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SERVICE DATE - AUGUST 13, 2004

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

STB Docket No. 42060 (Sub-No. 1)<sup>1</sup>

NORTH AMERICA FREIGHT CAR ASSOCIATION

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Decided: August 11, 2004

These two proceedings involve charges that have been imposed by The Burlington Northern and Santa Fe Railway Company (BNSF) on privately owned freight cars. The first proceeding, STB Docket No. 42060, was initiated by a protest and petition for investigation filed by North America Freight Car Association (NAFCA), which the American Chemistry Council (ACC) and the National Industrial Transportation League (NITL) have supported as intervenors. In particular, NAFCA challenges certain BNSF rules and tariff provisions that impose storage and diversion charges on empty private tank cars (“private” freight cars are cars that are owned and supplied by someone other than a railroad). This decision denies NAFCA’s protest and petition for investigation with respect to BNSF’s storage and diversion charges.<sup>2</sup>

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<sup>1</sup> These proceedings have not been consolidated but are being considered together in this decision for administrative convenience.

<sup>2</sup> Protests and petitions for investigation involving storage charges were also filed in four other proceedings: 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 R.R.; 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 & Co. — Protest and Petition for Investigation. The parties privately settled their disputes in these cases, and those proceedings have all been dismissed, except for

(continued...)

In the second proceeding, STB Docket No. 42060 (Sub-No. 1), NAFCA challenges BNSF tariff provisions that impose storage and demurrage charges on all types of private cars (not just tank cars) when they are being held on tracks owned by a railroad prior to loading. NAFCA's complaint alleges, among other things, that imposition of these charges is an unreasonable practice under 49 U.S.C. 10702. BNSF has moved to dismiss that complaint. This decision denies BNSF's motion to dismiss and directs the parties to submit a joint procedural schedule.

## BACKGROUND

Railroads have a common carrier obligation to provide equipment needed to transport commodities they hold themselves out to carry. 49 U.S.C. 11121; Charges for Movement of Empty Cars, B&P RR, Inc., 7 I.C.C.2d 18 (1990) (Buffalo & Pittsburgh); Gen. Amer. Transp. Corp. v. Indiana Harbor Belt RR, Co., 3 I.C.C.2d 599 (1987) (Indiana Harbor Belt), aff'd, Gen. Amer. Transp. Corp. v. ICC, 872 F.2d 1048 (D.C. Cir. 1989) (GATC), reh'g denied, 883 F.2d 1029 (1989), cert. denied, 493 U.S. 1069 (1990). Railroads can meet this obligation by supplying their own cars to move the freight, using cars of another railroad, or using private cars supplied by shippers or other owners. When railroads use private cars, they must compensate the lessor or owner for their use. GATC, 872 F.2d at 1050. The compensation must reflect the cost of owning and maintaining that type of freight car, including a fair return on its cost. 49 U.S.C. 11122(b). These payments are typically referred to as "allowances."

In 1986, the Board's predecessor, the Interstate Commerce Commission (ICC), determined that a negotiated agreement to govern the railroads' use of private tanks cars was consistent with the requirements of 49 U.S.C. 11122(b) and adopted the agreement — thereby giving it regulatory effect. Ex Parte No. 328, Investigation of Tank Car Allowance System, 3 I.C.C.2d 196 (1986), supplemented, 7 I.C.C.2d 645 (1991) (referred to hereinafter as "Ex Parte No. 328 Agreement" or "Agreement"). The Ex Parte No. 328 Agreement contains a formula for calculating mileage allowances for tank cars (the "allowance system") that is used to determine the compensation that a railroad must pay when it utilizes private tank cars. Under 49 U.S.C. 11122(b), the compensation paid by a carrier for use of a private car must reflect the expense of owning and maintaining that type of freight car. The ICC found that the Agreement was consistent with section 11122(b) because it took into account the various services provided by the railroads and the car owners and the expenses incurred by each in connection with the use of private tank cars. 3 I.C.C.2d at 201.

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<sup>2</sup>(...continued)

STB Docket No. 42064, in which the parties have reached a settlement but have not yet reduced it to writing.

Although a railroad may impose additional charges that are not encompassed or addressed by the Agreement, there are restrictions. In particular, Section 8 of the Ex Parte No. 328 Agreement provides, inter alia, that “[n]o tariff that departs in any manner from the allowance system prescribed herein may be filed or will be permitted” unless it is found to be lawful and appropriate after an investigation by the agency.

STB Docket No. 42060.

Effective July 1, 2001, BNSF established new charges that include: (1) a daily storage charge on empty private tank cars held on BNSF tracks; and (2) a charge for diversions of empty tank cars.<sup>3</sup> NAFCA argues that the new storage and diversion charges must be investigated by the Board because they are departure tariffs under the Ex Parte No. 328 Agreement. BNSF acknowledges that these storage and diversion charges are new, but it argues that they are not departure tariffs because they do not alter the calculation of allowances under the Ex Parte No. 328 Agreement.

In a decision issued on April 28, 2003, the Board requested additional submissions from the parties to clarify and supplement the record. Relying on records of the late 1970’s negotiations of the Joint Negotiating Committee (JNC) (made up of railroad and shippers and others who own tank cars) that led to the Ex Parte No. 328 Agreement, NAFCA<sup>4</sup> argues that railroad costs related to holding tracks and diversion of empty private tank cars have already been taken into account in the allowance formula of the Ex Parte No. 328 Agreement. Thus, according to NAFCA, BNSF’s tariffs that shift storage and diversion costs to car owners must constitute departure tariffs, because their effect is to impose a new cost on tank car owners.

BNSF, on the other hand, takes the position that an allowance under the Agreement is a particular payment for a particular service, i.e., furnishing of private tank cars. In its view, the Ex Parte No. 328 Agreement covers the calculation and payment of allowances for use of private tank cars, but does not cover every conceivable matter related to private tank car use. BNSF disagrees with NAFCA’s view that any tariff charge that has the effect of reducing the net payment to the car owner is a departure tariff. BNSF takes the position, instead, that the test for whether a tariff that imposes a new charge is a departure tariff is whether the charge directly affects the computation of the mileage allowances under the formula; and BNSF’s storage and diversion charges do not. BNSF maintains that just because storage and diversion charges were

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<sup>3</sup> Private Car Storage Book 6005, and Diversion Book 6200-A (revised April 1, 2002, to allow one free diversion on empty private cars). A separate charge for storage of empty tank cars awaiting maintenance or repair on railroad-owned tracks was later withdrawn by BNSF.

<sup>4</sup> NAFCA, ACC, and NITL filed jointly in response to the reopening decision and will be referred to collectively herein as “NAFCA.”

not imposed on empty private tank cars in the past does not mean that carriers cannot impose them now. And according to BNSF, its imposition of separate storage and diversion charges as a way to address rail system congestion problems caused by some shippers and private car owners is more effective and fairer than trying to recover these costs by imposing higher line haul rates on all shippers across the board.

## DISCUSSION AND CONCLUSIONS

Each side has presented its view of what the parties meant when they negotiated the Agreement, and how the sparse and not entirely helpful precedent ought to be brought to bear on the current controversy. This decision addresses the salient points that the parties have raised; the Board has considered all of the arguments, although this decision does not discuss in detail those that would not affect the ultimate resolution of this case.

### A. Departure Tariffs Generally.

A review of the Agreement, its history, and applicable precedent leads to the conclusion that the BNSF storage and diversion charges at issue here are not departure tariffs. The leading case that sets forth the analysis for determining whether a railroad charge is a departure tariff under the Agreement is Buffalo & Pittsburgh. NAFCA raises a number of arguments in an attempt to distinguish that case, including arguments regarding what was the ICC's underlying rationale in that case and how this proceeding is different from that case. These arguments are not persuasive, as what the ICC addressed in that case is a very similar issue to the issue presented here.

In Buffalo & Pittsburgh, a carrier imposed separate charges for moving private tank cars to repair facilities, and the private tank car owners argued that those charges should be treated as departure tariffs under the Agreement. Although the new empty car movement charges did not directly limit or impose a "cap" on the allowances that carriers paid, they nevertheless had the effect of reducing the net compensation paid to the car owners. The car owners took the position that the "allowance system" in the Ex Parte No. 328 Agreement pertains not only to the computation of mileage allowances but also more broadly to practices affecting all elements of compensation that were in effect when the Agreement was negotiated, so that any change in those practices that had the effect of reducing the net compensation of the tank car owners was a departure tariff.

The ICC, however, disagreed. It concluded that it does not violate the Agreement, nor does it constitute a departure tariff, for a new charge to be imposed by carriers, so long as the new charge is for something that is not expressly covered within "the four corners of the Agreement," i.e., the factors included in the formula used to calculate the allowances. Buffalo & Pittsburgh, 7 I.C.C.2d at 25. Therefore, tariffs that added separate charges for moving private

tank cars to repair facilities did not change the allowance system and were found not to be departure tariffs under the Agreement. 7 I.C.C.2d at 25-26.

The storage and diversion charges at issue here are substantially similar to the empty car movement charges at issue in Buffalo & Pittsburgh. They are separate charges imposed by the carrier to reflect the added service it is performing by providing tracks on which to hold empty private tank cars prior to loading, or by diverting empty tank cars to a new destination at the shipper's request. They are not "tariffs imposing direct caps, raising the rate on tank car commodities, or other rate mechanism by which the carrier attempts to reduce the net allowance paid" pursuant to the formula, which were the types of tariffs that the ICC found were the JNC's "sole concern" regarding departure tariffs. 7 I.C.C.2d at 25-26.

Among NAFCA's arguments is a claim that BNSF's charges are a departure tariff under the Agreement because they increase the overall costs borne by private tank car owners and therefore reduce the net payment by BNSF to the car owners. This argument was squarely rejected in Buffalo & Pittsburgh. 7 I.C.C.2d at 26 ("Section 8(e)(2) addresses the allowance level the rail carrier *must pay*, and not the net (allowance minus tariff charges for repair moves) *the car owner receives.*") (Italics in original).

NAFCA also argues that this case is distinguishable from Buffalo & Pittsburgh based on whether the charge at issue was raised during the negotiations leading to the Agreement. Whereas the charge for repair moves at issue in Buffalo & Pittsburgh was specifically dealt with in the Agreement in Sections 3 and 4, discussions regarding charges for storage and diversion were not memorialized in the Agreement. Whether a charge was discussed during negotiations cannot be determinative of whether or not it was intended to be covered by the Agreement. Absent some specific language in the Agreement, it is impossible to discern an intent to prohibit such charges. This is particularly true when, as pointed out by the ICC in Buffalo & Pittsburgh, the Agreement defines departure tariffs as those "departing in any way from the allowance system *prescribed herein.*" See 7 I.C.C.2d at 25 (relying on the phrase "prescribed herein" to restrict the interpretation of the Agreement to its "four corners").

Next NAFCA contends that Buffalo & Pittsburgh's holding is limited because the tariff charge at issue in that case was usually paid to a different carrier from the one who would pay the allowance pursuant to the formula in the Agreement. That is true, but the ICC's decision did not turn on that fact. The ICC's conclusion that "[s]eparate rates for empty car movements do not involve allowances in this sense" (7 I.C.C.2d at 26) would apply whether several carriers or only one carrier were involved. Indeed, that discussion is only part of a lengthy analysis of multiple subsections of Section 8 of the Agreement, each of which led the ICC to conclude that departure tariffs were tariffs that related to the mileage allowance system set forth in the Agreement. 7 I.C.C.2d at 25-27 (discussing Sections 8(e) and 8(h) in particular).

In another attempt to distinguish Buffalo & Pittsburgh, NAFCA points to factual differences between that case and this one. Despite the ICC's holding that the repair movement charges at issue in Buffalo & Pittsburgh were not departure tariffs, NAFCA asserts that the Board can reach the opposite conclusion with respect to BNSF's storage and diversion charges at issue here. In particular, NAFCA asserts that the ICC ruled that the repair move charges were not a departure tariff because the inclusion of maintenance costs in the formula meant that any charges paid by the car owners to the railroad for repair moves would (at least in part) be offset by an increased allowance paid by the railroad to the car owners.

NAFCA is correct that the charges paid by car owners for the repair moves at issue in Buffalo & Pittsburgh were factored into the allowance formula as maintenance costs and thus increased the allowance paid by the railroads, whereas here storage and diversion charges are not factored into the allowance formula. However, the ICC's decision in Buffalo & Pittsburgh did not turn on whether a portion of the empty repair move charges might be recovered through allowances. Rather, Buffalo & Pittsburgh turned on other factors. Although the agency in Indiana Harbor Belt and the affirming court in GATC were aware that car owners could recover part of the repair move charges through mileage allowances, the rationale in those decisions for reversing the rule that had made repair moves free ("free repair move rule") to the car owners related to the misallocation of economic burdens among carriers (certain railroads made a disproportionate number of repair moves) and the conflict with the statutory policies of rate flexibility, revenue adequacy, and demand-based carrier pricing. Indiana Harbor Belt, 3 I.C.C.2d at 599. See also GATC, 872 F.2d at 1051. Another factor discussed extensively was that there was no apparent intent to "freeze" the free repair move rule under the "plain language" of Section 8 of the Agreement. 7 I.C.C.2d at 25.

#### B. Diversion Charges.

NAFCA alleges that BNSF's charges for diversions constitute a departure tariff. Under Section 1 of the Ex Parte No. 328 Agreement, car owners pay "mileage equalization" charges for movement of empty cars when empty car miles exceed loaded miles by 6% (thereby providing a grace factor of 106% of loaded miles before charges for excess empty movements are assessed). NAFCA argues that a tank car is likely to incur more switches the more empty miles it incurs, and therefore Section 1 represents a mechanism for curtailing empty car "excesses," including extra switching that may result when empty car miles exceed the 106% ratio. Because the BNSF diversion charge at issue here is in addition to Section 1's penalty for excess empty miles, NAFCA asserts that it should be treated as a departure tariff.

According to BNSF, these charges are not a departure tariff. BNSF explains that, unless directed to do otherwise on a bill of lading, carriers automatically return tank cars to their origin point after unloading; a diversion occurs when a customer decides to change the bill of lading and to redirect the empty cars. BNSF allows one free diversion and then charges for the second and subsequent diversion requests. BNSF explains that most diversions occur after cars have

already been classified and switched into a block of other cars moving in the same direction. To accomplish the diversion request, BNSF says it must reclassify and re-block the cars. BNSF contends that these additional services increase its costs and may delay the movement of other cars and trains.

As with all issues raised by petitioners, we look first to the terms of the Agreement. The parties to the Agreement clearly contemplated that returning empty tank cars may be routed in ways that would exceed the loaded route. In other words, the parties expressly agreed to an approach where empty cars would be permitted to return to their origination point at no additional charge, or if they traveled a longer distance, that the car owner would be charged for each additional mile when the distance exceeded the loaded route by 6%.

Nevertheless, the Agreement does not appear to contemplate the other additional costs a railroad might incur. Although the 106% figure was originally designed to account for both empty return mileage and a reasonable amount of empty repair mileage, see GATC, 872 F.2d at 1054 n.12, there are costs a railroad incurs in addition to an average cost to move a car each additional mile. Undoubtedly, it is more costly for a railroad to divert a car to a new destination multiple times because, as BNSF explains, it often must reclassify the car, which requires more railroad resources in yards and terminals and results in additional administrative work. BNSF opening statement at 40 and attached verified statement of Douglas W. Langston at 16. The railroad should be able to recover these costs.

Significantly, BNSF's charge applies only to cars that are being diverted multiple times, as it permits the first diversion for free. The costs a railroad incurs as a result of a car owner diverting a car multiple times are different from the costs the railroad incurs to move a car between two points. The equalization provision in the Agreement appears to address this second set of costs to compensate the railroad for moving an empty car between two points. BNSF's diversion charges appear to have been imposed to recover the first set of costs.

Construing a provision applying extra charges for multiple diversions as a departure tariff seems inconsistent with the formula's purpose. This provision is intended to encourage private tank car owners to manage their fleets more efficiently to reduce excessive empty mileage. Indiana Harbor Belt, 3 I.C.C.2d at 601 n.5. Permitting a tank car owner to divert its cars an unlimited number of times without permitting the railroad to recover from that owner the railroad's additional costs to provide that service would not encourage such efficient fleet management. Additionally, it could require that the additional costs be spread among all car owners with the result that car owners that manage their tank car fleet well could be subsidizing those owners that manage their fleet poorly.

Accordingly, BNSF's diversion charges do not trigger the automatic investigation procedures that the Ex Parte No. 328 Agreement sets up for departure tariffs.

C. Storage Charges.

NAFCA points to excerpts from the minutes of JNC meetings, which NAFCA reads to indicate that providing and maintaining tracks for holding empty private tank cars prior to loading were considered during the negotiations to be a railroad function and, accordingly, a railroad cost.<sup>5</sup> Therefore, according to NAFCA, imposing a charge for that service now reduces the net allowance paid by BNSF to the private tank car owners.

Certainly, the record in this proceeding indicates that the subject of charges for storage of empty private tank cars was discussed during the JNC negotiations. But the record does not indicate that the parties ever reached agreement on this issue. And it is clear that the parties agreed to be bound only by those understandings that were expressly included in the Ex Parte No. 328 Agreement.<sup>6</sup> See Buffalo & Pittsburgh, 7 I.C.C.2d at 25.

The Ex Parte No. 328 Agreement does not expressly provide for storage charges for empty private tank cars awaiting loading. This indicates that the parties did not reach agreement on the issue, so storage charges are neither prescribed nor proscribed.<sup>7</sup> And if storage charges are not covered under the Ex Parte No. 328 Agreement, then BNSF's imposition of a storage charge on empty private tank cars held on BNSF's tracks is not a departure tariff. As the ICC explained in Buffalo & Pittsburgh, 7 I.C.C.2d at 25, the Agreement does not indicate an intent to "freeze and immunize from change" matters that the Agreement does not cover.

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<sup>5</sup> See, e.g., NAFCA opening statement, verified statement of Joseph C. Gasz, at 6, quoting from minutes of the August 16, 1977 JNC meeting: "A location that orders an empty tank car held on railroad property causes the rail carrier to allocate a car spot for the holding of the empty car. This occupation of a car spot on railroad property by an empty tank car begins the cycle of handling empty tank cars on railroad property."

<sup>6</sup> BNSF opening statement, verified statement of John J. Robinson at 12: "It must also be remembered that all of the parties to the JNC were well aware that the Commission would be prescribing what the parties ultimately agreed upon. Thus, the parties were extremely careful to ensure that what they agreed to, and only what they agreed to, was specifically included within the language of agreement. The parties never intended that items not specifically included within the agreement would be prescribed."

<sup>7</sup> See verified statements of Gasz, at 11 (NAFCA opening statement) and Robinson, at 11 (BNSF opening statement).

STB Docket No. 42060 (Sub-No. 1) (Motion to Dismiss Broader Complaint).

Finally, NAFCA challenges BNSF's imposition of storage and demurrage charges on all types of empty private cars (not only tank cars) awaiting loading.<sup>8</sup> NAFCA contends that the imposition of these charges on private cars is an unreasonable practice in violation of 49 U.S.C. 10702, constitutes a failure to furnish adequate car service in violation of 49 U.S.C. 11121(a), violates the requirements of 49 U.S.C. 10746 regarding demurrage charges, and violates the shipper allowance provisions of 49 U.S.C. 10745.

BNSF moved to dismiss this complaint on October 5, 2001 (supplemented in a filing on October 30, 2002). According to BNSF, NAFCA's 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."<sup>9</sup> BNSF asserts that individual complaints can be filed if there are specific instances of hardship or abuse due to application of its storage or demurrage charges to private cars. NAFCA, however, denies that it is seeking a ruling that a railroad must "furnish unlimited holding tracks for unlimited periods of time at no charge,"<sup>10</sup> and submits that its complaint allows for other reasonable alternatives that can be developed through discovery and the submission of evidence.

Granting a motion to dismiss requires that all factors be viewed in the light most favorable to complainant. Thus, motions to dismiss prior to the submission of evidence are generally denied, to insure that participants have a full and fair opportunity to meet their burden of proof. National Grain & Feed Ass'n v. Burlington N. R.R., Docket No. 40169, slip op. at 4 (ICC served June 1, 1990). At this point, the Board cannot say that there is no possible basis on which NAFCA could prevail. Accordingly, the complaint should be permitted to go forward. Pursuant to the Board's General Rules of Practice, the parties are directed to discuss discovery and procedural matters and file a proposed joint procedural schedule.

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

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<sup>8</sup> These charges are contained in BNSF's Private Car Storage Book 6005, including Item 1300 (cars held for loading on railroad controlled or public delivery tracks); and in BNSF's Demurrage Book 6004-A.

<sup>9</sup> BNSF October 5, 2001 motion at 22 (emphasis in original).

<sup>10</sup> NAFCA November 5, 2001 reply to motion to dismiss at 7.

It is ordered:

1. In STB Docket No. 42060, NAFCA's protest and petition to investigate are denied, and the proceeding is discontinued.

2. In STB Docket No. 42060 (Sub-No. 1), BNSF's motion to dismiss is denied. Pursuant to 49 CFR 1111.10, the parties are to discuss discovery and procedural matters by August 25, 2004 and propose a joint procedural schedule September 1, 2004.

3. This decision is effective September 12, 2004.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams  
Secretary