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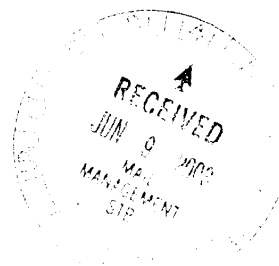
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June 9, 2003

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



Re: 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.

Dear Secretary Williams:

Enclosed for filing are a signed original and 10 copies of Submission of North America Freight Car Association, American Chemistry Council, and The National Industrial Transportation League in Response to the April 28, 2003 Decision of the Board in the above-referenced proceeding. Also enclosed in a floppy disk in Microsoft Word format containing the same.

Respectfully submitted,

Andrew P. Goldstein

Andrew P. Goldstein
Attorney for
North America Freight Car Association

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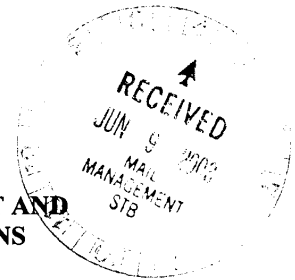
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ORIGINAL

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



SUBMISSION OF NORTH AMERICA FREIGHT CAR ASSOCIATION,
AMERICAN CHEMISTRY COUNCIL, AND THE NATIONAL
INDUSTRIAL TRANSPORTATION LEAGUE IN
RESPONSE TO THE APRIL 28, 2003
DECISION OF THE BOARD

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Dated: June 9, 2003

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. 42060

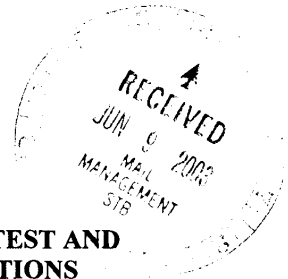
**NORTH AMERICA FREIGHT CAR ASSOCIATION -- PROTEST AND
PETITION FOR INVESTIGATION -- TARIFF PUBLICATIONS
OF THE BURLINGTON NORTHERN AND SANTA FE
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**SUBMISSION OF NORTH AMERICA FREIGHT CAR ASSOCIATION,
AMERICAN CHEMISTRY COUNCIL, AND THE NATIONAL
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RESPONSE TO THE APRIL 28, 2003
DECISION OF THE BOARD**

I. Summary of Position

North America Freight Car Association, on behalf of certain of its members ("NAFCA"), the American Chemistry Council ("ACC"), and The National Industrial Transportation League ("NITL"), collectively "Petitioners," are responding to the Board's April 28, 2003 Decision in which the parties were requested to furnish additional comments and data.

Petitioners' position is that the Ex Parte No. 328 tank car allowance system is a constructive mechanism that should be preserved. Tank cars are unique because they are supplied entirely by shippers. The tank car allowance system deals through negotiated compromise with a statutory requirement that railroads must either provide all necessary instrumentalities of transportation or compensate shippers if they do so, and as a negotiated system is preferable to the repetitious, lengthy and costly litigation that had occurred to resolve tank car allowance issues prior to Ex Parte No. 328.



Tracks on which to hold empty cars prior to loading are an essential component of a freight car's use cycle and a part of each railroad's necessary infrastructure. The costs of pre-loading holding tracks for private tank cars were identified by the Ex Parte No. 328 negotiators as railroad costs and were left in that posture even though the negotiators recognized that there could be circumstances under which some form of discipline might have been appropriate to curb shipper abuses. This result was part of an allowance system compromise under which both railroads and tank car lessees gave up various economic claims. The allowance system, for example, presently causes tank car lessees to forego recovery of thousands of dollars in annual per car maintenance and inspection costs that would be recoverable under a literal application of allowance law.

By seeking to impose the costs on shippers of holding tracks for empty tank cars prior to loading, the Burlington Northern and Santa Fe Railway Company ("BNSF") is not imposing "routine" disciplinary charges, as it claims, but is transferring its track infrastructure costs to its customers, who had no reason to expect to bear those costs when they acquired the tank cars forced on them through railroad car supply policies. BNSF's changes unilaterally upend the Ex Parte No. 328 system and underlying compromises.

The provisions of Section 8 of the Ex Parte No. 328 agreement provide an investigative mechanism to scrutinize changes in the system, such as those made by BNSF. A Section 8 investigation does not mean that a change in the system is barred; it means the change must be justified by the proponent railroad. As a fallback, renegotiation of the agreement is possible under Section 9 of the agreement.

BNSF unfortunately refuses to subject its changes to Section 8 scrutiny and instead threatens to start Ex Parte No. 328 on the road to its "demise," if the Board will not

allow BNSF's changes. That would be an undesirable result that will not make BNSF's obligations to pay allowances go away, but will reinstitute the bitter litigation cycles that prevailed prior to Ex Parte No. 328 and may require railroads to incur additional items of tank car expenses currently not included in the Ex Parte No. 328 allowance system.

The one case upon which BNSF relies to avoid a Section 8 investigation was aimed at correcting a specific inequity that is not present here. Petitioners call upon the Board to follow the investigative procedures provided in Ex Parte No. 328 to evaluate the propriety of the allowance system changes made by BNSF.

II. General Background

On June 26, 2001, NAFCA filed a petition in the captioned proceeding requesting the Board to institute an investigation under Ex Parte No. 328, Investigation of Tank Car Systems, 3 I.C.C. 2d 196 (1986) ("1986 Decision") into certain tariff publications of BNSF.

The new BNSF tariff matter, which took effect on July 1, 2001 (the "July 1, 2001 change"), made changes in three basic areas of private tank car use:¹ the changes (1) required private tank car operators to pay daily storage charges for using BNSF tracks for holding empty private tank cars for more than a day prior to loading, (2) imposed charges for diversion of empty tank cars between point of last unloading and point of next load, and (3) imposed new, increased charges for the holding of empty tank cars on railroad tracks while awaiting maintenance or repair. NAFCA, supported by various other parties, contended that these changes were "departure tariffs" within the meaning of the 1986 Decision and were, therefore, subject to mandatory investigation by the Board pursuant to

¹ For the purposes of this pleading, tank cars in all instances are deemed to be privately-owned inasmuch as virtually all of the tank cars operating on America's railroads are privately-owned.

the terms of that Decision. Contemporaneously, NAFCA filed a complaint with the Board alleging that, if BNSF's challenged practices are not deemed to be subject to Ex Parte No. 328, then the July 1, 2001 change and similar provisions published by BNSF with respect to private cars other than tank cars should be set aside as unlawful in violation of various provisions of the Interstate Commerce Commission Termination Act ("ICCTA"). See North America Freight Car Association v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42060 (Sub-No. 1) ("Complaint" or "Sub-No. 1" proceeding). Subsequently, ACC and NITL intervened in this proceeding in support of NAFCA. This response is filed jointly on behalf of NAFCA, ACC, and NITL.

In a decision served on October 18, 2001 ("October 18 Decision"), the Board ordered this proceeding and certain related proceedings involving similar issues held in abeyance and ordered the parties to attempt to resolve their differences through negotiations. The parties were also directed to file periodic reports with the Board reflecting the status of those negotiations.

During the course of negotiations, BNSF and the Railway Progress Institute ("RPI") reached an agreement in Docket No. 42061 that resulted in an amendment of Items 1000 and 150 of BNSF's Storage Book 6005 to exclude "[c]ars held for placement to private repair facilities" from the application of the new storage charges. Consequently, that issue no longer is involved in this proceeding.

On May 20, 2002, NAFCA and certain other parties in Docket No. 42060 filed a letter with the Board reporting on the status of negotiations, as directed by the Board. The May 20 letter reported that negotiations in Docket No. 42060 had concluded without any substantive agreement other than that reached in Docket No. 42061. The May 20

letter also advised the Board that BNSF had determined to make, and had made, certain tariff changes unilaterally, effective April 1, 2002, but had declined to make such changes retroactive to July 1, 2001, had declined to place a fixed term on the changes, and had reserved the right to make further storage and diversion charge changes unilaterally through tariff publications. In plain words, BNSF had declined to enter into a binding, negotiated solution of the storage charge and diversion charge issues, and had made only those unilateral changes deemed by it to be propitious, while reserving the right to alter its adjustments at any time in the future.

The unilateral changes made by BNSF effective April 1, 2002 included revisions to two tariff provisions described in the June 26, 2001 petition for investigation. BNSF amended Item 1700 of Storage Book 6005 to reflect new storage rates as shown in new Item 1800 of Storage Book 6005. As a result, effective April 1, 2002, some of the storage charges that initially had been set at \$25.00 per car per day on July 1, 2001 were reduced to either \$15.00 or \$10.00 per car per day, depending on the geographic location of the car holding point. Additionally, BNSF granted a credit for one storage charge day to each empty tank car from which BNSF receives a revenue line-haul movement.

The second relevant change made by BNSF on April 1, 2002 affects paragraphs 12-15 of the June 26, 2001 petition, challenging BNSF's institution of a new bill of lading charges of \$150.00, subject to a maximum of \$450.00 per bill of lading, from any diversion request applicable to an empty tank car. On April 1, 2002, BNSF amended Item 1000 of Diversion Book 6200 to permit one free diversion per tank car (also without retroactivity to July 1, 2001, and also subject to future unilateral change by BNSF).

- (2) Whether the cost of operating and maintaining holding tracks for private cars prior to loading was considered by the parties to be a railroad cost in the Ex Parte No. 328 negotiations;
- (3) The significance of the absence of storage charges on cars awaiting loading in the Ex Parte No. 328 agreement;
- (4) The significance of the contentions (a) that the furnishing of holding tracks for empty private cars prior to loading is included in the line-haul rates paid by BNSF shippers, and (b) that the movement of private car cycles is largely within the control of BNSF;
- (5) Information regarding the "typical duration for holding private tank cars awaiting loading and on the length of track that is used in holding these cars";
- (6) Whether the diversion charges imposed by BNSF are attributable to "switching out cars or blocks of cars that a shipper in mid-shipment diverts to a new location," and;
- (7) Comments on "how, in today's environment, the Board should evaluate a charge if we find that it is a departure tariff."

Petitioners regard BNSF's tariffs as "departure tariffs," in which case the consequences of that fact should be determined under the Ex Parte No. 328 process. While reserving our right to challenge the relevancy of some of the information and responses sought by the Board in the April 28 Decision, we endeavor in this filing to supply the information desired by the Board to the extent we are able to do so at this time. Attached as Exhibit No. 1 is the statement of Joseph C. Gasz, who performed various official roles in the Ex Parte No. 328 process ("Gasz V.S."). Attached as Exhibit 2 is the statement of Gary T. Kurtz, a former Equipment Manager for BNSF.

IV. Placing the Ex Parte No. 328 Mileage Allowance System in Perspective

Railroads do not pay tank car allowances because of Ex Parte No. 328; they pay them because they are required to do so by statute. Ex Parte No. 328 is an agreement, adopted and prescribed by the Interstate Commerce Commission, to give effect to the statutory allowance obligations of the railroads.

A railroad's obligation to pay allowances to shippers has its roots in 49 U.S.C. 10745 and predecessor provisions that were contained in the Interstate Commerce Act, formerly 49 U.S.C. § 1, et seq. Section 10745 states, as here pertinent:

A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part may establish a charge or allowance for transportation or service for property when the owner of the property, directly or indirectly, furnishes a service related to or an instrumentality used in the transportation or service. 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.

The antecedent provisions of Section 10745 were interpreted consistently by the ICC and the courts to mean that, where transportation instrumentalities or services which it is the obligation of a railroad to furnish are instead furnished by shippers, compensation, or an "allowance," must be paid to the shipper: "the act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them." Interstate Commerce Commission v. Diffenbaugh, 222 U.S. 42 (1911). See, also, United States of America v. Aberdeen & R.R. Co., 263 I.C.C. 303, 313 (1945); Terminal Charges at Pacific Coast Ports, 255 I.C.D. 673, 676 (1943) ("Carriers are obligated to perform or make allowances for all services necessary to give effect to their published rates").

The earlier versions of the language now appearing in 49 U.S.C. 10745 stated:

If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefore shall be published in tariffs or schedules filed in the manner provided in this part.... and the Commission may ... determine what is a reasonable charge as the maximum to be paid by the carrier....

See former 49 U.S.C. 15 (13), later recodified as 49 U.S.C. 15 (15). In 1978, former Section 15(15) again was recodified to 49 U.S.C. 10747 as part of a general revision of the Interstate Commerce Act. See Public Law 95-473. The legislative history of the recodification states that "[t]he purpose of the bill is to restate in comprehensive form, without substantive change, the Interstate Commerce Act and related laws.... In the restatement, simple language has been substituted for awkward and obsolete terms...." House Report No. 95- 1395, July 26, 1978, Cong. Record Vol. 124 (1978), p. 4. The legislative history of former Section 10747 states that the words "may publish a tariff" are substituted for "shall be published in tariffs or schedules filed in the manner provided in this chapter" because of revisions governing the publication and filing of rates. Ibid at page 99. When tariff filing was eliminated in the ICCTA, the allowance provisions were further revised to their present form in Section 10745, reflecting the complete elimination of tariff filing and the new method of "publishing" rates and service terms set forth in 49 U.S.C. 11101.

Despite the precatory appearance of the phrase "may establish a charge or allowance" in Section 10745, the allowance provisions retain their original mandatory meaning as interpreted by the ICC and the courts because such decisions have not been overruled subsequent to the 1978 recodification, made "without substantive change," or subsequent to enactment of the ICCTA. At least one court has held that allowances remain manda-

tory subsequent to the ICCTA. Englehard Corp. v. Springfield Terminal Ry. Co., 193 F. Supp. 2d 385 (D. Mass. 2002) ("railroads fulfill their common-carrier obligation to make available suitable railcars by paying car providers.") Indeed, the legislative history of the ICCTA indicates very plainly that the elimination of tariff filings brought about by the ICCTA was not intended in any respect to alter or weaken the allowance system. House Report No. 104-311 (November 6, 1995, to accompany H.R. 2539) states, at page 100, in reference to the allowance provisions of the bill:

This provision, which replaces the rail portions of former Section 10747, maintains the agency's regulatory authority to address the treatment by railroads of shipper-furnished or other non-railroad-owned cars, equipment, and services. The Committee is aware that certain segments of the national rail car fleet are already owned largely or entirely by non-carriers, and that there is a strong possibility in the future that even more of the fleet will cease to be carrier-owned. Therefore, this provision remains highly relevant to future dealings with railroads with the owners of non-railroad-owned equipment. The Committee does not intend to disturb any existing arrangements or regulations, including those adopted in negotiated-rulemaking proceedings, on this subject.

When the instrumentality of transportation furnished by the shipper is a freight car, then payment of an allowance to the shipper is not only necessitated by Section 10745, but must be made in accordance with the terms of 49 U.S.C. 11122(b). See Ex Parte No. 328, Investigation of Tank Car Allowance System -- Petition for Clarification or Reconsideration (unprinted decision of November 9, 1987) ("[The railroads] are correct that, under section 11122(a), the Commission's authority to prescribe car compensation is discretionary. [Citation omitted.] However, section 11122(b), which contains the standards governing car compensation, provides that car compensation 'shall be determined' by the factors enumerated in that section. It is thus clearly mandatory, and by its terms, governs all mileage al-

allowance tariffs regardless of whether or not they were prescribed by the Commission under section 11122(a)." (Emphasis in text.)

Accordingly, even in the absence of the tank car allowance system prescribed in Ex Parte No. 328, it would be necessary for BNSF and other railroads to compensate shippers if they furnish instrumentalities of transportation,² whether or not such allowances first are published in tariffs. Bud Antle, Inc. v. United States, 593 F.2d 865 (9th Cir. 1979).

Within this context of the allowance system, Ex Parte No. 328 can continue to serve as a useful, efficient, and in some respects critical tool to meet statutory objectives. Prior to the Ex Parte No. 328 tank car allowance system, tank car providers and railroads engaged in protracted, costly litigation to resolve allowance issues. The Ex Parte No. 328 system was a carefully negotiated compromise to avoid the continuation of such litigation. *Gasz V.S.*, p. 10-12.

Several of the questions posed by the Board in the April 28 Decision appear to recognize that what is at stake in this case may well go beyond the facial issue of whether the specific tank car changes instituted by BNSF on July 1, 2001, are "departure tariffs" within the meaning of Section 8 of Ex Parte No. 328. Indeed, this case may well influence the question of whether there will continue to be a negotiated framework for the resolution of tank car mileage allowances in the context of Ex Part No. 328.

To a great extent, Petitioners have been constrained to mention this issue because of the suggestion made by BNSF, in its October 29, 2002 Reply to the October 9 petition of NAFCA, ACC, and NITL, that, should the Board not accept BNSF's position and find that

² The term "transportation" includes "a locomotive, car ... yard, property, facility, instrumentality, or equipment of any kind related to the movement of ... property ... regardless of ownership or an agreement concerning use; and ... services related to that movement, including receipt, delivery, elevation, transfer in transit ... storage, handling ... of ... property." 49 U.S.C. § 10102(9).

its July 1, 2001 changes fail to qualify as Section 8 "departure tariffs," BNSF will take steps from which "one could readily predict the demise of the [Ex Parte No. 328] Agreement."³

It is unfortunate that BNSF has chosen to bypass the provisions of Section 8 to take the position that, unless it can achieve its ends without observing the mechanism of that section, it is "likely" to initiate Section 9 renegotiation steps that will result in the "demise" of Ex Parte No. 328. Renegotiation of Ex Parte No. 328 is not the only option available to BNSF within the framework of the Agreement. Pursuant to Section 8, it can seek to justify its July 1, 2001 changes under the "special circumstances" test of Section 8(e). Were BNSF confident that its storage and diversion charges are merely "routine," as it alleges, it should not shy from subjecting them to scrutiny under Section 8. Section 9 was intended as fall-back to Section 8.⁴

Part of the difficulty here is that BNSF is unwilling to stay within the framework of Ex Parte No. 328 or negotiate as provided in the Agreement. As the Board has been informed, most recently by BNSF in its October 29, 2002 Reply, BNSF is willing to enter into individual negotiations with individual shippers, under confidential terms of unknown

³ BNSF Reply, October 29, 2002, fn. 18. ("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.")

⁴ In the absence of Ex Parte No. 328, railroads and tank car providers would not only be re-immersed in litigation, but may find themselves subject to uncertain guidelines regarding the requirements of Section 11122(b). See *LO Shippers v. Aberdeen & Rockfish Ry. Co., et al.*, 4 I.C.C. 2d 1 (1987), *aff'd.*, *LO Shippers Action Committee v. ICC*, 857 F.2d 802 (D.C. Cir. 1988) ("LOSAC" cases), in which the ICC held that covered hopper car allowances should be subject to "market" considerations in addition to other Section 11122(b) standards. The so-called "LOSAC" cases applied to covered hopper car compensation issues, and not to tank car compensation. Because they were Section 11122(b) cases exclusively, they would not necessarily be dispositive of allowance litigation involving transportation instrumentalities other than cars themselves. Moreover, because railroads supply virtually no tank cars but do supply about 40% of all covered hopper cars, there may be substantial differences between the role of the tank car "market" and the role of the covered hopper car "market" in a tank car allowance case.

duration. It claims to have been successful in reaching agreements of that type, and Petitioners expect that there are, in fact, shippers who have been impelled to so act because they are faced with the imposition of the tank car storage charges that BNSF has published, without intervention by the Board. Ex Parte No. 328 was not, however, designed to permit a carrier to obtain a coercive negotiating advantage through tariff publications that quite plainly affect the tank car allowance system.

As discussed below, Petitioners recognize that not all use of carrier track for the holding of empty tank cars prior to loading would under all conditions be a transportation use for which a carrier would be responsible were it to furnish the cars involved, and for which allowances accordingly are always payable under the statute, Ex Parte No. 328 aside. Without intending to disclose the precise discussions that took place between Petitioners and BNSF pursuant to the Board's directions, Petitioners think it fair to comment that it was made plain by Petitioners to BNSF that the question of when carrier track ceases being an instrumentality of transportation and becomes an instrumentality of the shipper was one open to negotiation, Ex Parte No. 328 notwithstanding. Petitioners also think it fair to point out that the record reflects the position of BNSF; as disclosed in Petitioners' May 20, 2002 letter to the Board, and in other filings, BNSF chose to make certain adjustments unilaterally instead of on a negotiated basis, refusing to enter into agreements with Petitioners regarding the duration of any provisions currently applicable to its storage charges or other changes.

Although BNSF has attempted to posture its July 2001 changes as mere "routine storage and diversion charges on tank cars" (see fn. 3, supra), they are, instead, an attempt to transfer BNSF's infrastructure expenses, as they were accepted as being during the Ex

Parte No. 328 negotiations, to its customers without any form of ongoing allowance or compensation, as required by statute. This goal was acknowledged by BNSF when its storage charges and other changes were announced in February 2001. Attached as Exhibit No. 3 is a reprint of the February 2, 2001 "Service Advisories" website edition dedicated by BNSF mainly to an explanation of the storage charge rules that it intended to publish later that year, and did publish on July 1. In that document, BNSF states in bold print:

"The Intent of These Changes is to Improve Asset Utilization for our Customers and Effectively Expand Capacity Without Additional Capital Outlays."

BNSF's intent is, of course, to expand capacity without "additional capital outlays" by BNSF, but with additional capital outlays by BNSF's customers, whose only options are to either pay the daily storage charges or to construct their own storage tracks or lease storage track from BNSF at their own expense. As Petitioners will explain below, the cost of railroad infrastructure to hold empty tank cars prior to loading was always considered to be a railroad expense, and the uncompensated transfer of that expense from BNSF to its customers unquestionably affects the costs of operating and maintaining tank cars as contemplated under the Ex Parte No. 328 mileage allowance system.

Petitioners also believe that a necessary part of evaluating BNSF's position should entail an examination of the reasonableness of imposing the charges in the context of the prior expectations of the parties.

It is indisputable that tank car shippers acquired their fleets without any expectation that they would be impressed with the financial burdens of the infrastructure to hold the empty cars prior to loading. In part because BNSF, like other railroads, declines to furnish tank cars, and in part because the private tank fleet is either owned or under fixed term

leases and subject to long-term lessor financial commitments, it is not possible to abruptly reduce the private tank car fleet in response to the threat and burdens of storage charges.

BNSF's customers who supply tank cars were given very little forewarning of the new storage charges. They were announced in early 2001 for application later that year. The sudden and total reversal of prior policy by BNSF regarding the obligations of its tank car customers to pay storage charges is in stark contrast with the manner in which BNSF and other railroads agreed to treat each other when they altered another long-standing freight car practice: the payment of car hire between railroads for the use of each others' freight cars. Car hire is a charge that a "lessee" railroad pays to a car owner when its freight car is on the lines of the "lessee." The ICC had prescribed car hire rates pursuant to Section 11122, the same section that governs private car allowances. However, in 1990, the railroad industry and other car suppliers petitioned the agency to replace the system of car hire prescription with a deprescribed regime of "market" compensation enforceable through arbitration, if necessary. Under the proposal, car owners no longer would be guaranteed the financial returns on their car investments that had been a reasonable expectation when the cars were acquired.

The railroads recognized, however, that an abrupt end to all degree of car hire revenue assurance would work a hardship on carriers that had made freight car investments in reliance on that system, so their deprescription proposal contemplated a 10-year phase in to provide equity in the transition. The ICC adopted deprescription with the 10-year phase in. See Ex Parte No. 334 (Sub-No. 8), Railroad Car Hire Compensation -- Rulemaking, 9 I.C.C. 2d 1090 (1993).

Were the question of appropriate BNSF storage charge levels and rules to be considered by the Board, Petitioners would maintain that any major transition in the allowance or cost structure for private tank cars would be unreasonable unless accompanied by phase-in with equitable considerations similar to those that BNSF and other railroads accorded their own investments in freight cars when they made the transition from a prescribed to a deprescribed car hire market.

Petitioners clearly would prefer that Ex Parte No. 328 remain intact as a tank car allowance system. Unfortunately, in light of BNSF's disinclination to follow the dictates of Section 8 or to enter into Section 9 renegotiation for any purpose other than to bring about the "demise" of the Agreement, that goal is problematic. But, Petitioners respectfully suggest that the Board should not whittle away at the parties' Ex Parte No. 328 bargain in the face of BNSF's intransigence. Petitioners believe that, with the answers to the questions posed in the April 28 Decision, it will become clearer than ever before that BNSF is endeavoring to pass on to its tank car customers holding track infrastructure costs that were plainly regarded as being part of a railroad's obligation to furnish tank car service and facilities, and that such steps are subject to investigation under the tank car allowance agreements.

V. Responses to Specific Board Questions

Because some of the questions posed by the Board in its April 28 Decision are related to each other or involve related responses, Petitioners will combine certain of those questions.

Whether the Cost of Operating and Maintaining Holding Tracks for Private Cars Prior to Loading was Considered by the Parties to be a Railroad Cost in the Ex Parte No. 328 Negotiations;

**The Significance of the Contention that the Furnishing of Holding Tracks
for Empty Private Cars Prior to Loading is Included in the Line-Haul
Rates Paid by BNSF Shippers.**

Joseph C. Gasz was a transportation official of E.I. du Pont de Nemours and Company ("DuPont"), for 32 years with senior responsibility for all modes of transportation. He participated in the Ex Parte No. 328 negotiations as the shippers' Secretary of the Joint Negotiating Committee ("JNC") between 1975 and 1979, during the first round of Ex Parte No. 328 negotiations. During the second round, between 1982 and 1986, Mr. Gasz represented chemical shipper groups that participated in the Ex Parte No. 328 negotiations. His attached statement reflects not only his first-hand knowledge of more than six years of Ex Parte No. 328 negotiations, but also a recollection of events refreshed from a review of his extensive negotiating records. Gasz V.S., p. 1, 2.

The JNC, comprised of carrier and tank car owner/shipper representatives, was divided into various subcommittees, each with a specific area of allowance system "jurisdiction." Subcommittee 5 was charged with the responsibility to develop proposals for "Handling Empty Tank Cars."

The minutes of the August 16, 1977 Ex Parte No. 328 negotiating meeting contain a report from Subcommittee 5 that is set forth in essentially *verbatim* form by Mr. Gasz. In this report, authored and agreed to by railroads and tank car representatives alike, the JNC stated:

Empty tank cars, being instruments of transportation, place a burden to be born (sic) by carriers to the proper limits of transportation related use.... Tank cars, like all rail cars and all instruments of transportation, follow an ever-changing rhythm. Their purpose is to transport commodities under safe conditions. To accomplish this, the tank cars must seek the next movement to which it is suited.

During this course, the tank cars incur the natural elements of transportation; i.e., Movement ... Nonmovement....

A location that orders an empty tank car held on railroad property causes the rail carrier to allocate a car spot for the holding of the empty car. This occupation of a car spot on railroad property by an empty tank car begins the cycle of handling empty tank cars on railroad property.

Gasz V.S., pp. 4-6. These minutes leave no doubt whatsoever that operating and maintaining holding tracks for private cars prior to loading was considered by the parties to be a railroad function and thus a railroad cost in the Ex Parte No. 328 negotiations.

The costs of operating and maintaining holding tracks for private cars prior to loading continued to be regarded by railroads as an item of railroad expense until 2001, when BNSF determined to shift that expense from itself to its tank car customers. It is not rationally possible to otherwise explain the February 2001 BNSF statement, cited above, that the "intent" of its new storage charge regime was to "effectively expand capacity without additional capital outlays." That statement could only have been talking about an expansion of BNSF capacity without additional BNSF capital outlays and the transfer of those capital outlays to tank car suppliers. BNSF's statement and actions affirm the conclusion that the costs of constructing, maintaining, and operating empty car holding tracks were, indeed, carrier costs as contemplated by the Ex Parte No. 328 allowance system.

BNSF routinely provides holding tracks for empty cars of BNSF ownership. Gary T. Kurtz was, for 38 years, until 2001, employed by BNSF as an Equipment Manager. In his statement, Exhibit No. 2, Mr. Kurtz explains that BNSF cars often are idled on BNSF tracks between point of unload and point of next load for up to 30 days at terminal points. Kurtz V.S., pp. 1-2. Shippers who purchase BNSF service and who receive BNSF equipment are paying for these BNSF holding services of empty cars as part of their line haul

rate. The holding tracks for those cars thus are a part of the transportation service and facilities furnished by BNSF. If the costs of providing and maintaining those facilities are shifted by BNSF to its customers, the customers are entitled to an allowance under the provisions of Section 10745 or 11122 -- the very type of allowance that is encompassed in the Ex Parte No. 328 tank car allowance system.

BNSF has argued that its storage charges applicable to private tank cars do not differ from the manner in which it treats cars of its own ownership, pointing to its practices in the handling of railroad-furnished cars that are assigned to the use of specific shippers. BNSF argues that these assigned cars are subject to penalties for non-acceptance similar to those that it seeks to impose on private tank cars.

However, there are major differences between private tank cars and railroad-owned cars that are assigned to a shipper. A car assignment is voluntary and can be terminated at any time by either party. If BNSF imposes assigned car charges or rules deemed by the shipper to be unfair, the shipper can terminate the car assignment and look to BNSF for a supply of cars pursuant to BNSF's common carrier obligations. But no such options are available to tank car shippers. They must either purchase their own cars (approximately 25 percent of the tank car fleet is owned by shippers) or enter into binding leases with car suppliers that cannot be terminated simply upon dissatisfaction with a change in BNSF rules or charges. More importantly, there are no BNSF tank cars in common carrier service to be used in the event that a shipper is dissatisfied with BNSF's policies toward private tank cars.

Empty freight cars routinely require the use of carrier holding tracks between unload point and next load point. If the empty cars are of BNSF ownership on BNSF lines,

and have not been "spoken for" at a loading point, the cars may be held almost anywhere on the BNSF system for days or weeks until needed. Kurtz V.S. The only difference between that type of BNSF system car and a private car is that a private car normally does not leave its unload point unless its next point of use is known and has been designated, so that there is no need for a pause in the empty return movement (except as may be necessary to meet BNSF's operating convenience). It would be inappropriate to conclude that, because of this difference between the handling of BNSF system cars and private cars, holding tracks for empty private cars are not a necessary part of BNSF's car service infrastructure. At one point or another -- either somewhere along the route between unload and load point or at the load point -- holding track for empty cars is almost always essential, which is in great measure why such tracks were always considered an item of railroad cost.

The rules instituted by BNSF inappropriately demand that tank car suppliers hone the use of their car cycles down to the point where the cycle contains only one or two days of idle time (the "free time" contained in BNSF's storage rules), while BNSF's own cars rely on cycles that often contain numerous days or weeks of idle time. This approach not only contracts Ex Parte No. 328, but is unreasonable.

**The Movement of Private Car Cycles is Largely Within the Control of BNSF;
Information Regarding the Typical Duration for Holding Private Tank Cars
Awaiting Loading and on the Length of Track that is Used in
Holding These Cars**

These two issues are almost inseparably intertwined. Shippers require tank cars at their facilities in order to keep the facilities in operation; if tank cars are not present to receive finished product, a facility can be forced to slow down or shut down, which has extremely expensive and damaging ramifications. BNSF supplies none of the necessary cars.

The number of empty tank cars on hand and the amount of time they are held varies from industry to industry and facility to facility. In many cases, an ideal supply of empty tank cars awaiting loading at a shipper facility would equal three days' loading capacity for the cars; at others, it is four to seven days' worth. There may be some facilities where even greater numbers of cars are on hand. Not all cars, however, necessarily would be on carrier track as all shipper facilities can hold some number of empty cars prior to loading.

Several factors can affect the flow of empty cars to a loading point, and carrier performance is perhaps the foremost of those factors. A car's use cycle breaks down into five segments: (1) time between the arrival of the empty car at the loading point and the placement of the empty car for loading on shipper track (which is the part of the car cycle to which BNSF seeks to apply storage charges); (2) time between placement of the car on shipper track and billing of the car back to the railroad as a load; (3) time between receipt of billed car and arrival at destination; (4) time held at destination due to consignee, and (5) empty transit time back to the next loading point.

The railroad controls or influences four of the five elements of the car cycle. Loaded and empty transit times are entirely within the control of the railroad or its connecting carriers. Destination demurrage rules, either imposing charges for cars held excessively on railroad destination tracks or excusing consignees from paying any demurrage when a private car they do not own is on their own tracks, are within the control of the destination carrier and influence the consignee's retention of the car. At the loading point, the period of time the empty car awaits placement on shipper tracks is influenced by several factors, one of which is whether the carrier switching cars from the carrier's yard to the shipper tracks is furnishing the oldest cars first or simply the most convenient car to place.

Many tank cars have a fungible use at a specific loading origin, so that when one of those cars is idle on carrier holding tracks for an inordinate period of time, it is likely to be because the car was more difficult for the carrier to access than other cars and was bypassed when the shipper's loading track required additional equipment. In some instances, holding time for empty cars is impacted by seasonality demands.

Petitioners have not undertaken to survey a thorough cross-section of facilities that initiate tank car loads, but have reviewed data from several such facilities.

At one tank car originating facility served by BNSF, loaded movements and empty returns by BNSF consistently represented approximately 70 percent of the total car cycle, including time while the car was at the destination awaiting unloading and time while the car was empty at origin awaiting loading.

An examination of loaded and empty tank car transit times, for both BNSF single line moves and joint-line moves where BNSF is the originating carrier, disclose wide variances between the same origin-destination pairs. For example, in September 2002, transit time under load from one origin to one destination averaged 6.11 days, but varied from 3 days to 12 days, with 41% of the shipments exceeding the average. The movement of empty cars from the unload point back to the same origin took anywhere from 1 day to 12 days, with about as many cars taking 5 days or less as took 7 days or more.

Examination of other trip movement records originating on BNSF indicate similar continuing disparities between the same origin and destination pairs. In some cases the average transit times for loaded moves are greater than the average transit time for empty moves, while in other cases the reverse is true. Petitioners have not subjected these data samplings to a professional statistical analysis, but it is evident that, even were apparent

abnormalities producing extreme data removed from consideration, there consistently remain variations in the range of 40 percent in loaded and empty transit times between the same origin and destination pairs.

Petitioners make no claim that either they or their customers are in all respects free from responsibility for unpredictable tank car cycle performance, and acknowledge that the allocation of responsibility for inconsistent or unpredictable car cycle times is a complicated issue. Indeed, in part because of the difficulties involved in assigning definitive limits to the performance of all phases of a tank car cycle, the Ex Parte No. 328 negotiators decided that they would forego tank car allowance system rules that attempted to apportion empty car handling and holding costs between railroad and tank car suppliers and instead accepted, as part of the Ex Parte No. 328 compromise, the continuing assumption that such costs were railroad responsibility. Gasz V.S., pp. 12-13.⁵

No prudent shipper utilizing tank cars wants to maintain a fleet larger than is necessary to meet business demands without risk of plant shut-down. Tank car rentals and operating costs are extremely high, running between \$350.00 and \$1,200.00 per month exclusive of certain cleaning expenses. BNSF has suggested that storage charges for empty tank cars on railroad track are necessary as a discipline against excessive tank car fleets. But there is no reason to think that the size of the tank car fleet -- now virtually an entirely private fleet -- is any greater than it would be were BNSF to undertake to supply all tank cars. One can presume that BNSF would seek to avoid the acquisition of expensive, unnecessary cars; and shippers certainly do the same thing. When BNSF service deteriorates, or the

⁵ In recognizing the problems associated with apportioning responsibility for car handling between carriers and shippers, the negotiators were reflecting a viewpoint that had been concurrently voiced judicially. In Dana Corporation v. Interstate Commerce Commission, 703 F.2d 1297 (D.C. Cir. 1983), the court reversed an ICC car demurrage and storage decision where the charges in question might in part have been "attributable to the fault of the carriers."

service of its connecting lines deteriorates, as occurred several years ago following various rail mergers, it is necessary for shippers to acquire additional tank cars to compensate for longer cycle times in order to avoid the horrific prospects of plant shut-downs or customer defections due to inadequate tank car supply. One can assume that, had BNSF undertaken to supply tank cars for its bulk liquid originations, BNSF also would have sought to protect those originations through additional car acquisitions from time to time. Those cars do not just disappear when the railroad service crisis abates. They linger to the detriment of the shipper and carrier alike.

Predicting the proper size of a car fleet is not an exact science. BNSF itself cannot do so where it is the car supplier, and has not managed to achieve a perpetual balance between car demand and car cycle. Kurtz V.S., p. 2. Occasional freight car excess in relation to demand is inevitable, regardless of who supplies the cars.

As indicated above, Petitioners cannot supply firm figures to indicate the typical duration for holding private tank cars on railroad track awaiting loading. At some facilities, a tank car fleet has been sized for a three-day car supply on hand; at others, a supply sufficient for five, six, or seven days is on hand. There are approximately 80 cars per mile of storage track, so a facility with a three day supply and loading 30 tank cars per day would require a minimum of one mile or so in empty car storage space. At current BNSF tank car storage rates, which are set at \$10.00, \$15.00, or \$25.00 per chargeable day, tank car shippers face storage charges that can range between some \$290,000 and \$730,000 per mile of BNSF storage track used annually.⁶ If the shipper has property on which it can build its own additional storage track, it will face construction costs of at least \$1 million

⁶ In 2001, BNSF had gross revenues of \$279,000 per mile of road operated and net revenue of \$34,408 per mile of road operated. Railroad Facts, 2002, Association of American Railroads, pp. 66, 69. Its storage charges have the potential to outstrip some of its fixed assets in earning power.

per mile, plus annual maintenance. This is not a trifling transfer of infrastructure costs, particularly considering the fact that BNSF already has storage track for these cars and continues to receive the same freight revenue for moving the loaded cars as it did before it transferred the track storage infrastructure costs to its customers.

**What Constitutes a Departure Tariff Under Section 8 of the
Ex Parte No. 328 Rules**

In requesting comments on what constitutes a departure tariff under Section 8, the Board proposed that the parties discuss Charges for Movement of Empty Cars, B&PRR Inc., 7 I.C.C. 2d 18 (1990) ("Buffalo & Pittsburgh"), including the statements in that case that Section 8 did not intend to "freeze and immunize from change ... matters which are beyond the four corners of the agreement," and that Section 8 was designed to prevent "attempts to avoid paying the full allowance specified by the formula, whether in the form of tariffs imposing direct caps, raising on the rate on tank car commodities, or other rate mechanisms by which the carrier attempts to reduce the net *allowance* paid."

Petitioners believe that the language which bears most directly on the question posed -- what constitutes a departure tariff under Section 8 -- is found in the mileage allowance agreement itself. Section 8 begins: "No tariff that departs in any manner from the allowance system prescribed herein may be filed or will be permitted except as provided below." Under that statement, a departure tariff by definition is one "that departs in any manner from the allowance system." The Ex Parte No. 328 decision explains that it was the intent of Section 8 to require an investigation of departure tariffs "whatever the form," and not necessarily departures that take the form only of a "cap" on the allowance paid. 3 I.C.C. 2d at 198.

In Buffalo & Pittsburgh, the ICC had before it a railroad tariff that imposed charges for the movement of empty tank cars to repair facilities and a claim by the tank car owners that such tariffs were "departure tariffs" because they reduced the value of the prescribed level of tank car allowances. The ICC nevertheless found that the empty move charge tariff was not a "departure tariff."

There were several bases for the ICC's decision, and not merely the language at 7 I.C.C. 2d 18, 25, recited in the Board's April 28 Decision and relied upon by BNSF. Moreover, the facts in Buffalo & Pittsburgh regarding empty movement charges in relation to the Ex Parte No. 328 allowance system differ materially from those involving storage charges for empty private cars prior to loading.

First, it is necessary to understand the evolution of Buffalo & Pittsburgh. The case came about only because of a prior ICC decision, Gen. Amer. Transp. Corp. v. Ind. Harbor Belt RR Co., 3 I.C.C. 2d 599 (1987) ("IHB"), aff'd., General American Transp. Corp. v. ICC, 872 F.2d 1048 (D.C. Cir. 1989) ("GATC"), in which railroads were permitted, for the first time in over 40 years, to assess charges for the movement of empty private cars to or from repair facilities.

IHB was aimed at correcting a specific, narrow inequity that had arisen because the prior rules governing empty repair moves incorrectly presupposed that all carriers providing the free moves to repair shops were also sharing equitably in the freight revenues generated by the private cars. IHB concluded that such was not the case, and that separate empty movement charges were necessary in order to correct the imbalance between expenses incurred by carriers providing a heavy flow of empty private car movements to repair facilities when the same carriers received *de minimis* or no freight revenues from the

same cars. IHB, 3 I.C.C. 2d at 603. In rendering the IHB decision, the ICC was acutely aware of the fact that allowances for private car use were available to offset the private car owner's payment of tariff charges for moving the cars to or from repair facilities. IHB, 3 I.C.C. 2d at 605-608. The reviewing court focused on this aspect of IHB: "The ultimate responsibility for the costs of owning railcars, including the costs of empty repair moves, would continue to be transferred to railroads through customary channels – such as mileage allowances." GATC, 872 F.2d at 1051-52.

Having committed itself to correct what had been presented to it as the inequitable visitation of undue expense on carriers who were helpless to recover their empty car movement costs, and after having its decision affirmed judicially, the ICC had virtually no choice but to find a rationale for escaping Ex Parte No. 328 departure tariff provisions when the agency was confronted with specific empty movement charges for tank cars. Buffalo & Pittsburgh makes it very clear that it was the ICC's intent in that case to follow through on IHB. It characterized its decision as one involving "[t]ariffs charging for moving privately owned empty rail cars on their own wheels for ordinary repair or maintenance, in reliance on *Gen. Amer. Transp. Corp. v. Ind. Harbor Belt RR Co.*," 3 I.C.C. 2d 599 (1987). Buffalo & Pittsburgh, 7 I.C.C. 2d at 18. Later in its decision, the ICC explained that, to view the empty movement tariffs as Ex Parte No. 328 "departures" would be "inconsistent with the rationale" of IHB. 7 I.C.C. 2d at 28. The same cannot be said of BNSF's storage charges.

As noted in the April 28 decision, BNSF focuses on the IHB statement that "it is virtually impossible to read the phrase 'prescribed herein,' as an intent to freeze and immunize from change ... matters which are beyond the four corners of the agreement and which

were specifically excluded from consideration by the JNC." Buffalo & Pittsburgh, 7 I.C.C. 2d at 25. However, such forceful and exclusive reliance on this passage is misplaced in this case for several reasons.

One is that the railroads contended in Buffalo & Pittsburgh, and the ICC agreed, that charges for moving empty tank cars to repair points was a matter "not a part of the negotiations that produced" Ex Parte No. 328. 7 I.C.C. 2d at 24. But the evidence in this case demonstrates that the holding of empty tank cars on carrier tracks prior to loading was considered, and that the parties negotiating Ex Parte No. 328 expressly contemplated that the costs of holding empty private cars prior to loading were railroad costs. It was the deliberate decision of the negotiators to leave the entirety of those costs with the railroads as part of a compromise which also deprived tank car lessees or operators of tank cars of the ability to recover many of their costs, such as those for car linings and cleaning. *Gasz V.S.*, pp. 16-18. No such bargain was shown to underlie the empty movement tariffs involved in Buffalo & Pittsburgh. In this case, excluding holding track charges from Section 8 will upend a negotiated understanding and compromise reached by the parties. Such an approach would contradict the ICC's plainly stated desire to avoid "an erroneous impression that negotiated settlements are neither lasting nor binding, and may be overturned by one party's unilateral" action. Ex Parte No. 328, Investigation of Tank Car Allowance System, 367 I.C.C. 48, 50 (1982).

Another distinction between Buffalo & Pittsburgh and this case lies in the level of rational expectation that the ICC attributed to tank car owners regarding repair shop movements during the Ex Parte No. 328 negotiations. The ICC rejected the car providers' claims that the JNC intended to "freeze" the pre-IHB status quo, concluding that the parties

actually intended the opposite because they included provision for the recovery of repair shop movement costs in the allowance formula, and did so because they were aware, or should have been aware, during the Ex Parte No. 328 negotiations of the likelihood that IHB would be decided in a manner to require payment of those charges by tank car providers. 7 I.C.C. 2d at 27.

No similar facts or circumstances exist regarding storage track charges. The tank car provider representatives negotiating Ex Parte No. 328 had no reason whatsoever to believe that the ICC was on the verge of, or even considering, a rule to require the transfer of holding track infrastructure expense from railroad to shipper, and no provision was made in the mileage allowance system for the recovery of those charges or costs through allowance payments.

A concurrent and related reason advanced by the ICC for refusing to treat charges for the movement of empty cars to repair facilities as Section 8 “departures” was its conclusion that Section 8 “is virtually impossible to apply in the context of empty repair move charges.” 7 I.C.C. 2d at 26. The ICC found that this “impossibility” arose from the fact that the carrier publishing the empty movement charges (Buffalo & Pittsburgh) would not be the same carrier making mileage allowance payments, so that the empty movement charges would not result in any net reduction in the allowances being paid to tank car providers. Ibid.

Applying the same test here, the storage charges or holding track costs of BNSF truly represent a net “reduction” in the mileage allowances being paid by BNSF and received by its customers. BNSF is assessing storage charges on empty cars which ultimately it handles in line-haul service, which generate revenue for BNSF and for which

BNSF makes mileage allowance payments. Even if there are some instances in which BNSF, perhaps as a switching carrier, provides holding tracks for empty tank cars that will receive a line-haul movement via another originating carrier, BNSF still will receive switching revenue for those cars. No "undesirable cross-subsidies," as the ICC styled them (7 I.C.C. 2d at 24), of the IHB type are present here.

In focusing on the Section 8 issue, the Board has also directed the parties' attention to the statement in Buffalo & Pittsburgh that Section 8 (e) was concerned "with attempts to avoid paying the full allowance specified by the formula, whether in the form of tariffs imposing direct caps, raising the rate on tank car commodities, or other rate mechanisms by which the carrier attempts to reduce the net *allowance* paid" (emphasis in text). Given that the provision of holding tracks for empty tank cars prior to loading was regarded by the Ex Parte No. 328 negotiators to be a carrier responsibility and expense, the creation of a new cost to be borne by shippers for that expense indisputably does reduce the net allowance paid by BNSF and received by its tank car customers.

The inappropriateness of concluding that storage track charges do not depart from the tank car mileage allowance system is further evident if one looks beyond the tactical choices made by BNSF. Assume that BNSF genuinely regards itself as being in the position of paying excessive mileage allowance compensation to tank car furnishers because it is incurring holding track costs that BNSF regards as the responsibility of the tank car provider. BNSF could do what other railroads did previously; it could announce that it was placing a "cap" on its mileage allowances in order to stem the payment of inappropriately high allowances. Had BNSF made that choice, there is no doubt that the tariff containing the "allowance cap" would be a departure tariff subject to investigation under Section 8.

By instead imposing rules which contain charges when shippers use BNSF tracks for empty private cars prior to loading, BNSF is attempting to accomplish the very same purpose while hoping to evade the investigatory provisions of Section 8. The Board should not sanction that device.

Petitioners will stop short of attempting to define a "departure tariff" in all circumstances. However, the steps taken by BNSF result in a new cost to those shippers furnishing tank cars. Those cars produce revenue for BNSF and reduce the mileage allowances paid by BNSF and received by those shippers for their cars. These provisions must be treated by the Board as "departure tariffs" under Section 8.

The Significance of the Absence of Storage Charges on Cars Awaiting Loading in the Ex Parte No. 328 Agreement

Storage charges are not included specifically in Ex Parte No. 328, except under Section 5 which deals with empty cars awaiting repair or maintenance, because the negotiators could not devise an appropriate procedure to transfer any part of the storage charge burden from the railroads, where it resided, to the tank car owners; and because the parties had to make compromises in order to reach an agreement. Gasz V.S., p 11.

Implicit in this question is the issue of whether the absence of specific holding track rules means that a railroad is free to pursue the course chosen by BNSF and impose its unilateral version of a holding track solution that the Ex Parte No. 328 negotiators (including those representing the predecessors of BNSF) could not or would not reach. The answer, Petitioners think, clearly must be in the negative, in part for the reasons explained in the preceding subsection and also in light of the structure and purpose of allowance agreement as a whole.

Other than with respect to Section 5, which applies solely to "charges applicable to the movement and/or holding of empty private tank cars at tracks or adjacent to non-railroad facilities for cleaning, lining, relining, maintenance, modification or repair," the agreement contains no invitation for any railroad to publish any "tariff" regarding holding charges. Section 5(a)(c) states that the charges "in this item" may be superseded by certain writings "that contain empty private tank car handling and holding provisions as part of the overall agreement." The storage charges published by BNSF do not qualify for that treatment because they are not in "this item" (i.e., Section 5 of the agreement) and are not part of any "overall agreement." Accordingly, there is no express warrant in Section 5 or elsewhere in Ex Parte No. 328 for a "departure tariff" containing storage charges for empty tank cars on railroad track awaiting loading.

One of the tenets of the mileage allowance system was that it be capable of annual updates in order to reflect current conditions of tank car use and to pass muster under statutory provisions. Update data was to be furnished exclusively by four large tank car lessors. The only exception to this approach was the inclusion of a limited number of items of lessee cost set forth in Section 3(b), which were included at their original cost subject to annual inflation adjustment only. Since track storage charges are, by definition, a lessee cost, no such charge or cost may be considered under the agreement for purposes of calculating the tank car allowance. *Gasz V.S.*, p. 13.

Whatever the full scope of reasons for the Ex Parte No. 328 compromises may have been, the fact remains that there were numerous compromises that resulted in an overall agreement that all sides presented to the ICC for approval, and that received its approval and prescription. If it is now BNSF's position that those compromises work something of a

hardship on it when it comes to empty car storage, then it should be pointed out that the compromises also work hardships on tank car providers, who are unable to recover their full costs of tank car ownership and use under the compromise system.

For example, the updated amount currently included in the annual recalculation for "lessee cost" is approximately \$ 103.00, although the actual annual cost of the items that are supposedly covered by that amount is far greater. *Gasz V.S.*, p. 16. Other items of lessee expense that are highly costly, and that are appropriate items of allowance compensation because they are costs that would be incurred by the railroad were it to supply the cars, also are excluded. Examples of such excluded costs are those for certain types of car cleaning and inspections mandated by government rules, that can aggregate thousands of dollars per car per year. *Gasz V.S.*, pp. 17-18. The current formula deprives tank car operators of compensation for those expenses.

The tank car allowance agreement as a whole was crafted to make it unnecessary for every item of tank car expense to be addressed specifically because the agreement contains a basic process for renegotiation and a separate, special process if a railroad such as BNSF believes it necessary to seek a change in a specific aspect of the system. The "departure tariff" provisions of Section 8 allow BNSF to seek an adjustment for what it might regard as an appropriate storage charge expense that was not included in the negotiated system. BNSF's tank car allowance system changes should be examined under Section 8, where they may or may not pass muster.

**Whether the Diversion Charges Imposed by BNSF are Attributable to
Switching Out Cars or Blocks of Cars that a Shipper in Mid-
Shipment Diverts to a New Location**

There is a short answer to this question, and it found in BNSF's diversion tariff, BNSF Diversion Book 6200-A.

In the normal course of events, when a tank car is emptied it is either automatically reverse-routed to its last loading point or, if a new destination is named prior to unloading and release of the car, it is routed to the new destination, in either case at no additional transactional freight charge, but subject to the mileage equalization provisions of Section 1 of the agreement to police against excessive empty route miles.

The new empty tank car diversion charges of BNSF are designed to come into play when BNSF receives a "diversion" order after the next destination of the empty car has been determined in the manner just described. A "diversion" is defined in Item 300 of BNSF Diversion Book 6200-A to mean "any request for change in the bill of lading, waybill, service order, or shipping document applicable to cars that are in BNSF's possession as a line-haul carrier."

The empty tank car diversion charges are set forth in Item 1100, subpart B-1, of the Diversion Book and there apply to any "change in consignee."

Consequently, if an empty tank car is still on the tracks of the industry that unloaded it but has been released to BNSF for movement, thereby placing the car in BNSF's possession as a line-haul carrier, the designation of a new consignee from that point on would constitute a "diversion" within the meaning of BNSF's tariff. The car need not undergo a single switch for the diversion charge to apply. Had the car not been "diverted," it would be handled in the usual course of BNSF operations, undergoing whatever

number of switches might be necessary to return the car to its designated point for next loading or repair. If the car is "diverted" before it has moved an inch, it will be handled in precisely the same way, but just to a different destination. It is impossible to conclude that the BNSF diversion charges are attributable only to switching out cars or blocks of cars that a shipper in mid-shipment diverts to a new location.

Comments on "How, in Today's Environment, the Board Should Evaluate a Charge if We Find that it is a Departure Tariff"

If BNSF's tariff filings are found to constitute "departure tariffs," then the burden of proving that its departure tariff "is in all respects lawful" and to justify "an exception from the general rule that the nationally prescribed allowance level applies and must be paid" resides with BNSF under Section 8(e) of the agreement.

Petitioners are uncertain whether the Board is asking how the reasonableness or lawfulness of the BNSF charge level would be determined, or whether the Board is asking how the charge would mesh with the statutory allowance provisions. If the former, Petitioners believe that BNSF would be required to segregate and exclude from its storage charges all costs and penalties attributable to its own actions. Dana Corporation v. ICC, supra. Its present storage charge rules do not do so, containing only limited relief for a narrowly-defined form of "bunching." The reasonableness of BNSF's rules would also require examination as they affect and help determine the size of the shipper's bill. At best, BNSF would be entitled to compensation only for some portion of the value of track actually used.

The Board's reference to "today's environment" raises the possibility that the Board may be questioning why, given current railroad rate-making latitude, tank car suppliers would even bother to quarrel with costs of this nature since BNSF may well be able to raise

its freight rates even if the storage charges are defeated. If that is the purpose of the Board's question, Petitioners reply as follows.

From a commercial perspective among sellers and buyers of goods -- the customers of the railroad industry -- it makes a great deal of difference whether a cost of transportation appears in a tariff or is imposed by other means on a shipper. Tariff charges represent definite, clearly stated costs of doing business, capable of ascertainment before sales are made. When a cost of transportation is included in the freight rate, the buyer and seller of goods can negotiate as to which of them will pay the freight rate, and the freight rate is known to both in tariff form. When a cost of transportation is imposed by a railroad on only one party to the commercial transaction -- the party that supplies the tank car that delivers the goods -- then that cost becomes an item of overhead. While the parties to a transaction can negotiate stated, published transportation costs, they cannot negotiate amorphous overhead costs, such as ever-changing tank car storage charges. Moreover, if railroad infrastructure expenditures are included in freight rates, they become subject to challenge if the freight rate violates Section 10701. If those same infrastructure costs are passed on to shippers outside of a rate structure, as BNSF proposes, they may escape scru-

tiny altogether. So, even in "today's environment," it does make a difference how railroad costs are treated.

Respectfully submitted,



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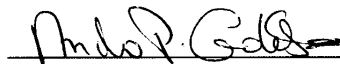
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Transportation League

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Submission of North America Freight Car Association, American Chemistry Council, and The National Industrial Transportation League in Response to the April 28, 2003 Decision of the Board has, this 9th day of June 2003 been served on all parties of record by first class mail, postage prepaid, and by hand delivery on counsel for BNSF.



Andrew P. Goldstein.

**STATEMENT
OF
JOSEPH C. GASZ**

My name is Joseph C. Gasz. I retired in 1999 from E.I. du Pont de Nemours and Company ("DuPont"), where I held the position of Principal Transportation Manager. My career with DuPont spanned 32 years and was spent entirely in DuPont's Transportation and Logistics Department, where I was a senior DuPont official with responsibility for all modes of Transportation.

Between 1975 and 1979, I participated in the first phase of Ex Parte No. 328 ("Ex Parte No. 328 I") as the shippers' Secretary of the Joint Negotiating Committee ("JNC"). Between 1982 and 1986, I was DuPont's representative to the Chemical Manufacturers Association (now the American Chemistry Council) and represented chemical shipper groups that participated in the negotiation of the current Ex Parte No. 328 agreement (which I sometimes may refer to as "Ex Parte No. 328 II"). The Tank Car Allowance System and rules were ultimately prescribed by the Interstate Commerce Commission ("ICC") in 1986, as subsequently amended. As Secretary for the JNC and as a participant, I prepared numerous reports of Ex Parte No. 328 negotiations that were filed with the ICC jointly by the private tank car parties and the railroad interests in these proceedings and that were circulated among the participants to the negotiations. As DuPont's representative and Secretary of the JNC, I participated actively in almost every aspect of the Ex Parte No. 328 negotiations and discussions, including those involving use of carrier tracks for holding empty private cars. I also served on the joint railroad-shipper

committee responsible for updating the Ex Parte No. 328 agreement until I retired in 1999.

Currently, I provide part-time consulting service to DuPont. I have been requested by North America Freight Car Association ("NAFCA") to prepare this statement on its behalf.

Purpose of this Statement

On April 28, 2003, the STB issued a decision in Docket No. 42060, North America Freight Car Association -- Protest and Petition for Investigation -- Tariff Publications of the Burlington Northern and Santa Fe Railway Company, a case involving a petition alleging that certain "storage" charges published by BNSF for application when empty private tank cars are held on BNSF tracks prior to loading represent a "departure tariff" within the meaning of the Ex Parte No. 328 rules. The Board's April 28 decision requests the parties to furnish additional information and comments regarding several issues.

The purpose of this statement is to address three of the issues regarding which the STB seeks additional data: (1) "what constitutes a departure tariff under Section 8 of the Ex Parte No. 328 rules, (2) "whether the cost of operating and maintaining holding tracks for private cars prior to loading was considered by the parties to be a railroad cost in the Ex Parte 328 negotiations," and (3) the "significance of the absence of storage charges on cars awaiting loading in the Ex Parte No. 328 agreement."

General Background

I have reviewed numerous copies of JNC meeting minutes and other JNC written exchanges, as well as transmittals between the tank car interests that participated in the Ex Parte No. 328 negotiations. Those negotiations began in 1976 and resulted, in 1979,

in an unreported decision of the ICC that adopted a tank car mileage allowance system proposed jointly by railroads and private tank car suppliers ("Ex Parte No. 328 I," or "1979 Decision").

Three years after the 1979 ICC decision, the railroad industry expressed its dissatisfaction with the tank car allowance system that it had negotiated for three years, and petitioned the ICC to suspend the annual updates in allowance payments called for under the allowance mechanisms established by the 1979 decision. The ICC declined to suspend the updates but granted an alternative request for renegotiation of the allowance system. Ex Parte No. 328, Investigation of Tank Car Allowance System, 367 I.C.C. 48 (1982). In rejecting the railroads' request for suspension of the allowance agreement that they had entered into just three years previously, the ICC stated, "we are most reluctant to intervene at all, or to delay operation of a formula that has been so carefully negotiated.... We are concerned that premature intervention on our part may create an erroneous impression that negotiated settlements are neither lasting nor binding, and may be overturned by one party's unilateral recourse to this commission. Such regulatory fallback is at odds with Congress' and the Commission's efforts to promote negotiated settlements and would significantly reduce the incentives for diligent pursuit of the negotiation process". 367 I.C.C. at 50.

Further Ex Parte No. 328 negotiations then took place for an additional three years. In 1985, the JNC filed a proposal with the ICC for an amended tank car allowance system, and the ICC published the proposal for comment. In 1986, what is now the basic tank car allowance system was adopted by the ICC, Ex Parte No. 328, Investigation of

Tank Car Allowance System, 3 I.C.C. 2d 196 (1986), which included the unchanged portions of Ex Parte No. 328 I, adopted in 1979 .

Even then, the matter of tank car allowances was not at rest. In 1987, the railroads sought "clarification or reconsideration" of the 1986 ICC decision adopting the tank car allowance system to which the railroads had agreed. The ICC rejected their request, stating that their "position reflects a misunderstanding of the nature of Section 11122," which was (and I understand still is) the statutory basis for private freight car allowances and rules.

In 1991, there was a further adjustment of the tank car allowance system, prompted in that instance by a joint railroad-tank car owner request for a consensual modification of certain technical aspects of the 1986 decision. That request was granted. Ex Parte No. 328, Investigation of Tank Car Allowance System, 7 I.C.C. 2d 645 (1991).

It may be well to remember that all of the parts of the tank car allowance agreements were never accepted individually but were required to be settled in their entirety before a joint petition could be forwarded to the ICC proposing a settlement to these issues. This was accomplished in Ex Parte No. 328 in the ICC Orders of 1979 and 1986. It was important to the participants that the ICC continued to oversee this process by enforcing this agreement on a continuing basis. The railroads had the power of the tariff while the shippers had to rely on the power of the ICC to continue to mediate between the parties. This is why Sections 8 and 9, which were crucial to the continuance of this negotiated process, were able to be added to the allowance system in 1986 and were the last big hurdle to bring the tank car allowance process to settlement.

**Holding of Empty Tank Cars Prior to Loading was Regarded By
All Ex Parte No. 328 Parties As a Railroad Cost**

Throughout almost the entirety of the first six years of Ex Parte No. 328 negotiations, there was discussion and consideration of how to treat the costs associated with empty tank cars being held on railroad tracks prior to loading. The JNC was divided into a number of working subcommittees, formed to consider and develop proposals on specific aspects of the allowance system. JNC Subcommittee 5 was charged with the task of developing proposals for "Handling Empty Tank Cars." The minutes of the August 16, 1977 Ex Parte No. 328 I negotiating meeting, which I co-authored with Mr. J.S. Goode of the former Missouri Pacific Railroad Company, contain the following report from Subcommittee 5:¹

5 - HANDLING EMPTY TANK CARS

Committee is proceeding on four basic issues:

- I - Responsibility
- II - Type of Discipline
- III - Price
- IV - Structure/Rules

General subcommittee agreement has been reached on subject I - Responsibility (copy attached as information) and development work has been progressed on the remaining subjects. Upon completion, the four pages will form the framework for Ex 328 participants discussion and direction in this area.

¹ Emphasis has been added by me in italics.

I - Responsibility

The responsibility for handling empty tank cars is both the carriers and the tank car providers. *Empty tank cars, being instruments of transportation, place a burden to be born (sic) by carriers to the proper limits of transportation related use.* Beyond the limits of transportation related use, the burden should be transferred to the tank car providers. The difficulty comes in trying to qualify and quantify the end point of transportation related use separating the responsibilities of both parties. Each is justified, yet to satisfy both is the challenge.

Tank cars, like all rail cars and all instruments of transportation, follow an ever-changing rhythm. Their purpose is to transport commodities under safe conditions. To accomplish this, the tank cars must seek the next loaded movement to which it is suited. During this course, the tank cars incur the natural elements of transportation; i.e.,

- Movement
- Nonmovement

The area of movement is for the most part being handled by Task Group 1. We are mainly concerned with the nonmovement aspects of tank cars. However, any movement incurred by the assignment of these responsibilities must naturally fall as part of this study group.

Empty tank cars arrive at a location incur two events. The empty tank car is ordered to a spot on the location, or it is ordered to be held by the rail carrier. Locations that take empty tank cars directly on site instantaneously relieve the rail carrier of incurring hold cost associated with the transportation related use of empty tank cars. *A location that orders an empty tank car held on railroad property causes the rail carrier to allocate a car spot for the holding of the empty car. This occupation of a car spot on railroad property by an empty tank car begins the cycle of handling empty tank cars on railroad property.*

As providers and carriers, we must find equitable methods of allocating burden into non-chargeable and chargeable events thereby reimbursing both parties for cost incurred.

II - Type of Discipline

- III - Price
 - IV - Structure/Rules
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I must emphasize that the wording of this report was agreed to by both tank car providers and railroads. It shows clearly that all parties recognized that "nonmovement" of cars are one of the "natural elements of transportation," and that the "occupation of a car spot on railroad property by an empty tank car begins the cycle of handling empty tank cars on railroad property."

The same theme was reflected in a subsequent meeting of the JNC representatives. Minutes of the March 8, 1978 Ex Parte No. 328 meeting in St. Louis reflect that the "Handling of Empty Cars" Subcommittee 5 reported:

Rail carriers have maintained a need for disciplines in (a) the area of empty tank car handling and switching, and (b) empty tank car storage on railroad-owned tracks. Increasing costs require constant review concerning track utilization purposes. *Free storage of private cars imposes many problems in addition to loss of use of trackage.* Movement of cars, switching time and expense, computer input, notification and inquiry concerning disposition and consignment of empty stored cars provide additional rail expense factors to the problem of private empty cars on railroad-owned tracks.

The railroad suggestion to concentrate efforts on specific areas of discipline and to attempt to narrow differences of approach is made with knowledge that studies or analyses must be made of uses and movements of empty cars....

A meeting of the Subcommittee # 5 was held at St. Louis on March 3, 1978. This meeting reached basic agreement on the need to jointly define the disciplines and responsibility areas under handling of empty tank cars in terminal movement and the associated problems of holding

or storing empty private tank cars. Railroads should be protected from abusive and unreasonable service demands but facilities, shippers, consignees should not be unduly penalized for situations beyond normal control.

Within these same Ex Parte No. 328 I discussions, the railroads resurrected an earlier proposal that had been introduced and dropped: namely, a tariff setting a limited number of free days for holding empty tank cars on railroad tracks, coupled with storage charges for excess detention. This approach was what was meant by the word "discipline" in the minutes, and is discussed in the same Subcommittee 5 report under the heading "Specific Areas of Disciplines." The Subcommittee report then refers to an AAR rate docket proposal addressing the handling of empty tank cars that was "subsequently assigned to the Joint Tank Car Task Force for resolution under Ex Parte No. 328 procedures." My files contain a copy of a 1975 AAR rate docket notice that advances the following proposal:

A storage charge equivalent to the time portion of the applicable daily car hire rate will be assessed after five days free time when empty private cars are held on railroad tracks for further disposition by the car owner or lessee.

These background materials from the Ex Parte No. 328 negotiations establish two things clearly. First, holding empty tank cars on railroad tracks prior to loading was considered a railroad cost during the Ex Parte No. 328 negotiations. Second, the railroads did not effectuate a transfer of those costs to the tank car suppliers before Ex Parte No. 328 was prescribed.

**The Significance of the Absence of Storage Charges on Cars
Awaiting Loading in the Ex Parte No. 328 Agreement**

Despite the clear recognition by all parties involved in Ex Parte No. 328 negotiations that the holding of empty tank cars on railroad tracks prior to placement for loading was part of a normal car use cycle until the point where the use of railroad tracks for private cars became "abusive," the parties determined not to adopt specific rules governing the holding of empty tank cars on carrier tracks except while awaiting maintenance or repair. The agreement regarding this issue is reflected in Section 5 of Ex Parte No. 328, which contains a regime of rules and charges applicable to empty cars held on railroad tracks awaiting repair or maintenance. These conclusions were reflected in both the 1979 agreement and the agreement prescribed by the ICC in 1986, 3 I.C.C. at 208.

To understand why the interim and final Ex Parte No. 328 proposals presented to the ICC by the joint negotiators did not include provisions that attempted to expressly define the conditions for holding empty tank cars on railroad tracks prior to loading requires an examination of the context in which the Ex Parte No. 328 negotiations were conducted.

We approached the negotiations based on statutory provisions that were interpreted as requiring railroads to pay allowances when the owner of the property transported by a railroad furnishes a service related to or an instrumentality used in the transportation or service. The current statutory provision reflecting this obligation is 49 U.S.C. 10745. Although I am not a lawyer, my files contain many ICC decisions about allowances.

When the instrumentality furnished by the shipper is, in fact, a freight car, then an allowance is required to be paid as determined by the provisions of Section 11122. As the ICC stated in its Ex Parte No. 328 decision served on November 19, 1987:

* * * under section 11122(a), the Commission's authority to prescribe car compensation is discretionary. [citation omitted.] However, section 11122(b), which contains the standards governing car compensation, provides that car compensation "shall be determined" by the factors enumerated in that section. It is thus clearly mandatory, and by its terms governs all mileage allowance tariffs regardless of whether or not they were prescribed by the Commission under section 11122(a) (emphasis in text).

Accordingly, even before the ICC adopted and prescribed the Ex Parte No. 328 standards currently in effect, shippers who supplied their own freight cars were entitled to appropriate compensation, and that entitlement often led to bitter, protracted, and expensive litigation. See, for example, Investigation and Suspension Docket No. 8406, Mileage Allowances, Tank Cars Between Points in the United States, 337 I.C.C. 23 (1970).

The parties that requested the ICC to authorize the commencement of Ex Parte No. 328 negotiations in 1975 did so because they hoped to avoid continuing, protracted disputes and litigation regarding mileage allowance payments. The representatives of both carriers and tank car providers, of whom I was one, approached the negotiations recognizing that no progress would be made, and adversarial litigation would continue *ad infinitum*, unless negotiations were approached in a spirit of true compromise. The timing was right as the industry was going through tremendous changes. The ICC in a Docket No. 35537 decision issued on April 13, 1976 increased tank car mileage allowances by 22.5% and made other changes to the allowance process, providing an incentive for carriers to negotiate. The same decision also allowed the parties to express views concerning the framework, scope and issues of the rulemaking proceeding to be instituted concerning the tank car allowance system. The ICC issued an Order in Ex Parte No. 328, dated September 16, 1975, which allowed the parties to set up a joint negotiating committee to propose solutions

to the Commission, provided for periodic reports to the Commission, and provided for adjudication by the Commission if agreement could not be reached.

A joint statement filed by the parties with the ICC on May 19, 1976 submitted a list of issues the parties would address in this rulemaking procedure. Issue No. 7 was "What rules should apply to the Storage and Handling of empty tank cars." The issue list was left in very general terms so that all the parties could propose to negotiate all aspects of a tank car allowance system. The parties knew that litigation was not the answer and were willing to explore a lasting settlement of tank car allowance issues.

One of the areas of compromise made in the course of the Ex Parte No. 328 negotiations had to do with provisions governing empty tank cars held on carrier tracks. By the time the negotiators met on July 12, 1978, Subcommittee 5, assigned to consider Handling and Holding Empty Tank Cars by Railroads on Railroad Track, co-chaired at that time by J.A. Austin of the AAR and J.H. Norton of Du Pont representing the Manufacturing Chemists Association (a predecessor of the current American Chemistry Council), prepared meeting minutes stating that, "[a]s part of the negotiated settlement between the parties in Ex Parte No. 328 it was agreed that, under certain circumstances, holding and supplementary handling charges would apply to the movement and holding of empty private tank cars by railroads on railroad track at non-railroad facilities for cleaning, lining, relining, maintenance, modification or repair." This particular agreement is now reflected in Section 5 of the Ex Parte No. 328 agreement (3 I.C.C. 2d at 208). No further mention is made of any additional charges for holding empty private cars on railroad tracks because the parties could not come to any agreement for the empty private car issue beyond the disposition of such cars while awaiting cleaning or repair, as provided in Section 5. All parties agreed to

progress the Ex Parte No. 328 I settlement without action on the storage of empty tank cars outside of shipper facilities.

There were several reasons why the additional empty car issues were not addressed specifically, even though it was recognized by all parties that railroad tracks are necessary to hold empty tank cars as part of a normal transportation use car cycle.

As the Ex Parte No. 328 I negotiating minutes indicate, and as indicated above, when Ex Parte No. 328 was negotiated there were no such things as holding or storage charges for empty tank cars on railroad tracks awaiting placement for loading on shipper track. The railroads assumed that burden, because they would have had to provide their own tracks for holding empty tank cars prior to loading if the railroads, themselves, had chosen to supply the tank cars. The only question that arose regarding these holding tracks was when their use for empty private tank cars stopped being part of the normal car use cycle and became a non-transportation matter because shippers were abusing their ability to use railroad tracks for periods longer than could reasonably be regarded as within a normal transportation use cycle. The parties were unable to agree on the disposition of this issue and determined to allow the status quo to govern, i.e., holding tracks would continue to be carrier responsibility.

The compromises that were made were in many respects based on practical considerations. Because it was recognized that allowance payments could not be frozen in time and, instead, had to make provision for adjustments in input data to reflect the changes in conditions relevant to Section 11122(b), it was regarded as largely impractical to base the Ex Parte No. 328 system on input from the hundreds of shippers that operated tank cars as lessees or owners. As a result, it was determined that all of the input data for annual ad-

justments to the allowance formula would be provided by four tank car leasing companies, reflecting only leasing company costs except to the minor extent discussed below.

Consistent with that approach, the Ex Parte No. 328 allowance system takes into account virtually no shipper lessee expenses, with the exception of those included on a one-time basis under Section 3(b) of the agreement (3 I.C.C. 2d at 206). These costs consists of a few specific items only: programmed maintenance of valves, non-discretionary cleaning costs, and certain personnel expenses associated with monitoring and scheduling cars for repairs and inspections. The annual sum of these costs was \$34.88 in 1976, not to be re-determined annually, but only to be indexed yearly.

The BNSF tariff, as I understand it, requires tank car shippers to pay for holding empty tank cars on railroad holding tracks through daily storage charges. The shippers alternatively can lease or construct private storage tracks for which BNSF offers no ongoing compensation to the shippers. If shippers supplying private tank cars are now required to pay for the costs of railroad tracks to hold empty cars prior to loading, the tank car mileage allowance formula as presently in existence does not allow for recovery of those costs. There was, in fact, no reason to include such costs in the calculation of the formula, either on a stand-still or annual update basis, because all such costs were assumed by the railroads. If passed on to shippers, they will not appear in the annual updates and will not result in an increase in mileage allowance payments because only leasing company costs are included for those purposes, and leasing companies do not pay "storage" charges; only shippers do.

BNSF takes the position that a tariff which increases the car user's costs of tank car ownership through "storage" charges is not a "departure tariff" within the meaning of Ex

Parte No. 328 because it does not result in a "cap" or other direct reduction of the mileage allowance. That argument is, in my opinion, directly contrary to the tenets of Ex Parte No. 328. As can be seen from the agreement as a whole, Ex Parte No. 328 approaches allowances as an assessment of compensatory costs incurred by those who provide private tank cars, with negotiated adjustments made where appropriate to prevent abuses and to maintain the system in a posture of workable updates. It is a comprehensive "system," and not merely a payment for when the tank car is moving under load.

For example, if railroads were to provide tank cars themselves, they would have to move the cars empty from point of unload to point of next load, presumably within the freight rate charged. Accordingly, empty tank car movements were regarded as a subject for inclusion in an allowance "system." However, during the Ex Parte No. 328 negotiations, the railroads contended that shippers would receive a windfall if they were able to direct empty tank cars to move over routes far more circuitous and in excess of the loaded route miles on which the freight rates were based. As a result, Section 1 of the allowance system contains a "mileage equalization" rule that allows shippers only a limited number of empty miles in excess of loaded miles and requires "disciplinary" payments to the railroads if that limit is exceeded. I believe that, were the railroads to attempt unilaterally to change the mileage equalization rule from its present 106% of loaded miles to, for example, 102% of loaded miles, with penalties to apply for excess empty movements, the result would be a "departure tariff" even if the actual loaded car mileage allowance paid was not capped as such.

Similarly, the charges established in Section 5 for handling empty tank cars awaiting repair are not directly part of the mileage allowance paid by railroads to shippers, yet

the rules in Section 5 plainly were regarded by all parties as appropriate to a mileage system that reflects the requirements of Section 11122.

In my view, all such issues are clearly within the four corners of Section 11122 and were clearly within the four corners of the Ex Parte No. 328 agreements. Section 11122 addresses car service and determines the cost of tank car compensation.

As the Ex Parte No. 328 mileage allowance formulas suggest in Section 4 of the agreement (3 I.C.C. 2d at 206-208), the formula is based on both time and mileage considerations, yet the mileage allowances are paid only for loaded miles. The reason for this manner of resolving the requirements of Section 11122 is that it proved impractical, in the eyes of the negotiators, to pay allowances on an ongoing basis, subject to annual adjustment, that were couched in terms of anything but loaded miles. Nevertheless, the allowance formula clearly was intended to include cars when under movement and when idle. It would, in my judgment, be a perversion of that purpose to conclude that railroads unilaterally may now impose charges on shippers that affect idle tank car time and costs simply because the negotiated compromise was to produce an allowance paid per loaded mile as a matter of practicality. The loaded mile calculation was not intended as authority for railroads to add or transfer new tank car operating costs to shippers simply because those new costs can be framed in terms other than in the cents per loaded mile allowance payment.

An integral part of the mileage allowance system is that it provides a way for adjustments to be made through the Section 8 and 9 procedures, added in the negotiating round that began in 1982. Those provisions were crucial to a final agreement. The mileage allowance system negotiated by the tank car providers and the railroad industry actually contemplated the possibility of unintended consequences or changed circumstances for

which no specific provision was made in the rules presented to and adopted by the ICC.

Section 8 deals with a railroad tariff "that departs in any manner from the allowance system prescribed" and is not to be allowed "except as provided" in Section 8. Section 9 of the agreement provides for renegotiation of the "mileage allowance formula and system" under specified circumstances.

Both of these provisions were negotiated carefully and somewhat painfully by both sides, as each was intended as a means to police and perpetuate an allowance system that contained many compromises and left each side without the full measure of protection it would have desired ideally.

It was no accident that Section 8 addresses tariffs that depart "in any manner from the allowance system," and did not simply talk about tariffs that "capped" a carrier's willingness to pay the actual mileage allowance flowing from the allowance formula contained in the system. This broad language was chosen to reflect the fact that the parties had made a bargain from which they could not depart except under the methodology contained in Section 8. If the bargain was deemed outdated, then Section 9 provided a mechanism to seek renegotiation of the system.

The final Ex Parte No. 328 bargain cut two ways. More than one example of a tank car operating or maintenance cost that was known to exist at the time Ex Parte No. 328 was negotiated, but that was excluded from the formula, comes to mind as part of the broad compromise allowance system. For example, tank car lessees incur many costs in excess of those for which recovery is permitted under the limited provisions of Section 3(b) of the agreement (3 I.C.C. 2d at 206), and pay far more today for the few items of lessee costs that are included in that provision than the original \$34.88 per car per year, which currently

is \$103.00 per car per year on an updated basis. Different types of tank cars incur different types of cleaning costs which are not reimbursed at all when the tank car operator owns the cars or leases the cars and which are seldom reimbursed under typical tank car leases. For example, tank cars utilized in the transportation of food products or ingredients would be subject to mandatory cleaning if the car had been loaded with tallow (animal fat) on one trip and was next to be used for the transportation of an edible product such as crude or refined vegetable oil. Absent such cleaning, the car is likely to result in commodity contamination that violates federal and state law. This mandatory, or non-discretionary, cleaning occurs periodically -- depending on the needs of the car user -- but probably not less than once per year, and costs approximately \$600.00 per event, not including the cost of out-of-service time or the substantial cost of approximately \$400.00 per car for the car to undergo a koshering process when necessary. Programmed valve maintenance is estimated to cost a lessee over \$90.00 or more. These car operating expenses alone greatly exceed the current "lessee cost" input figure of \$103.00. Tank cars involved in chemical service incur similar expenses.

Tank car linings are another mainstay item of tank car maintenance costs that were excluded from the allowance system. Not all tank cars require linings, although most do; but the railroad industry took the position during Ex Parte No. 328 negotiations that, because tank car liners were not necessary for 100% of all tank car movements and are replaced under subjective criteria (another way of saying that they are "discretionary"), the costs should be excluded unless paid for by lessors. However, when Ex Parte No. 328 was negotiated, and today, tank car liners were not a lessor expense, so the result is that this cost, which I would estimate to come to \$3,800.00 per occurrence, also is excluded from

the mileage allowance system, even though it is a cost that would be incurred by the railroads were they to furnish the tank cars.

In addition to "non-discretionary" tank car cleaning costs, tank cars incur many necessary cleaning costs that are regarded as "discretionary" under Ex Parte No. 328 and are excluded from the system. An example of such a maintenance item is car cleaning to remove odors or deposits that accumulate in the car after a certain number of trips, depending on the nature of the load and duration of the trip. An accumulation of sludge in a tank car generally is detected by weighing the empty car prior to loading, while non-hazardous goods odors are detected through human intervention. The point at which a sludge accumulation or odor becomes an impediment to the use of the car is a subjective judgment of the car's operator, which is the lessee or owner of the car. Because of the subjective element involved in these maintenance steps, the Ex Parte No. 328 negotiators agreed that it would be difficult to "formularize" these expenses and omitted them from the list of Section 3(b) "lessee costs." Nevertheless, they represent a tidy expense cost, since this form of "discretionary" cleaning occurs from one to six times per year per car, depending on the service in which the car is used, and costs \$300-\$450 per event, or \$300 to \$2,400 annually. Were railroads to supply all tank cars, the carriers would have to bear these cleaning costs because cars justifiably would be rejected for loading from time to time as a result of either unsuitable odors or sludge accumulations.

Some tank car maintenance costs have arisen recently by virtue of new regulations and are borne by the shippers. The HM-201 regulations of DOT, governing the use of tank cars transporting hazardous materials, are an example. Those regulations took effect in 1998 for non-insulated cars and in 2000 for insulated tank cars. They require certain peri-

odic inspections and tests by lessees and car owners that can aggregate thousands of dollars per car. Many of these costs are not reflected in the annual Ex Parte No. 328 mileage allowance updates because of the mileage allowance system's limitations discussed above.

Tank car lessees and owners cannot act unilaterally under the mileage allowance system to cover either unforeseen or increased costs that they agreed to omit from the update formula for practical or compromise reason. Their avenue of recourse, should they want to expand the allowance system to now reflect these costs, would be to seek renegotiation of the allowance system under Section 9. The parties agreed that, during the course of any such negotiations, the then-existing formula and updates would remain in effect for the tank car fleet, which, according to January 2003 AAR data, consists of 252,661 private cars and just 671 railroad-owned cars.

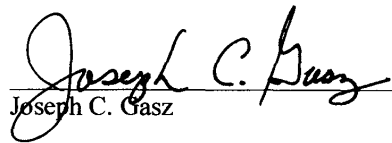
The Ex Parte No. 328 negotiators did not intend for the railroads to have broad, unlimited rights to make allowance system revisions while the car suppliers' rights remained limited. Section 8 was included so that railroad efforts to make changes in the system could be tested through an investigation; not necessarily barred, but tested. If Section 8 does not afford relief, Section 9 is available. To say that a railroad, because it publishes a "tariff," has an unobstructed right to do through unilateral action what it could not do if, like a shipper, it had no right to publish a "tariff," unbalances the Ex Parte No. 328 bargain.

Were it not for the fact that it was always contemplated, throughout the Ex Parte No. 328 negotiations, that railroads would administer the mileage allowance system through a tariff structure (being free, of course, to deviate from that system in individual cases through bilateral, consensual transportation contracts with their customers), there would have been no reason for inclusion of Section 8. Railroads and tank car providers

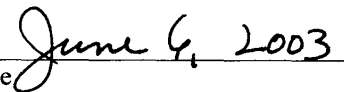
alike would have had to use Section 9 for Ex Parte No. 328 adjustments. But, because railroads do publish tariffs, and can initiate tariff action unilaterally, the tank car allowance system had to contain a structure and process when those tariffs were filed and focused on a Section 8 investigation to examine alterations to the allowance system proposed by railroads. That is why Section 8 provides that "no tariff that departs in any manner from the allowance system prescribed herein may be filed or will be permitted except as provided below," and states that any railroad filing such a tariff "will conclusively be presumed to have concurred in a request for investigation." Sections 8 and 9 were not in the first round of Ex Parte No. 328 I (1979). These provisions were added and became effective with Ex Parte No. 328 II (1986) because it was recognized that there needed to be a form of enforceability and adherence to this process.

If BNSF or any other railroad that attempts to pass tank car ownership costs on to its customers without additional compensation under the mileage allowance system can do so without any effort to first have its proposal scrutinized under Section 8 or later to invoke Section 9 if necessary, then I would see no reason why renegotiation of Section 9 any longer would be binding on tank car lessees or other tank car providers who currently are not recovering their full costs of tank car ownership or facility costs, and I would see no reason why such parties could not institute adversarial proceedings to recover those costs from each appropriate railroad without instituting Section 9 renegotiation of the agreement.

I, Joseph C. Gasz, do hereby state under penalty of perjury that the foregoing statement is true and that I am authorized to make the same.



Joseph C. Gasz



Date

STATEMENT OF

GARY T. KURTZ

1. My name is Gary T. Kurtz. I retired from The Burlington Northern and Santa Fe Railway Company in 2001 and presently reside in Hot Springs Village, Arkansas.

2. I was employed by BNSF for nearly 38 years, spending much of that time as an Equipment Manager. At the time of my retirement, I was Equipment Manager for covered hopper cars other than grain cars, but I have worked with several different types of cars, including grain cars and coal cars.

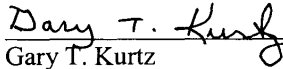
3. I have been requested by North America Freight Car Association (NAFCA) to provide a brief description of certain aspects of freight car management on BNSF, and I have agreed to do so based on my understanding of those practices at the time of my retirement and during the years I was employed by BNSF and its forerunners.

4. When a free running freight car of BNSF ownership (a freight car that is not subject to a mutual agreement between BNSF and a shipper regarding the next load or loading point for the car) is made empty at its destination, the BNSF car management system searches its car order files to determine whether that car is needed for a new load. If it is, the car is dispatched in the direction of the new loading point. If the car is not needed for a new load, then it is designated for either long term storage flows or short term storage flows on BNSF. Long term storage occurs when the car management system believes that there will be no need for the car for at least 30 days, in which event the car normally is removed from BNSF terminals and placed on storage tracks, where the car does not revisit the car order files until removed from long term storage. If the system determines that there is likely to be a need for the car within 30 days, the car usually is held in short term storage on BNSF terminal tracks. While in short term storage,

the car order files are reviewed daily to determine if there is a load needing that car. The car may or may not be switched back and forth, depending on the level of activity in that particular terminal. A car may remain in short term storage anywhere from a day upward, depending on operating and demand factors.

5. The holding of some empty railroad cars of BNSF ownership on BNSF between unload point and next load point is inevitable. No railroad I have worked for has been able to match car supply with car use in a precise manner that keeps all cars moving in a continuous cycle where empties never pause, awaiting the next load. Holding empty cars of BNSF ownership in operating readiness while in short term storage at BNSF terminals or on other BNSF property for days or longer while awaiting a load is a usual and normal aspect of BNSF car management.

I, Gary T. Kurtz, state under penalty of perjury, that the foregoing statement is true; that I have made the same voluntarily; and that I require no authorization to do so.



Gary T. Kurtz

May 2, 2003

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For: Grain Trade Industry

Service Advisories

02/02/2001

BNSF Private Equipment Policy

This Pricing Update is intended to notify BNSF customers of changes to existing rates or price structures.

To increase asset utilization for both BNSF and Private fleets, BNSF will be making changes to the current Private Equipment Policy. The changes will provide additional operational flexibility and increased capacity for our customers. The following changes become effective May 1, 2001 and will apply to both loaded and empty equipment held railroad tracks.

- This policy **will not** supercede any provisions of existing contracts concerning the use of private equipment. However, if your contract refers to a rules tariff and the tariff changes, these changes will apply.
- **Storage charges for loaded** private equipment will be reduced from the current \$75/day to \$25/day.
- **Storage charges for empty** private equipment will be increased from the current No Charge/day to \$25/day.
- Storage charges will apply at origin, destination and any intermediate holding location.
- There will be no credits given. Under the current policy, one (1) credit is given for loaded private equipment.
- **Charges begin** after the 2nd 12:01AM after Constructive Placement until the request for placement to private track is received.
- Under the new policy, Saturdays, Sundays and holidays that fall between Constructive Placement and the 2nd 12:01AM are excluded. Once charges begin Saturdays, Sundays and holidays will be chargeable.
- **Refused equipment:** Once **loaded equipment** is refused, charges will be assessed against the **consignor** of the load. Once **empty equipment** is refused charges will be assessed against the **lessee or owner** of the equipment. In either case, once charges begin for refused equipment, Saturdays, Sundays and holidays will be chargeable (Prior to refusal, this Policy will assess storage charges, to the consignee, from the 2nd 12:01AM after Constructive Placement until refusal).
- **Equipment held for disposition:** Storage charges will be assessed from the 1st 12:01AM after return to BNSF tracks until disposition is received at the rate of \$25/day inclusive of Saturdays, Sundays and holidays.
- **Equipment containing hazardous materials:** a charge of \$75.00/day in addition to the standard storage charge of \$25.00/day will apply. Charges will run concurrent with storage charges.

Ancillary Issues:

- **Intra-Plant Switches** will remain at \$105. Under the new policy, empty equipment will not be chargeable if immediately followed by a loaded movement under either line-haul or switching rates of BNSF.
- **Diversions** under the new policy, both loaded and empty diversions will be charged. (\$150 for a single car diversion with a maximum of \$450 for a multiple car diversion).

diversion on a single BoL)

The intent of these changes is to improve asset utilization for our customers and effectively expand capacity without additional capital outlays. By announcing the changes three months prior to implementation, we hope you will have necessary time to adjust your operations. By standardizing, simplifying, and automating the process we will improve our ability to deliver more effective services.

If you have any questions regarding the new policy, please contact your Account Representative, or send us an e-mail at CustomerInterface@BNSF.com. You can also contact Douglas Langston, Director Equipment Utilization at 817-352-6322, or Ken Graham, Senior Manager Equipment Utilization at **817-352-6412** or Gary Bender, Acco Manager - Chemicals at **410-539-2450**.

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