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October 29, 2002

BY HAND-DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

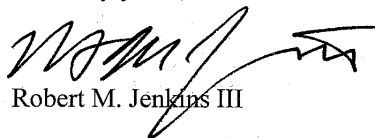
Re: Docket No. 42060, North American Freight Car Association – Protest and Petition for Investigation – Tariff Publications of The Burlington Northern and Santa Fe Railway Company

Dear Secretary Williams:

Please find enclosed for filing an original and ten (10) copies of The Burlington Northern and Santa Fe Railway Company's "Reply to North America Freight Car Association's Petition for Clarification and, Alternatively for Reconsideration; and for Resumption of Processing."

Please date-stamp the enclosed extra copy of the Reply and return it to our representative. Also enclosed is a diskette containing the Reply in electronic format.

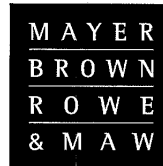
Sincerely yours,


Robert M. Jenkins III

RMJ/bs

Enclosures

cc: All Parties of Record



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206512

BEFORE THE
SURFACE TRANSPORTATION BOARD



DOCKET No. 42060

NORTH AMERICA FREIGHT CAR ASSOCIATION – PROTEST
AND PETITION FOR INVESTIGATION – TARIFF PUBLICATIONS
OF THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

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**REPLY TO NORTH AMERICA FREIGHT CAR ASSOCIATION'S
"PETITION FOR CLARIFICATION AND, ALTERNATIVELY, FOR
RECONSIDERATION; AND FOR RESUMPTION OF PROCESSING"**

The Burlington Northern and Santa Fe Railway Company ("BNSF") replies here to the "Petition for Clarification and, Alternatively, for Reconsideration; and for Resumption of Processing," which North America Freight Car Association ("NAFCA") filed with the Board on October 9, 2002.¹

Preface and Summary of Argument

In its Petition, NAFCA seeks clarification or reconsideration of the Board's Decision served October 18, 2001 ("October 18 Decision"), which required the parties to this and other related proceedings to negotiate concerning the tank car allowance agreement ("Ex Parte 328 Agreement") approved in Ex Parte No. 328, *Investigation of Tank Car Allowance System*, 3 I.C.C.2d 196 (1986). Oct. 9 Pet. at 10. NAFCA also asks the Board to bypass BNSF's Motion to Dismiss NAFCA's Protest and Petition for

¹ The National Industrial Transportation League ("NITL") and the American Chemistry Council ("ACA") joined in NAFCA's filing.

Investigation, which BNSF filed on July 16, 2001, and to proceed with an investigation into whether BNSF's storage and demurrage charges on empty private cars constitute "departure tariffs" within the meaning of the Ex Parte 328 Agreement. Oct. 9 Pet. at 11. Finally, NAFCA asks the Board to consolidate this proceeding with the proceedings in Docket No. 42060 (Sub-No. 1) and to provide for six months of discovery, including depositions, in the combined proceedings. Oct. 9 Pet. at 19.

Regarding NAFCA's request that the Board clarify or reconsider its October 18 Decision, BNSF believes there is no need now for industry negotiations under the Ex Parte 328 Agreement. The Board's October 18 Decision had the salutary effect of encouraging most of the parties that had filed cases against BNSF and the Union Pacific Railroad ("UP") to settle those cases, while leaving BNSF's and UP's demurrage and storage charges in place. Only NAFCA's Protest and Petition for Investigation is left under Ex Parte 328, and it is readily disposed of as a matter of law.

NAFCA suggests in its October 9 Petition that the Board should bypass BNSF's pending Motion to Dismiss and institute an investigation here, because the Board's predecessor, the Interstate Commerce Commission ("ICC"), instituted an investigation when confronted a decade ago with claims that charges for movements of empty tank cars to repair facilities constituted "departure tariffs" within the meaning of Section 8 of the Ex Parte 328 Agreement. Oct. 9 Pet. at 11, *citing Charges for Movement of Empty Cars, Buffalo and Pittsburgh R.R., Inc.*, 7 I.C.C.2d 18 (1990) ("*Buffalo and Pittsburgh*"). Far from supporting NAFCA's position, however, the ICC's decision in *Buffalo and Pittsburgh* demonstrates why NAFCA's Protest and Petition for Investigation should be dismissed, pursuant to 49 U.S.C. § 11701(b), for failure to state reasonable grounds for

investigation and action. The ICC determined in that case that, by its express terms, Section 8 applied only to tariffs that “depart[] in any way from the *allowance system prescribed herein*.” 7 I.C.C.2d at 24 (emphasis in original). Independent railroad tariffs that might have an impact on private car owners’ costs, but that are not addressed in the Agreement, are not “departure tariffs.”² Particularly in light of the ICC’s clear legal holding in *Buffalo and Pittsburgh*, there are no reasonable grounds for the Board to institute an investigation under Section 8 into independent demurrage, storage, or diversion charges on empty private cars that are nowhere addressed, much less prohibited, in the Ex Parte 328 Agreement.

NAFCA’s request that the Board consolidate this docket with the proceedings in Docket No. 42060 (Sub-No. 1) and provide for six months of discovery, including depositions, only underscores the wisdom of disposing of NAFCA’s protest in this case now, as a matter of law. In the first place, the issue of whether BNSF’s demurrage and storage charges constitute “departure tariffs” under the Ex Parte 328 Agreement has nothing to do with whether such charges constitute “unreasonable practices” or otherwise violate the ICC Termination Act. The ICC in *Buffalo and Pittsburgh* properly rejected efforts to confuse the limited “departure tariff” question under Section 8 with

² The only provision of the Ex Parte 328 Agreement that even arguably addresses storage charges on empty (or loaded) private cars is Section 5 of the Agreement, which prescribes holding charges for empty private cars held on railroad tracks outside repair facilities. The Railway Progress Institute Committee on Tank Cars (“RPI”), which represents the largest private tank car owners in the country, protested BNSF’s and UP’s storage tariffs solely on the ground that those tariffs would constitute “departure tariffs” if they supplanted the prescribed holding charges in the narrow circumstances covered by Section 5. BNSF and UP published exceptions to their tariffs to conform their charges to the provisions of Section 5 where cars were being held outside repair facilities, and RPI withdrew its protests.

statutory challenges that might be attempted against a railroad's charges, 7 I.C.C.2d at 28-29, and the Board too should reject such efforts.

In the second place, it is pointless to conduct discovery, as NAFCA suggests it wants to do, into what different parties' intentions may have been in negotiating the Ex Parte 328 Agreement in 1983-86. The ICC has already found that there is no ambiguity in the plain language of that Agreement, 7 I.C.C.2d at 25-27. Whatever individual parties may have wanted outside "the four corners of the agreement," *id.* at 25, is irrelevant.

Finally, NAFCA's effort to prolong this case stands in marked contrast to the actions of other tank car owner interests that had concerns about BNSF's tariffs. All others that filed their own cases under the Ex Parte 328 Agreement have withdrawn them. NAFCA is certainly entitled to a ruling by the Board on the legal sufficiency of its Protest, which the Board can provide expeditiously by ruling on BNSF's Motion to Dismiss. NAFCA should not be permitted, however, to use the mere fact of having filed a Protest, which fails to state reasonable grounds for investigation, to burden BNSF and the Board with pointless discovery and evidentiary proceedings.

Background

NAFCA filed its Protest and Petition for Investigation in this proceeding on June 26, 2001. NAFCA claimed that BNSF's newly published changes to its Private Car Storage Book 6005 and Diversion Book 6200-A, which applied storage and diversion charges to empty private cars, including tank cars, constituted unauthorized "departures" from the Ex Parte 328 Agreement. BNSF timely filed a Motion to Dismiss on July 16, 2001. Citing the *Buffalo & Pittsburgh* decision, BNSF argued that the law

was clear that only tariffs that violated the express provisions of the tank car allowance scheme set forth in the Ex Parte 328 Agreement could constitute “departure tariffs” under that Agreement and that, on their face, neither its storage nor its diversion charges conflicted with any of the provisions of the Agreement. Accordingly, pursuant to 49 U.S.C. § 11701(b), BNSF requested that the Board dismiss NAFA’s case for failure to state reasonable grounds for investigation and action.

UP had also published its own storage charges applicable to empty private cars, and NAFA’s case against BNSF was one of several cases that were filed by tank car interests against BNSF and UP claiming that their changes to their storage and diversion tariffs constituted unauthorized “departure tariffs.”³ The Board in its October 18, 2001 Decision ordered the proceedings in all of those cases held in abeyance while the railroads and tank car owners negotiated their disputes in accordance with the Ex Parte 328 Agreement. In response to the Board’s Decision, the parties determined that it would be preferable for them to attempt to settle their disputes in the individual cases before engaging in industry-wide negotiations. They filed a joint motion asking the Board to hold its October 18 Decision in abeyance pending those negotiations. The

³ STB Docket No. 42060, North America Freight Car Association—Protest and Petition for Investigation—Tariff Publications of The Burlington Northern and Santa Fe Railway Company (the U.S. Clay Producers, the Chlorine Institute, NITL, BP Corporation North America, E.I. DuPont, and CPC-Diversified International all filed petitions to participate in the proceeding); STB Docket No. 42061, Railway Progress Institute Committee on Tank Cars Petition for Investigation and Protest Pursuant to Ex Parte No. 328 (the U.S. Clay Producers, the Chlorine Institute, NITL, BP Corporation North America, and E.I. DuPont all filed petitions to participate in the proceeding); STB Docket No. 42062, The Chlorine Institute, Inc.—Protest and Petition for Investigation—Tariff Publications of Union Pacific Railroad Company; STB Docket No. 42063, Railway Progress Institute Committee on Tank Cars Petition for Investigation and Protest Pursuant to Ex Parte No. 328 (NITL filed a petition to participate in the proceeding); STB Docket No. 42064, E.I. DuPont de Nemours and Company—Protest and Petition for Investigation (NITL and NAFA filed petitions to participate in the proceeding).

Board granted that motion, and also granted subsequent requests for extensions of time to continue the settlement process.⁴

BNSF held discussions not only with the parties and intervenors in the cases that had been brought before the Board, but also with other shippers and car owners that had concerns about the application of BNSF's demurrage and storage charges in their particular circumstances. BNSF reached settlement agreements with the Railway Progress Institute's Committee on Tank Cars ("RPI"), the Chlorine Institute, the U.S. Clay Producers, BP Corporation North America Inc., and Diversified CPC International, and they withdrew their petitions or interventions.⁵ In Statements filed with the Board, several parties recognized that BNSF and UP must be allowed to set tariffs as necessary to address congestion on their systems, so long as they were prepared to discuss, and, if possible, reach agreement with individual shippers concerning their needs at specific locations.⁶ BNSF agreed to establish a process for such discussions,

⁴ See Board decisions served November 20, 2001, January 8, 2002, February 20, 2002, March 20, 2002, April 12, 2002, and May 29, 2002 in STB Docket Nos. 42060, 42061, 42062, 42063, and 42064.

⁵ 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. (Served March 20, 2002); 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. (Served April 12, 2002); 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. (Served May 29, 2002).

⁶ Joint Statement of the Chlorine Institute and The Burlington Northern and Santa Fe Railway Company, 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 Feb. 26, 2002); Notice of Settlement and Withdrawal of Petition to Intervene by U.S. Clay Producers Traffic Association, North America Freight Car Association—Protest and Petition for Investigation—Tariff

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and did so. It entered into numerous agreements with shippers regarding individual locations. Where they wished to construct their own tracks to hold their cars, BNSF announced its willingness to enter into agreements to share the cost of such construction by agreeing not to collect storage charges for a stated period in order to encourage them to do so. BNSF also leased track to shippers to hold their cars and thereby avoid storage fees.⁷

UP independently negotiated with parties and intervenors concerned about UP's tariffs and reached settlements regarding those tariffs.⁸ Significantly, neither UP's nor BNSF's settlements resulted in any significant amendments to their tariffs.

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Publications of The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42060, et al. (filed May 20, 2002); Statement of Diversified CPC International, Inc. 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 May 23, 2002); and Joint Statement of the Chlorine Institute and the Union Pacific Railroad Company, The Chlorine Institute, Inc.—Protest and Petition for Investigation—Tariff Publications of Union Pacific Railroad Company, STB Docket No. 42062 (filed April 2, 2002).

⁷ As noted earlier (see footnote 2, *supra*), BNSF and UP also agreed with RPI to publish notes to their storage tariffs to except private tank cars held outside repair facilities from those tariffs.

⁸ Joint Statement of the Chlorine Institute and the Union Pacific Railroad Company, The Chlorine Institute, Inc.—Protest and Petition for Investigation—Tariff Publications of Union Pacific Railroad Company, STB Docket No. 42062 (filed April 2, 2002); Notice of Settlement and Withdrawal of Petition for Investigation by Railway Progress Institute Committee on Tank Cars, Railway Progress Institute Committee on Tank Cars Petition for Investigation and Protest Pursuant to Ex Parte No. 328, STB Docket No. 42061 (filed May 2, 2002); Letters from Frederick L. Wood, Attorney for E.I. du Pont de Nemours and Company (dated August 5, 2002) and Andrew P. Goldstein, Attorney for North America Freight Car Association (dated August 14, 2002) to Vernon A. Williams, Secretary of the Surface Transportation Board, concerning settlements in Docket No. 42064.

While BNSF was not required by its settlements to withdraw or significantly amend its tariffs, BNSF did listen carefully to the concerns expressed by shippers, and on April 1, 2002, BNSF made some changes to fine-tune its storage charge program:

- BNSF established a three-tier rate structure for storage charges, depending on geography and operational constraints. The charge of \$25 per car for cars held beyond the 48-hour free period was retained at locations where track congestion is likeliest, but reduced to \$15 per day at locations where it is less likely, and \$10 per day where it is least likely. See Item 1800B, BNSF Private Car Storage Book 6005.
- BNSF revised its diversion tariff to allow one free diversion on empty private cars. See BNSF Diversion Book 6200-A. Previously, no free diversions on empty private cars had been allowed.
- BNSF revised its storage tariff to provide one credit day for empty private cars if the car is loaded and shipped via BNSF revenue line-haul. See Item 1700, BNSF Private Car Storage Book 6005.
- BNSF revised its switching tariff to waive the \$300 intra-terminal switch charge for cars ordered, placed, and subsequently cancelled (except for grain and grain products). See Item 140, BNSF Switching Book 8005-A.
- BNSF reinstated its \$75 per day storage charge for loaded private equipment. See Item 1700, BNSF Private Car Storage Book 6005.

Despite its tariff refinements and its considerable success in settling with most organizations and with individual shippers, BNSF was unable to reach agreement with NAFCA.⁹ In its October 9, 2002 Petition, NAFCA recognized that BNSF had amended

⁹ Although NITL has been an intervenor in Docket No. 42060 from the outset, it has permitted NAFCA to take the lead in discussions about settlement. ACA did not enter an appearance in any proceeding until it belatedly filed intervention papers in Docket Nos. 42060 and 42060 (Sub-No. 1) on September 20, 2002.

NAFCA's interest appears to be narrowly focused on the use of tank cars to transport grain products (e.g., soybean oil). UP's storage charges do not apply to grain products transported in tank cars. Although NAFCA claims that any storage charge applied to an empty tank car constitutes a "departure tariff" under the Ex Parte 328 Agreement, NAFCA withdrew its protest against UP under the Ex Parte 328 Agreement

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its tariffs, and NAFCA amended its claims and factual assertions accordingly, but NAFCA continued to assert that the application of any kind of storage or diversion charge to an empty tank car was an unauthorized "departure" from the Ex Parte 328 Agreement. Oct. 9 Pet. at 4-5, 11-12.

Argument

NAFCA in its October 9, 2002 filing makes three requests of the Board: (1) to clarify or reconsider its October 18 Decision requiring industry-wide negotiations under the Ex Parte 328 Agreement, (2) to proceed with an investigation of whether BNSF's demurrage and storage charges, as applied to empty private cars, constitute "departure tariffs" under the Agreement, and (3) to consolidate this proceeding with NAFCA's statutory complaint proceeding in Docket No. 42060 (Sub-No. 1) and establish a procedural schedule, including substantial discovery, for the combined proceedings.

While BNSF believes that the Board's October 18, 2001 Decision had significant beneficial effects, it would not object at this point to the Board reconsidering that Decision and moving on to the merits of NAFCA's Protest and Petition for Investigation. BNSF, however, strongly opposes NAFCA's suggestion that the Board reject BNSF's Motion to Dismiss and proceed with an investigation. The law is clear that NAFCA's Protest and Petition for Investigation states no reasonable grounds for investigation,

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on the condition that UP would notify NAFCA if and when UP applied its storage charges to cars transporting grain or grain products. Letter from Andrew P. Goldstein, Attorney for North America Freight Car Association (dated August 14, 2002) to Vernon A. Williams, Secretary of the Surface Transportation Board in Docket No. 42064. While UP's storage charges do apply to tank cars carrying chemicals, neither NITL nor ACA has pursued a challenge to UP's charges. Thus, no party is any longer challenging the application of UP's storage charges to empty tank cars as "departure tariffs."

and it should be dismissed pursuant to 49 U.S.C. § 11701(b). Further, the Board should not consolidate this case with the very different case presented in Docket No. 42060 (Sub-No. 1), much less provide for the kind of burdensome and pointless discovery sought by NAFCA.

I. Renegotiation of the Ex Parte 328 Agreement Is Unnecessary in This Case

When the Board was originally presented last year with disputes concerning BNSF's and UP's extension of demurrage and storage charges to empty private cars, it appeared that most of the large tank car owners and two of the nation's largest railroads were at odds over the Ex Parte 328 Agreement. Given the age of that Agreement and the fact that allowances on all other car types are set independently by each railroad, it certainly might have seemed that the Ex Parte 328 Agreement had outlived its usefulness.¹⁰ Demurrage and storage charges have long been applied to loaded private cars, and to loaded and empty railroad cars – including tank cars. If the parties could not agree on whether the extension of demurrage and storage charges to empty private tank cars constituted a “departure tariff” within the meaning of Section 8 of the Agreement, then perhaps the time had come for the parties to revisit the entire agreement.

¹⁰ The ICC recognized long ago that, absent agreement among all of the interested parties, it was both unnecessary and inconsistent with Congress' mandate in the Staggers Act for mileage allowances to continue to be set on an industry-wide basis. See *Lo Shippers Action Comm. v. Aberdeen and Rockfish Ry. Co.*, 4 I.C.C.2d 1, 9-11 (1987) (“requiring all carriers to set their allowances at the same level would run directly contrary to the preference expressed in the Staggers Act for individual rather than collective ratemaking”). The Ex Parte 328 Agreement, which applies only to tank cars, is the last vestige of collective agreement on mileage allowances.

As it turned out, the dispute was overblown – at least as far as most of the parties were concerned. When the Board issued its October 18 Decision requiring industry-wide negotiations under the Ex Parte 328 Agreement, all parties agreed that it might be possible to settle the pending cases instead, and it quickly became clear that most of the petitioners and intervenors did not wish to press any broad claim that BNSF's and UP's demurrage and storage charges constituted "departure tariffs" under Section 8. RPI had challenged BNSF's and UP's charges only insofar as they applied to empty cars held outside repair facilities, and the principal concern of the Chlorine Institute, the U.S. Clay Producers, and the individual shipper parties was that BNSF should be receptive to concerns that individual shippers might raise about the transitional impact that BNSF's charges could have at specific locations. As noted earlier, they withdrew their claims when BNSF agreed to make a specific exception in its tariff for cars held outside repair facilities and confirmed that it would work with individual shippers to resolve concerns they might have about specific locations.

All claims have also been withdrawn against UP. The only "departure tariff" claim that remains is that of NAFCA, supported by NITL and ACA, in Docket No. 42060. BNSF believes, as discussed next, that that claim can and should be dismissed as a matter of law. Particularly in light of the numerous settlements, it appears that most parties are in agreement about the scope of the Ex Parte 328 Agreement and there is no need now for industry-wide negotiations about that Agreement. Accordingly, BNSF does not oppose reconsideration of the Board's October 18 Decisions to permit action on the merits of NAFCA's Protest and Petition for Investigation.

II. The Board Should Grant BNSF's Motion To Dismiss NAFCA's Protest And Petition For Investigation

The issue presented by NAFCA's Protest and Petition for Investigation is a narrow one. Does the extension of BNSF's storage and diversion charges to empty private cars constitute a "departure tariff" within the meaning of Section 8 of the Ex Parte 328 Agreement?¹¹ That is not a difficult issue to resolve. The ICC was confronted with a similar question in the *Buffalo and Pittsburgh* case and found that, by its plain language, Section 8 applied only to a tariff "departing in any way from the allowance system prescribed herein." 7 I.C.C.2d at 25 (emphasis in original). Since the Ex Parte 328 Agreement nowhere purported to address whether it was permissible for railroads to assess charges for movements to repair facilities, the ICC held that such charges did not constitute "departure tariffs" within the meaning of Section 8. *Id.* at 25-27.

The only reference in the Ex Parte 328 Agreement to charges for holding empty cars on railroads' tracks is very specific and narrowly circumscribed. Section 5 of the Agreement sets forth the charges that railroads may assess for holding empty private tank cars on their tracks outside non-railroad repair facilities.¹² No other provision of the

¹¹ If those tariffs did constitute "departure tariffs" within the meaning of Section 8, BNSF would be required to show "special circumstances" justifying such a departure or seek to reopen the Ex Parte 328 Agreement. *Ex Parte No. 328*, 3 I.C.C. 2d at 209-10. The Board need not reach that issue. See *Buffalo and Pittsburgh*, 7 I.C.C.2d at 28-29 (holding that it would not address the "special circumstances" issue in light of its holding that the challenged charges for movements of empty cars to repair facilities did not constitute a "departure tariff" at all).

¹² There is room for debate about whether even this provision was intended to foreclose railroads from setting independent rates for holding cars outside repair facilities. Section 5(c) stipulates that the rules and charges set forth there for cars held outside repair facilities were not intended to supersede "new . . . agreements or tariffs

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Agreement even arguably addresses what a railroad may charge for holding a shipper's cars on its tracks.

NAFCA in its October 9 Petition says that this absence of prescribed demurrage or storage charges in the Ex Parte 328 Agreement means that the Board must treat any such charges that a railroad may set as "departures" from the Agreement.¹³ Oct. 9 Pet. at 11-12. But the ICC, which had itself approved the Agreement only a few years before, applied precisely the opposite reading in *Buffalo and Pittsburgh*. The ICC found there that a railroad's independent tariffs could be found to "depart" from the allowance system prescribed in the Ex Parte 328 Agreement only if those tariffs conflicted with the express terms of the Agreement. 7 I.C.C.2d at 25.¹⁴ NAFCA's contrary argument

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that contain empty private tank car handling and holding provisions as part of the overall agreement." *Ex Parte No. 328*, 3 I.C.C. 2d at 208. However, in the interest of settlement with RPI and like-minded parties, BNSF and UP agreed to an exception in their storage tariffs in the narrow circumstances covered by Section 5. This satisfied the "departure" concerns of RPI and the other parties that withdrew their complaints.

¹³ NAFCA also argues that BNSF's storage and diversion charges depart from the Ex Parte 328 Agreement because they "reduce the value of the tank car allowances paid by BNSF," and that any changes in the status quo of how private tank cars are treated necessarily departs from the Ex Parte 328 Agreement. Oct. 9 Pet. at 14. These same arguments were raised by the tank cars owners in *Buffalo and Pittsburgh* and summarily rejected by the Board. See 7 I.C.C. 2d at 24. There, the ICC found that the "interpretation advanced by the car owners [could] be supported only by *unduly straining the language of the agreement*." *Id.* (emphasis added)

¹⁴ NAFCA asserts that in its *Buffalo and Pittsburgh* decision the ICC principally relied on *General American Transp. Corp. v. Indiana Harbor Belt R.R. Co.*, 3 I.C.C. 2d 599 (1987), ("*IHB-II*") to reach its conclusion that charges for moving empty cars to private repair facilities were not departure tariffs within the meaning of the Ex Parte 328 Agreement. Oct. 9 Pet. at 14-15. This is simply not true. The ICC's *Buffalo and Pittsburgh* decision rested principally on "the plain language of § 8 of the agreement." 7 I.C.C.2d at 25. The ICC certainly found that its decision in *IHB-II* bolstered its conclusion that the Ex Parte 328 Agreement did not apply to independent rates set by railroads for special services, regardless of whether they might increase the costs of car

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would stand the *Buffalo and Pittsburgh* decision on its head. Tariff arrangements that were not mentioned at all in the Agreement would be prohibited because they were not mentioned there. That is exactly what the ICC in *Buffalo and Pittsburgh* said the Agreement plainly could not be read to mean.¹⁵

NAFCA argues alternatively that the Board should not reach the merits of its Protest and Petition for Investigation at this point, but should instead do as the ICC did in *Buffalo and Pittsburgh* – that is, initiate a lengthy investigation proceeding. Oct. 9 Pet. at 11. But NAFCA's "process" argument effectively asks the Board to ignore settled law. The ICC initiated an investigation in *Buffalo and Pittsburgh* because the

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owners. *Id.* at 28. The Board too can certainly find support in *IHB-II* for the proposition that it should be skeptical of any reading of the Ex Parte 328 Agreement that would purport "to freeze and immunize from change . . . matters which are beyond the four corners of the agreement." Railroads are encouraged by statute to set special charges for special services "[i]n order to encourage more efficient use of freight cars," 49 U.S.C. § 10722, and the Board, like the ICC, can certainly find additional support for its reading of the Ex Parte 328 Agreement in such clear authority.

¹⁵ NAFCA's misapprehension of the interpretative law applicable to the Ex Parte 328 Agreement equally infects its argument about BNSF's diversion charges. In its October 9 Petition, NAFCA argues that the "mileage equalization" formula in the Agreement addresses the issue of excess empty mileage; accordingly, diversion charges are implicitly prohibited. Oct. 9 Pet. at 12-13. But, as is apparent on the face of BNSF's diversion tariff, that tariff is not directed at the costs of excess empty mileage. BNSF Diversion Book 6200-A. Rather, it is directed at BNSF's costs of switching out cars or blocks of cars that a shipper in mid-shipment diverts to a new location. (BNSF charges \$150 for each diverted car, up to a maximum of \$450 for a block of cars of any size; thus, reflecting the reality of BNSF's own switching costs, the charge for switching out a few cars is the same as the charge for switching out a large block of cars.) BNSF does not assess a charge for the costs of the extra miles that may be occasioned by the diversion of an empty car or block of cars. Thus, there is no conflict with the Ex Parte 328 Agreement. Nowhere in the "mileage equalization" formula or anywhere else in the Ex Parte 328 Agreement is there any mention of diversion charges, much less a prohibition on such charges.

issue presented there was one of first impression. It was being asked for the first time to determine whether the Ex Parte 328 Agreement mandated only what was contained within the “four corners” of the Agreement, and otherwise left individual railroads free to conduct their business under their own tariffs. While the ICC conducted an investigation to make sure that all aspects of this question were considered, in the end it determined that the plain language of the Agreement was determinative.

Nothing in the law or common sense suggests that the Board is required to reinvent the wheel and conduct an investigation in this case just because the ICC did so in *Buffalo and Pittsburgh*. In fact, the ICC itself was confronted with that question in Docket No. 40433, *Switching Charges for Privately Owned Cars Moving to and from Repair Facilities, NW and SOU* (decision served March 11, 1991). The ICC found that the issues involved in that proceeding were the same as those involved in *Buffalo and Pittsburgh*, that no purpose would be served by an investigation, and, accordingly, that the case would be dismissed. *Id.* While the issues in this case are not identical to those in *Buffalo and Pittsburgh*, they are sufficiently similar that it is clear that no purpose would be served by an investigation and that this case should be dismissed, pursuant to 49 U.S.C. § 11701(b), for failure to state reasonable grounds for investigation.¹⁶

¹⁶ NAFCA suggests that the Board is required to conduct an investigation here, because Section 8 of the Ex Parte 328 Agreement requires an investigation of any “departure tariff.” Oct. 9 Pet. at 7, 11. But that bootstrap suggestion obviously begs the very question before the Board. If, as BNSF contends, it is clear under the plain language of the Agreement that storage charges on empty tank cars are not “departure tariffs,” then no investigation is required.

III. The Board Should Not Consolidate This Docket With Docket No. 42060 (Sub-No. 1), Nor Should It Permit Discovery

In its October 9 Petition, NAFCA asks the Board to consolidate the proceedings in Docket No. 42060 with the proceedings in Docket No. 42060 (Sub-No.1) and to prescribe a procedural schedule that provides six months for discovery, including depositions. Oct. 9 Pet. at 19. The Board should reject this request in every particular.

First, contrary to NAFCA's suggestion, the issue in Docket No. 42060 is quite different from the issues NAFCA has raised in Docket No. 42060 (Sub-No.1). The issue in the instant case is whether the application of storage charges to empty private tank cars constitutes a "departure tariff" within the meaning of Section 8 of the Ex Parte 328 Agreement. The analysis required is essentially one of contract interpretation. Given that the Agreement is not ambiguous, the Board can and should find, as the ICC found in *Buffalo and Pittsburgh*, that the plain language of the Agreement is controlling. Even if there were any ambiguity in the Agreement, the evidence and argument in the case would primarily concern the intent of the parties in negotiating the Agreement and the ICC in approving it.

In contrast, the "unreasonable practice" and other statutory claims that NAFCA has raised in Docket No. 42060 (Sub-No. 1) represent a broad challenge to the railroads' ability to assess charges, with respect to any type of empty private rail car, that encourage efficient car utilization and cost coverage. The issues there revolve around whether a railroad should be barred from extending to empty private cars the same kind of demurrage and storage charges that railroads have long applied, with the ICC's and the Board's consistent encouragement, to loaded private cars, and to loaded and empty railroad cars. See, e.g., *Railroads Per Diem, Mileage, Demurrage and*

Storage Agreement, 1 I.C.C.2d 924 (1985) (recognizing important role that demurrage and storage charges play in encouraging the efficient utilization and turnaround of rail cars, freeing up needed track space, and compensating railroads for the costs of holding cars on their lines). As discussed in its Motion to Dismiss in that case, BNSF believes that NAFCA's claims in Docket No. 42060 (Sub-No. 1) should be dismissed as a matter of law,¹⁷ but regardless of how those claims are disposed of, they do not involve the narrow issue of contract interpretation under Ex Parte 328 raised in Docket No. 42060. Consolidation of the dockets would only confuse those issues. For this reason alone NAFCA's consolidation request should be rejected.

Second, although NAFCA does not make clear why it believes discovery is necessary, its proffer of testimony on what some parties may have intended when they negotiated the Ex Parte 328 Agreement suggests that NAFCA wishes to seek discovery into the conduct of the 1983-86 Ex Parte 328 negotiations. Oct. 9 Pet. at 13-14. Obviously, that has nothing to do with the "unreasonable practice" and related statutory issues in Docket No. 42060 (Sub-No. 1). More importantly, however, the best evidence of the joint intention of the different parties involved in the tank car negotiations is the final language of the Ex Parte 328 Agreement. Given the ICC's finding in *Buffalo and Pittsburgh* that the language of that Agreement is clear, discovery into different parties' intentions would be burdensome and pointless. Thus, even if the Board determined to proceed with an investigation in Docket No. 42060, it should not permit discovery.

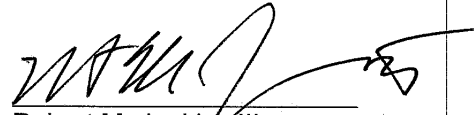
¹⁷ BNSF has today filed a letter with the Board, responding to NAFCA's letter pleading dated October 9, 2002, in Docket No. 42060 (Sub-No. 1), supporting action on the Motion to Dismiss that BNSF filed in that docket on October 5, 2001.

Third, most of the other parties and intervenors that originally had concerns about BNSF's and UP's storage charges on tank cars have had those concerns addressed and withdrawn their oppositions to those charges. NAFCA asserts that the Board "should appreciate the need for [the Board] to honor negotiated solutions that the parties reach" and that parties will have no incentive to "expend substantial resources on negotiated solutions" if "the terms of a negotiated solution are ignored." Oct. 9 Pet. at 10. BNSF could not agree more. However, it is NAFCA, not BNSF, that is attempting to ignore the express terms of the carefully negotiated Ex Parte 328 Agreement and use the Board's procedures to extract terms to which there was no agreement.¹⁸

¹⁸ In contrast, RPI and other parties who settled with BNSF and UP did not attempt to go beyond the four corners of the Agreement and argue, as NAFCA has, that the parties intended railroads to be barred from imposing the same kinds of storage and demurrage charges on empty private cars that they have long imposed on loaded private cars, and on loaded and empty railroad cars. If, as NAFCA would have it, the Ex Parte 328 Agreement were read to block railroads from imposing routine storage and diversion charges on tank cars, then BNSF and other parties would likely invoke the renegotiation provision of Section 9 of the Ex Parte 328 Agreement. In light of the post-Staggers Act history of such negotiations with respect to other car types (see note 10, *supra*), one could readily predict the demise of the Agreement.

NAFCA did not have to settle with BNSF, but it should not be permitted to prolong a case with unjustified discovery and additional pleadings, when the law is clear that there is no reasonable basis for investigation. The Board should deny NAFCA's procedural requests and grant BNSF's Motion to Dismiss.

Respectfully submitted,



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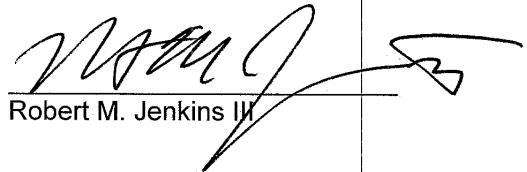
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Dated: October 29, 2002

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply to North America Freight Car Association's "Petition for Clarification and, Alternatively, for Reconsideration, and for Resumption of Processing" has been served by hand delivery on counsel for the North America Freight Car Association, Andrew P. Goldstein, counsel for the National Industrial Transportation League, Nicholas J. DiMichael, and counsel for the American Chemistry Council, Thomas E. Schick, this 29th day of October 2002.


Robert M. Jenkins III