

August 15, 2005

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Via Hand Delivery

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K St. N.W.
Washington, D.C. 20423

RE: STB Finance Docket No. 42060 (Sub-No. 1), *North America Freight Car Association v. BNSF Railway Company*

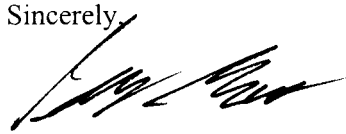
Dear Secretary Williams:

Enclosed please find the original and ten (10) copies of The National Industrial Transportation League's Brief as Amicus Curiae for filing in the above-referenced proceeding. Also enclosed is one diskette with a copy of the Brief in PDF and Word format.

An extra copy of this Brief is enclosed for time and date stamping and return to our offices.

If you have any questions regarding the foregoing, then please do not hesitate to contact me.

Sincerely,



Nicholas J. DiMichael
Jeffrey O. Moreno

*Counsel for The National
Industrial Transportation League*

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. 42060 (SUB-NO. 1)

NORTH AMERICA FREIGHT CAR ASSOCIATION

v.

BNSF RAILWAY COMPANY

**BRIEF OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE AND
THE AMERICAN CHEMISTRY COUNCIL
AS AMICI CURIAE**

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**BRIEF OF
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Pursuant to the an order served August 2, 2005, the National Industrial Transportation League ("League" or "NITL") and the American Chemistry Council ("ACC") hereby submit their Brief as *amici curiae* in this proceeding.

This case was brought by the North American Freight Car Association ("NAFCA") in a complaint filed on August 29, 2001, against certain empty car storage and demurrage charges published by the BNSF Railway Company ("BNSF"). The League and the ACC intervened in this case on September 13, 2001, and September 20, 2002, respectively, stating that a number of their members would be directly affected by the charges at issue; that they support innovative measures designed to improve the efficiency of the rail network; but that the storage and demurrage rules that had been published by BNSF may, in practice, adversely affect shippers. Thus, the League and the ACC supported the Complaint of NAFCA and urged the Board to initiate an investigation into the subject rules and charges.

As an Intervenor, the League and the ACC have participated at various stages of this proceeding, though they did not independently develop and present major written submissions to

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the Board, but rather joined NAFCFA in making joint submissions. As the proceeding moved forward, it became clear that the League and the ACC would not be developing and submitting their own evidence and argument based on such evidence on the issues identified by the Board in its decision served on August 13, 2004. Instead, the League and the ACC would comment, on behalf of their members, on evidence and argument submitted by the other parties.

Accordingly, during the course of this proceeding, in view of the nature of the League's and the ACC's participation and in order to resolve certain discovery disputes, the League and the ACC each reached an agreement with BNSF under which each organization would seek the Board's permission to withdraw as an Intervenor and instead participate as an *amicus curiae*. Those requests, as well as the League's proposal regarding the date for the submission of amicus briefs, was granted by the Board in an order served August 2, 2005.

On July 29, 2005, the Complainants filed their two-volume Opening Statement of Fact and Argument. While the League and the ACC are not in a position to comment on the specific facts set forth in the numerous Verified Statements in that filing, they do desire to comment upon the general principles that should inform the Board's consideration of the issues in this proceeding.

Specifically, the Board must take careful account of the fact that shippers have made massive investments to the rail transportation system over the past two decades, particularly investments in railcars. Individual shippers have made these investments to meet their individual transportation needs, but the collective size and scope of these investments in railcars have now resulted in a new reality for the nation's rail system: the dependence of that system on private cars. Indeed, the rail transportation system could not work without such shipper investments. Thus, the Board must be particularly sensitive to insure that the rules and charges applicable to

private cars are fair and non-discriminatory between railroad and private cars; that shippers with private cars should not be responsible for problems that are not of their making; and that rates and charges to encourage the efficient handling of cars should bear a reasonable relationship to, and not more than necessary for, the provision of proper incentives to assist in curing the problem presented.

ARGUMENT

Section 10702 of the ICC Termination Act, 49 U.S.C. 10702, states that a rail carrier providing transportation or service subject to the jurisdiction of the Board “shall establish reasonable . . . rules and practices on matters related to that transportation or service.” “Transportation” under the statute is broadly defined to include “car[s], vehicle[s] . . . or equipment of any kind related to the movement of . . . property . . . by rail, regardless of ownership . . . ,” as well as “services related to that movement, including receipt, delivery . . . storage, [and] handling” 49 U.S.C. 10102(9). Moreover, Section 11121(a)(1) of the Act requires a carrier to establish, observe, and enforce “reasonable rules and practices on car service.” *See*, 49 U.S.C. 11121(a)(1). “Car service” is similarly broadly defined in the Act to include the “use, control, supply, movement, distribution, exchange, interchange, and return of . . . cars . . . used in the transportation of property by a rail carrier.” 49 U.S.C. 10102(2).

The Board and its predecessor the Interstate Commerce Commission have confirmed in their decisions the breadth of its jurisdiction over “unreasonable practices” and the broad need for reasonable rules and practices on car service. *Grain Land Coop v. Canadian Pacific Limited and Soo Line Railroad Company, d/b/a CP Rail System*, STB Docket No. 41687 (December 9, 1999; *Parrish and Heimbecker, Inc. – Petition for Declaratory Order*, STB Docket No. 42031,

decision served May 26, 2000; *Ormet Corp. v. Illinois Central R. Co.*, 341 I.C.C. 647 (1972).

The Board, thus, clearly has jurisdiction over the rules and charges at issue in this case.

The past three decades have seen a remarkable shift in car ownership in the railroad industry. According to figures published by the Association of American Railroads, in 1970, non-railroad cars comprised just 18 percent, or about 330,000 cars, of the total car fleet of nearly 1.8 million cars. *Railroad Fact 2004* Edition, Association of American Railroads (October 2004), p. 51. In the next ten years, by 1980, the year that the Staggers Rail Act was passed, the percentage of private freight cars had climbed to 26 percent, with about 440,000 non-railroad cars out of the total 1.7 million freight car fleet. *Id.* By 1990, the total number of freight cars in service had declined precipitously, to 1.2 million cars (a drop of nearly 30%), but the total number of non-railroad cars had increased, to about 450,000, a figure that represented 37 percent of the total number of cars. By 2000, the number of railroad- cars had dropped again, from 761,000 in 1990 to 692,000 in 2000, a decline of nearly 10 percent, while the number of non-railroad cars had again risen from about 450,000 in 1990 to more than 688,000 in 2000, a massive increase of more than fifty percent. In that year, non-railroad freight cars for the first time comprised more than fifty percent of the total car fleet. By 2003, the last annual figure published by the AAR, the total non-railroad freight car fleet was 54 percent of the total number of cars. *Id.*

Indeed, the AAR's figures suggest another relevant dimension to the issue. In the four years between 1995 and 1999, non-railroad cars increased by approximately 112,000, or more than the number in any four-year period before or since back to 1929, an astounding twenty-percent increase in the number of non-railroad cars in just that four-year period. *Id.* This four-year period was a time of severe service problems in the railroad industry, starting with the

UP/SP merger, and ending with the purchase of Conrail by Norfolk Southern and CSX. Because of those service problems, shippers that were tied to the railroad system for their transportation had to acquire, and did acquire, large numbers of cars to be able to meet their customers' needs.

Thus, in the twenty-five years since the passage of the Staggers Act, the number of private cars increased by more than fifty percent, and ultimately comprised more than half of the total rail industry car fleet. In sharp contrast, the number of railroad freight cars declined from 1.270 million to just 590,000, a drop of nearly 55%, and now railroad freight cars comprise less than half the total of rail cars in service. Indeed, if only Class I rail carriers are considered, the drop has been even more precipitous: Class I rail carriers, despite moving and handling virtually every car on the nation's rail system, in 2003 controlled just 467,063 of the 1,278,980 cars in the system, or just 37 percent of the freight cars in the industry. *Id.* This represents a huge change from "traditional" railroading, in which the Class I carriers themselves supplied most or all of the instrumentalities of transportation.

The League and the ACC strongly believe that the Board must be very mindful of this radical shift in the industry as it examines the reasonableness of rules and charges applicable to railroad and non-railroad freight cars in this case. In particular, the Board needs to be aware of the asymmetric incentives at work, and the dangers to the public interest to which those asymmetric incentives might lead.

Specifically, Class I rail carriers have always had an incentive to prefer their own cars in their operations compared to private freight cars: after all, railroad freight cars represent the carriers' own investment, and the Class I rail carriers understandably wish to see the return on that investment maximized. During the time that Class I rail carriers controlled the large majority of freight cars (over 80%, for example, in 1970), that incentive was no danger to, and in

fact was supportive of, the entire rail system, as it encouraged rail carriers to efficiently handle the large majority of cars on the system.

But the situation is radically different now, though the incentive remains the same. Class I rail carriers continue to have an incentive to see the operations of and the return on their own cars maximized. But now, nearly two-thirds of the freight rail cars on the system are not owned by Class I rail carriers, even though the Class I rail carriers handle virtually all the cars on the system. This may lead to two problems. First, unfair or discriminatory rules against private freight cars could lead to systemic inefficiencies in which railroad cars are preferred even though they are a distinct minority of cars on the system; or worse, could act to discourage non-railroad owners from continuing to invest in freight cars. And second, since Class I rail carriers control the movement of all freight cars on the system, and since shipper investment in rail cars effectively ties most shippers to the use of rail, the dangers of monopoly pricing or service may arise. In either case, the League and the ACC believe that it is the statutory duty of the Board to protect the integrity and efficiency of the entire rail system, and to insure that the public interest and the nation's rail transportation policy are served. The Board must insure that non-railroad equipment is treated fairly and equitably.

There are four principles that flow from this analysis, each of which the Board should carefully consider as it analyzes the issues in this case.

First, given the vastly increased importance of private equipment on the rail system, the Board should insure that the rules for the use of non-railroad equipment are consistent with the rules for use of railroad equipment. In other words, the rules and practices of the rail industry should not unreasonably discriminate between private and railroad equipment. This is particularly true in the case of rules and practices to reduce congestion, since if a car takes up

needed space on a rail system, it makes no difference whether that space is occupied by a railroad railcar or a private railcar. If unduly discriminatory rules are permitted between railroad and private cars, such rules will tend to lessen shippers' desire to invest in such equipment. Railroads under the statute are common carriers. If shippers hesitate to invest in rail cars, this will either increase the need for railroads' to shoulder such investments, or lead to worse service on the rail system, thus further discouraging shipper use of the nation's rail system.

Second, if various types of equipment are contributing to congestion, the rules applicable to these various types of equipment should be consistent. Since different types of railcars take up basically the same "space" on a rail system (assuming that the number of "turns" are similar), one type of equipment should not be unfairly burdened if various types of equipment are contributing to the problem, at least without a convincing showing that different car types are contributing to the problem of congestion in different ways.

Third, owners of private equipment should not be responsible and penalized for the effects of a railroad's own erratic service. Where the carrier's service is unpredictable, the rules for the use of private equipment should make allowance for the unpredictability in the system, and the rules should not penalize shippers for problems that are not of their making. Thus, for example, fair "bunching" provisions are extremely important. Of course, as transit times become more predictable, rules can be tightened.

Finally, the level of storage or demurrage charges should "fit" the congestion problem at which it is aimed. That is, charges for demurrage or storage should not be at a level that exceeds the level necessary to assist in curing the problem. Put another way, given the market power that rail carriers have over shippers who have invested in private rail equipment, charges for private-car storage or demurrage should not be more than necessary to reflect the economic value of the

space on the rail system and the level necessary to encourage the efficient use of private railcars. Demurrage and storage charges for non-railroad cars should not become a "profit center," as this will not provide correct incentives for the use of non-railroad cars. Appropriate differential pricing should be reflected in the line-haul rate, not in charges allegedly designed to encourage the efficient use of rail cars.

WHEREFORE, the League and the ACC respectfully request that the Board consider the views presented in this Brief.

Respectfully submitted,



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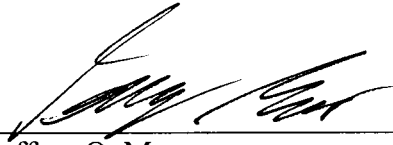
Counsel for
The American Chemistry Council

Counsel for
The National Industrial Transportation League

Dated: August 15, 2005

CERTIFICATE OF SERVICE

I hereby certify that I have this 15th day of August served copies of The Brief of The National Industrial Transportation League and the American Chemistry Council as Amici Curiae upon all parties of record in this proceeding by hand delivery.



Jeffrey O. Moreno

August 15, 2005