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July 7, 2003

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

By Hand Delivery

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:

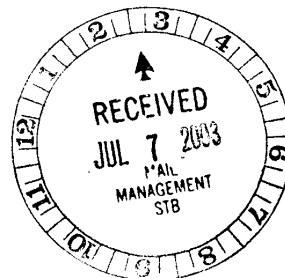
Enclosed for filing are a signed original and 10 copies of Reply of North America Freight Car Association, American Chemistry Council, and The National Industrial Transportation League in Response to the April 28, 2003 Decision of the Board. Also enclosed is a diskette in Microsoft format containing the same.

Respectfully submitted,

Andrew P. Goldstein

Andrew P. Goldstein
Attorney for
North America Freight Car Association

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Public Record



**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**

**REPLY 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**

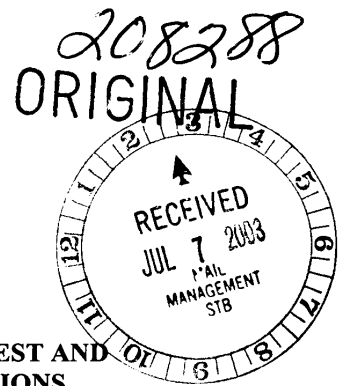
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Dated: July 7, 2003



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I. PREFACE

North America Freight Car Association ("NAFCA"), American Chemistry Council ("ACC"), and The National Industrial Transportation League ("NITL"), hereinafter collectively called "Petitioners," are replying to the Opening Statement of The Burlington Northern and Santa Fe Railway Company ("BNSF").

BNSF has offered a series of meandering, and sometimes emotional, arguments intended to distract from the issues in this case. This proceeding is about allowances to which shippers are entitled by statute whenever they furnish instrumentalities of transportation, whether in the form of freight cars or other services and facilities; and it is about a negotiated agreement that was prescribed by the Interstate Commerce Commission ("ICC") to implement the statutory allowance requirement.

BNSF argues that its private tank car storage provisions¹ should not be investigated under Section 8 of Ex Parte No. 328, Investigation of Tank Car Allowance System, 3 I.C.C. 2d 196 (1986)² because the storage charges have been successful in driving private cars off the BNSF system and have improved BNSF's performance. Whether such claims are true is doubtful and debatable at best; BNSF acknowledges that one prominent result of the storage charges has been to bring about leases of BNSF yard track by tank car customers. BNSF thus has many of the "exiled" private tank cars in its yards just where they always were, only now it is compelling its customers to pay rent for the tracks to hold the cars and is claiming that the cars no longer are on the BNSF system, thereby allegedly contributing to improved service. But even if the storage charges genuinely have removed some private tank cars from BNSF tracks, the measure of BNSF's coercive rules and charges is not whether they succeed, but whether they are proper.

One of BNSF's more emotional arguments is the claim that, if its tank car storage charges are not approved by the Board, it "would never be able to charge separately for any service, or component of service, that it had not previously charged separately for," such as higher rates for single car shipments than for multi-car service, and that it would not even be able to "differentiate its rates." These somewhat frantic assertions are nothing more than an attempt at "the sky is falling" alarmism.

BNSF attempts to push a similar alarmist button by arguing that Petitioners' position frustrates BNSF's goal of "unbundling" its services for pricing purposes and will turn back the tide of efficient railroad pricing. This is a sophistic argument of which the Board

¹ As used herein the term "storage provisions" refers to the tariff provisions of BNSF imposing rules and charges for the holding of empty private tank cars on railroad tracks prior to loading.

² Hereinafter Ex Parte No. 328. The tank car allowance system prescribed in Ex Parte No. 328 may sometimes be referred to hereinafter as the "allowance system."

should be wary in this particular case. Where an allowance system is at issue, the question presented really is how much of an allowance should be paid to the shipper; not how much of a freight rate should be paid to the carrier. Genuine "unbundling," which is a reduced rate offered in return for a more efficient shipper effort, can and will continue. Shippers have not resisted pricing changes that reward shipper contributions to greater transportation efficiency. Contrary to BNSF's claims, shippers did not resist the institution of lower multi-car rates, but welcomed them as rate reductions in return for pre-blocking of cars by shippers. The BNSF storage charges, however, do not offer rate reductions, but cost increases that are unaccompanied by any rate reduction. The storage charges represent nothing more than an uncompensated transfer of infrastructure costs associated with private car supply from BNSF to its customers. That is not the "unbundling" of a freight rate.

Although BNSF asserts that there was no discussion in the course of negotiating Ex Parte No. 328 of whether carrier holding tracks for empty private tank cars were regarded as a railroad cost, Petitioners' submission of June 9 in this proceeding ("June 9 Submission") establishes conclusively that such considerations and discussions did take place and recognized that holding tracks for such cars were indeed regarded as carrier responsibility. Absent from BNSF's Opening Statement is any explanation of why its rules regarding private tank car use, as published by the Association of American Railroads ("AAR") and applied by BNSF, are silent regarding a shipper's need to establish the existence of adequate car storage capacity as a precondition to the origination of private tank cars.³ Had it been BNSF's intent to exclude from originations on its system those private tank cars for which there was no adequate track storage available, BNSF presumably could have attempted to

³ As discussed, *infra*, BNSF and other railroads are entitled to require proof of adequate storage facilities for the use of other private equipment, but impose no such requirement for private tank cars.

impose a storage space condition for tank car entry as it does for other types of private cars. Its choice, instead, has been to acquire no tank cars of its own for shipper use and to rely on no requirement that there be adequate car storage capacity as a prerequisite to the acquisition of private tank cars, while later coming forward with its storage rules that impose penalties on shippers who fail to maintain the tank car storage capacity that BNSF did not require in the first place and who now fail to furnish, at their own expense, alternate track storage capacity.

One of the most remarkable aspects of the BNSF Opening Statement is its repeated assertion that Petitioners' claims, rather than being appropriate under Section 8 of Ex Parte No. 328, should be addressed in a separate complaint proceeding. BNSF in that respect notes the pending complaint in 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") as exemplary of the appropriate method to challenge the storage charges. Although the Opening Statement advises the Board that BNSF regards the Complaint as being without merit, BNSF neglects to mention the fact that it has filed a Motion to Dismiss the Complaint and has opposed any further processing of that case. Thus, from one side of its mouth it argues in this proceeding that Petitioners' concerns belong in a complaint case, if anywhere, and not in a petition for investigation of "departure tariffs" under Section 8 of Ex Parte No. 328; while out of the other side of its mouth it asserts to the Board that the Complaint should be dismissed and not go forward.

Petitioners' concerns have been before the Board for two years in this case and in the related Complaint.⁴ It should be clear to the Board that BNSF will seize upon any ar-

⁴ The Complaint addresses tank car issues to the extent the Board may determine not to entertain those issues in this proceeding, as well as similar issues related to private cars other than tank cars.

gument to advance its position or bring about delay, even if the argument is inconsistent with a position previously taken by BNSF.

There is no reason why both this case and the Complaint cannot go forward simultaneously on a consolidated record, as they are clearly related. The Board should not be influenced by BNSF's threat to bring about the "demise" of Ex Parte No. 328 under Section 9 if the Board allows an investigation to proceed under Section 8. Even if the required number of carriers were to petition for renegotiation under Section 9 after a Section 8 investigation had been instituted, Section 9 requires the investigation to remain in effect. In any event, as BNSF has finally acknowledged, the Board should consider Petitioners' arguments in at least one of the two pending cases.

II. REPLY TO BNSF'S STATEMENT

The Board's Decision of April 28, 2003 ("April 28 Decision") requested the parties to supply additional information on seven issues that are delineated at pages 7-8 of Petitioners' June 9 Submission. To the extent that BNSF has responded to the Board's enumerate requests in its Opening Statement, Petitioners here reply to BNSF. Attached in support of this reply is the Reply Verified Statement of Joseph C. Gasz (Petitioners' Ex No. 4, "Gasz R.V.S.").

A. The Section 8 Issue

BNSF makes two primary arguments in response to the Board's request that the parties supply additional information on the question of what constitutes a departure tariff under Section 8 of the Ex Parte No. 328 Rules. Its first argument is that, unless a rule or charge is expressly prohibited by the terms of Ex Parte No. 328, it is permissible. Its second argument is that the first argument has been settled by the decision in Charges for

Movement of Empty Cars, Buffalo & Pittsburgh R.R., 7 I.C.C. 2d 18 (1990) ("Buffalo & Pittsburgh"). BNSF Opening Statement, pp. 9-27. Petitioners disagree with BNSF's two major arguments, as well as with many of the sub-themes and factual claims upon which the two major arguments rest.

As a general proposition, it is not difficult to understand why BNSF makes the arguments it does; BNSF in many cases simply relies on misconceptions of fact.

One of its most significant misconceptions is illustrated by the fact that the BNSF Opening Statement Argument largely evades one of the critical questions posed in the April 28 Decision: whether the cost of operating and maintaining holding tracks for private tank cars prior to loading was considered by the parties to be a railroad cost in the Ex Parte No. 328 negotiations. The answer to this question is "yes" and is crucial to determining the proper relationship between BNSF's recent empty tank car storage charges and Section 8 of Ex Parte No. 328.

While not directly addressing this important question, BNSF asserts that "[n]o ... authority exists suggesting that free storage of empty private cars ... has ever been considered a predicate of the allowance system." BNSF Opening Statement, p. 23. BNSF's witness, Mr. John J. Robinson, states that he does "not recall either the railroads or the private tank car owners ever raising the issue, nor do I recall the parties ever discussing this issue as part of the Ex Parte No. 328 negotiations." Robinson V.S., p. 9.

Plainly, Mr. Robinson and BNSF are mistaken. As related in detail at pages 5-8 of Exhibit No. 1 to Petitioners' June 9 Submission (the opening Verified Statement of Joseph C. Gasz), Minutes of the August 16, 1977 Ex Parte No. 328 negotiating meeting disclose that the responsibility for providing holding tracks for empty tank cars prior to loading was,

indeed, discussed both specifically and extensively by the Ex Parte No. 328 railroad and tank car negotiators, and again arose at a March 8, 1978 negotiating meeting. These Minutes reflect the fact that the negotiators recognized that free storage of private cars on railroad tracks was the practice of the time.

Indeed, free storage of empty tank cars on railroad tracks prior to loading was so widely recognized a practice that the railroad industry on two occasions proposed to do away with the practice and to impose storage charges after five to seven days of free storage. Gasz R.V.S., 4-6. No such proposals would have been necessary had the holding of empty tank cars on railroad track not been regarded as railroad responsibility at railroad cost.

The recognition that it was, in fact, settled railroad responsibility to hold empty tank cars on railroad tracks prior to loading is inconsistent with virtually every interpretation of Ex Parte No. 328 advanced by BNSF. It is inconsistent with BNSF's contention that Ex Parte No. 328 was intended to leave any railroad free to impose storage charges for such services; were that the case, a railroad most certainly would have done so shortly after the tank car allowance system was prescribed by the ICC, given the fact that storage charges had twice been proposed by the railroad industry, with the second proposal having occurred just two years prior to the commencement of the last round of Ex Parte No. 328 negotiations. Id. And it is inconsistent with BNSF's claim that such storage charges have been necessitated by current "growth in rail traffic [that] absorbed much of the capacity on [BNSF's] system, and the problem of congestion and costs of storage [that] had risen apace." Langston V.S., p. 13. The railroad industry, including BNSF, obviously was aware of empty private car storage long before any recent growth in rail traffic occurred.

That the predecessors of BNSF chose not to pursue that concern when it was fresh in their minds after the adoption of the tank car allowance system strongly suggests that all parties knew at that time that efforts to impose pre-loading empty car storage charges would contradict the Ex Parte No. 328 compromise.

Other staples of private freight car life have been overlooked by BNSF in connection with its claim that tank car suppliers should have been aware at the time of the Ex Parte No. 328 negotiations that railroads might choose to assess storage or diversion charges on empty private cars. See Opening Statement, p. 10. In addition to the telling failure of the railroads to pursue such charges during and for 15 years after the Ex Parte No. 328 negotiations as described above, the railroad industry has adopted and operates under rules that allow private tank cars to be operated without any requirement that the parties operating the cars have any track storage space of their own on which to hold the cars.

Railroad industry rules governing the operation of private cars are contained in AAR Circular No. OT-5, the provisions of which can be found in The Official Railway Equipment Register. The OT-5 rules for private tank cars provide for the assignment of private car reporting marks to an owner or lessee of the tank car (i.e., permission to use the car) provided only that the applicant subscribes to the AAR Mechanical Interchange Rules. For private cars other than tank cars, the OT-5 rules provide that "approval for shipper [use] cannot be denied by the carrier(s) except for reasons for safety, mechanical factors or inadequate storage space." See, also, Shippers Committee, OT-5 v. Ann Arbor R. R., 5 I.C.C. 2d, 856 (1989), aff'd. sub nom., Shippers Committee, OT-5 v. ICC, 968 F.2d 75 (D.C. Cir. 1992). Had there been any pending need or desire for railroads, such as BNSF or its predecessors, to make storage track a tank car use issue, that possibility was masked

by the railroads' policy of allowing private tank car use without inquiry regarding the availability of storage track, as railroads have reserved the right to do with respect to private cars other than tank cars.⁵

If it is recognized, as Petitioners think it must be, that there was no reasonable expectation by tank car suppliers that pre-loading holding tracks for empty tank cars were, or might be, regarded as shipper responsibility when Ex Parte No. 328 was negotiated, then it becomes difficult, if not impossible, to accept the premise of BNSF's argument that Ex Parte No. 328 left BNSF and other railroads free to impose such storage provisions without scrutiny under Section 8 of that agreement. In order to buy that argument, one would have to assume that the tank car providers, who had spent six years negotiating Ex Parte No. 328, really intended to say that the only actions subject to Section 8 investigations were those that reduced the per-loaded-mile allowance payment itself.

Although BNSF, in an attempt to avoid this embarrassingly narrow construction of Section 8, asserts that Section 8 investigations also would apply to any change by a railroad in the "formula" for determining mileage allowances (Robinson V.S., p. 6), its claim is misleading. An examination of the allowance agreement will disclose that the railroads do not provide input data for the annual mileage allowance updates or otherwise make changes to the "formula"; their only contribution to formula updates arises under Section 2(d), which provides: "The Maximum Allowance Car Value on which allowances are to be calculated and paid shall be set for each year by applying a factor of 1.5 to the average price paid by

⁵ Although cars other than tank cars are not involved in Docket No. 42060, private cars other than tank cars have been subjected by BNSF to similar storage provisions, and those provisions are being challenged in the Complaint case, where Petitioners would argue that railroads, having granted OT-5 approval for private cars other than tank cars, and thus having interposed no objection on account of allegedly inadequate storage space, should not now be heard to impose storage charges and requirements after the private cars were acquired and placed in service in the belief that any storage track issues thought by a railroad to be relevant would have been raised when the cars were placed in service under the OT-5 process.

the railroads for new freight cars acquired during that calendar year, as calculated by the AAR." This is a purely objective piece of data, not subject to discretionary change. In all other respects, the input data is furnished by tank car leasing companies, and not subject to alteration by individual railroads, so that there are no opportunities for Ex Parte No. 328 formula changes by railroads.

Thus, stripped of its hyperbole, what BNSF is arguing is that the only railroad action subject to Section 8 is a "cap" on the per-loaded-mile payment derived from the Ex Parte No. 328 formula. Under such an interpretation of Ex Parte No. 328, it arguably would be permissible for BNSF or any other railroad to establish a storage charge not stated in terms of dollars per car per day, but, perhaps, as a forfeiture of 100 miles' worth of allowance payments, and such a charge would be immune from Section 8 investigation because it did not entail a direct "cap" on the per-loaded-mile number produced by the allowance formula. It should be plain, however, that to do so would just as effectively reduce the amount of compensation received by a tank car supplier as does a storage charge stated in terms of dollars per car per day or that results in the tank car provider having to furnish additional track infrastructure without full compensation, as is the case under the storage provisions. Gasz R.V.S., p. 8.

BNSF maintains that such a result was, indeed, intended; that if any agreement had been reached that the railroads could not charge for holding empty tank cars in circumstances other than those covered by Section 5 of the agreement, the agreement would have so stated. Robinson V.S., p. 11. That, however, is an unsupportable construction of the allowance agreement, as nowhere does the agreement contain any enumeration of specifi-

cally prohibited acts. Nor is there any evidence that the negotiators set out to specifically list every railroad action that would be subject to Section 8 investigation.

When the Ex Parte No. 328 Joint Negotiating Committee ("JNC") of railroads and tank car providers petitioned the ICC in 1985 to revise the tank car allowance system -- the revision that included Section 8 for the first time -- the petitioning parties submitted to the ICC a draft decision as Appendix A to their petition. In discussing the intended application of Section 8 to "departure tariffs," the railroads and the tank car providers agreed in the draft decision that railroads should have only a "limited opportunity to file such departures" and that among the matters to be regarded as a "departure" could be a railroad tariff that indirectly reduced the allowance paid even though it did not "cap" the allowance itself.

The draft decision proposed by the railroads and the tank car providers stated:

Many car providers would prefer that, once we prescribe the agreed-to system, the railroads should not be permitted, under any circumstances, to file a tariff that would result in an allowance level that departs from that which would result from the prescription herein. The railroads, on the other hand, believe they have and must preserve a right to initiate tariff changes and that "departures" (as explained below) from the national allowance levels may be justified by special circumstances. They, therefore, requested and received assurances that railroads would be given a *limited opportunity* to file such departures, provided they justify the lawfulness of departing from the agreed system prescribed herein. The agreement provides a mechanism for that *limited opportunity* by requiring an investigation proceeding whenever a departure tariff is protested.

* * *

"[D]epartures have taken various forms in tariffs published during the course of the negotiations. For example:

(2) An existing "Allowance" already in a rail tariff (which may provide an alternative to a tariff provid-

ing full allowances under the prescribed national system) that, as a practical matter, becomes applicable to tank cars used for particular movements by actual or effective cancellation of existing rates subject to the full allowances as prescribed in the national system. *A departure results when the subject tariff action withdraws or raises the freight rate to which the full allowance tariff applies, so that higher net charges under the allowance tariff result.*

A departure could also be brought about by other forms of tariff publication which produce results which depart in any way from the prescribed national system. For example: a railroad could publish a tariff restricting the payment of allowances to cars having a value not in excess of some specified dollar figure (emphasis added).

Through this submission, the JNC made it clear that a "departure tariff" was not confined to simply a railroad action that directly "caps" a per-mile allowance number. A "departure" can occur if a railroad takes other indirect actions that have the effect of reducing what a tank car provider receives for providing the tank car. That is precisely why the JNC advised the ICC in the draft decision that a "departure" would exist if a railroad attempted to alter an allowance by changing its freight rate or by restricting the payment of allowances to certain cars only. In neither instance did the JNC posit that only a direct reduction in the mileage allowance was essential for a "departure" to occur.

Petitioners believe that BNSF's predictably self-serving, narrow construction of Section 8 fails to place those provisions in their proper context at the time they were negotiated. Although presented as a limited concession by the railroads to forego their "right of independent action" (Robinson V.S., pp. 11-12), the Section 8 provisions really have nothing to do with that "right," which is merely the right of individual carriers to depart from agreed-upon rates or procedures established by authorized "rate bureaus." See Southern Pac. Transp. Co. v. Interstate Commerce Comm., 69 F.3d 583 (D.C. Cir. 1995). "Inde-

pendent action" is not a guarantee of any outcome. In this case, the outcome of any carrier's action is to be assessed under the Section 8 investigation procedures.

In reality, Section 8 was not included in the tank car allowance agreement primarily to protect railroads; it was included for the protection of tank car providers. Gasz. R.V.S., pp. 2-4. Railroads did not need the ability to "cap" mileage allowance payments in order to justify or market reduced freight rates, as BNSF claims (Robinson V.S., pp. 7-8). Had BNSF determined that any prescribed mileage allowance was too high and was standing in the way of a freight rate reduction, and were there a customer anxious for that freight rate reduction, BNSF had available to it the mechanism of a railroad transportation contract to establish both a reduced freight rate and a reduced mileage allowance for that freight rate. If BNSF had no customer in need of the reduced freight rate, it would have no need to "cap" or depart from the prescribed mileage allowance for that customer's private tank cars. Gasz, R.V.S., p. 3. Thus, it should be more than evident that BNSF's "right of independent action" explanation for the existence of Section 8 of the tank car allowance agreement is nothing but a red herring.

The real purpose of Section 8 was to protect tank car suppliers from the undue exercise by a railroad of its right to take unilateral action through tariff publication. But for Section 8, railroads might have changed their mileage allowances directly or indirectly and any such changes would have been subject to discretionary investigation by the ICC under what was then Section 10707 of the Interstate Commerce Act.⁶ Without the mandatory investigation provisions of Section 8, the mileage allowance system would have defied dependable oversight and invited repeated efforts by railroads to undercut the agreement.

⁶ Today, no tariff investigatory provisions exist in the Interstate Commerce Commission Termination Act ("ICCTA"), although the Board may enjoin a violation of the ICCTA under 49 U.S.C. § 721(b)(4).

Section 8 provided assurance to tank car providers that each departure from the agreement "whatever the form, must be justified by the publishing railroad and an investigation proceeding must be instituted if a petition for investigation (protest) is filed." Ex Parte No., 328, 3 I.C.C. 2d at 198.

B. The Buffalo & Pittsburgh Decision

Predictably, BNSF maintains that its narrow view of Section 8 is supported, if not compelled, by the Buffalo & Pittsburgh decision. BNSF Opening Statement, pp. 16-28.

As explained in Petitioners' June 9 Submission, at pp. 26-32, Buffalo & Pittsburgh was an extension of the ICC's decision in 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"). IHB was aimed at correcting a very specific, narrow inequity; the failure of intra-carrier rules governing the allocation of revenues and expenses related to the movement of private cars to compensate certain small carriers who were called upon to transport empty private cars to or from repair facilities but were not receiving commensurate revenues for handling the cars under load. In Buffalo & Pittsburgh, the ICC concluded that its commitment in IHB to relieve that inequity compelled it to conclude that railroad tariffs in general, establishing charges for the movement of empty tank cars to or from repair facilities, were not "departure tariffs" within the meaning of Section 8.

Buffalo & Pittsburgh can and should be distinguished from this case and confined to the one specific set of circumstances it was designed to cure; the inequity visited on small railroads who were compelled, under railroad industry revenue distribution rules and car handling practices of the time, to provide transportation service without adequate com-

pensation. The narrow IHB holding intended to do equity in limited circumstances should not become the tail that wags, changes, and commands the entire tank car allowance system.

Petitioners do not wish to reiterate extensively all of the reasons that can distinguish Buffalo & Pittsburgh, and the repair shop movements there considered, from the wholesale transfer of tank car infrastructure costs that BNSF has posited under the guise of storage charges. Briefly, we explained in the June 9 Submission that, in Buffalo & Pittsburgh, the ICC noted that any payments by tank car owners for movement of their cars to or from repair facilities would be recovered to some extent through payments made under the tank car allowance system; the same is untrue here, where none of BNSF's storage charges (or diversion charges, for that matter) are recoverable.⁷

The ICC also was concerned that standing in the way of charges for moving empty tank cars to or from repair facilities would produce a cross-subsidization by imposing costs on a carrier other than the one actually responsible for the payment of mileage allowances. Here, the carrier attempting to benefit from the new storage charges or the new shipper infrastructure compelled by the storage charges is the same carrier that is responsible for payment of the mileage allowances, thereby eliminating any objectionable degree of cross-subsidy.

In Buffalo & Pittsburgh, the ICC concluded that tank car suppliers should have been forewarned that the Commission was inclined to allow separate charges for the movement of empty tank cars to or from repair facilities because IHB was pending while

⁷ BNSF asserts (Opening Statement, p. 26) that the Buffalo & Pittsburgh decision did not turn on whether the tank car providers' payments for the repair facility movements could be recouped through the allowance system, but the reviewing court did not see it that way, holding that "[t]he ultimate responsibility for the costs of owning railcars, including the costs of empty repair moves, would continue to be transferred to railroads through customer channels -- such as mileage allowances." GATC, 872 F.2d at 1051-52.

Ex Parte No. 328 was being negotiated. In contrast, there has been no suggestion that charges and provisions of the type involved in this proceeding were about to be approved by the ICC while Ex Parte No. 328 was in negotiation, and the Board has no need to exclude such provisions from consideration under Section 8 of the allowance agreement in order to protect a new policy that was enunciated during the course of the negotiations.

In short, the exceedingly narrow construction of Section 8 urged upon the Board by BNSF on the basis of the "four corners" language in Buffalo & Pittsburgh is an inappropriate measure for application in this proceeding. Whatever may have motivated the ICC to decline to regard charges for the movement of empty tank cars as "departure tariffs" in Buffalo & Pittsburgh, an extension of that doctrine as requested by BNSF will limit Section 8 to only those situations where a railroad reduces the Ex Parte No. 328 allowance directly. As noted above, the documents submitted by the JNC to the Commission clearly indicate that all parties contemplated a broader interpretation of a "departure tariff."

Petitioners accordingly urge the Board to conclude that where, as here, a carrier responsible for paying tank car allowances publishes a tariff requiring a party entitled to receive those allowances to expend uncompensated funds to acquire or construct infrastructure necessary to use the tank cars that trigger the allowances, an indirect reduction in the allowance has occurred that is subject to investigation under Section 8, and that such investigation is not barred by Buffalo & Pittsburgh.

C. The Board Should Not Be Diverted by BNSF's Emotional and Largely Irrelevant Claims

The first of these BNSF claims is that its storage charges should not be investigated under Section 8 because they are responsible for major reductions in the amount of time that empty private cars dwell on BNSF track and for improved BNSF service. BNSF

Opening Statement, pp. 39-40; Langston V.S., pp. 3-5. Petitioners do not believe that BNSF has made a convincing case that its storage charges are responsible for what it regards as improved performance statistics; but even if the storage provisions have resulted in changes, such changes do not establish the propriety of the storage charges either under Section 8 of the allowance agreement or any other standard.

BNSF sets forth various data intended to convince the Board that the storage provisions have been a big success in reducing the number of empty private cars on BNSF lines and the amount of time that those cars dwell on BNSF lines. However, its data do not tell the whole story.

The BNSF storage provisions have forced shippers to lease trackage from BNSF to hold empty private cars prior to loading in order to avoid payment of daily charges. BNSF acknowledges that these track leases are a consequence of its storage provisions. Langston V.S., p. 38.

The trackage which shippers have leased from BNSF for empty private tank cars often is in the very same BNSF yard where the private cars were held prior to inauguration of the storage charge provisions. In fact, many of the track leases by BNSF fail to even assign specific trackage to the shipper, instead making the shipper pay BNSF for whatever "floating" track BNSF determines to use for empty tank car storage. Consequently, private tank cars are residing on the same trackage where they resided prior to the storage provisions, but BNSF is now able to claim that that trackage is "private" trackage and that cars on that trackage no longer are on BNSF tracks. There appears little doubt that this mere change in nomenclature has been responsible to a considerable extent for the so-called "re-

duction" in private cars on BNSF tracks alleged to have been produced by the storage charge provisions. See Gasz R.V.S., p. 13.

Other events unrelated to the storage charges also may have contributed to the "improvements" described by Mr. Langston. For example, BNSF now makes greater use than it did in early 2001 of large, shuttle grain train units that operate continuously without dwelling in railroad yards, thereby providing considerable relief from yard congestion. Gasz R.V.S., pp. 14-15. Additionally, there were many thousands more private cars off lease, and off the railroad system, in May 2003 than in May 2001 (the comparison period utilized by Mr. Langston), which may also have contributed to improved conditions on the BNSF system in a way unrelated to the storage provisions.

One of the points stressed by Mr. Langston is that the storage provisions brought about a reduction from an average of two days to an average of one-half day in the time that empty "industrial private cars sat on BNSF's tracks" between May 2001 and May 2003; and a reduction from an average of one and one-third days to one-third day for empty agricultural private cars over the same time span. Id.

To some extent, these data no doubt are attributable to the above-described reclassification of BNSF yard track to private track through the device of leasing the yard track to a shipper, thus enabling BNSF to assert that the cars no longer are on BNSF track even though they are in the same yard as previously. In any event, BNSF's claims regarding these reductions in private car dwell time are curious, given that private cars occupying BNSF track for one and one-third days or two days would not appear to incur charges under the BNSF storage provisions (which Mr. Langston describes, at p. 12 of his statement, as affording two free days). There is no palpable reason offered by BNSF to explain why

shippers, whose private cars are not incurring storage charges in the first place, would be prompted by the storage charge provisions to reduce even further the dwell time of those cars on BNSF tracks. This enigma suggests that there are, indeed, reasons other than the storage provisions behind any improvements that may have come about in BNSF service.

Petitioners applaud service improvements by BNSF, and the Board will note the absence in BNSF's submission of any suggestion that BNSF's customers endeavor to obstruct improvements in BNSF service. Nevertheless, BNSF's claims that its storage provisions have brought about significant service improvements are subject to substantial doubt. Moreover, if service improvements are the reason for the storage provisions, then Petitioners suggest that that is a matter for Section 8 "special circumstances" consideration, not an excuse for avoiding Section 8 scrutiny.

However, BNSF should not demand more of its customers than BNSF delivers with its own cars. BNSF's own car fleet is not sized to match demand perfectly; no car fleet can be. Where BNSF does elect to furnish cars, it often must hold those cars in its yards for days or weeks between unload point and next load point as part of routine car service. Gasz R.V.S., pp. 16-17. Shippers should not be required to pay BNSF for failing to use these temporarily surplus cars.⁸ Data available on BNSF's website shows that a substantial number of BNSF cars often are parked, without charge to its customers, because BNSF has been unable to plan its own fleet's use with exactitude. For instance, for the week of June 14, 2003, 2,759, or 13.8 percent, of BNSF's grain cars were idle, taking up over 31 miles of

⁸ Where shippers enter into voluntary, bilateral car service agreements with BNSF for cars other than tank cars, they may undertake to pay a penalty for not accepting a BNSF car when it is tendered as ordered. But all such plans are terminable by the shippers if BNSF's penalties are regarded as too onerous, and BNSF can be requested to supply cars without any special car service strings attached, causing BNSF to absorb at its own expense all mismatches between supply and demand.

BNSF track. Who is to say that these BNSF cars did not contribute to the congestion for which BNSF blames private cars entirely.

A second area of irrelevant BNSF assertions is the claim that Petitioners seek to interfere with "unbundled" pricing and rate differentiation. Langston V.S., pp. 10-14. In fact, Mr. Langston's impassioned presentation attempts to make it sound as if the entire BNSF pricing structure -- if not the pricing structure of the entire railroad industry -- will grind to a halt because "BNSF would never be able to charge separately for any service, or component of a service, that it had not previously charged separately for" if its efforts to "unbundle" private car storage track are investigated under Section 8 of the tank car allowance system. Id. at 13.

Mr. Langston uses the example of rate differentiation between single-car and multi-car service, claiming that BNSF would be unable to offer differentiated rates for these services if BNSF is thwarted in efforts to impose additional charges for the use of private car holding tracks. That reasoning turns pricing differentiation upside down. In BNSF's example, where different prices are maintained for single-car and multi-car service, the multi-car shipper is given a lower rate in return for pre-blocking its cars destined to a common point. But BNSF's storage charges do not offer any tank car provider a reduced rate; BNSF's freight rates have not been lowered, nor have its mileage allowances been increased, for those tank car suppliers who must now furnish their own holding tracks or pay the penalty for keeping what BNSF unilaterally has determined to be an excessive number of private tank cars on BNSF track. BNSF appears to have overlooked the fact that the question regarding holding track for empty private cars is one of allowances commanded by statute, compelling railroads to make payments to a shipper to the extent the shipper

furnishes a legitimate instrumentality of transportation, whether in the form of a freight car or another facility. See Bud Antle Inc. v. United States, 593 F.2d 865 (9th Cir. 1979).

The tank car allowance agreement, presented to and prescribed by the ICC to give effect to the statutory allowance requirements, is based on the opposite of "unbundling;" it is based of necessity on average costs. Gasz R.V.S., p. 11; see, also, Ex Parte No. 328, Sections 3 and 4. BNSF does not propose to unbundle its allowance payments in order to compensate tank car providers when they incur unusual, car-specific expenses in excess of the fleet average. BNSF only wishes to use "unbundling" as a reason to increase the costs of those shippers who were taken unawares by BNSF after they had acquired tank cars without any reasonable expectation that an effort would be made to impose higher costs on those tank car suppliers deemed by BNSF to have inadequate track storage. These conditions are far from the "single-car versus multi-car" type of unbundling to which BNSF improperly seeks to liken them.

Another inapt BNSF analogy asserts that its storage provisions are no different than demurrage charges assessed on loaded cars. Opening Statement, pp. 25-26. This claim rests on a total misapprehension of the difference between demurrage and the storage charge provisions of BNSF.

Demurrage on loaded cars occurs when the cars arrive at destination and the consignee is unwilling or unable to accept the cars. BNSF collects such demurrage charges for private cars, including tank cars, while on BNSF track. The entire demurrage charge for these private cars is retained by BNSF and none is remitted to the tank car provider.

The party paying destination demurrage is not the private tank car provider, and the party receiving and keeping the demurrage is not the private tank car provider. Accord-

ingly, this type of destination demurrage does not reduce the compensation being paid by a railroad for private equipment, increase the costs to the private car provider, or reduce the compensation received by the private car provider. Those conditions are in sharp contrast to the BNSF storage provisions, which transfer private car infrastructure costs from the railroad responsible for paying an allowance to the car provider, without compensation, thereby reducing the consideration received by the car provider.

D. BNSF's Diversion Charges Depart from Section 1 of the Agreement

Although BNSF argues that its diversion charges are intended to cover switching costs and not excess mileage costs (Opening Statement, p. 40), that claim is incorrect. Section 1 of the mileage allowance agreement was designed to address all issues connected with the return of empty tank cars from unloading points to their next point of use, whether that point be a new loading point, the prior loading point, or a repair facility. Gasz R.V.S., pp. 17-18.

Obviously, the more empty miles a tank car incurs, the more switches it is likely to incur. Accordingly, by limiting the ratio of empty tank car miles to loaded miles and by authorizing railroads to impose a penalty payment for excess empty miles, Section 1 represents a decision by the Ex Parte No. 328 negotiators to curtail all empty car movement "excesses," including the switching excesses that inevitably must flow from empty car miles that exceed the 106 percent ratio. Because diversions can produce more empty miles, the extra switches that may be associated with diversions will be curtailed to the extent the diversion charge penalty curtails empty mileage. The empty/loaded mile ratio of Section 1 and the penalties for exceeding that ratio thus were intended to police not only excess empty mileage, but all railroad switching associated with that mileage. In effect, the BNSF

diversion charge is a supplement to the penalty charge for excess empty miles that is contained in Section 1. For that reason, it is a "departure" from the provisions of Section 1. Gasz R.V.S., p. 18.

BNSF attempts to muddy the simple facts of Section 1 by emphasizing that diversions cause extra switching work. Petitioners do not dispute that. But, in addition to the fact that extra switching work was contemplated and dealt with through excess mileage penalties under Section 1, the extra switching often is brought about by BNSF itself. One of the principal reasons for diversions is that empty tank cars have not shown up with regularity where they have been directed and are expected for loading, so that shippers find themselves in need of diverting other cars to meet loading needs. Gasz R.V.S., p. 18.

Finally, BNSF's diversion charges are intended to serve a purpose that could not have been contemplated by Section 1; BNSF states that "charging [shippers] for all second diversions would deter shippers from using the diversion process to avoid paying storage charges." Langston V.S., pp. 19-20. This goal suggests that BNSF wants tank car shippers to pay storage charges. However, it would seem that BNSF should want to avoid these conditions, rather than promote them; that is, if it is truly concerned with excess private cars occupying BNSF tracks, it should not have switching charges that avowedly are designed to direct the private cars right to the BNSF tracks where BNSF claims it doesn't want the cars to be.

III. CONCLUSION

BNSF ends its Opening Statement with an inconsistent pairing: a claim that its storage and diversion tariff provisions can meet the Section 8 "special circumstances" test coupled with a threat to attempt to invoke the renegotiation provisions of Section 9 and

cause the demise of Ex Parte No. 328 if the Board makes BNSF observe the requirements of Section 8. Opening Statement, pp. 42-44. It is difficult to see why BNSF would want to destroy Ex Parte No. 328 if it truly believes that its storage and diversion provisions can satisfy the Section 8 "special circumstances" test.

The Board should not allow itself to be coerced by BNSF's threats to attempt to dismantle the mileage allowance system. To the contrary, the Board should accept BNSF's claim that it can meet the Section 8 "special circumstances" test and provide BNSF with an opportunity to do so. While Petitioners hope that BNSF will pursue that opportunity if presented with it, Petitioners must remind the Board that, even if BNSF and the required number of other railroads petition for renegotiation of the agreement under Section 9, the Board is required by Section 9 to go forward with any Section 8 investigation that has been instituted and is pending during renegotiations.

Petitioners have been disappointed at the unwillingness of BNSF to regard storage and diversion provisions as matters for negotiation, and instead to treat them as aspects of tank car supply and use subject to BNSF's unilateral authority. If the Board institutes an investigation under Section 8, Petitioners are hopeful that the Board's intervention will bring about a change in that outlook, and Petitioners are more than willing to enter into discussions, particularly if facilitated by an administrative law judge or other representative of the Board, to seek a fair and appropriate mutual accommodation of both issues. As the ICC noted in an Ex Parte No. 328 Decision in response to a railroad petition for clarification of the allowance system:

The agreement leaves to the Commission the task of establishing standards for determining the lawfulness of challenged tariffs.

Ex Parte No. 328, Decision served November 19, 1987.

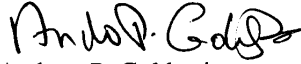
After two years of interposing objections and delays, BNSF now advises the Board that the proper forum for consideration of Petitioners' concerns is the related Complaint case, even though BNSF regards the Complaint as being without merit. BNSF Opening Statement, pp. 32, 45. Petitioners do not agree that the Complaint is the only appropriate vehicle to consider private car providers' concerns regarding BNSF tariffs, but we do agree that the complaint certainly does warrant consideration on the merits. Granted, to the extent the Board resolves private tank car concerns in this proceeding, it may not have to address them in the Complaint. Nevertheless, part (15) of the Rail Transportation Policy, 49 U.S.C. § 10101(15), added as part of the ICCTA, states that it is the policy of the United States Government "to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part."

Petitioners obviously believe that an investigation under Section 8 is warranted with respect to BNSF's storage provisions and diversion charges. We see no reason why such an investigation cannot proceed on the same record with the Complaint. Petitioners respectfully submit that it is unnecessary for the Board to determine at this point how to dispose of the issues on the merits before allowing complete records to be made in both cases. Indeed, BNSF's claims that it can satisfy the "special circumstances" test of Section 8 and that Petitioners are, after all, entitled to challenge BNSF's practices in the Complaint, appear to invite just such an approach.

For the foregoing reasons, Petitioners urge the Board to institute an investigation under Section 8 of Ex Parte No. 328 with respect to BNSF's storage provisions and diver-

sion charges applicable to tank cars, and further urge the Board to give appropriate consideration to the issues and requests pending in the Complaint.

Respectfully submitted,



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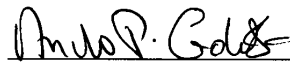
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply of North American 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 7th day of July 2003 been served on all parties of record, by first-class mail, postage prepaid.



Andrew P. Goldstein

s:/mcd/Joint Reply Finalized

REPLY VERIFIED STATEMENT

OF

JOSEPH C. GASZ

My name is Joseph C. Gasz. I am the same Joseph C. Gasz who furnished a Verified Statement as part of the June 9 Submission of North America Freight Car Association ("NAFCA"), American Chemistry Council ("ACC") and the National Industrial Transportation League ("NITL"). I inadvertently failed to mention in that statement that I am also consulting for Highroad Consulting, Inc.

The purpose of this statement is to respond to various claims and assertions made by John J. Robinson and Douglas W. Langston, witnesses on behalf of The Burlington Northern and Santa Fe Railway Company ("BNSF"), as well as certain arguments of BNSF in its Opening Statement, which I believe are misplaced. The abbreviations used hereafter in this statement are the same as those used in my initial statement, unless otherwise stated.

Storage Charges

There is a recurring contention throughout the BNSF Opening Statement that an effort to establish storage charges for empty tank cars on railroad tracks awaiting placement for loading, such as the BNSF charges here at issue, somehow is related to a railroad's "right of independent action" in setting rates and is not a matter for consideration under the "departure tariff" provisions of the tank car allowance system because departure tariffs were intended to be confined only to the specific mileage allowance payments themselves or to the formula for calculating mileage allowances contained in the Ex Parte

No. 328 system. See, e.g., Robinson V.S. 2-6; BNSF Argument 11-16. I believe that these claims are inaccurate.

Although I find the BNSF arguments, and the supporting Verified Statements of Mr. Robinson and Mr. Langston to be in some respects confusing, I understand the central point of the BNSF position on the relationship between the "right of independent action" and individual railroad efforts to alter the mileage allowance system to be essentially a claim that Section 8 of the tank car mileage allowance agreement -- under which departure tariffs would be subjected to scrutiny -- amounts to a relinquishment of a railroad's "right of independent action" with respect to its rates and service terms. The "right of independent action," at least as I understand that "right," has little or nothing to do with the question of whether the empty car storage charges and rules of BNSF are subject to investigation under Section 8.

A. Mr. Robinson's Statement

BNSF and Mr. Robinson suggest that the sole purpose of Section 8 was to establish a mechanism that was favorable to the railroads in that it would provide a means whereby they might seek to establish allowances lower than the amount resulting from the Ex Parte No. 328 system in order to accommodate a railroad's desire to publish a reduced freight rate level that was viewed by the railroad as having insufficient margin to accommodate the Ex Parte No. 328 allowance level. Robinson V.S. 2. I think this is an incorrect view of both the Ex Parte No. 328 negotiations and the resulting allowance system.

For one thing, by the time the Ex Parte No. 328 allowance system was negotiated to what is essentially its present form in 1985 and was approved by the ICC in 1986, rail

transportation contracts were permissible by statute. If any railroad desired to offer a reduced tank car rate to a customer and thought that an Ex Parte No. 328 mileage allowance was standing in the way, it could have done so through a contract had the customer been desirous of using the rate. Absent a tariff, no Section 8 "departure tariff" issue need have arisen because no mileage "cap" in a railroad tariff or any use of the "right of independent action" would have been necessary. Conversely, if a railroad's tank car customer was not interested in a particular reduced rate or in avoiding a rate increase, there was in those circumstances similarly no need for the railroad to publish a tariff reduction in the mileage allowance payment.

Accordingly, BNSF's intimation that Section 8 of the allowance system was designed to protect railroads and to preserve their right of "independent action" is misplaced. To the contrary, Section 8 was intended primarily to protect tank car shippers because railroads had the statutory right to publish tariffs unilaterally. To the extent that railroads were allowed to meet and collectively discuss rates and charges, including storage charges, the "right of independent action" allowed them to refuse to be bound by group decisions, at least as I understand that right. Railroads could, through tariff publication, propose any rate or charge of their choosing. Section 8 of the allowance system was designed as a limitation on that right, subjecting proposed changes to the allowance system to scrutiny under a standard that differed from that which would have applied to "usual" changes in railroad rates or service terms. But for Section 8 of the allowance agreement, a change in a mileage allowance payment would have been subject to discretionary investigation by the ICC under what was then Section 10707 of the Interstate Commerce Act. By contrast, Section 8 of Ex Parte No. 328 provided for mandatory in-

vestigation and thereafter placed the burden on the railroad to justify its departure tariff by "special circumstances" subject to the statute's allowance provisions, rather than under standards that would have applied in an ICC proceeding not brought under Section 8 of Ex Parte No. 328.

Contrary to the BNSF position, it was not the intent of the negotiated tank car allowance system that only a change to the allowance rate itself or to the formula from which the allowances are derived would be subject to mandatory investigation, while all other changes could proceed without Ex Parte No. 328 challenge. As the ICC recognized when it approved the present mileage allowance system, it was intended that each effort by any railroad to depart from the national agreement, "whatever the form" of the departure, "must be justified by the publishing railroad and an investigation proceeding must be instituted if a petition for investigation (protest) is filed." Investigation of Tank Car Systems, 3 I.C.C. 2d 196, 198 (1986). Section 8 of the agreement itself provides that "no tariff that departs in any manner from the allowance system prescribed herein" will be permitted except as provided in Section 8.

As I indicated in my prior statement, the "allowance system prescribed" in 1986 contains more than simply a mechanism for arriving at a payment per loaded mile to those who furnish private tank cars. Provisions are included in Section 1 for payment by tank car suppliers to railroads when empty tank car miles exceed loaded tank car miles by more than 106 percent. The "allowance system prescribed" was more than just rates per loaded mile paid for private tank car use.

I disagree with Mr. Robinson's contention that the absence of an express restriction in the agreement on the ability of a railroad to take steps that affect the value of an

allowance implies that all such steps were to be permitted without investigation under Section 8. My records show that, in 1975, the AAR announced that it was considering rules and charges for empty private cars, including tank cars, on railroad tracks while awaiting placement for loading, with charges to commence after five free days. That proposal was dropped and, as I pointed out in my earlier statement, it was agreed by the railroads during the course of the first round of Ex Parte No. 328 negotiations 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" and that "empty tank cars, being instruments of transportation, place a burden to be born [sic] by carriers to the proper limits of transportation related use." Nevertheless, the railroads did not insist on Ex Parte No. 328 rules carrying forward the AAR's 1975 proposal for empty car storage fees.

In 1981, a similar proposal was advanced by the AAR, this time suggesting a charge for empty private tank cars and other private cars when held on railroad tracks prior to loading "in excess of a reasonable time period" defined as "seven (7) days ... including Saturdays, Sundays and holidays from the first 7:00 a.m. subsequent to notification by the rail carriers." This proposal likewise was dropped by the carriers during the second round of Ex Parte No. 328 negotiations. If, as BNSF now suggests, it was the belief of the railroads that the Ex Parte No. 328 system negotiated prior to 1986 and prescribed by the ICC at that time contemplated storage charges of the type instituted by BNSF in 2001, it is indeed curious that no railroad singled out tank cars for such storage charges in the years immediately following the Ex Parte No. 328 prescription, especially given the fact that storage charges had been proposed just two years prior to the commencement of the second round of Ex Parte No. 328 negotiations. Indeed, it was not un-

til 16 years after the negotiations were concluded that BNSF claimed that storage charges for empty tank cars on railroad tracks while awaiting placement for loading were contemplated and permissible under Ex Parte No. 328. I believe firmly that, when BNSF instituted its storage charges in 2001, it overlooked Ex Parte No. 328 altogether (Mr. Langston asserts that only 5 percent of BNSF's tank car traffic pays Ex Parte No. 328 allowances), and that its current interpretation of the allowance system is nothing more than a retroactive rationalization to further its current goals. That neither BNSF (nor its predecessors) took action to establish storage charges soon after Ex Parte No. 328 was prescribed appears to me to be consistent with the fact that empty car storage charges for tank cars on railroad track prior to loading were not regarded as immune from Section 8 when the allowance system was negotiated.

I do agree with Mr. Robinson's statement (Robinson V.S., p. 8) that the railroads did not intend that the tank car allowance system would permanently freeze all existing railroad practices regarding private car use. Indeed, that is why Section 8 of the agreement was negotiated; to provide a method for the railroads to change their practices, but subject to mandatory investigation.

Mr. Robinson contends that the tank car allowance agreement was a comprehensive statement of all major items of tank car ownership, including interest, depreciation, repairs and maintenance, and that if any agreement had been intended to the effect that railroads could not charge for holding empty cars on their tracks in circumstances other than those addressed under Section 5 of the agreement, those restrictions would have been in the agreement (Robinson V.S., pp. 10-11).

The agreement was a compromise that omits many major items of tank car ownership and maintenance costs. Some of those were described at pages 16-18 of my earlier statement. Mr. Langston, at pages 21-22 of his Verified Statement, refers to similar items of tank car maintenance costs; "around \$650" to clean a general service tank car; "approximately \$1,000 (or more)" to clean more specialized tank cars, as examples. These costs and others described in my earlier statement are incurred by lessees and owner-operators of tank cars, and not by tank car owners, so they are excluded from the mileage allowance system, contrary to Mr. Robinson's views. As a result, the allowance system was the compromise agreement that I described in my opening statement, where each side gave up the right to assert recovery of certain costs. Tank car providers surrendered the right to recover very substantial car cleaning and many maintenance costs as part of the allowance system; railroads gave up the right to recover some of their costs, including their recognized expenses for holding empty private cars on railroad track awaiting loading, unless those costs were progressed under Section 8.

Giving credence to Mr. Robinson's current position would mean that railroads can use the power of their tariff publishing ability to make unilateral changes that alter the underpinnings of the 1986 agreement -- including, as one of those underpinnings, the proposition that holding empty tank cars on railroad tracks prior to loading was a railroad responsibility as part of the car use cycle -- while tank car providers would have no equivalent ability to recover through unilateral action all that they would be entitled to under the allowance provisions of the statute, including the substantial lessee and owner-operator costs that were omitted from the allowance system. Such a one-sided result was

not intended. What was intended was that Section 8 of the agreement be available when a railroad thought it necessary to make adjustments to the system.

To claim, as BNSF and Mr. Robinson now claim, that a storage charge provision is not a contemplated Section 8 issue because it does not directly reduce a mileage allowance payment opens the door to the complete destruction of the system. Under that approach, BNSF presumably could establish a storage charge stated, for example, to be a forfeiture of 100 miles' worth of allowance payments, instead of so many dollars per car per day, as BNSF has done. Because BNSF would not by that device be reducing directly the amount of an allowance payment, BNSF presumably would argue that such an approach would not be subject to a Section 8 investigation. Yet, the net effect of any such provision would be a reduction in the level of compensation being received by a tank car provider as a matter tied directly to the furnishing of the private tank car, just as the BNSF storage charges have that effect.

BNSF repeatedly asserts that its storage provisions on empty tank cars are no different than its demurrage provisions on loaded cars, but I would differ with that claim. For one thing, as I recall, demurrage charges most certainly have been a permanent part of the transportation landscape for as long as can be remembered. Demurrage is intended primarily to foreclose the undue detention of cars by individual railroad customers.

While it can be argued that BNSF's storage charges in some respects have a similar purpose, storage provisions on empty private cars awaiting loading are not traditional charges and are governed by other considerations; namely, the allowance provisions of the statute, which all of the Ex Parte No. 328 negotiators had firmly in mind. What we were negotiating when the tank car mileage allowance system was developed was a sys-

tem to determine how tank car providers should be compensated for furnishing freight cars and related facilities. A demurrage charge, often not payable by the tank car provider but by another party altogether, does not detract from the compensation received by the car provider under the mileage system. Storage charge provisions applicable to the private tank car awaiting loading by the car provider do exactly the opposite; they require tank car providers, who were not aware when they acquired their cars that they would be asked to supply storage track, to make a payment to the railroad for storage space, in order for the tank car to be operated and for that provider to receive a mileage payment from the railroad, and are clearly distinguishable from demurrage charges.

B. Mr. Langston's Statement

I would like to comment on some of Mr. Langston's statements, beginning with his testimony that tank car mileage allowances are basically irrelevant to BNSF because less than 5 percent of the tank cars moving on its system receive allowance payments (Langston V.S., p. 25). (I should observe that five percent appears to be an unusually low number, inasmuch as Mr. Robinson states, at page 7 of his statement, that "over one-half of the mileage allowances [currently paid by the four major U.S. railroads] to tank car owners are paid to the owners as provided for in individual privately negotiated contracts," suggesting a reliance on pure mileage allowance payments far in excess of 5 percent of all tank car usage.) I know from personal experience that, whether or not a rate contract calls for payment of tank car mileage allowances, allowance levels are taken into account in arriving at a contract rate.

A system of definable allowances such as Ex Parte No. 328 is especially important for tank cars, as opposed to other types of equipment provided by shippers. That is

so is that because tank cars are the only type of car not supplied by the railroads at all; other types of freight cars supplied by shippers also are supplied by the railroad industry to some extent. For example, while shippers supply many covered hopper cars used for grain movements, railroads also supply some such cars. Railroads compensate shippers who supply private grain cars either through specific mileage allowance payments or by maintaining a dual rate structure consisting of one level of rate for a given movement in carrier-furnished cars, and a lower rate for the same movement in private cars, with the spread between the two rates representing the value of the private cars. Where, as in the case of tank cars, there are no railroad-owned cars and no rates applicable in railroad-owned cars, there is no spread between a rate in railroad equipment and a rate in private equipment that can be used to determine the value of a private car. Thus, in the absence of a defined allowance per mile, it might be difficult to agree on the per trip value of a private tank car in a transportation context.

If there were no tank car allowance system, railroads, which do not furnish tank cars, easily and predictably would take the position that the shipper should be credited with no rate offset for furnishing its own tank car because the value of that car is not easily susceptible of determination. The tank car allowance system provides a valuable benchmark for determining the worth of the transportation instrumentality being furnished by the shipper for purposes of rate negotiations. Rail transportation contracts, which were in existence and widely used in 1986 when the present allowance system was prescribed, and thereafter when it was modified by the ICC as late as 1991, do not make the tank car allowance system obsolete from a shipper's point of view. Destruction of the

tank car allowance system would bestow a considerable advantage on the railroads when rates for the shipment of commodities in tank cars are discussed and negotiated.

Mr. Langston makes something of an impassioned argument to the effect that separate charges for private tank car holding tracks are an efficient form of service "unbundling" and consistent with BNSF's policies of price differentiation. Langston V.S., pp. 11-14. This argument is ironic in light of the Ex Parte No. 328 system agreed to by BNSF's predecessors.

The tank car allowance system is predicated on a concept that is 180 degrees opposite from unbundling; it relies exclusively on average cost experiences. BNSF does not pay any greater allowance for a tank car that, for example, experiences a mishap and incurs unexpected high and unusual costs than BNSF pays for the "ordinary" tank car of the same type. It does not pay more in a case of a tank car that comes on and off lease more often than other tanks cars, and thus incurs higher lessor cleaning expenses than the "average" of the same type. Nor does BNSF offer to make higher allowance payments under any of these circumstances. The tank car allowance system to which the railroads agreed is a system that rests upon average cost experiences. Even when BNSF provides service that utilizes cars owned by another railroad its rates do not vary from car to car, although its car hire costs may well vary.

Mr. Langston portrays shippers generically as having opposed all efforts by railroads to alter their pricing structure so as to differentiate between service with greater and lesser efficiencies, such as single and multi-car shipments, and he suggests that the BNSF storage charges are simply another step in the direction of more efficient pricing. As someone with far more extensive experience with railroad service than Mr. Langston, I

must differ with his views. Shippers in most cases embraced rate reductions that rewarded them for helping to make rail service more efficient. When multi-car rates were introduced by the railroads, they were offered as rate reductions in return for shippers pre-blocking cars going to the same destination. BNSF's storage charges involve no such rate reductions in return for a shipper effort. To the contrary, they impose cost increases by compelling shippers to lease or construct additional trackage, or to pay penalties to BNSF if the shippers cannot do so, while the freight rate remains unchanged.

I must also disagree with Mr. Langston's claim set forth at page 20 of his statement, where he asserts that BNSF does offer to furnish tank cars, but that its offers have been declined by shippers. I know of no offer by BNSF to furnish tank cars. Moreover, I know of no requirement that a railroad's customers agree to use railroad-supplied cars as a precondition to the acquisition of those cars by the railroad. Railroads have acquired many types of cars without the permission of their customers whenever the railroads deem it in their best interest to do so, and BNSF could furnish tank cars without its customers' consent if BNSF elected to do so.

When railroads do furnish equipment, they bear the entire cost of maintaining and servicing that equipment subject, naturally, to recovery of their costs through their rate structure. Mr. Langston points out (Langston V.S., p. 22) that tank cars often may have specialized uses which are best served by equipment dedicated to particular product lines or through expensive car cleaning between uses. If BNSF furnished tank cars, it would have to bear the costs and risks of these conditions, and it has elected not to do so. As I understand it, the theory of allowances basically is to reimburse the private car provider for those expenses that would be incurred by the railroad if it were to furnish the car.

BNSF apparently takes the position of choosing neither to furnish tank cars nor to make its customers whole when they do so.

BNSF most assuredly is not making its customers whole for the tank car infrastructure investments that are being compelled by the storage charge provisions. Companies that belong to the Petitioners' organizations advise me that, where they have made investments in private track construction as a result of the storage charges, the compensation provided by BNSF has not been sufficient to defray the complete costs of that construction and ongoing track maintenance. Ironically, where these same companies have been unable to construct additional storage track on their own property and have been forced to lease track from BNSF, the track they have leased often turns out to be "floating" track in BNSF yards -- that is, a track space chosen by BNSF at its convenience, rather than permanently assigned track -- so that the private tank cars remain in the same BNSF yard where they were before the storage charges were instituted, only now BNSF can claim that the private car fleet on BNSF track is smaller than prior to the storage charges because the same track is now classified as "shipper" track. It is entirely possible that this slight-of-hand is what is responsible for what Mr. Langston claims (Langston V.S., p. 5) to have been a reduction in private cars on BNSF tracks, allegedly attributable solely to the storage provisions.

It is also necessary for me to comment on Mr. Langston's assertion (Langston V.S., pp. 23-25) that slack time in the use cycle of a tank car is substantially under the control of the shipper. I think it is fair and accurate to say that both parties -- railroads and shippers -- share to some extent the responsibility for the efficient or inefficient use of tank cars; however, I think that BNSF has more control over these matters than its cus-

tomers. Mr. Langston appears to believe that, because shippers control the choice of a car's destination, they largely control the cycle time. His inference appears to be that BNSF would be better off if cars were used only for short movements that are relatively easy for BNSF to manage. That, however, is flatly contrary to BNSF's marketing strategies, which constantly demand from shippers that they give BNSF its longest possible haul and which encourage shippers to market their products to more distant BNSF destinations and interchanges, rather than to nearer ones.

Obviously, shippers can to some extent control the amount of time it takes for them to load a tank car once it is placed on their tracks, although it is incorrect to believe, as Mr. Langston suggests (Langston V.S., p. 5), that shippers can speed up their plant operations to accommodate rail cars. In any event, the loading of a tank car is only a small part of a car's cycle time. The loaded and empty moves are strictly under the control of the railroad, just as they would be in carrier-owned equipment. The grain processing members of NAFCA advise me that one reason why the BNSF system may be more fluid now than two years ago is because BNSF has made greater use of large, 110 car grain shuttle trains made up of covered hopper cars that are designed to move continuously from loading points to unloading points in unbroken cycles, replacing yard servicing necessary for smaller units of grain cars and producing increased train speed averages. The tank car leasing companies of NAFCA advise me that there were many more thousands of private cars in long-term storage in May 2003 than in May 2001 due to slackened demand, and that fact could well have alleviated some of the congestion that BNSF claims to have eliminated through storage charges.

One particular statement by Mr. Langston regarding shipper control of tank car cycles is especially curious; I refer to his claim that "private car owners and shippers have the ability to charge shippers and receivers demurrage when their private cars are held loaded or empty on private track." Langston V.S., p. 24. Mr. Langston does not state the source of this "ability."

I have reviewed the bill of lading forms prescribed by the STB, and can find no place on those forms where a shipper might unilaterally impose demurrage charges on a receiver when private cars are utilized. Moreover, I must point out that, for purposes of administering the private car system, the railroad industry considers a car "owner" to be the owner of the reporting marks on the car; "X" at the end of a mark denotes a private car, and each private car owner is assigned its own marks ending with "X". With respect to the substantial majority of the private tank car fleet, the car "owner" as denominated by the reporting marks is a leasing company, rather than the shipper that leases the car and sells the commodity shipped in it. It is totally infeasible for any vendor of goods to allow a car leasing company to determine when the consignee of goods shipped in the leased cars should have to pay demurrage on those cars, or how much demurrage should be paid. That is not the concern of the car lessor, and allowing the lessor to enter that realm would cause great disturbance in the relationship between a vendor and vendee of goods. Where it is commercially feasible, shippers attempt to negotiate the prompt release of cars by consignees.

There was a time when railroad demurrage rules imposed demurrage charges for private cars while on private tracks of a consignee. One case exemplifying that practice was Union Oil Co. of Calif. v. Atchison, T. & S. F. Ry. Co., 289 I.C.C. 686, 687 (1953),

which noted the existence of carrier demurrage rules providing that "private cars on private tracks shall be exempt from demurrage when the ownership of the car and the track is the same." In all other cases, demurrage applied. This demonstrates that even destination demurrage can be subject to BNSF's control. However, one reason why private car owners might not like to see destination demurrage applicable on private cars is because the railroads insist on the right to retain the full amount of the demurrage charge even though they have no car ownership costs for private equipment.

In demanding that shippers manage their private tank cars (or other private cars) in a manner that occupies the cars continuously in use cycle after use cycle with only two days slack time allowed in each cycle for the holding of empty cars prior to loading (Mr. Langston, at page 12, describes the BNSF rules as allowing "a two-day free period"), BNSF demands more of its customers than it apparently can achieve in the management of its own car fleet. I say that in part based on my own knowledge of how BNSF handles cars, and in part based on the Verified Statement of Gary T. Kurtz that accompanied my earlier Verified Statement. When BNSF or other railroads have no immediate use for one of their own system cars after it is unloaded, the car may be kept at a railroad yard for far longer than the two free days that BNSF has provided in its private tank car storage rules.

In truth, neither railroads nor shippers can plan a car fleet that fits demand and operating variances like a glove. One objectionable facet of the BNSF storage provisions is that they represent a unilateral charge imposed on BNSF's customers for what BNSF alone considers to be excessive use of BNSF tracks, while shippers have no commensurate ability to unilaterally recover from BNSF when BNSF operating inconsistencies or errors increase a shipper's private tank car costs. Mr. Langston asserts that the BNSF

storage tariff makes allowance for BNSF "bunching." But the tariff contains a very narrow definition of bunching, relying on deliberate acts of BNSF and excluding from bunching relief garden variety inconsistencies in BNSF service that make it extremely unwise for a shipper to risk a sharp reduction in the size of its tank car fleet.

Diversion Charges

Mr. Langston asserts that the diversion charges imposed by BNSF on private tank cars occur after cars have been switched into a block with a group of other cars that are moving in the same direction, and that a diversion order requires additional car switching in order to implement the diversion. He states that the diversion charges were designed in part to discourage this practice and in part to "prevent car owners from using the diversion process to circumvent BNSF's new storage policy for empty private cars." Langston V.S., pp. 18-19.

It first should be noted that a "diversion" can occur under the BNSF tariff once a car is released to BNSF, even if the car is on private track at the time. It is not necessarily true, therefore, that a diversion order always requires additional BNSF switching.

There no doubt are tank car diversions made after the cars are in a train consist headed toward a particular point. However, several reasons argue against the imposition of diversion charges even in those circumstances.

The first is that diversion practices do not differ now from when Ex Parte No. 328 was negotiated. Section 1 of Ex Parte No. 328 was designed to completely cover all empty tank car movements, including switching no matter how and where provided; between unload point and next unload point, or between unload point and a repair facility. Regardless of what type of empty move is involved, it required some switching when Ex

Parte No. 328 was negotiated, and it does now. Section 1 of the agreement contemplated that switching would always be necessary for empty moves.

Second, when diversions produce excess empty miles, Section 1 imposes penalties on the car provider. The Ex Parte No. 328 negotiators chose to penalize tank car providers for excess empty miles, rather than excess switches as such, because it was recognized that a limitation on excess empty miles would be expected to curtail the need for diversions and the additional switching produced by diversions.

Third, a prime reason why a shipper may find it necessary to divert a car after it has already started in one direction is because BNSF service has proven unreliable, making that car necessary at a loading point that should have received other empty cars but has not on account of inconsistent BNSF or other railroad service.

Fourth, diversions are in the interests of not only the shipper, but of BNSF if one is to believe its alleged desire to extract unnecessarily surplus cars from the fleet. If shippers are to be penalized for diverting cars, especially to cope with unpredictable or tardy BNSF service, the private car fleet will become less flexible and will require the addition of more cars to meet loading needs. Removing or penalizing flexibility from the private tank car system will make that system more cumbersome in the long run and more costly to railroad and shipper.

Mr. Langston's statement that BNSF's diversion charges were to prevent private car owners from using the diversion process to circumvent BNSF's new storage policy for empty private cars is extremely illuminating. He states that "charging [shippers] for all second diversions would deter shippers from using the diversion process to avoid paying storage charges." I had understood from BNSF statements, however, that the storage

charges allegedly were not a goal in and of themselves, but only a means to deter shippers from utilizing BNSF track unduly for empty private tank cars. By stating that it is using diversion charges to enforce storage charges, BNSF indicates that it regards storage charges as a revenue source that it wishes to protect, and not as a car movement accelerant. If storage charges truly are intended to reduce congestion on the BNSF system, it would seem that BNSF should be anxious to promote genuine ways to reduce that congestion, rather than employing diversion charges to make storage charges applicable, thereby increasing congestion because storage charges only accrue, according to BNSF, when a shipper has made undue and inefficient use of BNSF trackage.

C. Conclusion

As indicated in my opening Verified Statement, there are approximately 250,000 tank cars in the U.S. private tank car fleet. These cars make a valuable contribution to the railroad industry, generating billions of dollars a year in freight revenue.

On average, the value of a tank car is approximately \$70,000. Multiplied by the 250,000 cars in the U.S. fleet, private tank cars represent an investment of \$17.5 billion in infrastructure that otherwise would have had to have been made by railroads in order to earn the substantial revenues produced by the tank car fleet.

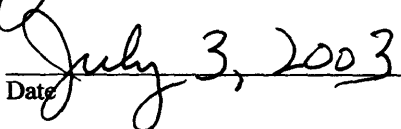
BNSF is a primary beneficiary of private investment in tank cars. Unfortunately, it seems to be leading the parade when it comes to an unwillingness to pay mileage allowances for those tank cars; it asserts that it pays mileage allowances only about 5 percent of the time, a number that appears much lower than the industry average described by BNSF's own witness, Mr. Robinson.

As pointed out in the June 9 Submission of Petitioners, BNSF states that, should it not be able to maintain its empty tank car storage charges because of Section 8 of the tank car allowance system, BNSF will take steps that it expects to lead to the "demise" of Ex Parte No. 328. Apparently, BNSF is willing to destroy the tank car allowance system because it regards itself as having an advantage when there are no defined allowance levels to represent the value of the tank car equipment furnished by shippers. I regard the BNSF storage charges, which are compelling tank car shippers to make uncompensated investments in tank car infrastructure, as another step towards transferring tank car ownership costs from railroad to shipper without adequate compensation. Such a step, in my view, strikes at the heart of the Ex Parte No. 328 bargain.

s:/med/Final Reply Verified Statement of Joseph W. Gasz

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