

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. BNSF notes that the deadlines referred to in Paragraph 10 were superseded by section 7304 of the FAST Act, which became Public Law No. 114-94 on December 4, 2015.

11. With respect to the first and second sentences of Paragraph 11, 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 11. BNSF denies the allegations contained in the third and fourth sentences of Paragraph 11.

12. BNSF denies the allegations contained in the first and second sentences of Paragraph 12. With respect to the third sentence of Paragraph 12, BNSF admits only that the March 19, 2014 meeting notes attached to the 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 12. The fourth sentence of Paragraph 12 is a citation to which no response is required. BNSF denies the allegations contained in the fifth sentence of Paragraph 12. BNSF denies the allegations contained in the sixth sentence of Paragraph 12 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 12.

13. BNSF denies the allegations contained in the first sentence of Paragraph 13. With respect to the second sentence of Paragraph 13, BNSF admits only that the Final Rule had an effective date of July 7, 2015. BNSF notes that a number of provisions of the Final Rule were superseded by the FAST Act, which became Public Law No. 114-94 on December 4, 2015. With respect to the third sentence of Paragraph 13, BNSF admits only that the Final Rule did not address how railroads charge for transportation. BNSF notes that PHMSA does not have and has

not asserted jurisdiction to regulate railroad rates. BNSF denies the allegations contained in the fourth sentence of Paragraph 13.

14. BNSF denies the allegations contained in Paragraph 14.

15. BNSF denies the allegations contained in the first sentence of Paragraph 15. The second sentence of Paragraph 15 states legal conclusions to which no response is required. With respect to the third sentence of Paragraph 15, 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 15. BNSF denies the allegations contained in the fourth sentence of Paragraph 15. The fifth sentence of Paragraph 15 is a citation to which no response is required. BNSF denies the allegations contained in the sixth sentence of Paragraph 15.

16. BNSF denies the allegations contained in the first sentence of Paragraph 16 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 16 on the grounds that the arithmetic is inaccurate. With respect to the third sentence of Paragraph 16, 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 16.

17. Paragraph 17 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.

18. Paragraph 18 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.

19. Paragraph 19 purports to incorporate and re-allege all prior paragraphs of the Complaint. In response to Paragraph 19, BNSF incorporates as though fully set forth herein its responses to Paragraphs 1 through 18 and the unnumbered paragraph on page 1.

20. BNSF admits that, except for the use of italics for certain language, Paragraph 20 contains an accurate transcription of a portion of the current version of 49 C.F.R. § 171.1.

21. Paragraph 21 states legal conclusions to which no response is required.

22. With respect to Paragraph 22, BNSF admits only that the quotation from 79 Fed. Reg. at 45,025 is accurately transcribed. The remainder of Paragraph 22 consists of either legal conclusions or citations to which no response is required. BNSF notes that the deadlines referred to in Paragraph 22 were superseded by section 7304 of the FAST Act, which became Public Law No. 114-94 on December 4, 2015.

23. With respect to Paragraph 23, BNSF admits that the quotations from 49 C.F.R. §§ 173.3(a) and 173.31(a) are accurately transcribed, except that the first quotation omits “or water” after rail. The remainder of Paragraph 23 consists of legal conclusions to which no response is required.

24. Paragraph 24 states legal conclusions to which no response is required. Nevertheless, BNSF denies that it has violated its common carrier obligation.

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 purports to incorporate and re-allege all prior paragraphs of the Complaint. In response to Paragraph 26, BNSF incorporates as though fully set forth herein its responses to Paragraphs 1 through 25 and the unnumbered paragraph on page 1.

27. Paragraph 27 states legal conclusions to which no response is required.

28. With respect to the first and second sentences of Paragraph 28, 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 28. The third sentence of Paragraph 28 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 page 10 of Complaint: BNSF denies that AFPM is entitled to any relief.

DEFENSES

1. The Complaint fails to state a claim that BNSF violated its common carrier obligation.

2. The Complaint fails to state a claim that BNSF has engaged in an unreasonable practice in violation of 49 U.S.C. § 10702.

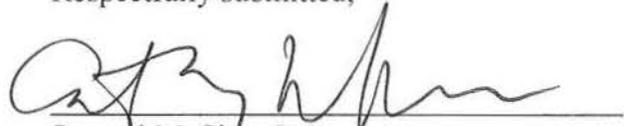
3. The Complaint challenges the legality of a rail rate established by BNSF but fails to allege market dominance over the transportation at issue, a statutory prerequisite to a rate challenge, and otherwise fails to comply with the pleading requirements for a rate challenge under 49 U.S.C. §§ 10701, 10707.

4. The 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 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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ATTORNEYS FOR
BNSF RAILWAY COMPANY

May 16, 2016

Certificate of Service

I hereby certify that on this 16th day of May, 2016, I have served a copy of BNSF

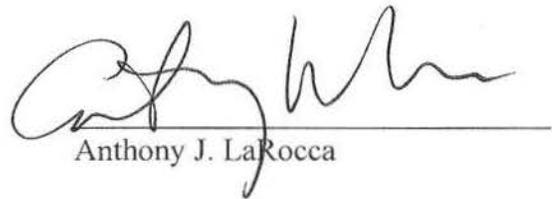
Railway Company's Answer on the following by the specified form of service:

By hand-delivery and email:

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