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BEFORE THE
SURFACE TRANSPORTATION BOARD

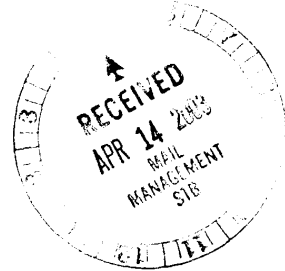
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DOCKET NO. 42056

TEXAS MUNICIPAL POWER AGENCY



v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

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SURFACE
TRANSPORTATION BOARD

PETITION FOR CLARIFICATION OR, ALTERNATIVELY, FOR
REOPENING AND RECONSIDERATION ON BEHALF OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
AND NORTH AMERICA FREIGHT CAR ASSOCIATION

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FILED

Dated: April 14, 2003

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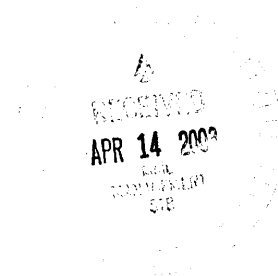
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

**PETITION FOR CLARIFICATION OR, ALTERNATIVELY, FOR
REOPENING AND RECONSIDERATION ON BEHALF OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
AND NORTH AMERICA FREIGHT CAR ASSOCIATION**

I. PRELIMINARY STATEMENT AND BACKGROUND

Members of North America Freight Car Association ("NAFCA") and The National Industrial Transportation League ("NITL") are manufacturers, lessors, owners, or operators of private freight cars and have a vital interest in the conditions under which such equipment can be operated on the national rail system.

Although this proceeding involves a complaint in which Texas Municipal Power Agency ("TMPA") seeks a determination of the maximum reasonable rate chargeable by The Burlington Northern and Santa Fe Railway Company ("BNSF") for the movement of certain coal shipments, the Board's Decision served March 24, 2003 ("March 24 Decision") contains a statement of "Pre-



liminary Matter" that may have broad application to private car use not just by TMPA, but by all owners and operators of private freight cars, and which, depending on how the Board intended the Preliminary Matter statement to apply, has the potential to cause economic distress to all owners and operators of private cars, now constituting more than 50 percent of the total national rail car fleet. The March 24 Decision language to which we refer is as follows:

The challenged rate applies only to movements in BNSF-supplied rail cars. In its complaint, TMPA also asks us to find that BNSF's refusal to establish a common carrier rate for transportation in rail cars supplied by TMPA or a third party at no cost to BNSF is an unreasonable practice under 49 U.S.C. 10702 and to prescribe a rate for coal shipments in TMPA-supplied rail cars. However, railroads have the right to use their own cars in preference to privately owned cars. Atchison, Topeka & Santa Fe Ry. v. United States, 232 U.S. 199, 214 (1914) ("Whatever transportation service or facility the law requires the carrier to supply they have the right to furnish. They can therefore use their own cars, and cannot be compelled to accept those tendered by the shipper on the condition that a lower freight rate be charged."). Accord Shippers Committee, OT-5 v. Ann Arbor R.R., 5 I.C.C.2d 856 (1989), aff'd sub nom. Shippers Committee, OT-5 v. ICC, 968 F.2d 75 (D.C. Cir. 1992). Thus, so long as BNSF is capable of meeting its common carrier obligations using its own rail cars (and there has been no showing to the contrary here), it is under no obligation to provide rates for transportation in privately owned cars. Until such time as there is an indication that shipper-owned cars will be needed to move TMPA's traffic, BNSF need not establish a rate for such service. Burlington N.R.R. v. STB, 75 F.3d 685 (D.C. Cir. 1996).

The foregoing Preliminary Matter statement must be evaluated in the context of the decision of the Interstate Commerce Commission ("ICC") in Shippers Committee, OT-5 v. Ann Arbor R.R., 5 I.C.C. 856 (1989) ("OT-5 Decision"), aff'd. sub nom Shippers Committee, OT-5 v. ICC, 968 F.2d 75 (D.C. Cir. 1992) ("DC Circuit Decision").

OT-5 is a railroad industry regulation, applicable to all private cars other than tank cars, that requires approval from the originating carrier for the use of private cars, the assignment of

reporting marks for the cars, and eligibility to receive compensation from railroads using the cars. See Circular No. OT-5 of the Association of American Railroads ("AAR"), published in The Official Railway Equipment Register, issued by R.E.R. Publishing Corporation, Agent, and OT-5 Decision, 5 I.C.C. 2d at 859 (The "OT-5 process ... provides a means by which private cars can be accepted into service and by which shippers can be paid when such cars are used"). See, also, 49 U.S.C. 10745 ("The Board may prescribe the maximum reasonable charge or allowance a rail carrier subject to its jurisdiction may pay for a service or instrumentality furnished under this section") and LO-Shippers v. Aberdeen & Rockfish Ry. Co., et al., 4 I.C.C. 2d 1, 19 (1987), aff'd, LO-Shippers Action Committee v. ICC, 857 F.2d 802 (D.C. Cir. 1988), cert. denied, 109 S. Ct. 2429 (1989) (reviewing criteria for establishing private car allowances payable to shippers).

The OT-5 Decision was the culmination of nearly a decade of litigation to resolve the tensions between the asserted rights of railroads to utilize their own cars, and the asserted rights of private car owners to utilize their cars in lieu of railroad equipment. Private car interests complained to the ICC throughout the 1980's that railroads were using the OT-5 process as a means of economic regulation of private car use, favoring their own fleets and placing unwarranted risks on private car ownership. The private car interests argued in favor of *carte blanche* to use private cars (1) in order to protect their investment in those cars, which in many instances they had made with the encouragement of the railroads, and (2) because it was not economically feasible to acquire and maintain private cars without assurance of the continuing ability to use the cars. The railroads argued (see 5 I.C.C. 2d at 859) that, because they have a duty to provide cars, they have an unrestrained, corresponding right to use their own cars in preference to private cars, citing Atchison, Topeka & Santa Fe Ry. Co. v. United States, 232 U.S. 199, 214-15 (1914)

("Santa Fe Case"), the same case principally relied on by the Board in its Preliminary Matter statement.

The ICC, however, adopted a position that stopped somewhat short of both groups' positions. Noting that "the ability of carriers to exclude private cars from their lines through the OT-5 process has created needless uncertainty for private car owners that discourages capital investment in private cars that may be useful in meeting the nation's transportation needs" (5 I.C.C. 2d at 857), the ICC found that it is "an unreasonable car hire practice in violation of §§ 10701, 11121, and 11122" for a railroad to deny OT-5 approvals "for reasons other than safety, mechanical factors, or inadequate track storage space." 5 I.C.C. 2d at 864.¹

In addition, the ICC held "that a refusal to transport a shipment in a private covered hopper car is an unreasonable practice if a railroad does not have a car available to provide itself." 5 I.C.C. 2d at 865. The agency declined to define what constitutes an "available" railroad car, stating that it would investigate on a case-by-case basis "unwarranted claims of car availability made by the railroads," employing considerations such as "how soon the carrier can deliver a car to the shipping point, the time sensitivity of the shipment ... and the availability of the private car." 5 I.C.C. at 865, fn. 16. Petitioners are unaware that any complaints have been brought under these provisions.

In affirming the OT-5 Decision, the Court of Appeals expressly recognized that the agency had adopted an "availability" test to be applied on an "ad hoc basis," at the time of loading. DC Circuit Decision, 968 F.2d at 79-80. The Court stated that "when the railroad has certified private cars under the OT-5 procedures, then someone must make a decision *at the time of*

¹ The provisions of former Section 10701, which required railroads to maintain reasonable practices, are recodified in 49 U.S.C. § 10702. The provisions of former Sections 11121 and 11122 were carried forward into the Interstate Commerce Commission Termination Act ("ICCTA").

loading as to whether railroad-owned or private cars will be given preference." Ibid at 80 (emphasis supplied).

What emerged from the OT-5 Decision was the ICC's recognition of OT-5 as a gateway process for private car use and compensation that cannot be closed to private car owners unless their cars fail to meet mechanical or safety requirements or there is inadequate storage for the cars. Once through this gateway, the private car can be used unless a railroad car is "available" at, in the court's words, "the time of loading." Neither the OT-5 Decision nor the DC Circuit Decision contains the merest hint that the railroads' OT-5 duties, and the corresponding rights of private car owners as defined in those decisions, may be nullified by a railroad refusal to furnish a private car rate. Nor is this result compelled by the Santa Fe Case.

II. RULE 1115.3(d) SUMMARY OF ARGUMENT

Petitioners request only limited clarification or alternative reconsideration of the one-paragraph discussion under the heading "Preliminary Matter."

The Preliminary Matter statement peremptorily addresses a subject that seems to have been only peripheral to the central rate level issues in the case. The Board held that, so long as a rail carrier is capable of meeting its common carrier obligations using its own rail cars, it is under no obligation to provide rates for transportation in privately owned cars. Petitioners seek clarification to determine if this holding goes further than was necessary to decide the specific issues in this case or instead nullifies the delicate balance that the ICC struck between the use of railroad-owned and private rail cars in the OT-5 Decision.

The balance struck in the OT-5 Decision involved two key holdings. First, the ICC declared it an unreasonable practice for a railroad to deny OT-5 approvals "for reasons other than safety, mechanical factors, or inadequate track storage." 5 I.C.C. 2d at 864. Second, the ICC

held “that a refusal to transport a shipment in a private covered hopper car is an unreasonable practice if a railroad does not have a car available to provide itself.” *Id.* at 865. In affirming the OT-5 Decision, the D.C. Circuit recognized that the agency had adopted an “availability” test to be applied *at the time of loading*. DC Circuit Decision, 968 F.2d at 79-80.

It is necessary to clarify the March 24 Decision to avoid an unworkable inconsistency with the OT-5 Decision. The March 24 Decision, when read in conjunction with the OT-5 Decision, can be construed to hold that a railroad need not quote a private car rate unless and until a railroad-owned car is determined to be “unavailable” *at the time of loading*. Since the Board’s rules, 49 C.F.R. § 1300.3, allow a railroad 10 days or more to respond to a rate request, this time lag is incompatible with the conditions of private car use set forth in the OT-5 Decision.

Therefore, Petitioners urge the Board to clarify that, once a shipper has acquired private cars and obtained OT-5 authority for such cars, a request for rates in those private cars is a reasonable request and the railroad must provide such rates. . This clarification would ensure that a private car rate exists for use when a railroad-owned car is unavailable at the time of loading. Since the March 24 Decision infers that TMPA had not acquired private cars and obtained OT-5 authority, this clarification would not alter the result of that decision. Nor would this clarification be inconsistent with the Santa Fe Case, which was the basis for the Board’s holding on the Preliminary Matter, since the mere existence of a private car rate would not preclude a railroad from using its own cars when such cars are available at the time of loading.

However, if the Board did intend to substitute the standards in the Preliminary Matter statement for those in the OT-5 Decision, Petitioners request reconsideration on the grounds that it would be inappropriate and material error to undo the OT-5 Decision. The March 24 Decision contains no explanation as to why it might be appropriate to restore the uncertainties confronting

private car owners that the ICC had ameliorated in the OT-5 Decision, which was based on a lengthy and in-depth consideration of the appropriate policies for the use of private cars. An agency cannot change its course without supplying a reasoned analysis indicating that it is deliberately changing prior policies and standards, rather than casually ignoring them. Greater Boston Television Corp. v. FCC 444 F.2d 841, 852 (D.C. Cir. 1970).

Furthermore, the Board cannot deviate from its own precedents, without providing a rational explanation. Greyhound Corp. v. ICC, 551 F.2d 414, 416 (D.C. Cir. 1977). As currently expressed, the Preliminary Statement may nullify the policy goals that were carefully presented in the OT-5 Decision, by denying shippers a private car rate for prompt and immediate use when a railroad-owned car is unavailable at the time of loading.

III. CLARIFICATION IS NECESSARY AND APPROPRIATE

As indicated in Petitioners' contemporaneous Petition for Intervention, the intent of the Board in making the Preliminary Matter statement is not entirely clear. The statement contains language suggesting that the Board may have regarded TMPA as being without private cars and without OT-5 authority, in which event there would be no necessary inconsistency between the Preliminary Matter statement and the OT-5 Decision.

On the other hand, if the Board acted in the belief that TMPA operates private cars which have OT-5 authority, or intended the statement to apply regardless of whether or not TMPA operates private cars with OT-5 authority, the Preliminary Matter statement may be intended to mean that a railroad can, in any and all circumstances, refuse to provide a rate applicable in private cars, unless and until it is shown to be incapable of meeting its common carrier obligations using its own rail cars and "there is an indication that shipper-owned cars will be needed to move" the shipper's traffic. Under that view of the case, a railroad declination to furnish a pri-

vate car rate may deprive the private car owner of its right to use a private car registered under OT-5 even when a railroad car is not available.

So far as Petitioners are aware, a railroad cannot be required to provide a service absent a rate for that service, and that would include the service of transporting goods in private cars.² The Preliminary Matter statement adverts to an opportunity for a shipper to obtain a private car rate quotation by demonstrating that the carrier is not capable of meeting its common carrier obligations using its own rail cars. However, the March 24 Decision does not explain how the showing thereby contemplated might proceed in a manner compatible with the procedures in the OT-5 Decision.

The OT-5 Decision plainly envisages a fleet of private cars qualified to move a shipper's goods whenever railroad cars are "unavailable" for loading in a specific instance (as opposed to being unavailable more generally). The only workable implication of that regime is that there be a private car rate in place so that the private car can be utilized promptly whenever railroad equipment is "unavailable." The March 24 Decision, on the other hand, appears to contemplate a demonstration that a railroad is unable to supply a sufficient number of its own cars before a private car rate is made available.

Further, under the Board's regulations, 49 C.F.R. § 1300.3, a railroad need not respond to a shipper request for any rate, including a private car rate, in less than 10 days and then may respond by either furnishing the rate or requesting additional information from the shipper. The time lag implicit in that process is absolutely incompatible with the OT-5 Decision process that

² A "private car rate" is deemed to be one which is available for use in private cars. To satisfy the provisions of LO-Shippers v. Aberdeen & Rockfish Ry. Co., *supra*, the private car rate may be set at a level lower than the corresponding rate for the movement of the same commodities in railroad equipment, or may be made subject to an ancillary tariff containing mileage allowance payments. If a railroad makes a private car rate available without compensation that is regarded as sufficient, the private car owner may bring a complaint seeking appropriate compensation. *Ibid.* See, also, OT-5 Decision at 866.

contemplates the timely use of a private car for the load at hand whenever railroad equipment is not available for that specific load *at the time of loading*. A procedure requiring a private car operator to demonstrate that a railroad is not meeting its common carrier obligations to supply a railroad owned car, and then imposing a further delay of 10 days or more for a private car rate to be furnished, completely frustrates the goals of the OT-5 Decision.

Because of the clear possibility of a serious inconsistency between the Preliminary Matter statement and the OT-5 Decision, Petitioners request the Board to clarify the relationship between the private car use provisions in the Preliminary Matter statement and those in the OT-5 Decision. Petitioners do not seek to foreclose TMPA from making any argument in support of its request for a rate in private cars; our interest in this case merely is to protect the integrity of the private car use provisions in the OT-5 Decision. Petitioners believe that goal will be preserved if the rationale for the Preliminary Matter statement is that BNSF was not required to provide a private car rate to TMPA because TMPA had not acquired any private cars and had not sought any OT-5 authority.

Under the provisions of 49 U.S.C. § 11101(a), a rail carrier is required to provide transportation or service subject to the Board's jurisdiction "on reasonable request." Petitioners urge the Board to clarify that, *once a shipper has acquired private cars and obtained OT-5 authority for such cars*, a request to a railroad for private car rates utilizing such cars constitutes a "reasonable request" within the meaning of Section 11101(a). Thereafter, the private cars can be used when railroad equipment is not "available." A requirement, under these circumstances, that a railroad provide a private car rate does not automatically preclude the railroad from using its own cars when they are available, and therefore does not contravene the Santa Fe Case, any more than the OT-5 Decision itself, which the ICC obviously regarded as compatible with the Santa Fe

Case. Rather, this requirement simply would ensure that a private car rate exists for use when a railroad-owned car is unavailable. Without such a rate, the protections of the OT-5 Decision are meaningless.

If the Board declines to adopt Petitioners' requested clarification of the March 24 Decision, Petitioners solicit any alternative explanation the Board may furnish to explain how the March 24 Decision provisions regarding private cars preserve the OT-5 Decision provisions fully in tact.

IV. REOPENING AND RECONSIDERATION IS REQUESTED IF THE BOARD CANNOT CLARIFY THAT PRIVATE CAR USE AS ESTABLISHED IN THE OT-5 DECISION REMAINS FULLY IN TACT

The OT-5 Decision pitted a broad cross-section of private car owners and lessees against the entire Class I railroad industry and its trade association, the AAR. As suggested previously, the case culminated some eight years of intermittent litigation (5 I.C.C. 2d at 858) to resolve the use prerogatives attaching to private cars. Indeed, after the OT-5 Decision was issued, there were additional proceedings before the ICC in the same case, resulting in the issuance of an unreported, supplemental decision,³ as discussed in the DC Circuit Decision.

In its OT-5 Decision, the ICC concluded that railroad refusals to admit private cars into the interchange system for reasons other than safety, mechanical factors, or inadequate track storage space, and refusals to allow private cars to be loaded unless railroad cars were "available," were --

practices [that] have discouraged, or could discourage, appropriate private car acquisitions that the shippers desire to make to assure themselves of transportation in times of greatest need. These investments make an important contribution to the statutory goal in § 11122 of an adequate car fleet. Moreover, these practices are not required for efficient car use; their prohibition will not impair sig-

³ 1990 ICC Lexis 382 (served Nov. 29, 1990)

nificantly railroad revenue adequacy but may avoid undue concentrations of market power.

5 I.C.C. 2d at 865. The Court of Appeals sustained the ICC's middle-of-the-road position as a permissible "policy choice." 968 F.2d at 80.

As indicated above, Petitioners hope it was not the Board's intent that the broad conclusions in the Preliminary Matter statement replace the conclusions in the OT-5 Decision. Should the Board actually have intended to substitute the standards enunciated in the Preliminary Matter statement for those in the OT-5 Decision, then Petitioners suggest that it would be inappropriate and material error for the Board to undo the OT-5 Decision.

An agency either must follow its own precedents or explain why it has departed from them. See Atchison, T. & S. F. R. Co. v. Wichita Board of Trade, 412 U.S. 800, 808 (1973). In Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), the D.C. Circuit declared that "an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute." [footnotes omitted] See also, Greyhound Corp. v. ICC, 551 F.2d 414, 416 (D.C. Cir. 1977) ("This court emphatically requires that administrative agencies adhere to their own precedents or explain any deviations from them.").

The March 24 Decision contains no explanation of why it is now appropriate to restore the same uncertainties to private car use that the ICC removed in the OT-5 Decision, where the ICC gave lengthy and exclusive consideration to developing appropriate policies for the use of private cars. Those policies have been revisited in this case in a terse statement of Preliminary Matter that is far from the central focus of the case, and which should not serve as a foundation for undermining the OT-5 Decision.

In addition to there being an absence of foundation in this proceeding for a result that conflicts with the findings in the OT-5 Decision, the Preliminary Matter statement incorrectly construes the OT-5 Decision. The OT-5 Decision allows -- indeed requires -- private cars to be utilized if they meet the requirements for OT-5 authority and no railroad car is "available" for a specific load. The ICC enunciated very clear reasons for reaching these conclusions, including the following statement:

We conclude that the OT-5 process as currently structured unnecessarily discourages acquisition of new covered hopper cars. To assure themselves of cars when conditions ... are favorable, many shippers wish to acquire private cars. They are deterred from doing so by the railroads' practice of withholding OT-5 approvals or granting them only for limited terms, with an asserted right to withdraw them at any time in the future....

Although shippers have acquired private cars in the past, despite the OT-5 practices, we believe that revision of the OT-5 process would reduce their investment risk and permit a level of acquisition that shippers believe is appropriate to their needs. We recognize that on several recent occasions we declined to disturb the OT-5 process. We are specifically reversing our conclusions in [Allied Corp. v. Union Pacific Railroad Company, 1 I.C.C. 2d 480 (1985)] that railroads are not obligated to enter into OT-5 agreements.

5 I.C.C. 2d at 869-70. If it is the intent of the Preliminary Matter statement to permit railroads to refuse to publish private car rates that can be used when private cars have obtained appropriate OT-5 approval, then the OT-5 Decision and its policy goals will have been nullified, as the Board will have denied shippers a private car rate for prompt and immediate use when a railroad-owned car is unavailable at the time of loading. Furthermore, the Board will have endorsed an alternative means by which railroads effectively can preclude the use of private cars by refusing to quote a private car rate, thereby creating further disincentives for shippers to invest in private cars, since they will have no assurance that they even can obtain a rate in sufficient time to make

effective use of their cars. No basis has been provided in the March 24 Decision to justify such results.⁴

Private cars play an increasingly vital role in the rail system today, accounting for some 52 percent of all freight cars.⁵ Although the percentage of freight cars supplied by private owners in 1914, the year of the Supreme Court's decision in Atchison, Topeka and Santa Fe Ry. Co., supra, relied upon by the Board, is not known, it is evident that railroads are withdrawing more and more from the business of car supply and leaving that role to shippers. In 1929, the first year for which car supply data is available, private car interests furnished 11 percent of all cars, Class I railroads furnished 85 percent, and other railroads the balance. The percentage of freight cars furnished by the railroad industry has steadily eroded since then; by 2001, the Class I railroad share of freight cars had declined to 38 percent, other railroads furnished 10 percent, and shippers furnished the remaining 52 percent.⁶

Petitioners do not ask the Board to draw any inferences from these data regarding the ability or inability of BNSF or any other railroad to meet its common carrier obligations. These are industry-wide data presented to demonstrate the potential significance of what appears to be a Preliminary Matter statement of industry-wide application. Private cars represent a bigger investment to non-carriers than to the railroad industry, and the conditions under which nearly 700,000 private cars can be used should not, Petitioners respectfully submit, be determined by a one paragraph Preliminary Matter statement in a rate reasonableness case that appears to overrule a 21-page decision that thoroughly considered the status of private cars.

⁴ Although Petitioners believe that there are strong economic arguments to be made currently against any removal of the private car use prerogatives set forth in the QT-5 Decision, Petitioners here rely on the provisions of that decision itself so as to avoid any suggestion that Petitioners are attempting to expand the issues addressed in the March 24 Decision.

⁵ Railroad Facts, 2002 Edition, Association of American Railroads, Washington, DC, p. 51.

⁶ Ibid.

WHEREFORE, Petitioners urge the Board to clarify or reopen its March 24 Decision in the manner and for the purposes described above.

Respectfully submitted,



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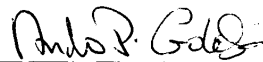


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Clarification or, Alternatively, for Reopening and Reconsideration on Behalf of The National Industrial Transportation League and North America Freight Car Association has, this 14th day of April, 2003, been served on all parties of record, by hand delivery or first class mail, postage prepaid.



Andrew P. Goldstein

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