<u>Annual Lease Rate per Foot</u>		
1. Annual Rate per Track Foot	\$10	\$20	\$30
2. Annual revenue per track mile	\$52,800	\$105,600	\$158,400
3. Effective ROI			
a. 10-year amortization	36.8%	76.7%	115.3%
b. 15-year amortization	38.2%	76.9%	115.4%
c. 20-year amortization	38.4%	76.9%	114.4%

Clearly, even the minimum 36.8 percent annual return on investment is greater than the Board's determination of the railroad industry pre-tax cost of capital for 2004 of 14.5 percent.

26. Opportunity costs are implicit or explicit costs that exist whenever one alternative is chosen over another. The comparative values of alternative uses can be ascertained from the rate of

^{12/} BNSF Reply Statement of Fact and Argument at 56, note 39.

^{13/} Langston VS at 25, note 19.

^{14/} Table Nos. 1 through 3 appear in our July 29, 2005 verified statement.

^{15/} It is important to note that all of the leases used by Complainants for private car storage involve existing yard tracks. There is no evidence that BNSF has acquired land or constructed new tracks for private car storage.

return an entity earns from each alternative. Based on the Board's most recent determination of revenue adequacy in Ex Parte No. 552 (Sub-No. 8), served August 12, 2004, BNSF's overall return on investment was determined to equal 6.2 percent for 2003. Given, that BNSF's annual track lease rates yield a minimum return of 36.8 percent and its overall return on investment is only 6.2 percent, one must conclude that the track lease rates cover the cost of alternative uses for this track.

VI. CONCLUSIONS

27. To the extent that holding time for private cars has been reduced since BNSF imposed demurrage and storage charges on empty private cars, the reduction in time is a function of increased demand for rail service, not the demurrage and storage charge program. This is best evidenced by the fact that BNSF has experienced a significant increase in carloads on its system which it is handling without a commensurate increase in the cars on its system. Stated differently, BNSF is handling more traffic with the same resources and it therefore is utilizing the equipment more efficiently without any showing that it could not achieve those efficiencies but for the empty car charges. The increase in rail traffic combined with the excess in capacity available in 2001 are the causal factors that allows BNSF to experience productivity gains. BNSF's demurrage and storage charge programs on private cars did not generate the increase in demand for rail service that provided for this productivity gain.
28. As shown by the { } percent frequency of return of "C" pool cars to the previous origin for reloading, it is apparent that "C" pool cars are not handled in the same manner as "commodity" or "P" pool cars which are returned to the previous origin for reloading only { } to { } percent of the time. "C" pool cars are handled like private cars which are also returned to the

previous origin for reloading.

29. The sampling methodology we used on Opening was shown to be representative of "C" pool cars and statistically significant for both two-sided and one-sided intervals at both the 95 percent and 99 percent confidence levels.
30. BNSF earns a return on investment from its track lease rates ranging from 36.8 percent to 115.4 percent. BNSF's statement that its track lease rates are not compensatory is incorrect.
31. Finally, because BNSF's return on investment from its annual track lease rates substantially exceed its overall return on investment of 6.2 percent, it is apparent that the lease rates exceed BNSF's opportunity cost for alternative uses for the leased track.

VERIFICATION

COMMONWEALTH OF VIRGINIA)
)
CITY OF ALEXANDRIA)

I, THOMAS D. CROWLEY, verify under penalty of perjury that I have read the foregoing Verified Statement of Thomas D. Crowley, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.


Thomas D. Crowley

Sworn to and subscribed before me
this day of November 3rd, 2005

Anthony V. Evanshaw III
Notary Public for the State of Virginia

My Commission expires: September 30, 2007

VERIFICATION

COMMONWEALTH OF VIRGINIA)
)
CITY OF ALEXANDRIA)

I, PHILIP H. BURRIS, verify under penalty of perjury that I have read the foregoing Verified Statement of Philip H. Burris, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

[Handwritten signature]

Philip H. Burris

Sworn to and subscribed before me
this day of November 3rd, 2005.

Arkansas

Anthony V. Evanshaw III
Notary Public for the State of Virginia

My Commission expires: September 30, 2007

REDACTED

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