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SERVICE DATE - APRIL 28, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42060

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

Decided: April 25, 2003

We are requesting additional submissions from the parties to this proceeding to clarify and supplement the record on specified issues. Statements of the parties are due 20 days from the date of service, and replies 10 days thereafter. Once we have received these responses, we will determine whether an investigation is warranted.

BACKGROUND

This proceeding was initiated by a protest and petition for investigation filed on June 26, 2001, by North America Freight Car Association (NAFCA). NAFCA challenged rules and tariff provisions of The Burlington Northern and Santa Fe Railway Company (BNSF) that became effective July 1, 2001, that required private tank car operators to pay daily storage charges for using BNSF tracks for holding empty private tank cars for more than a day prior to loading (storage charges); and imposed charges for diversion of empty private tank cars (diversion charges).<sup>1</sup> NAFCA filed its petition pursuant to Ex Parte No. 328, Investigation of Tank Car Systems, 3 I.C.C.2d 196 (1986), as supplemented at 7 I.C.C.2d 645 (1991) (Ex Parte No. 328), which contains rules and procedures negotiated between private tank car suppliers and the railroads for calculating and paying allowances for the provision and use of privately owned tank cars.

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<sup>1</sup> NAFCA also challenged storage charges on empty tank cars awaiting maintenance or repair on railroad tracks. According to NAFCA, this issue has been resolved and will not be pursued by NAFCA at this time.

In a decision served October 18, 2001, the Board ordered that STB Docket No. 42060 and four other proceedings<sup>2</sup> be put on hold while parties and interested individuals and organizations negotiated concerning the storage and diversion issues raised relating to Ex Parte No. 328.<sup>3</sup> As a result of negotiations, three proceedings have been discontinued: STB Docket No. 42061, STB Docket No. 42062, and STB No. 42063.<sup>4</sup> The fourth, STB Docket No. 42064, remains pending as final details of a reported settlement are being worked out. In a series of decisions, the Board extended the deadline for filings in any proceeding left unresolved by negotiations.

On October 9, 2002, NAFCA filed a petition in this proceeding (STB Docket No. 42060), asking that the Board allow this proceeding to go forward as an investigation under Ex Parte No. 328, and that the proceeding be consolidated with STB Docket No. 42060 (Sub-No. 1). In reply, BNSF argues that STB Docket No. 42060 should not be consolidated with STB Docket No. 42060 (Sub-No. 1), but should be dismissed. In a separate pleading, BNSF seeks dismissal of STB Docket No. 42060 (Sub-No. 1), as well.

#### QUESTIONS ON REOPENING

The Ex Parte No. 328 agreement sets allowances for the use of private tank cars and provides that departure tariffs are to be investigated by the agency. Section 8 of the Ex Parte No. 328 agreement states that a departure tariff is a “tariff that departs in any manner from the allowance system prescribed herein. . . .” NAFCA focuses on the “in any manner” language, while BNSF concentrates on the reference to “the allowance system prescribed herein.” NAFCA argues that the storage charges are departure tariffs because the cost of holding track charges are not recoverable under Ex Parte No. 328 and thus the value of the mileage allowances is reduced. BNSF, on the other hand, contends that

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<sup>2</sup> STB Docket No. 42061, Railway Progress Institute Committee on Tank Cars Petition for Investigation and Protest Pursuant to Ex Parte No. 328; STB Docket No. 42062, The Chlorine Institute, Inc. — Protest and Petition for Investigation — Tariff Publications of Union Pacific Railroad Company; STB Docket No. 42063, Railway Progress Institute Committee on Tank Cars Petition for Investigation and Protest Pursuant to Ex Parte No. 328; and STB Docket No. 42064, E. I. Dupont De Nemours and Company — Protest and Petition for Investigation.

<sup>3</sup> In addition, NAFCA filed a complaint against BNSF in North America Freight Car Association v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42060 (Sub-No. 1), challenging storage and demurrage charges on private tank cars and private cars other than tank cars prior to movement for loading.

<sup>4</sup> Those proceedings were discontinued in decisions served March 20, 2002, April 12, 2002, and May 15, 2002, respectively.

storage charges are not departure tariffs because no part of the Ex Parte No. 328 agreement addresses charges for holding shipper-owned cars on railroad tracks. To assist us in resolving the matters that remain at issue in this proceeding,<sup>5</sup> we seek responses from the parties on certain matters.

Parties should comment on what constitutes a departure tariff under section 8. In discussing section 8, reference to Charges for Movement of Empty Cars, B&P RR, Inc., 7 I.C.C.2d 18 (1990) (Buffalo & Pittsburgh), may be helpful. There, the Interstate Commerce Commission (ICC) stated that the term “prescribed herein” in section 8 did not intend “to freeze and immunize from change . . . matters which are beyond the four corners of the agreement.” 7 I.C.C.2d at 25. The ICC also noted that section 8(e) of the agreement talks about “the general rule that the nationally prescribed allowance level applies, and must be paid.” According to Buffalo & Pittsburgh, that language was concerned “with attempts to avoid paying the full allowance specified by the formula, whether in the form of tariffs imposing direct caps, raising the rate on tank car commodities, or other rate mechanisms by which the carrier attempts to reduce the net *allowance* paid.” 7 I.C.C.2d at 25-26 (emphasis in original). Parties should comment on the language in Buffalo & Pittsburgh that matters beyond the four corners of the agreement were not frozen, but also that carrier attempts to reduce the net allowance paid were not permitted.

Both NAFCA and BNSF note that the only part of the agreement that mentions storage charges is section 5, which concerns storage charges paid by car owners for private cars awaiting repair or maintenance. Consistent with their other arguments, the parties reach different conclusions from this fact. As noted, BNSF argues that, because no other provision addresses charges on holding tracks, its charges for holding cars on railroad tracks while awaiting loading cannot be considered departure tariffs. NAFCA, on the other hand, argues that the only storage charges incurred by the car suppliers are for cars awaiting repair or maintenance. It claims that the costs of tracks for holding empty private cars prior to loading is an “operating cost” associated with furnishing and using such cars, but that cost is not in the mileage allowance formula, because it was considered in the Ex Parte No. 328 negotiations to be a railroad cost. Please comment on whether the cost of operating and maintaining holding tracks for private cars prior to loading was considered by the parties to be a railroad cost in the Ex Parte No. 328 negotiations.

Related to this issue is the interpretation of the parties of Buffalo & Pittsburgh. According to BNSF, under Buffalo & Pittsburgh, a departure tariff has to depart from the express terms of the agreement. BNSF claims that NAFCA’s interpretation—that charges not mentioned in the agreement are prohibited—would stand Buffalo & Pittsburgh on its head. NAFCA, on the other hand, notes that

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<sup>5</sup> We are taking no action at this time on matters pending in STB Docket No. 42060 (Sub-No. 1).

Buffalo & Pittsburgh, citing Indiana Harbor Belt,<sup>6</sup> indicated, for example, that the ICC-approved carrier tariff charges for car repair moves were an item of maintenance costs and would thus be recouped by the car owners through the mileage allowance.<sup>7</sup> Please comment on the significance of the absence of storage charges on cars awaiting loading in the Ex Parte No. 328 agreement.

We seek responses from the parties on other matters related to the storage charge issue in this proceeding. NAFCA claims (in a filing made in STB No. 42060 (Sub-No. 1)) that the furnishing of holding tracks is included in line-haul rates paid by BNSF shippers. NAFCA also argues that BNSF controls almost the entire movement cycles of private cars, and that the number of private cars necessary to serve any shipping location is largely subject to BNSF's actions. Please comment on these contentions as they relate to contemporary industry practice involving the holding of loaded and empty cars and private car storage.

Please comment also on the typical duration for holding private tank cars awaiting loading, and on the length of track that is used in holding these cars.

In connection with the diversion issue, please describe the process of diverting empty cars. In its reply to the petition for clarification at 14, n.15, BNSF indicates that the charges pertain to "switching out cars or blocks of cars that a shipper in mid-shipment diverts to a new location." Please comment on whether this fully reflects the diversion process or whether there are other situations where diversion charges are applied.

Finally, the parties have thus far focused principally on whether the charges at issue are departure tariffs. Both parties should comment on how, in today's environment, we should evaluate a charge if we find that it is a departure tariff.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

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<sup>6</sup> Gen. Amer. Transp. Corp. v. Ind. Harbor Belt RR Co., 3 I.C.C.2d 599 (1987), aff'd, General American Transp. Corp. v. ICC, 872 F.2d 1048 (D.C. Cir. 1989), reh'g denied, 883 F.2d 1029 (1989), cert. denied, 493 U.S. 1069 (1990).

<sup>7</sup> "[E]mpty repair moves, instead of being free to the owner . . . would now be paid by each owner, who would be reimbursed (at least in part) through increased allowances." 7 I.C.C.2d at 23.

It is ordered:

1. Statements in response to this decision are due from NAFCA and BNSF 20 days after the date of service of this decision, and replies by the parties are due 10 days thereafter.
2. This decision is effective on the date of service.

By the Board, Chairman Nober and Commissioner Morgan.

Vernon A. Williams  
Secretary