

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
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June 15, 2016
Part of
Public Record

American Fuel & Petrochemical)	
Manufacturers,)	
)	
Complainant,)	
)	
v.)	Docket No. 42146
)	
BNSF Railway Company,)	
)	
Defendant.)	
)	

BNSF RAILWAY COMPANY’S ANSWER TO FIRST AMENDED COMPLAINT

BNSF Railway Company (“BNSF”) hereby answers the First Amended Complaint filed by American Fuel & Petrochemical Manufacturers (“AFPM”) in this proceeding. BNSF responds to the allegations in each separately numbered paragraph of the First Amended Complaint as follows:

Unnumbered paragraph on page 1: BNSF admits, on information and belief, that AFPM has an address as specified in the first sentence. BNSF admits that BNSF has an address as specified in the first sentence and that the First Amended Complaint purports to be filed by AFPM against BNSF. The second sentence states legal conclusions to which no response is required. Nevertheless, BNSF denies any allegation that BNSF engaged in any practice in violation of 49 U.S.C. §§ 10702, 11101, or 11704. The third sentence contains no allegations and requires no response.

1. BNSF admits, on information and belief, the allegations contained in the first sentence of Paragraph 1. BNSF denies the allegations contained in the second sentence of Paragraph 1 because it lacks knowledge or information sufficient to form a belief as to their

truth. The allegations contained in the third sentence of Paragraph 1 are vague and ambiguous and BNSF therefore denies them.

2. BNSF admits the allegations of the first sentence of Paragraph 2. The second sentence of Paragraph 2 states legal conclusions to which no response is required. With respect to the third sentence of Paragraph 2, BNSF admits only that BNSF provides transportation of crude oil and that such transportation has in the past been provided in general purpose DOT 111 tank cars. The remaining allegations in the third sentence of Paragraph 2 are vague and ambiguous and BNSF therefore denies them.

3. BNSF denies the allegations of the first sentence of Paragraph 3. The remainder of Paragraph 3 states legal conclusions to which no response is required.

4. Paragraph 4 states legal conclusions to which no response is required.

5. With respect to the first sentence of Paragraph 5, BNSF admits only that general purpose DOT 111 tank cars have sometimes in the past been used to transport crude oil on the BNSF network and that they are sometimes referred to as unjacketed DOT 111 tank cars. The remaining allegations in the first sentence of Paragraph 5 are vague and ambiguous and BNSF therefore denies them. With respect to the second sentence of Paragraph 5, BNSF admits only that the Association of American Railroads filed joint comments with the American Petroleum Institute at PHMSA, dated September 30, 2014, that contained a Table reporting that, in 2013, there were 22,930 general purpose DOT 111 tank cars in crude oil service, that there would be an anticipated total of 80,541 tank cars in crude oil service in 2015, and that 22,930 is 28.4% of 80,541.

6. With respect to the first sentence of Paragraph 6, BNSF admits that it is one of the largest freight railways in the United States and that it is a common carrier, but denies that it

provides services “throughout the United States.” With respect to the second sentence of Paragraph 6, BNSF admits only that BNSF offers service in 28 U.S. states and that BNSF was the product of nearly 400 different railroad lines that merged or were acquired over the course of 160 years. BNSF otherwise denies the allegations contained in the second sentence of Paragraph 6. BNSF denies the allegations contained in the third and fourth sentences of Paragraph 6.

7. BNSF denies the allegations contained in Paragraph 7 because it lacks knowledge or information sufficient to form a belief as to their truth.

8. BNSF denies the allegations contained in Paragraph 8.

9. BNSF denies the allegations contained in the first and second sentences of Paragraph 9. With respect to the third sentence of Paragraph 9, BNSF admits only that the price contained in BNSF Price Authority 90188, Amendment/Rev: 20, is \$1,000 dollars more for each origin/destination pair and route when transportation occurs in general purpose DOT 111 tank cars than when transportation occurs in other tank cars as indicated by the pricing authority. BNSF otherwise denies the allegations contained in the third sentence of Paragraph 9. BNSF denies the allegations contained in the fourth sentence of Paragraph 9. Sentence five of Paragraph 9 states legal conclusions to which no response is required.

10. With respect to Paragraph 10, BNSF admits only that the quotation from 79 Fed. Reg. 45,015, 45,025 is accurately transcribed. The remainder of Paragraph 10 states legal conclusions to which no response is required.

11. Paragraph 11 states legal conclusions to which no response is required.

12. With respect to the first and second sentences of Paragraph 12, BNSF admits only that the price contained in BNSF Price Authority 90188, Amendment/Rev: 20, is \$1,000 dollars more for each origin/destination pair and route when transportation occurs in general purpose

DOT 111 tank cars than when transportation occurs in other tank cars as indicated by the pricing authority. BNSF otherwise denies the allegations contained in the first and second sentences of Paragraph 12. BNSF denies the allegations contained in the third and fourth sentences of Paragraph 12.

13. BNSF denies the allegations contained in the first and second sentences of Paragraph 13. With respect to the third sentence of Paragraph 13, BNSF admits only that the March 19, 2014 meeting notes attached to the First Amended Complaint as Exhibit B generally reflect the subject matter of the discussion at the meeting, but specifically denies that the meeting notes represent, or claim to represent, a verbatim transcription of statements made by representatives of BNSF. BNSF otherwise denies the allegations contained in the third sentence of Paragraph 13. The fourth sentence of Paragraph 13 is a citation to which no response is required. BNSF denies the allegations contained in the fifth sentence of Paragraph 13. BNSF denies the allegations contained in the sixth sentence of Paragraph 13 because it lacks knowledge or information sufficient to form a belief as to their truth. BNSF denies the allegations contained in the seventh sentence of Paragraph 13.

14. BNSF denies the allegations contained in the first sentence of Paragraph 14. With respect to the second sentence of Paragraph 14, BNSF admits only that the Final Rule had an effective date of July 7, 2015, and that the FAST Act, which became Public Law No. 114-94 on December 4, 2015, superseded a number of provisions of the Final Rule. BNSF otherwise denies the allegations contained in the second sentence of Paragraph 14. BNSF denies the allegations contained in the third sentence of Paragraph 14.

15. BNSF denies the allegations contained in Paragraph 15.

16. BNSF denies the allegations contained in the first sentence of Paragraph 16. The second sentence of Paragraph 16 states legal conclusions to which no response is required. With respect to the third sentence of Paragraph 16, BNSF admits only that AFPM, AAR, and other interested parties filed comments with PHMSA in connection with the proceedings that culminated in the Final Rule, but otherwise denies the allegations contained in the third sentence of paragraph 16. BNSF denies the allegations contained in the fourth sentence of Paragraph 16. The fifth sentence of Paragraph 16 is a citation to which no response is required. BNSF denies the allegations contained in the sixth sentence of Paragraph 16.

17. BNSF denies the allegations contained in the first sentence of Paragraph 17 because it lacks knowledge or information sufficient to form a belief as to their truth. BNSF denies the allegations contained in the second sentence of Paragraph 17 on the grounds that the arithmetic is inaccurate. With respect to the third sentence of Paragraph 17, BNSF admits that BNSF Price Authority 90188, Amendment/Rev: 20, and subsequent revisions, applies or applied to shipments of crude oil in general purpose DOT 111 tank cars, but otherwise denies the allegations contained in the third sentence of Paragraph 17.

18. Paragraph 18 states legal conclusions to which no response is required. Nevertheless, BNSF denies that it breached any common carrier duty or its obligations under 49 U.S.C. §§ 11101 or 11704.

19. Paragraph 19 states legal conclusions to which no response is required. Nevertheless, BNSF denies that it engaged in any unreasonable practice or otherwise violated 49 U.S.C. § 10702.

20. Paragraph 20 purports to incorporate and re-allege all prior paragraphs of the First Amended Complaint. In response to Paragraph 20, BNSF incorporates as though fully set forth herein its responses to Paragraphs 1 through 19 and the unnumbered paragraph on page 1.

21. BNSF admits that, except for the use of italics for certain language, Paragraph 21 contains an accurate transcription of a portion of the current version of 49 C.F.R. § 171.1.

22. Paragraph 22 states legal conclusions to which no response is required.

23. With respect to Paragraph 23, BNSF admits only that the quotation from 79 Fed. Reg. at 45,025 is accurately transcribed. The remainder of Paragraph 23 consists of either legal conclusions or citations to which no response is required.

24. With respect to Paragraph 24, BNSF admits that the quotations from 49 C.F.R. §§ 173.3(a) and 173.31(a) are accurately transcribed. The remainder of Paragraph 24 consists of legal conclusions to which no response is required.

25. Paragraph 25 states legal conclusions to which no response is required. Nevertheless, BNSF denies that it has violated its common carrier obligation.

26. Paragraph 26 states legal conclusions to which no response is required. Nevertheless, BNSF denies that it has violated its common carrier obligation.

27. Paragraph 27 purports to incorporate and re-allege all prior paragraphs of the First Amended Complaint. In response to Paragraph 27, BNSF incorporates as though fully set forth herein its responses to Paragraphs 1 through 26 and the unnumbered paragraph on page 1.

28. Paragraph 28 states legal conclusions to which no response is required.

29. With respect to the first and second sentences of Paragraph 29, BNSF admits only that the price contained in BNSF Price Authority 90188, Amendment/Rev: 20, is \$1,000 dollars more for each origin/destination pair and route when transportation occurs in general purpose

DOT 111 tank cars than when transportation occurs in other tank cars as indicated by the pricing authority. BNSF otherwise denies the allegations contained in the first and second sentences of Paragraph 29. The third sentence of Paragraph 29 states legal conclusions to which no response is required. Nevertheless, BNSF denies that it has engaged in an unreasonable practice in violation of 49 U.S.C. § 10702.

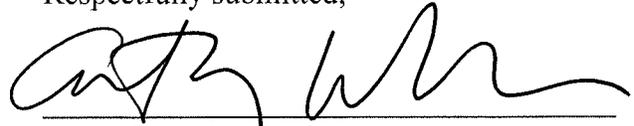
Prayer for Relief on pages 10-11 of First Amended Complaint: BNSF denies that AFPM is entitled to any relief.

DEFENSES

1. The First Amended Complaint fails to state a claim that BNSF violated its common carrier obligation.
2. The First Amended Complaint fails to state a claim that BNSF has engaged in an unreasonable practice in violation of 49 U.S.C. § 10702.
3. The First Amended Complaint challenges the legality of a rail rate established by BNSF but fails to allege market dominance over the transportation at issue, a statutory prerequisite to a rate challenge, and otherwise fails to comply with the pleading requirements for a rate challenge under 49 U.S.C. §§ 10701, 10707.
4. The First Amended Complaint fails to state a claim and is moot because its allegations depend on supposed interference by BNSF with PHMSA's regulation of transportation of crude oil in general purpose DOT 111 tank cars when the pertinent PHMSA regulations have been superseded by statute.
5. AFPM is precluded from pursuing its allegations as anything but a challenge to the reasonableness of BNSF rates by the doctrines of *res judicata* and/or collateral estoppel.

6. The relief sought in the First Amended Complaint is unavailable, as it conflicts with BNSF's statutory right to set a rate or rates it elects on its own initiative.

Respectfully submitted,



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Certificate of Service

I hereby certify that on this 15th day of June, 2016, I have served a copy of BNSF

Railway Company's Answer on the following by email:

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