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SERVICE DATE - JULY 14, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42003

APL LAND TRANSPORT SERVICES, INC.

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Decided: July 7, 1999

On June 6, 1997, APL Land Transport Service, Inc. (APL) filed a complaint against The Burlington Northern and Santa Fe Railway Company (BNSF), alleging that BNSF did not pay market-based compensation for use of APL's 100-ton and 125-ton, five-well, doublestack cars. These cars, which are nearly 300 feet long, are used for intermodal transportation service, carrying containers ranging from 20 to 48 feet in length in their five wells, with 40 to 53-foot containers stacked on top of the containers in the wells.<sup>1</sup>

In count 1 of the complaint, APL alleges that the allowances that BNSF currently pays for using APL's cars violate 49 U.S.C. 11122. BNSF is currently paying 1.2 cents per loaded mile, based on allowances published in Item 463-A of Mileage Tariff ICC PHJ 6007 (Mileage Tariff). APL asks the Board to establish the compensation rate that should apply to APL cars used by BNSF. In count 2 of the complaint, APL alleges that, between January 1996 and May 1997, BNSF misappropriated APL's cars and failed to observe requirements in the tariff to return cars empty to APL, in violation of 49 U.S.C. 11101(e) and 11121(a)(1), and engaged in an unreasonable practice by the failure and/or refusal to follow APL's car return instructions, in violation of 49 U.S.C. 10702(2) and 11121(a)(1). APL further alleges that BNSF was unjustly enriched by appropriating, reloading and reusing APL cars without APL's permission. APL requests that BNSF be required to pay reparations and damages for the alleged violations.

On July 10, 1997, BNSF answered the allegations in the complaint, claiming that it has acted reasonably when handling APL's cars and paid the appropriate mileage rates for APL cars as prescribed in the Mileage Tariff. It further asserts that APL has not established that it is entitled to the relief sought in the complaint.

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<sup>1</sup> In The Official Railway Equipment Register (Register), these cars are designated as Association of American Railroads Mechanical Designation "FCA," meaning flat car articulated.

A decision served July 25, 1997, established a procedural schedule. APL filed its opening evidence on February 3, 1998. BNSF filed its reply evidence on March 19, 1998. APL filed its rebuttal on April 20, 1998. APL and BNSF filed briefs on May 19, 1998. APL filed a reply brief on June 1, 1998, and BNSF filed a reply brief on June 17, 1998.<sup>2</sup>

## BACKGROUND

APL states that it provides and arranges for intermodal transportation service at more than 60 terminals in locations throughout the United States, Canada, and Mexico. APL has joint rate agreements with several “partner railroads” to provide rail service for intermodal shipments. APL also manages a fleet of almost 20,000 containers and more than 500 five-well doublestack articulated cars.

APL states that it pioneered the first stacktrain service in the United States in 1984, when it initially purchased and used doublestack rail cars to transport APL containers and containers of its customers. Then, in the late 1980s, TTX Company (TTX) entered the market and purchased cars, which were assigned to specific rail carriers. APL indicates that it received assigned cars from TTX through the Union Pacific Railroad Company (UP) to meet a portion of APL’s car needs. At that time, APL and other international ocean carriers contracted with rail carriers to run unit stacktrains. Subsequently, rail carriers no longer provided dedicated unit trains but handled containers on generic stacktrains.

In the early 1990s, TTX was no longer able to assign cars to railroads. Concerned about rising costs, service reliability and potential shortages of suitable car types, APL states that it decided to increase its fleet of doublestack cars and now owns or leases more than 550 five-well, doublestack cars.<sup>3</sup>

APL says that, during 1994 through 1996, it negotiated bilateral rail car use agreements with the major rail carriers, permitting the rail carriers to use APL rail cars for their own freight service without APL’s authorization. APL alleges that the agreements were intended to protect its investment in its rail car fleet and control its own car fleet in those situations. Bilateral agreements were reached with APL’s partner carriers: the Norfolk Southern Railway Company (NS); Consolidated Rail Corporation (Conrail);<sup>4</sup> Canadian National Railway Company (CN); and UP.<sup>5</sup>

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<sup>2</sup> The procedural schedule did not provide for the filing of reply briefs. Nevertheless, we will accept the reply briefs for the sake of a more complete record.

<sup>3</sup> The Register for January 1999 indicates that APL has 559 five-well doublestack cars.

<sup>4</sup> We recently authorized NS and CSX to acquire control of Conrail in CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company—Control and Operating Leases/Agreements—Conrail and Consolidated Rail

(continued...)

Agreements were also reached with CP Rail System, Inc. (CP) and CSX Transportation, Inc. (CSX). Apparently, each of these agreements establishes the compensation that these carriers pay to APL for use of an APL rail car for handling non-APL freight, using the prevailing TTX per diem and mileage rates as the benchmark.<sup>6</sup>

APL states that it also negotiated a bilateral car use agreement with The Atchison, Topeka and Santa Fe Railway Company (ATSF), which became effective January 1, 1995. ATSF was not a partner railroad with APL, but allegedly received APL cars carrying non-APL freight through interchange with one of APL's partner carriers. The agreement provided that ATSF would pay APL \$55 per day for the first ten days and \$100 per day thereafter, when ATSF used an APL rail car in ATSF freight service. APL indicates that, while the \$55 per day charge was lower than prevailing market rates (i.e., TTX and railroad-marked car rates), the \$100 second-tier rate was higher than prevailing market rates to encourage ATSF to return the APL cars rather than keep them on ATSF's lines indefinitely.

After ATSF was merged into the Burlington Northern Railroad Company (BN) to form BNSF, APL indicates that it sought to add BN to the APL-ATSF agreement. On May 2, 1996, APL officials allegedly met with BNSF officials, but no agreement was reached. On May 10, 1996, BNSF terminated the ATSF agreement, effective November 6, 1996, and advised APL that BN would not agree to be added to the APL-ATSF agreement. BNSF further indicated that BN and ATSF would compensate APL on the basis of the mileage charges in the Mileage Tariff. BNSF had indicated that APL was not a customer of BNSF, and that it would not pay APL's "premium" rate for using an APL car. BNSF also assertedly objected to having APL control how its cars would be used when on BNSF's lines.

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<sup>4</sup>(...continued)

Corporation, STB Finance Docket No. 33388 (STB served July 23, 1998) (Decision No. 89). As a condition to that authorization, we overrode antiassignment clauses in Conrail's contract with APL for 180 days after the date Conrail's assets are divided between NS and CSX (Day One). Id., slip op. at 113. We rejected APL's petition to clarify and/or reconsider that condition in subsequent decisions served August 7, 1998 (Decision No. 90); August 19, 1998 (Decision No. 91) and October 19, 1998 (Decision No. 96).

<sup>5</sup> APL also had an agreement with the Southern Pacific Transportation Company (SP), which was superseded by APL's agreement with UP, when SP merged into UP.

<sup>6</sup> The compensation APL receives pursuant to these bilateral car use agreements is as follows: NS—\$85 per day; Conrail—\$85 per day; CN—\$85 per day; CP—\$50 per day for first ten days and \$90 per day after ten days; CSX— \$55 per day; and UP—TTX rates (between \$2.09 and \$2.53 per hour, depending on car size, plus \$0.067 per mile). Under the SP agreement, APL received varying compensation based on TTX rail car rates for specific origin-destination pairs.

### THE APPLICABLE TARIFF

The Mileage Tariff contains mileage allowances and rules for handling private cars by various railroad participants. Item 463-A contains a mileage rate allowance of 1.2 cents per loaded mile, which BN and ATSF would pay for various types of cars. BNSF has applied this mileage rate allowance to APL cars.

APL asserts that the allowance published in the tariff should serve only as a default rate, because an ownership cost study was never conducted in developing this “catch-all” allowance rate, and thus this amount was never intended to compensate a private car owner for its ownership costs. Rather, it states, the rates in the tariff were intended to apply only to a small number of miscellaneous private car types. Indeed, APL notes that the tariff amount was established before the five-well, doublestack cars even came into existence.

APL also points to Item 454-B of the Mileage Tariff, which specifies that:

When a car is released from load on BN or ATSF, the empty will be returned via the reverse of the loaded route to the origin station of the last loaded movement. If the owner or lessee of the car desires movement via a different route or to a station other than the origin of the last loaded movement, empty billing instructions must be given to [BN or ATSF] prior to release of the empty car. If the owner or lessee of the car requests movement via a different route or to a different station other than the origin of the last movement, after release of the empty car, diversion provisions and charges, as named on BN Diversion Book 6200 Series or ATSF Diversion Book 6001 Series, are applicable.

According to APL, Item 454-B is consistent with rail industry practice that a railroad does not have a right to reload an empty private car unless the private car owner gives permission. APL states that, rather than requiring its cars to be returned to the loading point, it would permit BNSF to return its empty cars at any interchange point with one of its partner railroads.

### APL’S ARGUMENTS

APL contends that, under 49 U.S.C. 11122, when BNSF uses an APL car in BNSF revenue service, the carrier must pay APL a fair and reasonable compensation for the use of that car. That compensation, in APL’s view, should reflect what other carriers pay for the use of identical or similar cars, or what APL must pay when it obtains a replacement car (usually a TTX car) from one of its partner railroads to replace an APL car that BNSF is using in BNSF revenue service. APL states that the 1.2 cents per loaded mile allowance that BNSF pays APL under the Mileage Tariff amounts to slightly more than \$3.60 per day and is about twenty times less than BNSF pays for a

physically comparable TTX car and about thirty times less than what BNSF pays for a comparable foreign car. APL asserts that, in 1997, APL's cars were on BNSF's lines for more than 250,000 hours and 3.4 million miles, yet BNSF paid APL a total of only \$768.34.<sup>7</sup> According to APL, BNSF uses APL cars in the same manner as non-APL cars and makes the same revenue from shippers by using APL's cars as it does from non-APL cars when it reloads the cars with BNSF shippers' freight.

APL submitted car records purportedly showing that, from January 1996 through May 1997, 203 APL cars were interchanged with ATSF, BN and, subsequently, BNSF. Of that total, APL indicates that BNSF reloaded 127 cars, or 62.6%, rather than returning the cars to APL. APL indicates further that, during this period, the APL cars were reloaded an average of 2.01 times per car. APL states that those APL cars that were reloaded after their initial movement on the lines had an average of 3.22 reloads per car.<sup>8</sup>

APL claims that, whenever one of its cars is used to carry non-APL freight, it must obtain a car (typically a TTX car) from one of its partner railroads to replace that APL car and then pay that carrier the prevailing TTX rate for the replacement car. APL asserts that, if its car is used for freight service on the lines of a rail carrier with which APL has a bilateral car-hire agreement, the cost to APL for using the replacement car would be essentially offset by the car hire compensation that the carrier pays APL for using the APL car in the carrier's freight service. For APL cars used on BNSF's lines, however, APL's cost for the replacement car would only be partially offset by the nominal 1.2 cents per loaded mile compensation that BNSF paid under the tariff.

APL estimates that, as a result of BNSF's unauthorized use of its cars, APL incurred costs amounting to \$1,194,856.16 to replace cars during the period from June 1994 to January 1998. APL states that it could not possibly perform a car-by-car tracing to ascertain which specific car was used to replace a particular APL car used by BNSF. Instead, APL applied "comparable TTX rates," which, it says, are the rates at which APL's partner railroads charge APL for replacement cars, to the composite APL rail car fleet to arrive at a "weighted average cost" of \$2.31 per hour, and it then applied that rate to the total hours its cars spent on BNSF's lines. APL then determined mileage costs based on the total number of miles APL cars traveled on BNSF lines during the subject period at the alleged TTX mileage charge of \$0.067 per mile.<sup>9</sup>

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<sup>7</sup> Footnote 14 on page 27 of BNSF's Brief indicates that BNSF subsequently paid, under the Mileage Tariff, more than \$41,000 for compensation that was due in 1997.

<sup>8</sup> See APL reply brief, Exhibit 1. Apparently, this total does not include 7 cars interchanged with ATSF prior to November 1996, when the APL-ATSF agreement was in effect, but includes 42 cars interchanged with ATSF after the contract was terminated.

<sup>9</sup> See APL Rebuttal, verified statement of Dan C. Pendleton, Appendix B. The hours and mileage factors were applied to APL cars that moved over the former ATSF lines between  
(continued...)

As an alternative to its damage claim, APL requests that it be awarded restitution for BNSF's unjust enrichment in using APL cars. According to APL, BNSF receives the same compensation from shippers whether an APL car or another car is used. APL asserts that, by paying APL a nominal compensation for using its car, BNSF saves the difference between the compensation paid APL and the amount BNSF would have to pay to use a TTX or a foreign car, and thus BNSF was unjustly enriched. To ascertain the amount by which BNSF was allegedly unjustly enriched, APL determined the total number of hours and miles APL cars were on BN and BNSF's lines between June 1994 and January 1998 and ATSF's lines between November 1996 and January 1998 and multiplied that combined figure by the BNSF's "weighted average car cost" for non-APL cars of \$55.61, which equates to an hourly rate of \$2.32 per car. BNSF's weighted mileage cost was determined to be \$0.63 per mile. According to APL, the amount BNSF paid APL (\$12,148.59) was subtracted from this figure. The result—\$1,179,390.70—is claimed by APL to be the unjust enrichment savings to BNSF by using APL cars.<sup>10</sup>

APL also asks the Board to prescribe an allowance of \$75.00 per day (or \$2.31 per hour and \$0.0678 per mile) for BNSF's use of APL cars. APL states that this rate is essentially what BNSF pays on a weighted average basis for using non-APL cars and what APL pays on a weighted average for replacement cars. APL asks that the allowance be prescribed for a period of one year and that, if the parties are then unable to reach an agreement, the allowance be determined through arbitration.

#### BNSF'S ARGUMENTS

BNSF states that, in 1997, it handled nearly 3 million intermodal loads and derived 27% of its revenue from its intermodal operations. According to BNSF, the intermodal market is highly competitive, and intermodal shippers can and do demand timely delivery and competitive pricing. Because shippers can freely take their business elsewhere if unsatisfied with the service they are receiving, BNSF avers that it must constantly strive to lower its costs and to improve its service reliability. BNSF states that it has established an efficient system of free-running, intermodal cars that can be loaded, reloaded and interchanged efficiently without regard to any constraints imposed by the car's owner or by the destination of the shipper's freight. BNSF states that it has a pool of over 10,000 intermodal rail cars operating over its 35,000 miles of track, and that this fleet is vital to its competitive position and the effectiveness of its intermodal operations because it can load, unload and reload intermodal trains smoothly, quickly and at the lowest cost to its shippers.

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<sup>9</sup>(...continued)

November 1996 and September 1997 and APL cars that moved over BN and BNSF lines between June 1994 and January 1998. Page 12 of APL's reply brief indicates that APL is willing to reduce its claim by \$5,800 to represent penalty payments from its partner railroads. As adjusted, APL's replacement cost claim is \$1,189,056.16.

<sup>10</sup> See pages 26-27 of APL rebuttal statement of Mr. Pendleton.

BNSF states that it operates intermodal trains, consisting of 20 to 30 five-well doublestack cars, up to nearly one-mile long. According to BNSF, when an intermodal train arrives at its destination, the most efficient and cost effective manner to handle the train is to keep its individual cars intact, unload the cars, and then reload the same cars immediately without unnecessary or costly car switching or handling. Assertedly, this is possible only if BNSF can treat the cars in its intermodal fleet interchangeably. BNSF claims that, if an intermodal train contains cars that have inefficient use constraints, those cars must be switched out before the outgoing train can be reloaded. In addition to imposing unnecessary costs associated directly with excessive switching and car handling, cars with inefficient use constraints can unnecessarily delay loading and delivering intermodal freight. To avoid costs associated with these inefficient cars, BNSF states that it strives to minimize the instances where individual cars must be switched out from an intermodal train.

BNSF states that 85% of its intermodal fleet consists of free running TTX cars. Assertedly, BNSF benefits from using TTX cars by being able to put surplus TTX cars on "relief" when not being used and then using TTX cars when there are car shortages. From 1994 through 1996, on average, 12 to 16% of the TTX cars were surplus on BNSF lines, had not been requested by other TTX participants, and cost BNSF nothing. In the first half of 1997, TTX cars used by BNSF were on relief an average of 5.3% of the time. In 1997, TTX cars remained on BNSF an average of 39.63 days.

BNSF indicates that the remainder of its intermodal fleet consists of its own cars (5%), which remained on BNSF's lines an average of 35.27 days, and free-running foreign-owned cars, which remained on BNSF's lines an average of 25.43 days. BNSF states that foreign cars are relatively costly, and when circumstances permit, it strives to interchange them off its lines. BNSF indicates that APL cars made up a tiny fraction, less than ½ of 1%, of BNSF's intermodal fleet and remained on BNSF lines an average of 21 days.

BNSF states that APL's agreements with its partner railroads permit those carriers to use APL cars essentially without restriction. Allegedly, APL's partner railroads have shared the efficiency gains from these arrangements by substantially reducing the transportation rates charged to APL. However, BNSF claims that these arrangements have increased the number of APL cars interchanged onto non-partner carriers such as BNSF. Having voluntarily entered into the arrangements that permit APL cars to be interchanged to BNSF, APL has assertedly insisted on efficiency-crippling restrictions on BNSF's use of its cars. BNSF further claims that APL has been unwilling to stop its partner railroads from interchanging APL cars onto BNSF or imposing penalties in its contracts.

BNSF avers that APL demands that, after one of its partners or another railroad interchanges an APL car carrying non-APL freight onto BNSF, BNSF deliver the freight and return the APL car immediately to an APL partner. At the same time, BNSF states that APL wants to be compensated as if BNSF were free to use the APL car without constraint or restriction. BNSF states that it has been willing to enter into a car-use agreement with APL if it were permitted to treat APL cars as fungible free running cars, but it claims that APL has refused to do so. According to BNSF,

having a low-cost, free-running fleet of intermodal cars is vital to BNSF, as it is to all of BNSF's rail competitors. Nevertheless, BNSF states that APL has rejected its proposals that would have permitted BNSF to treat APL cars as efficient "free running" cars. As a result, no car-use agreement has been reached between APL and BNSF. Lacking a car-use agreement, BNSF compensates APL pursuant to the Mileage Tariff.

BNSF states that it does not use APL cars as it uses free-running TTX cars. BNSF acknowledges, however, that it does not always switch out APL cars immediately after they have been unloaded because that would allegedly cripple the carrier's intermodal operations and frustrate the needs of its shippers. BNSF states that it is in the business of transporting freight for its shippers, not retrieving errant APL cars improperly interchanged to it by APL's partners.

BNSF states that it usually manages to return APL cars far more quickly than TTX cars. To ensure that APL cars are returned as quickly as possible, BNSF states that it issues control orders that govern APL cars when they arrive in a BNSF terminal. Through these control orders, BNSF says that it endeavors to switch APL cars out of unloaded intermodal trains and send them back to one of APL's partner railroads. Absent APL's insistence on the return of its cars, BNSF claims that it would not have to engage in this excessive switching. However, BNSF indicates that the constraints imposed by the competitive intermodal market prevent BNSF from accommodating both APL's demands and the demands of BNSF's shipping customers. As a result, BNSF acknowledges that it has reloaded APL cars where to do otherwise would compromise the needs of its shippers. When this occurs, it pays APL the loaded tariff rate for BNSF's use of that APL car. BNSF asserts that its use of APL's cars has been reasonable and that, as a result of BNSF's efforts, APL cars are interchanged off BNSF on an expedited basis.

BNSF acknowledges that it cannot guarantee that APL cars interchanged onto BNSF are never reloaded. In many instances, BNSF claims that it delivers freight carried on APL cars to port facilities or other destinations that it neither owns nor controls. In those instances, BNSF claims that it acts as a "bridge carrier" delivering non-APL freight on APL's cars and receiving non-APL freight on APL's cars. BNSF further indicates that some APL cars are interchanged onto BNSF or are reloaded as a result of human error. Where such errors occur, BNSF states that it pays APL the loaded mileage rate. BNSF claims further that, at some unloading points, BNSF simply does not have a switch engine or crew available. Accordingly, it is not possible for BNSF to switch out an empty APL car under those circumstances.

BNSF states that compensating APL in accordance with the Mileage Tariff rate properly reflects what BNSF is willing to pay in a competitive marketplace for restricted-use cars that it does not want. If a problem exists, BNSF states that it is one of APL's making, and that it is one that APL could cure by permitting BNSF to handle APL cars as efficient free runners. In the face of APL's refusal to do so, BNSF asserts that there is no justification for regulatory action on the part of the Board.

## DISCUSSION AND CONCLUSIONS

Count 1 of the complaint charges that the prescribed allowance BNSF has paid for using APL cars is substantially less than the market-based compensation. APL claims that BNSF's refusal to pay higher compensation is a violation of 49 U.S.C. 11122. Section 11122 authorizes the Board to regulate car service to encourage purchase, acquisition, and efficient use of freight cars. Section 11122(b) contains the following standards for freight car compensation:

The rate of compensation to be paid for each type of freight car shall be determined by the expense of owning and maintaining that type of freight car, including a fair return on its cost giving consideration to current costs of capital, repairs, materials, parts, and labor. In determining the rate of compensation, the Board shall consider the transportation use of each type of freight car, the national level of ownership of each type of freight car, and other factors that affect the adequacy of the national freight car supply.

In setting compensation for freight cars, the statute requires that we consider the costs of car ownership and maintenance and other non-cost factors that affect the supply and efficient use of cars, including market demand. LO Shippers v. Aberdeen & Rockfish Ry. Co., et al., 4 I.C.C.2d 1, 9 (1987), aff'd sub nom., LO Shippers Action Committee v. ICC., 857 F.2d 802 806 (D.C. Cir. 1988).

APL has not submitted any evidence to reflect its cost of ownership or maintenance of its cars. Nor is there any indication that there is a shortage of APL cars or TTX cars. Instead, APL claims that the compensation rate for its cars should be based on the rate TTX charges for using TTX five-well doublestack cars. That rate, APL claims, reflects what car suppliers charge and what car users, including BNSF, pay for using these cars, reflects what comparable cars command in the market, and indicates the compensation that should be paid for these cars under supply and demand conditions. BNSF responds that TTX rates are not comparable market rates because APL cars are subject to controls imposed by APL that require BNSF to handle APL cars differently from TTX and other free-running cars.

The evidence before us indicates that TTX supplies intermodal cars to BNSF and other carriers under agreements that permit TTX cars to be free-running when they move on carriers' lines. Likewise, APL has agreements with its partner railroads that enable its cars to be free-running when they move on its partner railroads. APL does not have an agreement with BNSF enabling its cars to be free-running cars when on BNSF's lines.<sup>11</sup> However, the record here does not indicate

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<sup>11</sup> As we noted, APL had proposed that BNSF adopt the agreement that APL had with ATSF, which prescribed a two-tiered rate for APL cars: rate of \$55 per day for cars held for 10 days, and rate of \$100 per day for cars held beyond 10 days. The higher, second-tier rate was intended to encourage ATSF to return the car promptly. The ATSF agreement did not restrict or  
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that APL has imposed any specific restrictions or controls on the use of its cars; nor does the record show that APL manages its cars when on BNSF's lines, as BNSF claims.

However, Item 454-B of the Mileage Tariff does apply to APL cars and requires BNSF to return the cars empty. Through this provision, BNSF is thus limited in its use of APL cars and cannot use the cars as free-running while they are on its lines. APL cars are therefore treated differently from TTX cars, and the rates charged by TTX for its free-running cars thus cannot be accepted as a comparable market rate for setting BNSF's compensation for APL cars in this proceeding. Without any other probative evidence of its ownership expenses or other factors that would afford us an alternative basis upon which to act, we cannot grant APL's request that we set the amount of compensation that BNSF must pay APL for using its cars at a level beyond that currently established in Item 463-A of the Mileage Tariff.

In Count 2 of the complaint, APL charges that BNSF has failed to comply with Item 454-B of the Mileage Tariff requiring that empty cars be returned to the origin station of the loaded movement or to a location approved by APL. APL had indicated that it would permit BNSF to turn over APL cars through interchange with one of APL's partner railroads, rather than requiring BNSF to return the car empty to the origin station. Nevertheless, the evidence of record shows that, on more than 127 occasions during the period from June 1994 to January 1998, BNSF reloaded an APL car rather than returning the car empty or turning the empty car over to an APL partner railroad as required by the tariff.

BNSF claims that it properly compensated APL by paying the tariff rate. By adhering to the tariff rate, however, BNSF is likewise obligated to adhere to Item 454-B, which requires it to return an empty car to the origin station, or to an APL partner railroad. Carriers are required to abide by their published rules just as they are required to charge their published rates. Cargill, Inc. v. Atlantic Coast Line R. Co., 304 I.C.C. 487, 489 (1958).

BNSF acknowledges that it has not adhered to its tariff, but attempts to justify its actions. The carrier claims that it has taken steps to return empty APL cars as quickly as possible and notes that APL cars spend, on average, less than half the time on its lines than do TTX cars. BNSF further states that it cannot guarantee that APL cars will never be reloaded. The carrier explains that some APL cars are delivered to port facilities or other locations beyond its control or are reloaded by error; that occasionally it does not have equipment or crews available to switch out an APL car; or that it could not delay an entire intermodal train to switch out an APL car. Additionally, BNSF

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<sup>11</sup>(...continued)

penalize ATSF's right to reload an APL car, or limit the time ATSF could use the APL car in freight service. Nor did the agreement enable APL to manage or control the use of its cars when on ATSF. BNSF, however, did not agree to enter into the APL-ATSF agreement and terminated the agreement because it objected to the rates.

contends that the limitations on re-use of APL cars are costly and that the restrictions have adverse economic implications because they result in inefficient car use.

These claims cannot, however, excuse BNSF's failure to adhere to Item 454-B. Its failure to do so violates 49 U.S.C. 11101(e) and its failure to satisfy the tariff's requirement to promptly return APL cars empty results in an unreasonable practice contrary to 49 U.S.C. 10702(2) and 11121(a)(1). We therefore direct BNSF to cease and desist from violating Item 454-B of the Mileage Tariff.

We cannot, however, on this record grant APL monetary relief for BNSF's violations. Because, as discussed above, APL has failed to establish what the rate of compensation should be for the use of its cars, we cannot measure the extent to which BNSF has been unjustly enriched by using APL cars for transportation service in violation of the tariff. Similarly, we cannot determine to what extent APL has been damaged. APL claims that, in each of the 127 instances when one of its cars had been reloaded while on BNSF's line, APL obtained a TTX car to replace the reloaded car. APL's "weighted average" hourly cost data do not afford an acceptable alternative measure of relief because the data merely assume that APL must have obtained a TTX car to replace unreturned cars, not that it actually did so. We cannot grant damages on the basis of that assumption.<sup>12</sup>

We note here that APL could continue litigating this dispute by filing a petition to reopen this proceeding and seek to present new evidence to support its claim for damages for BNSF's violations. However, given the practical considerations attendant both to measuring the monetary impact of the past violations and to revising BNSF's operations for the future to effect compliance with our order and its statutory responsibilities, it appears that the parties could achieve a better resolution of these matters through private negotiations than what they might obtain through further adjudication. At various points in this dispute, APL has indicated a desire to reach a comprehensive, negotiated bilateral car use arrangement with BNSF that would establish mutually satisfactory compensation levels and usage rights, while BNSF also suggested that this dispute should ultimately be resolved by negotiations.<sup>13</sup> Accordingly, we encourage the parties to negotiate a mutually acceptable resolution of their differences.

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

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<sup>12</sup> APL has argued that it uses its car fleet 100% of the time, thus requiring it to use TTX cars as replacements when its cars are not promptly returned from BNSF. BNSF, however, has identified an APL document that indicates that, at any point in time, 55 of APL's cars are not being used to carry freight. APL does not dispute this fact and responds only that 55 cars are "dwell cars" waiting for their next load. Without any specific information about the holding time periods and how these APL cars are placed in service, we cannot accept APL's argument.

<sup>13</sup> Verified statement of Richard J. Barber, p. 5.

It is ordered:

1. Count 1 of APL's complaint is denied.
2. Count 2 of APL's complaint is granted to the extent that BNSF is directed to cease and desist from violating 49 U.S.C. 11101(e), 10702(2) and 11121(a)(1), and to comply with Item 454-B of the Mileage Tariff, requiring that APL cars be returned empty.
3. This decision is effective August 13, 1999.

By the Board, Chairman Morgan, Vice Chairman Clyburn and Commissioner Burkes.

Vernon A. Williams  
Secretary