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SERVICE DATE – JANUARY 26, 2007

SURFACE TRANSPORTATION BOARD

DECISION

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

NORTH AMERICA FREIGHT CAR ASSOCIATION, ET AL.

v.

BNSF RAILWAY COMPANY

Decided: January 24, 2007

In a complaint filed on August 1, 2001, the North America Freight Car Association (NAFCA) and 10 of its members (together, Complainants)¹ challenge tariff provisions of The Burlington Northern and Santa Fe Railway Company, now BNSF Railway Company (BNSF), that impose storage and demurrage charges on empty private freight cars (2001 Charges) when held on BNSF property beyond a “free time” period. Complainants allege that the imposition of such charges, which had not been imposed in the past, 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. For the reasons discussed below, we are denying the complaint.

BACKGROUND

Railroads have relied on storage and demurrage² charges to encourage efficient utilization of their rail cars, free up track space, and compensate them for the cost of holding cars

¹ NAFCA is an unincorporated association of entities that manufacture, lease, own, or operate private freight cars. Of its 24 members, 10 are participating as individual parties in this complaint: 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; and Tate & Lyle Ingredients Americas, Inc. On March 14, 2005, Complainants filed an amended complaint for the stated purpose of adding Complainants’ affiliates and subsidiaries as parties, and also to reduce the number of initial participating members from 11 to 10 as well as to reflect name changes for 2 of the 10 members. On April 1, 2005, BNSF opposed Complainants’ “March 14 motion.” On April 5 and 8, 2005, Complainants responded to BNSF’s opposition.

² Demurrage is a charge that compensates rail carriers for costs incurred when rail cars are detained by shippers and serves as a penalty for undue car detention. See Capitol Materials

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from use. Historically, these charges have been imposed on loaded freight cars—whether railroad-supplied or private cars, and whether held on railroad or private track—and on empty railroad-supplied cars held on railroad track. They have not, however, historically been applied to empty private cars.

In recent years, private car owners have increased their private car fleets in an attempt to have more cars available during seasonal and other periods of greater need. At times this has increased the number of empty private cars on the system, which has led to various difficulties and inefficiencies for carriers on whose lines the private cars sit. In response, a number of railroads have begun charging shippers for holding a shipper's empty private cars on their systems.

The Charges At Issue. In July 2001, BNSF published two such charges: storage charges for empty private industrial cars (generally, tank cars) and demurrage charges for empty private covered hopper cars used to transport grain, grain products, and sugar.³

The storage charges for tank cars, as amended in April 2002, implemented a three-tier rate structure in which the rate charged is dependent on both geography and operational constraints, including a charge of \$25 per day in areas where track congestion is most likely, \$15 per day in areas where congestion is likely, and \$10 per day in areas where congestion is least likely.⁴ The storage charges begin to accrue on empty private tank cars held for loading on BNSF track beyond a “free period.” The free period ends at the second 12:01 a.m. (excluding the first Saturday, Sunday, or holiday when computing to the second 12:01 a.m.) immediately after BNSF makes the cars available for placement at the shipper's facility (called constructive placement) but the cars remain on BNSF track.

Railroad demurrage charges are typically assessed under either a “straight” plan, whereby each car delivered by a railroad is entitled to a period of free time after which charges accrue if the car is not returned, or an “average” plan, in which there is no free period per se, but early returns are offset against late returns for all of a shipper's private cars at a particular location during the month. BNSF's empty private hopper car demurrage program at issue here uses the latter. Empty private hopper cars are assigned two “credits” each once the cars are constructively placed; for each day a car is not ordered into the facility, one “debit” is assessed.

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Inc.—Pet. For Dec. Order—Certain Rates and Practices of Norfolk So. Ry. Co., STB Docket No. 42068, slip op. at 2 (STB served Apr. 12, 2004) (Capitol Materials).

³ See BNSF Reply Evidence (BNSF Reply), Langston Verified Statement (V.S.) at 9-12.

⁴ See id. at 11.

The credits are used to offset debits. At the end of the month, debits and credits for all cars at that location are summed, and the shipper is charged \$50 for each net debit, if any.⁵

Under the storage charges tariff, private tank car owners have at least 24 hours, and, depending on when their cars are constructively placed, can have up to almost 5 days, to take their cars onto private track or into their own facilities after constructive placement before accruing charges for storage of cars. For hopper cars under the demurrage tariff, private car owners will have, on average, 2 days to accept their cars after constructive placement. Once the empty private cars are ordered in by the shipper, the shipper is not charged for the time it takes the railroad to actually place the empty private cars at the shipper's facility.⁶

The Complaint. Certain aspects of compensation for the use of private tank cars are governed by an agreement that our predecessor, the Interstate Commerce Commission (ICC), approved in 1986, under which carrier actions can be investigated if they depart from the basic terms of the agreement.⁷ Accordingly, shortly after BNSF implemented its charges for holding empty private cars, a number of private car owners and suppliers filed complaints at the Board, both with respect to BNSF's charges and with respect to similar charges implemented by Union Pacific Railroad Company (UP).⁸ Specifically, the Complainants filed (1) a petition in STB Docket No. 42060 for an investigation, challenging BNSF's storage charge program as a "departure tariff" under the terms of the ICC-approved agreement, and (2) a complaint in STB Docket No. 42060 (Sub-No. 1), raising the claims that are now before us. BNSF filed a motion to dismiss both the petition in Docket No. 42060 and the complaint in Docket No. 42060 (Sub-

⁵ See id. at Exh. J.

⁶ See id. at 9-10.

⁷ See Investigation of Tank Car Allowance Systems, 3 I.C.C.2d 196 (1986) (Tank Car).

⁸ See 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 (filed June 26, 2001) (the U.S. Clay Producers, the Chlorine Institute, the National Industrial Transportation League (NITL), BP Corporation North America, E.I. DuPont, and CPC-Diversified International filed petitions to participate in the proceeding); Railway Progress Institute Committee on Tank Cars Petition for Investigation and Protest Pursuant to Ex Parte No. 328, STB Docket No. 42061 (filed June 27, 2001) (the U.S. Clay Producers, the Chlorine Institute, NITL, BP Corporation North America, and E.I. DuPont filed petitions to participate in the proceeding); The Chlorine Institute, Inc.—Protest and Petition for Investigation—Tariff Publications of Union Pacific Railroad Company, STB Docket No. 42062 (filed Sept. 26, 2001); Railway Progress Institute Committee on Tank Cars Petition for Investigation and Protest Pursuant to Ex Parte No. 328, STB Docket No. 42063 (filed Sept. 25, 2001) (NITL filed a petition to participate in the proceeding); E.I. DuPont de Nemours and Company—Protest and Petition for Investigation, STB Docket No. 42064 (filed on Sept. 26, 2001) (NITL and NAFCA filed petitions to participate in the proceeding).

No. 1). In a decision served on October 18, 2001, the Board ordered the parties to engage in industry-wide negotiations concerning the “departure tariff” issue. Eventually, all of the parties settled their cases, except that Complainants continued to pursue their claims against BNSF in Docket No. 42060 and Docket No. 42060 (Sub-No. 1).

In a decision served on April 28, 2003, the Board sought additional comments from the parties to assist it in resolving the “departure tariff” issues raised by Complainants in STB Docket No. 42060. The Board also held in abeyance any decision on the issues raised by the complaint in STB Docket No. 42060 (Sub-No. 1). The parties filed the requested comments, and in August 2004, the Board denied Complainants’ protest and petition for investigation in STB Docket No. 42060 and dismissed their “departure tariff” claim. The Board held that the agreement at issue in Tank Car (Tank Car Agreement) was not intended to “freeze and immunize from change” rate and service practices of the railroads that were not expressly included within the four corners of the Agreement.⁹

The finding that BNSF’s charges did not violate the Tank Car Agreement did not, however, mean that the charges could not possibly violate some provision of the Interstate Commerce Act. Thus, the Board allowed Complainants’ claims in this sub-docket to move forward, to ensure that participants had a full and fair opportunity to meet their burden of proof.¹⁰ After discovery, the parties filed evidence in this proceeding. The National Industrial Transportation League (NITL) and the American Chemistry Council (ACC) jointly filed an amicus brief.

PRELIMINARY MATTERS

Amended Complaint.

On March 14, 2005, Complainants filed an amended complaint seeking to add subsidiaries and affiliates of the named Complainants as parties. Complainants explain that they filed the amended complaint as a precaution in the event that we do not agree with their assessment that such subsidiaries and affiliates were already parties to the original complaint. They also assert that we need not reach this issue until we reach the issue of damages. On April 1, 2005, BNSF replied, opposing amendment of the Complaint. On April 5 and 8, 2005, Complainants responded to BNSF’s opposition.

As Complainants suggest, we do not need to reach this issue unless and until we find that there has been a violation of the Interstate Commerce Act and that there have been damages as a result. As discussed below, we find that Complainants have not shown a violation of the

⁹ See 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 et al., slip op. at 8 (STB served Aug. 13, 2004) (August 2004 Decision).

¹⁰ Id. at 9.

Interstate Commerce Act with respect to any of their claims. The inclusion of additional parties would not change that outcome. Thus, the issue of whether subsidiaries and affiliates that are not referred to in the original complaint are nevertheless embraced in this proceeding is moot.

Burden of Proof.

Complainants contend that the burden is on BNSF, as the proponent of the 2001 Charges, to demonstrate that the imposition of the challenged charges is a reasonable practice.¹¹ For this proposition, Complainants appear to rely on a single case, Consolidated Rail Corp. v. ICC, 646 F.2d 642, 648 (D.C. Cir. 1981) (Conrail), in which the burden of proof was placed on the railroad to show that adding charges for extra services used in the transportation of spent nuclear fuel was not unreasonable.¹² But Conrail is not analogous. Conrail involved tariffs filed in response to prior ICC orders rejecting railroad efforts to “flag out” of common carrier tariffs for carrying spent nuclear fuel, and the case arose under a pre-1980 statutory provision that expressly put the burden of proof on a carrier whose proposed rate change was suspended or put under investigation before it became effective. See 49 U.S.C. 10707(e) (1980).¹³ Moreover, as the court pointed out in Conrail, 646 F.2d at 650, the extra services for which the railroad was attempting to charge extra, which were purportedly required for safety reasons, were not required by the Department of Transportation (DOT) and the Nuclear Regulatory Commission (NRC), which had primary jurisdiction over safety. Indeed, DOT and NRC had determined that the transportation was safe without the additional special services applied by the railroads. Therefore, the court placed the burden on the railroads to prove that the presumptively valid regulations were unsatisfactory or inadequate in their particular circumstances. Conrail, 646 F.2d at 650. In other circumstances the burden has consistently been placed on complainants to prove the merits of an unreasonable practice claim. See Cities Service Oil Co. v. Soo Line R.R., 356 I.C.C. 838, 842 (1977) (“Complainant has the burden of establishing by competent evidence that the assailed [demurrage and storage charges] are unjust and unreasonable.”). There is no basis for shifting the burden in this proceeding.

BNSF argues that the 2001 Charges should be considered presumptively valid and that Complainants therefore bear a higher standard of persuasion, to present “compelling” evidence.¹⁴ However, BNSF does not provide any authority for this proposition. While the burden is clearly on Complainants to prove their claims, there is no extraordinary standard of persuasion that must be met here.

¹¹ See Complainants’ Rebuttal Evidence (Complainants’ Reb.) at 34.

¹² See Complainants’ Opening Statement (Complainants’ Open.) at 43-44.

¹³ See Trainload Rates on Radioactive Materials, Eastern R.R., 362 I.C.C. 756, 757 (1980).

¹⁴ See BNSF Reply at 35.

DISCUSSION

This case turns on who should bear the expense of holding empty shipper-supplied freight cars beyond a reasonable free period. Complainants generally assume that BNSF is obligated to hold complaining car owners' empty private cars without charge, and that assumption underlies many of Complainants' claims. Yet neither the law nor the record supports this assumption, which stems primarily from two arguments made by Complainants: (1) that BNSF has not historically charged for holding empty private cars; and (2) that the complaining private car owners are cross-subsidizing all line-haul ratepayers by paying the 2001 Charges.

Under our statute, railroads are encouraged to independently price their services so as to eliminate cross-subsidies and improve track and equipment utilization. See, e.g., Mr. Sprout, Inc. v. United States, 8 F.3d 118, 127 (2d Cir. 1993) (citing the rail transportation policy, then at 49 U.S.C. 10101a, as reflecting Congress's intent, in the Staggers Rail Act of 1980 (Staggers Act), to allow rail carriers to recover their costs from shippers who generate them and thus discourage cross-subsidization). Toward that end, BNSF has established new charges for empty private cars not only to compensate BNSF for the use of its track but also to encourage shippers to utilize their private cars more efficiently and to discourage them from holding empty private cars on BNSF's system for extended periods of time. Those objectives are reasonable. Moreover, railroad conditions today are quite different from what they were even 10 years ago. Traffic is up and capacity is tight. Thus, even if holding cars for a private owner's convenience without separate compensation was a common practice in the past, that does not mean that it is unlawful for carriers to try to move them more quickly under today's conditions.

Complainants assert that the 2001 Charges require shippers to pay BNSF twice for holding their empty cars – once through the line-haul rate and a second time through the 2001 Charges.¹⁵ They contend that, as a result, they are cross-subsidizing the line-haul rates of all shippers. BNSF argues just the opposite, contending that, prior to the 2001 Charges, all other shippers were cross-subsidizing private car owners for the cost of holding empty private cars for extended periods on the BNSF system.¹⁶ BNSF claims that, by implementing the 2001 Charges, it is eliminating that cross-subsidy.

There is merit to BNSF's cross-subsidy argument. Storing empty private cars imposes costs on the railroad, including the loss of system fluidity and the opportunity cost associated with using track for long-term car storage that instead could be used to facilitate the efficient movement of freight.¹⁷ The 2001 Charges recover costs from those that generate them. This is

¹⁵ See Complainants' Reb. at 44, 48.

¹⁶ See BNSF Reply at 35, 50, 77.

¹⁷ Using existing track to store empty private cars takes needed capacity from a rail network that is already overburdened. BNSF estimates that construction of new track costs

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exactly what the Board, the ICC before us, and Congress have encouraged railroads to do. Recovering the cost of empty private car storage from the suppliers of those cars advances several aspects of the rail transportation policy, including allowing the demand for services to establish rates (49 U.S.C. 10101(1)), fostering sound economic conditions in transportation (49 U.S.C. 10101(5)), encouraging efficient management of railroads (49 U.S.C. 10101(9)), and encouraging individualized ratemaking (49 U.S.C. 10101(10)).

Complainants assert that traditionally “it was understood that shippers would furnish private cars and railroads, including BNSF, would supply tracks on which to hold those cars so long as they were empty awaiting loading, all as part of BNSF’s freight rate,”¹⁸ and they argue that now charging separately for empty private car storage should require the railroad to lower its line-haul rates, which BNSF did not do when it introduced the 2001 Charges. But Complainants do not claim that any contract existed or that the complaining shippers relied on any specific representation from BNSF. Nor do they provide any evidence that the line-haul rates paid by private car shippers before the 2001 Charges included the cost of storing empty private cars for any particular length of time or that they included all such costs. Moreover, even if prior rates did fully incorporate the costs of indefinitely storing empty private cars (which Complainants have not shown to be the case), BNSF demonstrates that the practices of the owners and users of private cars in recent years have put increasing burdens on the carrier’s infrastructure and operations,¹⁹ and under the law, BNSF may raise the price for its services, as long as the total amount paid is reasonable. Complainants do not here challenge the reasonableness of any line-haul rates.

Complainants argue that all shippers benefit from a more fluid rail system and that the burden of paying these holding charges should not be placed on private car owners alone. This is merely restating the same cross-subsidy argument. While it is true that more efficient private car operations will benefit the entire system, it does not follow that all shippers should pay for the problems or costs generated by a relative few. Nor does it follow that BNSF or other railroads should be barred from applying demurrage and storage charges that give individual shippers incentives to manage their operations, including private car fleets, as efficiently as possible. Moreover, it is no impediment to the new charges that BNSF did not previously charge private

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anywhere from \$1.5 million to \$2.5 million per mile, depending on location, as well as attendant and significant maintenance costs. BNSF Reply, Langston V.S. at 3.

¹⁸ Complainants’ Open. at 24.

¹⁹ BNSF describes the difficulties sometimes caused by empty private cars, alleging that it was regularly forced to move empty cars around its yards, and, in some cases, even between yards in order to free up space to prepare blocks of cars for its line-haul trains. Sometimes, empty private cars had to be held in yards and on side tracks short of their final destination because there was no room for them in yards already clogged with empty private cars. See BNSF Reply, Langston V.S. at 6.

car owners for demurrage or storage of empty cars. See Gen. Amer. Transp. Corp. v. Ind. Harbor Belt RR Co., 3 I.C.C.2d 599, 610-11 (1987), reh'g denied, General American Transp. Corp. v. Indiana Harbor Belt Railroad Co., ICC Docket No. 35404 (ICC served Feb. 22, 1988), aff'd sub nom. General American Transp. Corp. v. ICC, 872 F.2d 1048 (D.C. Cir. 1989) (ICC reversed its 40-year-old policy that had prevented railroads from charging private car owners for the cost of empty repair moves).

In light of these general findings, we now turn to Complainants' other specific claims.

Unreasonable Practice Claims.

Complainants argue that BNSF's establishment of demurrage and storage charges applicable to empty private cars constitutes an unreasonable practice in violation of 49 U.S.C. 10702 and assert that the court's criteria for "reasonableness" in Conrail must apply here.²⁰ But as we already have noted, the Conrail decision was premised on facts not present here and on a statutory scheme predating the Staggers Act. In any event, in section 10702, Congress did not limit the Board to a single test or standard for determining whether a rule or practice is reasonable; instead, it gave the Board "broad discretion to conduct case-by-case fact-specific inquiries to give meaning to those terms, which are not self-defining, in the wide variety of factual circumstances encountered." Granite State Concrete Co. v. STB, 417 F.3d 85, 92 (1st Cir. 2005); see also WTL Rail Corp.—Pet. For Dec. Order And Interim Relief, STB Docket No. 42092, slip op. at 6 (STB served Feb. 17, 2006). This broad discretion is necessary to permit the Board to tailor its analysis to the evidence proffered and arguments asserted under a particular set of facts.

The principle underlying demurrage is straightforward: when a shipper holds a rail car beyond a reasonable time, it is taking up a railroad asset for which the railroad should be compensated. Demurrage charges therefore serve two purposes: (1) to compensate the railroad for added costs (e.g., for the car-hire charges it pays to the carrier owning the equipment being held) or loss of the use of assets; and (2) to encourage shippers to return freight cars to the system, thereby making the entire system more efficient.

²⁰ See Complainants' Open. at 43; Complainants' Reb. at 17. In discussing the safety measures at issue in Conrail, the court stated that:

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 cost; and second, that when compared with other possible safety measures, they represent an economical means of achieving the expected safety benefit.

Conrail, 642 F.2d at 648.

It is true that demurrage is most often applied to loaded cars, whereas here the carrier applied these charges to empty rail cars. But contrary to Complainants' claim,²¹ that does not make the charges improper. The 2001 Charges meet both purposes for which such charges are applied to loaded cars: they compensate the railroad for use of its assets (i.e., the space on its track or at its yards), and they encourage more efficient use of freight cars on its system. Promotion of cost recovery and efficient equipment utilization are not unreasonable purposes.

Complainants nevertheless make several arguments that imposing the 2001 Charges under the particular circumstances presented here is an unreasonable practice under section 10702 and ask that we void the tariffs, or provisions of the tariffs, that impose them on the complaining car owners. These arguments are discussed below.

Abusing market power. Complainants suggest that BNSF's market power "warrants intervention" by the Board as a matter of policy, citing 49 U.S.C. 10101(6) and (12) (concerning an absence of competition and predatory pricing and practices prohibitions). However, Complainants concede that market power over private car traffic does not itself make the 2001 Charges an unreasonable practice.²² Moreover, Complainants have not demonstrated that BNSF has market power over the complaining shippers. Indeed, BNSF's actions in implementing the 2001 Charges are not suggestive of a carrier abusing its market power. See BNSF Reply, Langston V.S. at 8-9 (discussing the steps taken by BNSF to inform shippers about the new charges and respond to shippers' concerns about them, including offering to waive the charges in the first year to offset the cost of new track construction and offering to enter into transitional leases). In any event, it is not an abuse of market power for BNSF to seek to recover from private car suppliers the costs associated with storing those suppliers' empty private cars on its system; to the contrary, it is consistent with the individualized pricing principles advanced by Congress in the Staggers Act.

Blaming private shippers for congestion. Complainants contend that BNSF has wrongly singled out empty private cars as the cause of congestion on BNSF's system so that it might place the cost of creating additional infrastructure on private car owners.²³ They contend that BNSF has not shown that private empty cars are any part of the cause of inefficiencies or congestion on its system.²⁴

²¹ See Complainants' Reb. at 12-13, 31-32.

²² See id. at 39.

²³ See Complainants' Open. at 27-28.

²⁴ See Complainants' Reb. at 9, 18, 34. Complainants suggest that BNSF need not have retired 500 miles of track, which could have been used for holding empty private cars. See Complainants' Open. at 51. However, Complainants have not shown that any of the retired track, which it does not identify, would have been useful in reducing congestion through the storage of private cars. In any event, BNSF's retired track is irrelevant if private car shippers are

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Complainants wrongly assume that BNSF must justify the new practice of charging for empty private cars before imposing these charges. However, as discussed above, the burden of proving that the 2001 Charges are unreasonable is on Complainants. Moreover, the record indicates that, prior to the 2001 Charges, significant numbers of empty private cars were being stored on BNSF's tracks for extended periods of time. That there also were many railroad-controlled cars also sitting for long periods on BNSF's tracks does not mean that the railroad is foreclosed from taking steps to address the portion of the problem posed by private cars, by seeking to hold shippers accountable for the costs their cars impose.

Complainants assert that any efficiency gains in traffic or transport times since the charges were imposed in 2001 is merely a coincidence related more to larger economic events than to the 2001 Charges.²⁵ While Complainants' quantitative evidence may indicate that other factors also contribute to efficiency gains, it fails to establish that the positive impact of the 2001 Charges is not substantial.

BNSF submitted evidence showing that on April 30, 2001, there were 2,686 empty private cars sitting on BNSF's track that had been at the same location for more than 30 days, taking up over 31 miles of BNSF track space. A total of 1,572 of these empty private cars had been sitting on BNSF's track for over 100 days.²⁶ Moreover, in May 2001 empty private industrial cars sat on BNSF's track for an average of 2 days after constructive placement.²⁷ By contrast, in July 2005, the average was less than half a day. And in May 2001, empty private agricultural cars sat on BNSF's track for an average of one and one-third days, whereas in July 2005, the average was two-fifths of a day. Further, BNSF shows that billings for empty private cars sitting on its track beyond the allowed free period have dropped consistently every year since 2001 – from \$12.5 million in a six-month period in 2001, to \$11.2 million in 2002, to \$6.8 million in 2003, to \$4.7 million in 2004.²⁸ Indeed, Complainants admit that the 2001 Charges may well have “caused many shippers to endeavor to order empty private cars from BNSF track into shipper loading tracks more quickly than before the changes took effect”²⁹—the very effect the 2001 Charges were intended to produce.

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responsible to pay for the use of that track and are not willing to compensate BNSF for that use. See BNSF Reply at 53.

²⁵ See Complainants' Open. at 27-30; Complainants' Reb. at 21-30.

²⁶ See BNSF Reply, Langston V.S. at 5.

²⁷ See *id.*, Exhs. E & F.

²⁸ See *id.* at 15.

²⁹ Complainants' Open. at 30.

Complainants argue that the decreases in holding time and billings are due to leases of track space that private car owners are forced to enter, and further contend that those leases do not take the empty private cars off BNSF's system or help congestion.³⁰ BNSF responds that the leases are given in less congested areas and are compensatory.³¹ In any case, the fact that private car owners have purchased leases in less congested areas or built additional private track is evidence that the 2001 Charges are succeeding in moving empty private cars off BNSF track or, in the case of leases, compensating BNSF for holding them.³²

Forcing shippers to add infrastructure or extracting improper leases. Complainants contend that it is improper for BNSF to use the 2001 Charges to force shippers to add industrial track or obtain usurious leases from BNSF.³³ They argue that, because all shippers benefit from increased capacity, additional track should be paid for by BNSF, not private car owners. However, as discussed above, the cost of holding Complainants' empty private cars was being cross-subsidized by the line-haul ratepayers, and not the other way around. Thus, it is not improper for private car owners to be held responsible for the cost of holding their empty cars, and, likewise, encouraged to invest in private track or enter into leases to avoid the 2001 Charges.

Complainants claim that, because of these leases, BNSF's empty private car storage program does not fulfill the objectives of 49 U.S.C. 10746.³⁴ The objectives of section 10746 are improved "freight car use and distribution" and "maintenance of an adequate supply of freight cars." 49 U.S.C. 10746(1) & (2). The record shows that the 2001 Charges give incentives to private car owners to make more efficient use of their cars, which would meet the objectives of section 10746. Indeed, as noted, Complainants concede that those incentives may well have been effective in causing shippers to order in private cars more quickly than before. Nor is there any evidence that the 2001 Charges have made, or are likely to make, the freight car supply inadequate.

Complainants assert that the lease rates offered by BNSF for holding empty private cars are "inflated"³⁵ (and thus, by extension, BNSF's imposition of demurrage and storage charges

³⁰ See id. at 52; Complainants' Reb. at 28.

³¹ See BNSF Reply at 57.

³² Moreover, to the extent that BNSF employs so-called "floating" leases, they permit BNSF to move and store cars where they will cause the least disruption. See id., Langston V.S. at 25.

³³ See Complainants' Open. at 49-56.

³⁴ See id. at 54; Complainants' Reb. at 50-51.

³⁵ See Complainants' Open. at 52 & Exh. 8 at 8-10.

are unreasonable by virtue of compelling shippers to enter into such leases). But as BNSF points out,³⁶ Complainants incorrectly base this assertion on BNSF's daily storage rates, rather than its annual lease rates. BNSF shows that, using the correct figures, its track lease rates are less than the costs of building and maintaining storage tracks.³⁷ On rebuttal, Complainants take a different approach, asserting that the lease rates are excessive not in comparison to the cost of constructing new track, but rather in comparison to the average net book value of BNSF's yard and way track.³⁸ We may not consider this new argument, raised for the first time in rebuttal, because BNSF did not have the opportunity to address it.³⁹ We note, however, that this agency has traditionally viewed replacement cost as "conceptually the best method available" for asset valuation, Standards For Railroad Revenue Adequacy, 364 I.C.C. 803, 820 (1981), and Complainants accepted BNSF's storage construction cost in their original analysis.⁴⁰

Failing to provide relief for "erratic service." Complainants argue that, by not making adequate provisions for what they call "erratic service," referring primarily to service variability,⁴¹ BNSF has engaged in an unreasonable practice.⁴² BNSF responds that service variability is a necessary part of rail service to and from many shipper locations that cannot support scheduled unit-train service. According to BNSF, in any 1-month period, it serves as many as 15,000 separate origin-destination pairs, many of which are single-car or small block movements.⁴³ It claims that it is not unusual to have 50 different shippers represented in one train. Further, off-line movements add additional elements of limited control. In light of the complexity and variety of many private car movements, it would be inappropriate to hold that a railroad's tariffs are unlawful because they do not penalize the railroad for service variability unrelated to fault. See Capitol Materials, slip op. at 7 ("[G]iven the many variables outside a railroad's control that may affect delivery . . . a railroad cannot reasonably be expected always to be able to meet an ideal delivery timetable.").

³⁶ See BNSF Reply, Langston V.S. at 25, n.19.

³⁷ Id.

³⁸ Complainants' Reb., Exh. 16 at 10-11.

³⁹ See, e.g., SWKR Operating Co.—Abandonment Exemption—In Cochise County, AZ, In The Matter Of A Request To Set Terms And Conditions, STB Docket No. AB-441 (Sub-No. 2x), slip op. at 2 (STB served Nov. 12, 1997).

⁴⁰ See Complainants' Open., Exh. 8 at ¶27.

⁴¹ See Complainants' Open. at 19-23.

⁴² See id. at 56-60; Complainants' Reb. at 52-55.

⁴³ See BNSF Reply at 60-61.

Complainants suggest that “bunching” (deliveries not reasonably timed or spaced) by BNSF causes the complaining owners not to be able to receive their empty cars when made available for placement.⁴⁴ However, it is not unusual for average demurrage plans to exclude or limit relief for bunching, in light of the benefit of the averaging afforded under such plans.⁴⁵ See Capitol Materials, slip op. at 7. Moreover, Complainants do not make any specific claims of bunching.⁴⁶ Instead, they make a general claim of possible harm that is too vague to permit us to find an otherwise valid tariff unlawful.

While Complainants attribute congestion on the BNSF system to current service variability, they fail to address why the complaining shippers are not prepared to receive their empty cars before charges accrue. Complainants have the ability to track their cars, but they have not shown that they have done so. Even without tracking their cars, private agricultural hopper car owners are given an average of 2 days to accept their empty private cars without charge. And it is noteworthy that the vast majority of private car owners do not incur demurrage or storage charges.

The 2001 Charges have decreased the amount of time private cars are held on BNSF track, and there is no evidence to show that such a reduction will worsen service variability. To the contrary, the weight of the evidence suggests that it is likely to improve it. Accordingly, Complainants have shown no basis for us to find that the lack of a provision for service variability unrelated to fault constitutes an unreasonable practice or requires an adjustment to the free time allowed before charges accrue.⁴⁷

⁴⁴ See Complainants’ Open. at 57.

⁴⁵ BNSF’s straight private car storage program does allow for relief from bunching that occurs as a result of an act or neglect of BNSF. See id., Exh. 1 App. B-2 (BNSF Private Storage Book 6005 Item 3100C).

⁴⁶ The fact that a shipper might suffer hardship from a service failure at a particular location or particular locations does not warrant overturning the railroad’s entire storage or demurrage program, as there are other remedies available for that situation. See, e.g., Dana Corporation, 703 F.2d at 1305 (shippers permitted “to show that, in particular instances, the idle-time for which charges are assessed is attributable to the fault of the carriers”).

⁴⁷ Historically, demurrage disputes before the Board have been rare because the railroad and shipper tend to work out the specific issues that arise in a movement. See Capitol Materials, slip op. at 2. If the parties cannot work out their dispute, then this agency is available to hear their complaints. Id.; see also, e.g., The Prince Manufacturing Co. v. Norfolk and Western Ry., 356 I.C.C. 702 (1978). Here, however, Complainants wish to eliminate the charges altogether.

Car Service Claims.

In what is essentially another way of packaging their unreasonable practice claim, Complainants seek to have BNSF's demurrage and storage tariffs partially struck down or modified on the ground that they violate BNSF's car service obligations under 49 U.S.C. 11121(a). They claim that the 2001 Charges will curb car supplies by reducing the number of private cars and therefore the number of overall freight cars available. But the size of the future private car fleet—which we cannot predict—will depend on a variety of factors that will be taken into consideration in the business decisions of both railroads and shippers. As there is nothing inherently wrong with a carrier's determination to assess charges when private parties use its track longer than necessary, there is no basis for finding that the practice, by itself, violates BNSF's car service obligations. We review the Complainants' specific car service arguments below.

Complainants contend that BNSF unfairly discriminates by treating empty private agriculture covered hopper cars more harshly than other types of cars that are subject to different holding charges.⁴⁸ But as BNSF points out, the agricultural hopper fleet consists of a mix of private and railroad-owned cars, and private agricultural hopper cars were included under the demurrage tariff so that private and railroad-owned cars of that type would be covered under the same set of rules — an approach that is not unreasonable. Complainants have not shown that BNSF's average demurrage plan, which applies to covered agricultural hoppers, is inherently more harsh than its straight storage plan. In comparing the \$50 per-net-debit charge under the average demurrage plan and the \$10-15-25 tiered levels of daily storage charges for tank cars and other non-agricultural cars under the straight storage plan, Complainants ignore the benefit of averaging available under the former but not the latter. While under the straight storage plan every car that sits beyond the permitted free time will accrue the applicable daily charge regardless of how quickly other cars are loaded, under the average plan debits that accrue for a car that sits longer than its 2 “credit” days can be offset against credits accrued by other cars that are loaded quickly, so shippers that move their cars efficiently can do well under an average plan. In any case, Complainants have not shown that applying different programs (neither of which has been shown to be inherently more harsh than the other) to different types of cars in different service carrying different commodities and thus potentially subject to different market forces, is unreasonable.

Complainants argue that they should be able to choose between an average plan and a straight plan, citing Field Container Corp. v. ICC, 712 F.2d 250 (7th Cir. 1983).⁴⁹ There, the court was interpreting the system of nationwide, collectively set demurrage and storage charges then in place. Field Container Corp. did not hold that, to be reasonable, a demurrage or storage program must offer shippers a choice between an average plan and a straight plan. Thereafter, the ICC allowed carriers to establish individualized demurrage and storage programs based on

⁴⁸ See Complainants' Open. at 60-62; Complainants' Reb. at 56-58.

⁴⁹ Complainants' Open. at 57-58.

market forces. Railroads Per Diem, Mileage, Demurrage and Storage Agreement, 1 I.C.C.2d 924 (1985).

Complainants also contend that free time provisions in both BNSF's demurrage and storage tariffs unreasonably favor railroad-supplied cars over private cars.⁵⁰ But the cars typically move in transportation under different circumstances (e.g., railroad-owned cars in the "C" pool designation may be moved by the railroad to limit congestion). When they move under similar circumstances (e.g., railroad-owned cars that are assigned to a shipper for its exclusive use), the railroad-owned cars are treated no more favorably than private cars.⁵¹

Compensation Under Section 10745.

Finally, Complainants claim that it is a violation of 49 U.S.C. 10745 for BNSF not to compensate shippers when they build or lease track to hold their own empty private cars.⁵² However, shippers that lease storage track from the railroad are not providing any service or instrumentality of transportation, but rather compensating the railroad for the use of the railroad's track. We are unpersuaded by Complainants' assertion that, to the extent shippers decide to construct their own additional private storage track in order to avoid paying the 2001 Charges, BNSF must compensate them under section 10745 for the cost of constructing and maintaining that track. To be sure, a shipper's expansion of its own car storage capacity provides a benefit to the carrier (or carriers) serving that shipper, by keeping cars not presently needed for the carriage of freight off the carrier's system.⁵³ But not all shipper actions resulting in a benefit to the carrier are compensable under section 10745. See Lehigh Valley R.R. v. United States, 243 U.S. 444, 446-47 (1917). A shipper constructing its own storage space for storage of its own idle cars is not furnishing a rail carrier an instrumentality used in the transportation of freight, nor is it providing a service related to such transportation. See 49 U.S.C. 10102(9)(B) (identifying, as within the meaning of "transportation," services including storage of goods being shipped, but not storage of rail cars). Rather, it is assuming, as it should, a cost associated with the fleet-sizing decisions that the shipper itself has made.

⁵⁰ See Complainants' Open. at 62-66; Complainants' Reb. at 58-62.

⁵¹ See BNSF Reply at 68-75.

⁵² See Complainants' Open. at 66-69; Complainants' Reb. at 64-65.

⁵³ Indeed, BNSF acknowledges that the 2001 Charges were intended to motivate shippers to increase their private storage capacities.

Amicus Brief.

In their joint amicus brief,⁵⁴ NITL and ACC express concern that unfair or discriminatory rules could create systematic inefficiencies and a hostile environment toward private freight cars, leading to a loss of shipper investment in additional freight cars, as well as monopoly pricing or services. They set forth four “principles” that they suggest the Board consider in assessing the issues in this case: (1) that the rules and practices of the rail industry should not unreasonably discriminate between private and railroad equipment; (2) that the rules applicable to different types of equipment should be reasonably consistent; (3) that owners of private equipment should not be penalized for the railroads’ service failures; and (4) that the level of storage or demurrage charges should “fit” the congestion problem at which it is aimed.⁵⁵ BNSF does not object to these principles. Rather, it maintains that the 2001 Charges meet each one of them. As discussed above, the 2001 Charges are not improper, they have not been applied inconsistently between like equipment under similar circumstances, and they reasonably meet their objectives by compensating the carrier for holding empty private cars and by encouraging the efficient movement of empty private cars. The record shows that the 2001 Charges are likely to improve efficiencies or compensate BNSF for use of its track. Moreover, there are sufficient remedies available to protect individual shippers from harm incurred due to the fault of the railroad.

CONCLUSION

Complainants have failed to prove any of their claims. Therefore, there can be no damages or reparations awarded to the Complainants.

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

It is ordered:

1. The amended complaint is denied.
2. This decision is effective on January 25, 2007.

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

Vernon A. Williams
Secretary

⁵⁴ NITL and ACC changed their status from intervenors in support of Complainants to amici in order to resolve certain discovery disputes with BNSF.

⁵⁵ See NITL-ACC Br. at 6-8.