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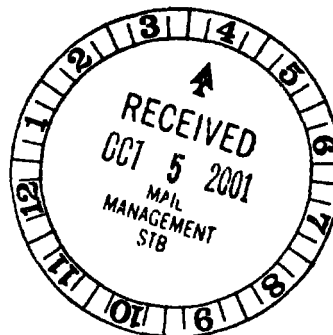
OCT 5 2001

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October 5, 2001



The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

Re: STB Docket No. 42060 (Sub. No. 1) North America Freight Car Association v. The Burlington Northern and Santa Fe Railway Company

Dear Secretary Williams:

Enclosed for filing are the original and ten (10) copies of The Burlington Northern and Santa Fe Railway Company's Motion to Dismiss the Complaint in the above captioned subdocket. Also enclosed is a 3.5 inch disk, containing the text of the Petition in WordPerfect 9.0.

I would appreciate it if you would date-stamp the enclosed extra copy of the Motion to Dismiss and return it to the messenger for our files.

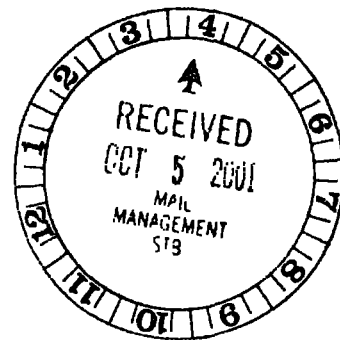
Sincerely,


Robert M. Jenkins III

Enclosures

cc: Andrew P. Goldstein
Nicholas J. DeMichael
Henry M. Wick

CHARLOTTE CHICAGO COLOGNE FRANKFURT HOUSTON LONDON
LOS ANGELES NEW YORK PALO ALTO PARIS WASHINGTON
INDEPENDENT MEXICO CITY CORRESPONDENT JAUREGUI, NAVARRETE, NADER Y ROJAS



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. 42060 (Sub. No. 1)

NORTH AMERICA FREIGHT CAR ASSOCIATION

v.

**THE BURLINGTON NORTHERN AND SANTA FE
RAILWAY COMPANY**

MOTION TO DISMISS

Pursuant to 49 C.F.R. § 1111.5 and 49 U.S.C. § 11701(b), The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby moves to dismiss the Complaint filed in the above-captioned subdocket by North America Freight Car Association ("NAFCA") on August 29, 2001.

I. INTRODUCTION AND SUMMARY

The Board and its predecessor, the Interstate Commerce Commission ("ICC"), have long recognized the important role that demurrage and storage charges play in encouraging the efficient utilization and turnaround of rail cars, freeing up needed track space, and compensating railroads for the costs of holding cars on their lines. See, e.g., *Railroads Per Diem, Mileage, Demurrage and Storage Agreement*, 1 I.C.C.2d 924 (1985). The use of special charges to promote efficient car utilization is expressly encouraged by the ICC Termination Act, 49 U.S.C. § 10722, and the policies favoring such charges are just as applicable to cars owned or controlled by shippers ("private

cars”) as to those owned or controlled by railroads (“railroad cars”). BNSF, like other railroads, has for years assessed charges for holding railroad cars assigned to or ordered by a shipper on BNSF’s tracks, regardless of whether those cars are loaded or empty. It has also assessed charges for holding loaded private cars on its tracks.

BNSF recently revised its demurrage and storage tariffs in order, among other things, to lower the charge, from \$75 to \$25 per car per day, for holding loaded private cars beyond a two-day free period, and to add a charge, \$25 per car per day, for holding empty private cars beyond the two-day free period. (The charge to hold covered hopper cars used to transport grain and sugar beyond the two-day free period was set at \$75 per car per day.) The charge for holding loaded or empty railroad cars remains at \$75 per car per day, with a two-day free period for loaded cars and a one-day free period for empty cars.

NAFCA’s Complaint in this subdocket picks out of these tariff changes BNSF’s new charges for holding empty private cars beyond a two-day period and challenges BNSF’s right to impose any charge for holding empty private cars under any conditions. In support of its claim, NAFCA cites a myriad of statutory provisions. NAFCA asserts that such charges constitute an “unreasonable practice” under 49 U.S.C. § 10702, are inconsistent with BNSF’s car service obligations under 49 U.S.C. § 11121, violate the requirements of 49 U.S.C. § 10746 regarding demurrage charges, and are inconsistent with the shipper allowance provisions of 49 U.S.C. § 10745.¹

¹ These claims are different from, and considerably broader than, NAFCA’s claims in the main docket, Docket No. 42060, *North America Freight Car Assoc. – Protest and Petition for Investigation – Tariff Publication of The Burlington Northern and Santa Fe Ry.* (filed June 26, 2001). There, NAFCA challenges the application of BNSF’s tariff charges to empty tank cars, on the ground that those charges are not authorized by Ex

The STB and the ICC have strongly disfavored this kind of blunderbuss attack on changes in a railroad's car management programs. See *National Grain and Feed Assoc. v. Burlington Northern R.R.*, 8 I.C.C.2d 421, 434 (emphasizing "the wide latitude accorded railroads to manage their car practices"). For a railroad to introduce or change a tariff to charge for a particular service that it did not separately charge for in the past provides no basis for complaint. Railroads are encouraged to innovate in their tariff offerings, particularly with respect to car utilization and management. *Id.* at 426. That is precisely what BNSF has done with its new demurrage and storage charges and what it intends to do in the future as circumstances warrant. While the Board can and should step in to adjudicate when abusive situations are claimed and demonstrated in individual cases, broad allegations of the possibility of abuse cannot justify regulatory intervention. *Id.* at 439.

The Complaint in this case provides a textbook example of the kinds of claims that should be dismissed. First, as a general matter, it cannot possibly be an "unreasonable practice" under Section 10702 for BNSF to assess a charge for holding an empty private car on its tracks beyond a reasonable free period. If it were, then it

Parte No. 328, *Investigation of Tank Car Allowance System*. On July 16, 2001, BNSF moved to dismiss the petitions in that docket and a companion docket, Docket No. 42061, *Railway Progress Institute Comm. on Tank Cars – Petition for Investigation and Protest – Pursuant to Ex Parte No. 328* (filed June 27, 2001). The petitioners replied on August 6, 2001, and BNSF's motions await the Board's decision.

NAFCA suggests in a footnote to its Complaint (p. 8 n.5) that it intends to file "at an appropriate time" a motion to consolidate the proceedings in this subdocket with the main docket. If the Board dismisses these proceedings, NAFCA's intention will become moot. If it does not, BNSF would vigorously oppose consolidation of these distinct cases.

would also constitute an “unreasonable practice” for BNSF to assess charges for holding loaded private cars and loaded or empty railroad cars that are held for a shipper’s benefit beyond a reasonable free period. Empty private cars take up just as much track space as loaded private cars, or loaded or empty railroad cars, and a charge for holding those cars for the shipper’s benefit serves the same salutary car utilization and compensation purposes. Such charges have been assessed for decades.

NAFCA suggests (Complaint, ¶5) that delay in loading a car might be BNSF’s fault, but, as NAFCA recognizes (Complaint, ¶7) provision is made in the storage tariff for waiving storage charges for delay caused by bunching that is BNSF’s fault. In any event, NAFCA’s suggestion is a red herring. NAFCA’s position is not that storage charges on empty private cars constitute an “unreasonable practice” only when delay is caused by the railroad; rather, NAFCA argues that storage charges on empty private cars are an “unreasonable practice” *per se*. If that were the case, however, all other demurrage or storage charges would also have to be considered unreasonable *per se*, because delay in moving empty or loaded railroad cars or loaded private cars may also sometimes be the fault of the railroad or railroads involved.²

NAFCA also claims that “[h]olding tracks for empty cars at origin, whether private cars or railroad cars, are a necessary component of railroad service and freight car supply” (Complaint, ¶6). Even if that were true, however, it would not mitigate against a

² The fact that demurrage and storage charges are not unreasonable in and of themselves does not mean that no relief is available for the shipper in the case of abusive charges by a railroad for delay that is caused by the railroad. The Board can and should be available to resolve disputes in specific cases concerning legitimate claims that shippers were charged for delays caused by the railroads. See, e.g., *The Prince Manufacturing Co. v. Norfolk and Western Ry. Co.*, 356 I.C.C. 702 (1978).

railroad taking reasonable measures to ensure the efficient use of those tracks or to be compensated when cars are unduly detained or stored on those tracks. NAFCA concedes that BNSF historically has furnished "all track space on its own lines necessary for holding empty cars" (Complaint ¶6). NAFCA has not taken issue either with the level of BNSF's charges or the length of the free period permitted for the use of that track space. Instead, NAFCA claims that no charge should be permitted at all for any length of time a railroad may be required to hold an empty private car.³ Needless to say, nothing in the law interpreting any of the statutory provisions cited by NAFCA supports the notion that railroads can or should be required to store a shipper's cars indefinitely with no compensation.

NAFCA suggests that if shippers are "unable or unwilling" to pay the BNSF storage and demurrage charges, then they must "either find alternate track space or reduce their private car fleets" (Complaint, ¶12). But shippers do not have to pay any charge for cars that are moved within the two-day free period, and NAFCA does not claim that there is some other charge for holding empty private hopper cars that shippers would be "willing and able" to pay if BNSF is required to hold their cars beyond the free period. One of the principal attributes of demurrage and storage charges is that they give shippers an incentive to keep their cars, or railroad cars they have ordered or been assigned, moving efficiently through the rail system. Understandably, some

³ NAFCA asserts that "[n]o such charges apply to cars operated by BNSF unless they have been expressly ordered" (Complaint, ¶6), but railroad cars that have not been ordered by a shipper or assigned to that shipper need not be held for or returned to that shipper. Empty railroad cars that have been ordered by a shipper or assigned to a shipper are subject to demurrage charges precisely because they are being held for that shipper's benefit. There is no reason that empty private cars should be treated any differently.

shippers might prefer not to pay any demurrage or storage charges, but this cannot provide an excuse for prohibiting railroads from charging for the use of their track space.⁴

Nothing in the car service provisions of Section 11121 or the demurrage provisions of Section 10746 provides any support for NAFCA's allegations. Indeed, on its face, Section 11121 makes clear that "reasonable rules and practices" on car service include adequate provision for a railroad to cover its costs. A railroad has no duty to provide any service or facility for free.⁵ See, e.g., *ACF Industries, Inc. – Petition for Exemption*, Docket No. 40194, 1989 ICC LEXIS 108 (May 1, 1989). Similarly, Section 10746 requires railroads to compute demurrage charges in a way that encourages freight cars to be used and distributed efficiently and an adequate supply of cars to be maintained. BNSF's demurrage charges on covered hopper cars are now the same for private cars as they are for railroad cars. They give shippers the same incentive to work

⁴ NAFCA complains that its members purchased private cars in reliance on BNSF providing track space free of charge for empty private tank cars (Complaint, ¶10), but even if this were true, it would prove too much, since it would justify freezing in place all tariffs affecting car owners. The Board and the ICC in the past have rejected claims of reliance on old tariff schemes even when car owners could point to settled decisions by the ICC to justify their reliance. See *General Amer. Trans. Corp. v. Indiana Harbor Belt R.R.*, Docket No. 35404, 1998 ICC LEXIS 55 (February 22, 1988). Here, NAFCA has pointed to nothing that could justify any expectation that BNSF or any other railroad would never extend demurrage and storage charges to empty private cars.

⁵ NAFCA suggests that BNSF should be required to provide holding tracks for empty private cars for free because supposedly BNSF failed to provide enough railroad cars to meet shippers needs (Complaint, ¶4). Even assuming that highly questionable proposition were true, however, it would not justify blocking BNSF from charging for holding those cars on its tracks, whether empty or loaded, beyond a reasonable free period. Any savings that BNSF and other railroads realize as a result of having shippers supply their own cars are reflected in the allowances they pay off of line haul tariff rates and the contract prices they negotiate with those shippers. Shippers who hold their cars on a railroad's line beyond a reasonable period – regardless of whether their cars are loaded or empty – cannot reasonably complain if they are charged for it.

with BNSF to move those cars – whether empty or loaded – efficiently through the system, thereby maximizing their utilization and minimizing the need for additional cars. Finally, even if there were any doubt about the appropriateness of BNSF charges under the statutory scheme, it would be resolved by Section 10722, which specifically encourages separate charges for separate services “[i]n order to encourage more efficient use of rail cars.”⁶

None of NAFCA's claims is legally supportable, much less provides “reasonable grounds for investigation and action.” 49 U.S.C. 11701(b). To proceed with discovery, evidentiary submissions, briefing, and adjudication of NAFCA's claims would be a colossal waste of the Board's and the parties' resources. NAFCA's Complaint should be dismissed.

II. TARIFF BACKGROUND

BNSF recently amended its demurrage and storage charges as they apply to private equipment. Prior to the recent revisions, with the exception of covered hopper cars used to transport grain, grain products, and sugar (“grain and sugar cars”), BNSF assessed demurrage charges of \$75 per day on loaded private and loaded or constructively placed empty railroad cars held on BNSF track. See BNSF Demurrage Book 6004-A. Loaded private grain and sugar cars and loaded or constructively placed

⁶ NAFCA's claim under Section 10745 (Complaint, ¶23) cannot stand even the mildest scrutiny. Essentially, NAFCA's argument is that (a) BNSF has an obligation to furnish holding or storage tracks for empty private cars indefinitely at no cost, and (b) if BNSF is not going to provide for indefinite free storage of empty private cars, then under Section 10705 BNSF must pay an allowance to shippers for providing such track. The short answer to this bootstrap argument is that neither BNSF nor any other railroad has now, or has ever had, any legal or logical obligation indefinitely to provide holding or storage track free of charge for private cars, loaded or empty.

empty railroad grain and sugar cars held on BNSF track were assessed a nonpeak season demurrage charge of \$25 per day. *Id.* BNSF also provided two free days of credit for loaded cars, whether private or railroad cars, and one free day of credit for constructively placed empty railroad cars. *Id.*

In addition to demurrage charges for empty railroad cars, BNSF assessed storage charges of \$25 per day on empty railroad cars held on BNSF track that were assigned to a particular shipper. *Id.* Demurrage charges were assessed once the car was ordered in by the shipper. BNSF did not assess storage or demurrage charges on empty private cars held on BNSF tracks, including empty private covered hopper cars. All of these charges were contained in BNSF Demurrage Book 6004-A (Issued October 2000).

Effective July 1, 2001, BNSF amended its policies regarding storage and demurrage charges for empty and loaded private cars, including private grain and sugar cars, held on BNSF tracks. See BNSF Private Car Storage Book 6005 and BNSF Demurrage Book 6004-A.⁷ BNSF reduced its charge for holding loaded private equipment (with the exception of loaded private grain and sugar cars) on its track beyond a two-day free period from \$75 to \$25 per day.⁸ See BNSF Private Car Storage

⁷ BNSF's new storage policies, which are set forth in BNSF Private Car Storage Book 6005, apply to all private equipment held on BNSF track except for private grain, grain products, and sugar covered hopper cars, which are governed by the policies contained in BNSF Demurrage Book 6004-A. Both Books can be found on BNSF's web site at www.BNSF.com/website/demurrage.nsf/Demurrage.

⁸ The storage rules provide that charges will begin to accrue on the second 12:01 a.m., excluding the first Saturday, Sunday, or Holiday after constructive placement. The practical effect of this provision is that a shipper may have as much as 4 full days and 23 hours and 59 minutes of free time, or as little as 24 hours and one minute of free time, depending on when the car was constructively placed.

Book 6005. BNSF also added a \$25 per day storage charge for empty private equipment (with the exception of empty private grain and sugar cars) held on BNSF track beyond a two-day free period. *Id.* BNSF's new storage policy provides allowances for bunching that is caused by BNSF. *Id.*

As discussed above, BNSF's new storage charges do not apply to empty or loaded grain/grain products/sugar cars. The treatment of these private cars is governed by BNSF's demurrage rules and charges. See BNSF Demurrage Book 6004-A. Effective July 1, 2001, BNSF revised its demurrage rules to apply the same rules and charges to all grain and sugar cars. BNSF extended to empty private covered hopper cars the same \$25 per day demurrage charge that applied to constructively placed empty railroad grain cars held on BNSF track. *Id.* Effective August 1, 2001, the demurrage charge was increased from the \$25 non-peak season rate to the the \$75 peak season rate for grain cars.⁹ *Id.* Sugar cars will remain at the \$25 non-peak season rate until October 1, 2001, when the rate will increase to the \$75 peak season rate. *Id.* at Item 1100I. Allowances are made for loaded bunching and runaround caused by BNSF. *Id.*

III. Argument

A. The Board Should Dismiss Count I of NAFCA's Complaint

In Count I of its Complaint (¶¶18-19), NAFCA claims that BNSF's storage and demurrage charges constitute both "unreasonable practices" in violation of Section 10702 and a failure to furnish adequate car service in violation of Section 11121(a).

⁹ BNSF may again reduce its \$75 demurrage charge in the nonpeak season, or increase this or other charges when appropriate. All of BNSF's storage and demurrage charges are subject to change in response to market conditions.

The specific violation claimed is “[t]he refusal of BNSF to continue to furnish holding tracks without additional charges for empty private cars awaiting loading” (Complaint, ¶19). Although NAFCA cites the specific demurrage and storage rules and charges assessed by BNSF (Complaint, ¶¶19, 7, and 8), NAFCA does not challenge any of the specific terms of those tariffs. The wrongdoing asserted by NAFCA is not the level of BNSF’s demurrage or storage charges, nor the reasonableness of the free period permitted, nor the application of those charges in an instance where a shipper believes that the delay in loading cars was caused by BNSF. Rather, the asserted wrongdoing is assessing any charge for holding an empty private car on BNSF’s tracks.

As a general matter, of course, neither BNSF nor any other railroad is under any legal obligation to provide unlimited storage or otherwise permit shippers to hold cars indefinitely on their tracks. See *Railroads Per Diem, Mileage, Demurrage and Storage Agreement*, 1 I.C.C.2d 924 (1985); *Industrial Scrap Corp. v. Indiana Harbor Belt R.R.*, Docket No. 40126, 1987 ICC LEXIS 120 (September 22, 1987). The Board and the ICC have long recognized the important role that demurrage and storage charges play in encouraging efficient car use by ensuring the prompt turnaround of equipment and compensating railroads for the expenses and capital costs they incur in holding cars beyond a reasonable free period. See, e.g., *Ex Parte No. 462, Exemption of Demurrage from Regulation*, 1996 STB LEXIS 101 (March 29, 1996); *South Carolina Ry. Comm. v. Seaboard Coast Line R.R.*, 365 I.C.C. 274, 277 (1981); *Ford Motor Co. v. Chesapeake & Ohio Ry. Co.*, 311 I.C.C. 559, 562 (1960).

None of this authority suggests that the purposes or the benefits of demurrage and storage charges are any less compelling when applied to private cars than they are

when applied to railroad cars. See, e.g., *Cities Service Oil Co. v. Soo Line R.R.*, 356 I.C.C. 838 (1977). Such charges have long been assessed against both loaded and empty railroad cars (when they are ordered by or assigned to a shipper) and against loaded private cars.

The gravamen of NAFCAs “unreasonable practice” and “adequate car service” claims in Count I is that BNSF until recently did not assess storage or demurrage charges for holding empty private cars beyond a reasonable free period and it would be unfair for BNSF to start to do so now. This claim is easily rejected as a matter of law. The ICC long since rejected the notion, as a general matter, that it is unreasonable for railroads to assess special charges for special services, just because they had not previously done so. See, e.g., *ACF Industries, Inc. – Petition for Exemption*, Docket No. 40194, 1989 ICC LEXIS 108 (“The [National Rail Transportation Policy] and Congressional mandates expressed in the Railroad Revitalization and Regulatory Reform Act of 1976 and the Staggers Act encourage the application of separate rates for distinct rail services, demand-based rates and revenue adequacy and discourage cross subsidization and misallocations of costs.”)¹⁰

¹⁰ The ICC has not just rejected the simplistic notion that any practice or price that may have favored a particular shipper or class or shippers could never be changed. It has also rejected the idea that shippers could claim special dispensation because they may have made capital investments on the assumption that old practices would never change. See *General Amer. Trans. Corp.*, Docket No. 35404, 1998 ICC LEXIS 55 (February 22, 1988). Even when the old practice had been endorsed in prior ICC decisions, the ICC was not persuaded that it should exempt from the new practice shippers who may have made investments on the assumption that the old practice could never change. *Id.* In this case, shippers have no basis for assuming that BNSF or any other railroad might not change their demurrage or storage charge practices regarding empty private cars. At least since passage of the Staggers Rail Act of 1980, railroads have been expressly encouraged to charge separately for special services and

In particular, in Section 10722, the statute makes specific provision for railroads to assess special charges to enhance car utilization:

In order to encourage more efficient use of freight cars, notwithstanding any other provision of this part, rail carriers shall be permitted to establish premium charges for special services or special levels of service not otherwise applicable to the movement. The Board shall facilitate development of such charges so as to increase the utilization of equipment.

In light of this statutory mandate that it “facilitate development” of special charges to enhance car utilization, the Board must treat with particular skepticism claims that assessing such charges is an “unreasonable practice” or otherwise in violation of the ICC Termination Act. When, for example, the ICC was presented with a host of “unreasonable practice” allegations in 1992 in connection with an innovative car reservation (“COT”) program implemented and administered by BNSF’s predecessor, Burlington Northern Railroad Company, the ICC rejected all of those allegations, citing Section 10722 (then Section 10734) and “the wide latitude accorded railroads to manage their car practices.” *National Grain and Feed Assoc.*, 8 I.C.C.2d at 434. The ICC stressed that “the ratemaking flexibility advocated by the Staggers Act gives rail carriers the freedom to explore new transportation programs and services without the need to receive regulatory approval.” *Id.* at 439.

particularly to innovate in their tariffs affecting car utilization. See, e.g., *ACF Industries, Inc.*, *supra*.

Thus, even if it were true (which is, to say the least, highly questionable), that NAFCA’s members acquired their private cars in reliance on BNSF continuing to provide track space at no charge for empty private cars that are held beyond a reasonable free period on its lines (Complaint, ¶10), it would provide no legal basis for barring BNSF from changing its policy and charging for that service.

The Board's reasoning in that decision applies even more so here. Unlike the COT program, which was truly innovative, BNSF's tariff changes here simply extend to empty private cars the same kind of charges that have applied for years to loaded private cars and to loaded and empty railroad cars. If the assessment of a modest demurrage or storage charge for the holding of empty private cars beyond a reasonable free period could constitute an "unreasonable practice" under Section 10702 or a violation of a railroad's car service obligations under Section 11121, then so could the assessment of demurrage and storage charges on loaded private cars or loaded or empty railroad cars.

To support its claims, NAFCA constructs an elaborate theory, which starts with the assertion that shippers have purchased cars because BNSF has failed to provide them with the cars that they need (Complaint, ¶4), moves to the contention that private car use is largely controlled by the railroads (Complaint, ¶5), and hinges on the conclusion that "[h]olding tracks for empty cars at origin, whether private or railroad cars, are a necessary component of railroad service and freight car supply" (Complaint, ¶6). None of these contentions, however, provides any logical or legal support for its claims.

Regarding NAFCA's contention that shippers have been forced to buy their own cars (Complaint, ¶4), the ICC and the Board have repeatedly made clear that shippers buy their own cars for a variety of reasons, including their own convenience, marketing needs, and tax benefits such as investment tax credits, interest deductions, and accelerated depreciation deductions. See, e.g., *Allied Corp. v. Union Pacific R.R.*, 1 I.C.C.2d 480, 486-87 (1985); *Lo Shippers Action Comm. v. Aberdeen and Rockfish Ry.*,

4 I.C.C.2d 1, 15 (1987). In any event, NAFCA is not here claiming that BNSF has violated Section 11121 or its common carrier obligation by failing to provide cars on reasonable request, so its hyperbolic contention has no legal relevance.

NAFCA's contention that "[p]rivate car use is largely subject to the control of the originating carrier and its connections, rather than to shipper control" (Complaint, ¶5) also misses the legal mark. The difference from an operating standpoint between private cars and railroad cars that have not been assigned to or ordered by a shipper is that private cars must be returned by reverse route to their owners. Absent the owners' agreement, railroads cannot use their private cars to transport other shippers' goods. See, e.g., *APL Land Transport Services, Inc. v. The Burlington Northern and Santa Fe Ry. Co.*, Docket No. 42003, 1999 STB Lexis 419 (July 14, 1999). Thus, whatever control a railroad may have over its operations, it cannot use an empty private car elsewhere when the owner refuses to take it. For purposes of demurrage and storage, that empty private car presents the same problem for the railroads as an empty railroad car that has been assigned to or ordered by a shipper, but which the shipper will not take. Such cars cannot be used elsewhere, and they occupy valuable track space. If demurrage or storage charges may appropriately be assessed against the empty railroad car, then they may appropriately be assessed against the empty private car.¹¹

If the point of NAFCA's operational "control" argument is that BNSF may sometimes be at fault for bunching or other problems that could cause private car owners to incur demurrage or storage charges for which they are not responsible, the

¹¹ Of course, the same symmetry exists between the assessment of storage or demurrage charges on loaded private and loaded railroad cars. And railroads, including BNSF, have long assessed such charges against both.

short answer is that this issue is not unique to demurrage or storage charges assessed against empty private cars. The same issue can and does arise with respect to charges on empty or loaded railroad cars and on loaded private cars. In the vast majority of instances, disputes over that issue between railroads and shippers are resolved without the necessity for regulatory intervention, but the Board is available, and should be available, if necessary to resolve such disputes. See e.g., *Cities Service Oil Company*, 356 I.C.C. 838; *The Prince Manufacturing Co.*, 356 I.C.C. 702. What the Board should not be available for is a claim that a demurrage or storage tariff constitutes an “unreasonable practice” and a violation of a railroad’s “adequate car service” responsibilities, per se, because it is possible that the railroad may in some instances be responsible for delay that results in a charge against a shipper. Cf. *National Grain and Feed Assoc.*, 8 I.C.C.2d at 439 (broad allegations of the possibility of theoretical abuse insufficient to justify blocking an innovative car service program).

As noted, NAFCA concludes its introductory discussion – which NAFCA then uses as the fundamental predicate of its claims in Count I – with the proposition that providing holding tracks for empty cars at origin is a necessary component of railroad car service (Complaint, ¶¶6, 18). The fundamental legal problem with NAFCA’s conclusion, even assuming it were true, is that it does not follow that such holding tracks must be provided for free.¹² On the contrary, Section 11121 by its own terms makes clear that a railroad may not be forced to provide facilities or equipment in such a way

¹² Significantly, NAFCA does not claim that BNSF has failed to provide sufficient holding tracks. NAFCA concedes that BNSF historically has furnished “all track space on its own lines necessary for holding empty cars” (Complaint, ¶6). NAFCA’s complaint is that BNSF will not continue to furnish those tracks for free to shippers who require BNSF to hold their empty cars on its lines beyond a reasonable free period (Complaint, ¶19).

as to “adversely affect the ability of the rail carrier to provide safe and adequate transportation,” to adversely affect the ability of the railroad to earn a return on the facilities and equipment “equal to the rail carrier’s current cost of capital,” or to “impair the ability of the railroad to attract adequate capital” (49 U.S.C. § 11121(a)(1)(A), (B), and (C)). It is difficult to conceive of a claim more at odds with the letter or the spirit of Section 11121 than a claim that a railroad must provide holding tracks free of charge, for an indefinite period and an indefinite number of empty private cars, without regard to the operating congestion such a practice encourages or the capital costs that the railroad necessarily incurs.

It bears emphasizing that NAFCA’s claims are limited to BNSF’s new demurrage and storage charges applicable to empty private cars. NAFCA does not challenge BNSF’s right to apply demurrage or storage charges to loaded private cars or to empty or loaded railroad cars that have been assigned to or ordered in by a shipper. In other words, NAFCA does not claim as a general matter that it is an “unreasonable practice” or a violation of BNSF’s “adequate car service” obligations to assess a separate charge for the service of holding cars for a shipper’s benefit beyond a reasonable free period. NAFCA’s complaint is that BNSF will not continue to exempt empty private cars from a demurrage and storage charge regime that has worked for years to encourage the efficient utilization of other cars and to compensate railroads for their costs.

NAFCA does not deny that the application of demurrage and storage charges to empty private cars can have the same kind of salutary effect on car utilization and railroad cost coverage that the application of such charges to other cars has had. Instead, NAFCA claims that shippers who are “unwilling or unable to pay the new BNSF

storage and demurrage charges” (Complaint, ¶12) will be adversely affected. Of course, any new charge assessed by a railroad can elicit dire predictions from shippers that are “unwilling or unable to pay.” At least since passage of the Staggers Act in 1980, the ICC and the Board have regularly rejected claims that innovative new car management programs should be blocked because some shippers may be adversely affected. See, e.g. *National Grain and Feed Assoc.*, 8 I.C.C.2d at 427.

In this case, claims of theoretical harm to shippers must be viewed with a particularly skeptical eye. In the first place, shippers need pay no demurrage or storage charges on empty private cars if their cars are not held beyond the free period. Thus, shippers who manage their fleets so as to minimize holding time on their empty cars will minimize their charges. Those who do not so manage their fleets will pay more. NAFCA complains that some shippers may not have as much capacity as others to avoid the new charges – because their loading facilities may lack sufficient land capacity to add their own holding tracks (Complaint, ¶14) or because BNSF may not have nearby tracks BNSF is willing to lease (Complaint, ¶15) – but these kinds of variations in shippers’ circumstances cannot logically or legally provide an excuse for condemning a car management program.¹³ Shippers that are in a position to build or

¹³ NAFCA makes the inflammatory assertion that in some instances “BNSF has quoted lease charges for such tracks that are exorbitant and commercially damaging” (Complaint, ¶15). While BNSF vigorously denies that that is the case, the Board need not resolve NAFCA’s assertion here. BNSF is not requiring any shipper to lease track, but simply requiring shippers to pay for the track they use beyond a reasonable free period. NAFCA has not here made any contention that a \$25 charge for most cars (\$75 for covered hopper cars in peak season) is an unreasonably high charge for holding cars, whether loaded or empty. (NAFCA could not have made such a charge without addressing the issue of market dominance, within the meaning of 49 U.S.C. § 10707, and rate unreasonableness, within the meaning of 49 U.S.C. § 10704. See *Ametek, Inc.—Petition for Declaratory Order; Ametek, Inc. v. Panther Valley Railroad Corp.*,

lease track to avoid paying demurrage or storage charges, whether on loaded or empty cars. are incurring their own costs in lieu of those charges. By the same token, shippers that manage their fleets so as to minimize the number of cars that must be held on the railroads' lines are minimizing the costs to the railroads of congestion and occupied track space. Those who are unwilling or unable to do either cannot reasonably complain if they are required to pay for holding their cars on the railroad's track.

In the second place, NAFCA has not suggested a charge for holding empty cars that all shippers would be "willing and able" to pay. NAFCA's claim in this case is that any charge for holding empty cars for any period is unreasonable. While it is certainly understandable that some shippers might not want to pay demurrage or storage charges on empty private cars (or, for that matter, on loaded private cars or railroad cars), NAFCA cannot credibly claim that they are unable to pay any such charges.¹⁴

Finally, if its charges threaten to impose a true hardship on a shipper, BNSF stands ready to work with that shipper to relieve that hardship, whether through contractual or other arrangements. That is the way in which any real concern about BNSF's charges should be resolved. If such voluntary negotiations do not resolve the issue, and the shipper has a credible claim of abuse, then and only then should the Board be prepared to entertain a complaint from that shipper directed to its specific

Docket Nos. 40663, 40664, 1993 ICC LEXIS 13 (January 15 1993).) Since empty and loaded cars take up the same amount of track space and present the same congestion issues, a charge that is reasonable for one is certainly reasonable for the other.

¹⁴ It bears noting that the Complainants listed in Appendix A to NAFCA's Complaint include A. E. Staley Manufacturing Company, Ag Processing Inc., Archer Daniels Midland Company, Bunge North America, Inc., Cargill, Incorporated, Cenex Harvest States Cooperative, Chicago Freight Car Leasing Company, ConAgra Trade Group, First Union Rail, GLNX Corporation, and The David Joseph Company. These are all significant companies, several of which dwarf BNSF in size and financial strength.

situation. The Board should not entertain the kinds of undifferentiated claims of theoretical harm presented by NAFCA in its Complaint. Accordingly, the Board should dismiss Count I for failure to state a reasonable basis for investigation.

B. The Board Should Dismiss Count II of NAFCA's Complaint

In Count II of its Complaint NAFCA argues that BNSF's demurrage charges for empty private grain and sugar cars violate 49 USC § 10746, which directs rail carriers to calculate demurrage charges and establish rules that encourage efficient freight car use and distribution and an adequate supply of freight cars.¹⁵ NAFCA appears to assert that any assessment of demurrage charges on empty private cars violates 49 USC § 10746.¹⁶ Prior Board and ICC precedent make it patently clear that NAFCA is incorrect.

Both the Board and the ICC before it have recognized a rail carrier's right to assess demurrage charges for the undue detention of equipment beyond allowable free time. See *Ford Motor Company*, 311 I.C.C. at 562; *Ex Parte No. 462, Exemption of Demurrage from Regulation*, 1996 STB LEXIS 101. The ICC and the Board have also recognized the important role demurrage charges, including private car demurrage charges, play in compensating railroads for the use of their track and in discouraging the undue detention of rail cars and their prompt return to service. See *Ford Motor Company*, 311 I.C.C. at 562; *Car Demurrage Rules, Nationwide*, 350 I.C.C. 777, 800 (1975) ("elimination of demurrage charges on private cars would very seriously and

¹⁵ NAFCA also reiterates all of the assertions raised in Count I of its Complaint—specifically, that BNSF's demurrage charges are unreasonable practices in violation of 49 USC § 10702 and 49 USC § 11121(a). BNSF has thoroughly addressed these allegations in Section III. A. above. BNSF sees no need to repeat them here.

¹⁶ BNSF notes that NAFCA appears to have no objection to BNSF's practice of assessing demurrage charges on empty railroad cars, or loaded railroad or private cars.

adversely affect the utilization of privately owned cars and would thus decrease the savings and car-days that may be gained in the overall national fleet"). Moreover, it is clear that demurrage charges may be assessed on private cars held on railroad track beyond the allowable free period. *Cities Service Oil Company*, 356 I.C.C. at 839-40.

Further, BNSF's demurrage charges are clearly consistent with and fulfill the requirements and objectives of 49 U.S.C. § 10746. BNSF revised its demurrage charges to apply the same charges to empty private grain and sugar cars that are already applied on empty rail grain and sugar cars. This change in BNSF's demurrage policy ensures that shippers have the same incentive to turn all cars around promptly, whether empty or loaded, rail or private. Such a practice encourages shippers to work with BNSF to keep all cars moving efficiently through the system—not just rail cars—and helps ensure the availability of an adequate car supply. Assessing demurrage on empty private cars also discourages shippers from using BNSF's track as a storage facility, thereby preventing congestion on BNSF's system. Preventing congestion is an important goal. Both the Board and the rail industry are well aware of the significant problems that can occur in the nation's rail transportation system when rail lines become congested with cars and railroads are unable to move them.

Since it is clear that BNSF may assess demurrage charges on empty private cars and NAFCA has not claimed that BNSF has failed to compute those charges in a manner that encourages efficient freight car use and distribution or an adequate freight car supply, the Board should dismiss Count II for failure to state a reasonable basis for investigation.

C The Board Should Dismiss Count III of NAFCA's Complaint

In Count III of its Complaint, NAFCA argues that BNSF is obligated to furnish storage tracks for empty private cars at no cost and that if it chooses not to do so, Section 10745 requires it to pay an allowance to private car owners for furnishing the storage track for BNSF. ¶22, NAFCA Complaint. The Board should reject this specious argument. Despite NAFCA's claims, as discussed in Section III. A. above, neither BNSF nor any other railroad is legally required to provide shippers unlimited track space at no charge for storing their empty or private equipment. Indeed, the very fact that railroads have the right generally to assess storage and demurrage charges for cars held on their track beyond the allowed free period makes it patently clear that railroads are under no such obligation. Since BNSF is not obligated to furnish holding track free of charge, its failure to pay shippers an allowance for such service cannot be a violation of Section 10745. The Board should dismiss Count III of NAFCA's Complaint for failure to state a reasonable basis for investigation.

IV. CONCLUSION

Demurrage and storage charges have long been widely applied by railroads, and applauded by the Board and the ICC, as an effective means of encouraging efficient car utilization and helping to cover the railroads' capital costs. When concrete individual disputes arise about whether those charges have been fairly applied, and the parties could not resolve them, the Board and the ICC have stood ready to intervene in cases where significant actual abuse is shown.

In this case, BNSF's demurrage and storage charges on empty private cars are set at the same or lower level than its charges on loaded private cars or loaded or empty railroad cars that have been assigned to or ordered by a shipper. NAFCA has

made no concrete claim that BNSF has applied those charges unfairly. Instead, NAFCA has claimed that it is unreasonable per se for BNSF to assess charges at any level for any time period to hold empty private cars on its lines. Those cars, however, take up the same amount of track space and expose BNSF to the same costs as loaded private cars or loaded or empty railroad cars assigned to or ordered by a shipper. The fact that BNSF has not charged for holding empty private cars beyond a reasonable free period in the past provides no legal basis for prohibiting BNSF from charging for that service now. The ICC Termination Act specifically encourages railroads to charge for such services in order to encourage efficient car utilization, 49 U.S.C. § 10722, and mandates that the Board recognize the needs of the railroads to cover the costs of equipment and facilities involved in car service, 49 U.S.C. § 11121.

The theoretical possibility of hardship or abuse arising from BNSF's new charges is not legally sufficient to support the kind of undifferentiated attack NAFCA has mounted here against those charges. Discovery in this context would invite a huge fishing expedition. Evidentiary submissions would be unfocused. The legal briefs ultimately would revolve around the issues that are framed by this Motion to Dismiss, and that the Board can decide now. To proceed with litigation on the basis of a

Complaint that is so deficient, on its face, in legal justification would invite an enormous waste of the Board's and the parties' time and resources.

NAFCA's Complaint should be dismissed in its entirety.

Respectfully submitted,



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Dated: October 5, 2001

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Motion to Dismiss of The Burlington Northern and Santa Fe Railway Company has been served by hand delivery on counsel for North America Freight Car Association, Andrew P. Goldstein and on counsel for the National Industrial Transportation League, Nicholas J. DeMichael, and by first class mail on Henry M. Wick, counsel for U.S. Clay Producers Traffic Association, Inc., this 5th day of October 2001.


Nicole H. Fradette