

ORIGINAL

LAWRENCE W. BIERLEIN
DOUGLAS M. CANTER
JOHN M. CUTLER, JR.
ANDREW P. GOLDSTEIN
STEVEN J. KALISH
RICHARD D. LIEBERMAN
CHANNING D. STROTHER, JR.

OF COUNSEL
KAREN R. O'BRIEN

LAW OFFICES
McCARTHY, SWEENEY & HARKAWAY, P.C.
SUITE 600

2175 K STREET, N.W.
WASHINGTON, D. C. 20037
(202) 775-5560

August 20, 2002

ENTERED
Office of Proceedings

AUG 21 2002

Part of
Public Record

FACSIMILE
(202) 775-5574

E-MAIL
MSH@MSHPC.COM

WEBSITE
HTTP://WWW.MSHPC.COM



By Hand Delivery

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW, Mail Room (Room 715)
Washington, DC 20423

Re: 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:

North America Freight Car Association ("NAFCA") requests the Board to issue a procedural schedule setting the date for the filing of petitions for reconsideration of the Board's decision of October 18, 2001 (the "October 18 Decision").

This proceeding involves certain private tank car storage, diversion and demurrage charges, and related rules, of the Burlington Northern and Santa Fe Railway Company ("BNSF") that took effect July 1, 2001 (the "July 2001 changes") and were challenged by NAFCA on June 26, 2001 as being contrary to certain provisions of an order of the Interstate Commerce Commission ("ICC") in Ex Parte No. 328, Investigation of Tank Car Allowance System, 3 I.C.C.2d 196 (1986) ("Ex Parte 328").

NAFCA's challenge to the July 2001 BNSF changes took the form of a Protest and Petition for Investigation ("Protest") under § 8 of Ex Parte 328, claiming that the July 2001 changes constituted "departure tariffs" that violate the negotiated and prescribed provisions of Ex Parte 328.

In the October 18 Decision, the Board addressed Docket 42060 and four other proceedings in which similar "departure tariff" violations of Ex Parte 328 had been alleged. The four other proceedings were: Docket 42061, Railway Progress Institute Committee on Tank Cars Petition for Investigation and Protest Pursuant to Ex Parte 328 (aimed at limited aspects of BNSF's July 2001 changes); Docket 42062, The Chlorine Institute Inc. – Protest and Petition for Investigation – Tariff Publications of Union Pacific Railroad Company (challenging private tank car storage charges published by Union Pacific Railroad Company, hereinafter "UP", that became effective on October 1,

2001); Docket 42063, Railway Progress Institute Committee on Tank Cars Petition for Investigation and Protest Pursuant to Ex Parte No. 328 (challenging limited aspects of UP's October 1, 2001 private car storage charges); and E.I. Du Pont de Nemours and Company – Protest and Petition for Investigation (also a "departure tariff" challenge of UP's private car storage charges). In its October 18 Decision the Board noted that both BNSF and UP had taken the position that their assailed tank car tariff changes did not violate Ex Parte 328, and the Board stated:

We will resolve this matter if it becomes necessary to do so. At this time, however, we believe that the private parties are in a better position than we are to determine how best to resolve the issues raised in these proceedings. Therefore, we will hold these proceedings in abeyance and require the parties to engage in negotiations provided for in the [Ex Parte 328] Agreement.

The October 18 Decision also directed the parties to provide the Board, by January 16, 2002, with written reports on the progress of those negotiations. In a separate comment to the October 18 Decision, Vice Chairman Burkes questioned whether it was appropriate to interpret Ex Parte 328 as requiring renegotiation of the tank car allowance system when a petition requesting an investigation of a "departure tariff" is filed. He stated that the Board should have instituted an investigation to resolve the conflict over whether the railroads' changes were "departure tariffs".

In a decision served on November 20, 2001 in Docket 42060 and the other four cases, the Board clarified that the date for seeking reconsideration of the October 18 Decision would be extended to 20 days after the end of the negotiations required by the October 18 Decision.

Following service of the October 18 Decision, the petitioning parties in the five proceedings identified above, and other parties in support of the petitioners, engaged in discussions with UP and BNSF. As appropriate, the parties jointly requested the Board to extend the reporting period so that ongoing negotiations might continue. Ultimately, the petitioning parties in Docket Nos. 42061, 42062, and 42063 resolved their limited areas of difference with BNSF and UP, and those proceedings were discontinued by various orders of the Board. On August 5, 2002, the petitioning party in Docket No. 42064, E.I. Du Pont de Nemours and Company ("DuPont"), notified the Board that DuPont and UP have completed their negotiations, are reducing to writing an Agreement resulting from those negotiations, will file that Agreement with the Board; and that DuPont thereupon "will notify the Board that it will withdraw its protest and petition in the above proceeding." Additionally, DuPont and UP advised the Board in that letter that "neither believes that additional time needs to be provided by the Board for negotiations."

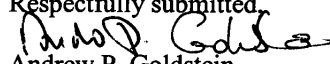
Of the five proceedings addressed in the October 18 Decision, only Docket 42060 has not been resolved fully. In a letter to the Board dated May 20, 2002, we informed the Board that NAFA and BNSF had not been able to resolve their differences and that the

remaining parties in this proceeding regard the negotiations as concluded.¹ In that same letter, we requested the Board to indicate when it intended the 20-day period for filing petitions for reconsideration of the October 18 Decision to commence. In a decision served on May 29, 2002 in Docket 42060, Docket 42064 and Docket 42060 (Sub-No. 1), North America Freight Car Association v. Burlington Northern and Santa Fe Railway Company,² The Board stated that, when the negotiations in Docket 42064 end, the Board will issue a Decision identifying the beginning of the 20-day period for filing petitions for reconsideration of the October 18 Decision. The Board also indicated that, should the negotiations in Docket 42064 become protracted to the detriment of the parties in Docket 42060, a separate decision will be issued in Docket 42060 to establish a procedural schedule for that proceeding.

As indicated above, NAFCA believes that the parties in Docket 42064 have made it plain to the Board that negotiations in that proceeding have concluded and that all that remains is for those parties to reduce their terminating agreement to writing. NAFCA accordingly believes that it is now appropriate for the Board to issue a procedural schedule in Docket 42060 establishing the date for the filing of petitions for reconsideration of the October 18 Decision. The issues in that case have been before the Board since June 26, 2001, and the tariff matter involved in the Docket 42060 protest has been in effect since July 1, 2001. Moreover, apparently as a result of the fact that Docket 42060 (Sub-No. 1) is related in various respects to Docket 42060, the complaint in Docket 42060 (Sub-No. 1) has not been processed; a motion to dismiss by BNSF and a joint reply to that motion by NAFCA and NITL remain pending before the Board. All the while, the July 2001 changes (albeit slightly altered by BNSF) have remained in effect, applicable to the equipment and facilities of NAFCA and NITL members. There is no reason for the Board to continue to hold Docket 42060 in abeyance pending the filing of a formal dismissal request in Docket 42064 when it is now clear that the negotiations in that case are over.

For the foregoing reasons, NAFCA urges the Board to issue an order establishing a date for the filing of petitions for reconsideration of the Board's October 18 Decision in Docket 42060.

Respectfully submitted,



Andrew P. Goldstein

Attorney for

North America Freight Car Association

cc: All parties

¹ In addition to NAFCA, the National Industrial Transportation League ("NITL") is a party to Docket 42060. Other parties identified in n.8 to the October 18 Decision as having requested intervention in Docket 42060 have since resolved their limited interests in this proceeding and have withdrawn their interventions.

² Docket 42060 (Sub-No. 1) is a complaint that addresses aspects of BNSF private car changes of July 1, 2001 applicable to private equipment other than tank cars and, alternatively, to private tank cars should the Board determine not to entertain Protests in Docket 42060.