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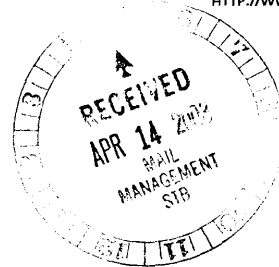
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April 14, 2003

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423



Re: Docket No. 42056
Texas Municipal Power Agency v. The Burlington Northern and Santa Fe
Railway Company

Dear Secretary Williams:

Enclosed for filing are a signed original and 10 copies each of (a) a Petition for Leave to Intervene, and (b) a Petition for Clarification or, Alternatively, Reopening and Reconsideration on Behalf of the National Industrial Transportation League and North America Freight Car Association. Copies of each pleading on a floppy disk are also enclosed in Microsoft Word format.

Additionally, we provide herewith our check in the amount of \$150.00 as the filing fee in the event that the Board determines to accept for filing the tendered Petition for Reconsideration.

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Sincerely,

Andrew P. Goldstein
Attorney for
North America Freight Car Association

cc: All Parties

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. 42056

TEXAS MUNICIPAL POWER AGENCY

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

PETITION OF THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
AND NORTH AMERICA FREIGHT CAR ASSOCIATION FOR LEAVE TO
INTERVENE TO SEEK CLARIFICATION OR, ALTERNATIVELY,
REOPENING AND RECONSIDERATION

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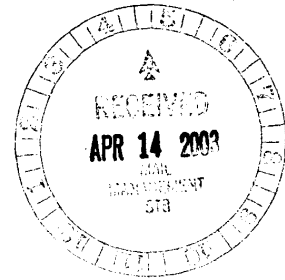
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Dated: April 14, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD



DOCKET NO. 42056

TEXAS MUNICIPAL POWER AGENCY

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

PETITION OF THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
AND NORTH AMERICA FREIGHT CAR ASSOCIATION FOR LEAVE TO
INTERVENE TO SEEK CLARIFICATION OR, ALTERNATIVELY,
REOPENING AND RECONSIDERATION

Petitioners, The National Industrial Transportation League ("NITL") and North America Freight Car Association ("NAFCA"), hereby seek leave to intervene in this proceeding and tender herewith for consideration by the Board their Joint Petition for Clarification, and Alternatively for Reopening and Reconsideration of the Board's decision in the captioned matter served on March 24, 2003 (the "March 24 Decision").

Petitioners seek to intervene and to be heard only with respect to the language appearing in the March 24 Decision under the caption "Preliminary Matter," 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).

NAFCA is an unincorporated association formed for the purpose of furthering and protecting the interests of private freight car manufacturers, lessors, owners, and lessees. Its members own or operate over 300,000 private cars. NITL is a national trade association representing approximately 700 companies that are involved with all modes of transportation, including rail, and that conduct industrial and/or commercial enterprises throughout the United States and internationally. Many of its members similarly own or operate private freight cars. NAFCA, NITL, and their members are directly affected by the "Preliminary Matter" statement of the Board set forth above.

Petitioners believe that the Board's Preliminary Matter statement, if not otherwise clarified, may alter the conditions set forth by the Interstate Commerce Commission for the use of private freight cars in Shippers Committee, OT-5 v. Ann Arbor R.R., 5 I.C.C. 2d 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"). If the Board's Preliminary Matter statement is not clarified to remove any apparent conflict with the conclusions reached in the OT-5 Decision, then Petitioners seek reopening and reconsideration of the conclusions reached in the Preliminary Matter.

The Preliminary Matter statement implies, without stating expressly, that TMPA does not own or operate the private cars for which it sought a private car rate; the Board states that TMPA seeks "a common carrier rate for transportation of rail cars supplied by TMPA or a third party," suggesting that the cars had not yet been obtained by TMPA. Nor does the Preliminary Matter statement disclose that TMPA had sought and obtained OT-5 authority for any private cars.

Petitioners ask the Board to clarify that its determination that The Burlington Northern and Santa Fe Railway Company ("BNSF") could refuse to provide a rate in private equipment to complainant, Texas Municipal Power Authority ("TMPA"), was because there was no evidence that TMPA owned or operated private freight cars for which it sought and obtained OT-5 authority. With this clarification, Petitioners would not regard the Preliminary Matter as inconsistent with the OT-5 Decision.

Alternatively, if the Preliminary Matter statement did assume that TMPA operated private cars and holds OT-5 authority, or is intended to be applicable whether or not TMPA operates private cars that have OT-5 authority, Petitioners seek reopening and reconsideration as necessary to give continuing effect to the OT-5 Decision. Petitioners take no position on the merits of this case other than with respect to its possible alteration of the findings in the OT-5 Decision.

This proceeding was handled pursuant to modified procedure. Under 49 C.F.R. 1112.4, intervention may be granted (1) if it will not unduly disrupt the schedule for filing verified statements, and (2) would not unduly broaden the issues raised in the proceeding. There is no pend-

ing schedule for the filing of statements and Petitioners do not seek to introduce any new issue into the case. Accordingly, Petitioners have satisfied the requirements of Section 1112.4.

Additionally, a request to reopen this case is permissible under 49 C.F.R. § 1115.4, which provides that "[a] person at any time may file a petition to reopen any administratively final action of the Board pursuant to the requirements of § 1115.3(c) and (d) of this part. A petition to reopen must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances and must include a request that the Board makes such a determination." A petition to reopen may be filed by a person that has not been a party to the case. T and P Railway -- Abandonment Exemption -- In Shawnee, Jefferson and Atchison Counties, KS, STB Docket No. AB-381 (Sub-No. 1X), served February 20, 1997.

Absent clarification by the Board of the Preliminary Matter, it is not fully possible for Petitioners to assert with certainty that the March 24 Decision involves material error. However, a contingent basis for material error is explained in the attached "Petition for Clarification or, Alternatively, Reopening and Reconsideration," where it is explained why the Preliminary Matter statement is inconsistent with and incorrect in light of the OT-5 Decision if it is, indeed, the Board's intent in this proceeding to hold that a rate applicable in private cars may be withheld by a railroad even with respect to private cars already registered for use under the OT-5 regulation.

Rather than repeating those reasons here, Petitioners request the Board to incorporate the explanation contained in the accompanying Petition for purposes of deciding this request for intervention and contingent reopening.



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Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition of the National Industrial Transportation League and North America Freight Car Association for Leave to Intervene to Seek Clarification or, Alternatively, Reopening and Reconsideration 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