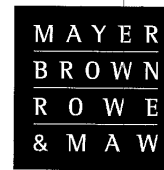


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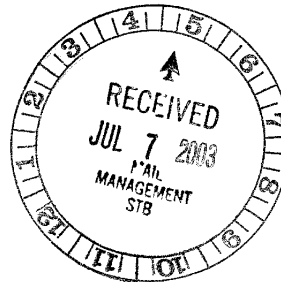
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July 7, 2003

BY FACSIMILE

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

Re: Docket No. 42060, North American  
Freight Car Association – Protest and  
Petition for Investigation – Tariff  
Publications of The Burlington Northern  
and Santa Fe Railway Company

Dear Secretary Williams:

Please find enclosed for filing an original and ten (10) copies of “Reply Statement of The Burlington Northern and Santa Fe Railway Company in Response to STB Decision Served April 28, 2003.”

Please date-stamp the enclosed extra copy of the Reply and return it to our representative. Also enclosed are 3 diskettes containing the Reply Statement in electronic format.

Sincerely yours,

Robert M. Jenkins III

RMJ/bs

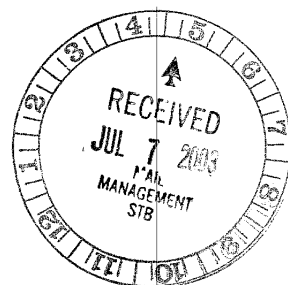
Enclosures

cc: All Parties of Record

208292

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**DOCKET No. 42060**

**NORTH AMERICA FREIGHT CAR ASSOCIATION – PROTEST  
AND PETITION FOR INVESTIGATION – TARIFF PUBLICATIONS  
OF THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY**

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**REPLY STATEMENT OF  
THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY IN RESPONSE  
TO STB DECISION SERVED APRIL 28, 2003**

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**ENTERED  
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Part of  
Public Record**

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Attorneys for The Burlington Northern and Santa Fe Railway Company

Dated: July 7, 2003

BEFORE THE  
SURFACE TRANSPORTATION BOARD



DOCKET No. 42060

NORTH AMERICA FREIGHT CAR ASSOCIATION – PROTEST  
AND PETITION FOR INVESTIGATION – TARIFF PUBLICATIONS  
OF THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY

REPLY STATEMENT OF  
THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY IN RESPONSE  
TO STB DECISION SERVED APRIL 28, 2003

In accordance with the Board's Decision served April 28, 2003, The Burlington Northern and Santa Fe Railway Company ("BNSF") replies here to the Submission of Petitioner North America Freight Car Association ("NAFCA") and Intervenor American Chemistry Council ("ACC") and The National Industrial Transportation League ("NITL"), filed June 9, 2002 ("NAFCA Submission"). Attached in support of BNSF's Reply are the reply verified statements of John J. Robinson and Douglas W. Langston.<sup>1</sup>

**PREFACE**

Nothing in NAFCA's Submission alters the controlling authority of Charges for Movement of Empty Cars, Buffalo & Pittsburgh R.R., 7 I.C.C.2d 18 (1990) ("Buffalo & Pittsburgh"), in this case. NAFCA does not seriously contend that anything within the four corners of the Ex Parte No. 328 Agreement either prescribes or proscribes storage

<sup>1</sup> The reply statements of Messrs. Robinson and Langston are referenced herein as "RVS Robinson" and "RVS Langston."

or diversion charges for empty private tank cars awaiting loading. Aside from the obvious fact that the ICC could not have prescribed anything of which it was unaware, the ICC made clear in Buffalo & Pittsburgh that it did not and would not approve anything that was not explicitly set forth in the Agreement, particularly if it tended to undermine the railroads' right of independent action. In any event, NAFCA has failed to make out a credible case either that the Joint Negotiating Committee ("JNC") intended for the ICC to prescribe any unexpressed "understandings" or that the JNC reached any unwritten agreement whatsoever regarding storage or diversion charges.

NAFCA devotes the opening pages of its Submission to the surprising argument that BNSF's "intransigence" in opposing NAFCA's unfounded interpretation of the Agreement threatens the Ex Parte No. 328 allowance regime for private tank cars. But it is NAFCA, not BNSF, that threatens that regime with its "departure tariff" claims. Most tank car interests have either made no such claims or have withdrawn them. NAFCA's dire prediction of "bitter litigation cycles" if the Ex Parte No. 328 regime collapses is not only inherently self-serving, but extremely difficult to credit, since car hire for all other car types has been deprescribed in the wake of the Staggers Act without the kind of strife suggested by NAFCA.

As a general matter, NAFCA advances no cogent legal or economic reason why private tank cars, or any other type of private cars, should be immune from storage or diversion charges. There is no doubt that the imposition of such charges on all car types, whether privately owned or controlled or railroad-owned or controlled, can and does contribute to the efficient functioning of the rail system. That such charges were not generally imposed on empty private cars in the past is no reason for not permitting

individual railroads to impose them now, as both the Union Pacific Railroad (“UP”) and BNSF have done. Both the ICC and the Board have repeatedly made clear that shippers and car owners can claim no entitlement to the indefinite continuation of past charges and practices, particularly when they have proven to foster the kind of inefficiency and cross-subsidization that the Staggers Act and the National Rail Transportation Policy were designed to combat. Unbundling storage and diversion charges from line-haul rates is a much fairer and more effective means of dealing with the congestion problems imposed on the rail system by some shippers and private car providers than permitting their storage and diversion practices to continue unfettered and attempting to recoup the costs through higher line-haul rates on all shippers.

In any event, for purposes of this proceeding, the law is clear that BNSF’s storage and diversion charges are not “departure tariffs” within the meaning of Section 8 of the Ex Parte No. 328 Agreement. Accordingly, the Board should dismiss NAFCAs’ petition for investigation.

#### **ARGUMENT**

The central question in this case is narrow and straightforward. Does the Ex Parte No. 328 Agreement, as prescribed by the ICC, impose an obligation on railroads to justify a “departure tariff” before they may assess charges for the storage or diversion of empty private tank cars? The ICC effectively answered “no” to that question in the Buffalo & Pittsburgh case, and nothing in NAFCAs’ Submission justifies different regulatory treatment for private tank cars than for other car types.

**I. NOTHING IN NAFCA'S OPENING STATEMENT ALTERS THE CONTROLLING AUTHORITY OF BUFFALO AND PITTSBURGH IN THIS CASE**

In its Buffalo & Pittsburgh decision, the ICC held that Section 8 of the Ex Parte No. 328 Agreement could not be read to “freeze and immunize from change . . . matters which are beyond the four corners of the agreement.” 7 I.C.C.2d at 25. Storage and diversion charges for cars awaiting loading are nowhere addressed within the four corners of the Agreement. Accordingly, on its face, the Buffalo & Pittsburgh decision constitutes controlling precedent for a holding here that BNSF's charges do not constitute “departure tariffs” within the meaning of Section 8 of the Ex Parte No. 328 Agreement.

NAFCA in its submission essentially asks the Board to ignore the ICC's holding in Buffalo & Pittsburgh. Claiming that “forceful and exclusive reliance on this passage is misplaced” (NAFCA Submission at 29), NAFCA suggests that what really matters is whether the JNC had an unexpressed “understanding” that individual railroads would not be permitted to assess storage charges on empty tank cars awaiting loading (*Id.* at 29-32). As we discuss below, NAFCA's position makes no legal or logical sense in the context of the Buffalo & Pittsburgh decision. Moreover, it rests on two fallacious assumptions. First, contrary to NAFCA's position, the JNC never intended to make any agreements that were not reduced to writing and expressly set forth in the agreement jointly proposed to the ICC. Second, even if the JNC had intended to enter into unwritten “understandings,” no agreement of any kind was ever made concerning storage charges for empty private tank cars being held other than at repair facilities.

**A. The ICC Did Not Prescribe Anything In Ex Parte No. 328 That Was Not Set Forth Within The Four Corners Of The Agreement**

NAFCA does not seriously argue that anything within “the four corners” of the Ex Parte No. 328 Agreement either prescribes or proscribes storage or diversion charges for empty private tank cars being held other than at repair facilities. Thus, unless the Board overrules the ICC’s holding in Buffalo & Pittsburgh that the Agreement applies only to matters expressly set forth in the Agreement, that is the end of NAFCA’s claim that BNSF’s charges constitute “departure tariffs.”

NAFCA suggests that the ICC’s decision in Buffalo & Pittsburgh was grounded on its finding that the free repair move “rule” at issue in that case was “not part of the negotiations that produced” the Ex Parte No. 328 Agreement. NAFCA Submission at 29. But this flies in the face of the ICC’s own analysis of the language of the Agreement. The ICC stressed that the Agreement applied by its terms only to the “allowance system prescribed herein.” 7 I.C.C.2d at 25 (original emphasis). Even assuming “that the phrase ‘tank car allowance system’ is a term of art embracing all of the rules bearing on tank car compensation contained in PHJ 6007, including the free repair moves rule,” the ICC held that the phrase “prescribed herein” limited the scope of the Ex Parte No. 328 Agreement to the specific matters covered by the express language of the Agreement. *Id.*

Nor was the ICC persuaded by the argument of the car providers in Buffalo & Pittsburgh that any railroad charge that could reduce their income was necessarily a “departure tariff.” On the contrary, the ICC found in Section 8(e), which speaks of “special circumstances justifying an exception from the general rule that the nationally prescribed allowance level applies,” further support for its holding that the Agreement

treated as “departure tariffs” only “rate mechanisms by which the carrier attempts to reduce the net allowance paid.” *Id.* at 25-26 (original emphasis). While charges for movements of empty tank cars to repair facilities (like charges for storage and diversion services) could increase the car owners’ costs, the ICC held that such separate rates “do not involve allowances” within the meaning of Section 8. *Id.*

NAFCA attempts to avoid that holding here with a tortured argument that assumes BNSF’s storage and diversion charges are disguised “caps” on allowances. NAFCA Submission at 31. But BNSF’s charges are no more “caps” on allowances than were the railroad’s charges for empty repair moves in Buffalo & Pittsburgh. Indeed, shippers and car owners that do not require storage or diversion services pay no charges at all. The minority that do pay those charges are not the victims of an attack on the allowance system. They are simply paying for the extra services they receive. BNSF pays the same car allowances to them as to any other private tank car provider under the Ex Parte No. 328 formula.<sup>2</sup>

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<sup>2</sup> NAFCA suggests that the ICC was concerned in Buffalo & Pittsburgh, among other things, with cross-subsidization among railroads if small switching carriers performing empty repair moves were not making mileage allowance payments on long-haul movements. NAFCA Submission at 30-31. While that is certainly true, it does not distinguish that case from this one. The ICC did not conclude there that only small switching carriers could assess charges for movements to repair facilities. Rather, the particular hardship suffered by small switching carriers provided yet another reason for freeing all carriers to assess separate charges for movements to repair facilities, regardless of whether they also made allowance payments on line-haul movements. Since nothing in the Ex Parte No. 328 Agreement prescribed or proscribed such charges, the ICC held they were necessarily permitted.

Furthermore, even were concerns about cross-subsidization considered an important predicate of the ICC’s decision in Buffalo & Pittsburgh, the cross-subsidization by railroads and shippers of car providers that congest the rail system by using the railroads’ tracks to store their cars would provide more than enough foundation for a

(cont’d)

Finally, NAFCA attempts to distinguish Buffalo & Pittsburgh based upon “the level of rational expectation that the ICC attributed to tank car owners regarding repair shop movements during the Ex Parte No. 328 negotiations.” NAFCA Submission at 29-30. Unfortunately for NAFCA, this attempt to distinguish Buffalo & Pittsburgh actually serves to underscore what clear authority that decision provides for the Board to dismiss this case. The ICC was not impressed in Buffalo & Pittsburgh with the tank car providers’ argument that they had no reason to anticipate in the Agreement the possibility that the railroads might begin charging for empty repair moves. The ICC was not impressed for two reasons. The first was that everyone was aware at the time that consideration was being given to reversing the free repair move “rule.” 7 I.C.C.2d at 17. The second was that, even if the JNC had expressly agreed to continue the free repair move rule for tank cars, the ICC “would not have approved an agreement” that could foreclose the railroads’ ability to charge separately for this service. *Id.* at 27.

NAFCA argues in its Submission that the car provider representatives on the JNC had no reason to expect that railroads would ever begin to charge separately for storage or diversion of empty tank cars, which explains why nothing was said in the Agreement about such charges. NAFCA Submission at 30. But, as we discuss in more

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(... cont’d)

similar concern about cross-subsidization here. As we discuss further in Part III below, it would be inequitable, inefficient, and uneconomic for railroads not to be permitted to unbundle charges for extra storage and diversion services from their line-haul rates, regardless of the type of rail cars involved. Since nothing in the Ex Parte No. 328 Agreement prevents railroads from using such salutary unbundling to address the twin problems of congestion and cross-subsidization, tank car providers can claim no special exemption from BNSF’s or any other railroad’s separate storage and diversion charges.

detail in Part I.B. below, NAFCA's own witness Mr. Gasz makes clear that there was considerable discussion during the JNC's negotiations about the possibility of reaching collective agreement on charges for holding or diverting empty private cars. VS Gasz at 5-8. And there was no doubt why the issue was raised:

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

VS Gasz at 7 (original emphasis) (citing Minutes of March 8, 1978 Ex Parte No. 328 meeting). In light of these announced concerns, NAFCA cannot claim with a straight face that the car providers had no reason to expect that if the Agreement did not expressly prescribe or proscribe storage or diversion charges on cars awaiting loading, individual railroads might choose to assess them in the future.

Perhaps even more importantly, neither NAFCA nor the Board can assume that if the JNC had expressly agreed to proscribe independent storage and diversion charges on cars awaiting loading, the ICC would have approved such a proscription. As we explained in BNSF's Opening Statement, the ICC by no means equated collective negotiations about car hire with collective negotiations about demurrage and storage charges. BNSF Opening Statement at 11-12. In fact, within months of circulating the JNC's proposal for a revised tank car allowance agreement, the ICC reaffirmed the

railroads' antitrust immunity to discuss car hire issues, but withdrew that immunity with respect to any discussion of demurrage or storage charges.<sup>3</sup> Railroads Per Diem, Mileage, Demurrage and Storage Agreement, 1 I.C.C.2d 924 (1985). Even assuming that the ICC might have approved an express agreement setting nationwide storage charges for cars awaiting loading (as it did in Section 5 in the limited context of cars awaiting repairs), it is highly unlikely that the ICC would have countenanced a blanket prohibition on charges for cars awaiting loading, particularly when it made clear that it would have rejected such a blanket prohibition on charges for empty repair moves.

In any event, the ICC was never asked to approve an agreement of any kind regarding empty tank cars awaiting loading. Regardless of what the JNC might have intended, the ICC could not have prescribed any agreement of which it was unaware. In Buffalo & Pittsburgh, only a few years after the ICC approved the Ex Parte No. 328 Agreement, the ICC confirmed that it only prescribed what was expressly set forth within "the four corners" of the Agreement. If NAFA believes that the Agreement should include a prohibition on storage and diversion charges for cars awaiting loading, it can

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<sup>3</sup> Soon thereafter, the ICC proposed to exempt demurrage and storage charges completely from regulation and decided to allow provisional antitrust immunity for demurrage and storage charges to continue pending its decision whether to exempt such charges altogether from regulation. Ex Parte No. 462, Exemption of Demurrage from Regulation (served December 16, 1985). The issue of antitrust immunity effectively became moot when, in 1986, the railroads determined they no longer wished to use antitrust immunity to collectively consider demurrage and storage charges. Although the Board decided to continue regulating demurrage and storage charges, it eventually removed antitrust immunity for the collective consideration of such charges in 1996. See Ex Parte No. 462, Exemption of Demurrage from Regulation (served March 20, 1996). For a more detailed history of ICC decisions regarding the regulation of storage and demurrage charges and the continuation of antitrust immunity concerning the collective consideration of such charges, see BNSF's Submission at 11-12 & n.10.

seek to reopen Ex Parte No. 328 under the reopening provisions of Section 9. But it cannot shoehorn in a prohibition that is not there, and was never prescribed, just because it contends that the JNC “meant” to include it.

**B. The JNC Never Intended To Adopt Any Unwritten “Understandings,” And, Even Assuming It Had Such An Intention, The JNC Reached No Unwritten Agreements Regarding Storage Or Diversion Charges**

Despite the fact that there is absolutely nothing in the language of the Ex Parte No. 328 Agreement that suggests that railroads were obligated to store empty private tank cars awaiting loading on their tracks free of charge, NAFCOA insists that the parties to the first Ex Parte No. 328 negotiations reached such an unwritten “understanding” and adopted it as part of their written agreement. As proof that the parties intended to adopt such an unwritten “understanding”, NAFCOA quotes the following language from the minutes of an August 16, 1977, Joint Tank Car Task Force (“JTCTF”) Committee meeting that contained a report of the subcommittee that was considering issues related to the storage and handling of empty private tank cars:

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

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

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

NAFCA Submission at 18-19. NAFCA claims that the quoted language clearly shows that the parties understood that railroads would be responsible for holding private cars on their tracks for free except where the cars were held outside private repair facilities. Moreover, NAFCA argues that this unwritten “understanding” was included as part of the agreement adopted by the JNC. NAFCA Submission at 18-19, 24.

Aside from the fact that the quoted language in no way evidences that the parties ever reached such an agreement, NAFCA’s assertions that the JNC intended to adopt such an unwritten “understanding” is simply wrong. Neither the JTCTF nor the JNC ever intended to adopt any unwritten “understandings” as part of the Ex Parte No. 328 Agreement. As Mr. Robinson explains in both his opening and reply verified statements, everything the parties agreed to in the course of the negotiations was specifically set forth in the written language of both the original and revised agreements. VS Robinson at 11-12; RVS Robinson at 5. The agreements were never intended to include any agreements that were not specifically prescribed within the agreements themselves. VS Robinson at 12; RVS Robinson at 5.

There are also practical reasons why the JNC could not have intended to adopt unwritten, and therefore, undocumented “understandings” between the parties, particularly “understandings” that were reached by the members of a subcommittee rather than the full committee. As Mr. Robinson explains, all of the parties that would subscribe to and be bound by any final agreement did not participate in the negotiations directly. Rather the JTCTF and JNC were comprised of representatives of railroad, tank car owner, and shipper interests. RVS Robinson at 6. Subcommittees were established in the first round of the Ex Parte No. 328 negotiations to address certain

issues and make recommendations to the full committee. *Id.* The full committee would then consider the subcommittees' recommendations and reach agreement concerning them (*i.e.*, whether to accept, reject, or modify them). *Id.* The full committee would then circulate the agreement in writing to all of the railroads, tank car owners, and shippers that were being asked to subscribe to the agreement. *Id.* Parties were then given an opportunity to comment on the proposed written agreement and asked to vote on whether the terms of the proposed agreement should be accepted or rejected. *Id.*

As Mr. Robinson explains, a significant number of the railroads that would be subscribing to the agreement, including all of the regional and shortline railroads, did not participate directly in the negotiations, and, therefore, relied on the written language in the proposed agreement to determine what they would be required to do if they subscribed to the agreement. RVS Robinson at 6. Clearly, the railroads that did not participate directly in the negotiations could not have known about any unwritten "understandings" made by members of the various subcommittees. Moreover, they could not know about any understandings the full committee reached unless the understandings were memorialized in writing and circulated to the subscribing parties. Therefore, it is simply impossible that they could have agreed to them. The only terms the parties that did not participate directly in the negotiations realistically could have been asked to agree to and could in fact have agreed to were the terms contained within the written language of the proposed agreements themselves. *Id.* at 6-7. This is why the negotiating parties made sure that the agreements reflected everything to which they had agreed as part of the negotiations. *Id.*

Even if one were to assume that the JNC intended to adopt unwritten “understandings”, NAFCA has proffered no evidence that shows that the JNC reached any understanding, let alone an actual agreement, that railroads would store empty private cars on their tracks at no charge except where the tank cars were stored outside private repair facilities. The documents referred to by Mr. Gasz do not in any way demonstrate that the parties reached any such agreement. Instead, the documents clearly show that the parties debated the issue but were unable to reach agreement. See RVS Robinson at 4. As Mr. Robinson makes abundantly clear in his statement, the only private car storage issue on which the parties were able to agree was the collective establishment of charges that would apply to empty private tank cars held outside private repair facilities. RVS Robinson at 2. This is why Section 5 of the Ex Parte No. 328 Agreement specifically provides for the level and amount of such charges. *Id.* Section 5 is silent on the subject of charges for empty private tank cars held anywhere else on the railroads’ systems because the parties never reached agreement concerning such charges. *Id.*

NAFCA would have the Board believe that something as important as the railroads giving up their right of independent action to establish charges for empty private cars held outside plant facilities and in their yards would not have been memorialized in writing and included within the language of the Ex Parte No. 328 Agreement itself. It certainly would have been easy enough for the parties to have done so. All they needed to do was to include in Section 5 of the Agreement a sentence that stated that the rules and charges included in Section 5 were the only rules and charges

that could be applied to empty private tank cars. The reason such language was not included in the agreement is that the parties never reached any such agreement.

**II. THE BOARD SHOULD REJECT NAFCA'S SUGGESTION THAT IT MUST TREAT BNSF'S CHARGES AS "DEPARTURE TARIFFS" IN ORDER TO PRESERVE THE EX PARTE NO. 328 ALLOWANCE REGIME**

NAFCA begins its Submission with a curious argument: "that the Ex Parte No. 328 tank car allowance system is a constructive mechanism that should be preserved." NAFCA Submission at 2. Apparently, NAFCA's suggestion is that if railroads set independent, market-based storage and diversion charges, the tank car allowance system will collapse. But neither BNSF nor UP has sought to reopen Ex Parte No. 328, and most of the tank car interests that challenged BNSF's and UP's storage and diversion charges have withdrawn their claims. Thus, if the Ex Parte No. 328 regime collapses, it can only be because NAFCA continues to press its ill-considered "departure tariff" claim.

NAFCA follows its suggestion that independent storage and diversion charges will destroy the Ex Parte No. 328 regime with a suggestion that the collapse of that regime will trigger a return to "the repetitious, lengthy, and costly litigation that had occurred to resolve tank car allowance issues prior to Ex Parte No. 328." *Id.* The fallacy in that assertion is that circumstances have changed, and changed radically, since the "bitter litigation cycles" that preceded the adoption of the revised Ex Parte No. 328 Agreement. *Id.* at 3. Few railroad charges of any kind are set collectively today, and car hire for all types other than tank cars has been deprescribed without the litigation strife suggested by NAFCA. Further, most of BNSF's tank car traffic already moves under contract or "zero rated" line haul rates that do not require payment of Ex Parte No. 328 allowances. If NAFCA wishes to continue to press its "departure tariff"

claim, that is its prerogative, but empty threats of “bitter litigation cycles” do nothing to advance its cause.

**A. Most Tank Car Interests Do Not Even Claim That Independent Storage And Diversion Charges Constitute “Departure Tariffs,” Much Less Suggest That BNSF’s “Intransigence” In Assessing Such Charges Threatens The Ex Parte No. 328 Regime**

When UP and BNSF initially published their independent demurrage, storage, and diversion charges, a number of tank car interests made “departure tariff” claims concerning their charges. As described in detail in the Background section of BNSF’s Opening Statement, most of those organizations or shippers have since withdrawn their claims. The Railway Progress Institute (“RPI”) – which represents the largest tank car owners and played a leading role in the JNC negotiations – claimed that UP’s and BNSF’s tariffs “departed” from the Agreement only insofar as those tariffs would set different charges for cars being held outside repair facilities than those prescribed in Section 5 of the Agreement. When UP and BNSF amended their tariffs to except cars being held outside of repair facilities, RPI withdrew its claims. RPI never claimed that UP’s or BNSF’s tariffs constituted “departure tariffs” as applied elsewhere.

BNSF and UP also reached independent settlements with the Chlorine Institute, the U.S. Clay Producers, BP Corporation North America Inc., Diversified CPC International, and E.I. duPont de Nemours and Company, and these parties also withdrew their claims (in both Docket No. 42060 and Docket No. 42060 (Sub-No. 1)). None of these settlements required either BNSF or UP to significantly amend their tariffs. In Statements filed with the Board, several parties recognized that BNSF and UP must be allowed to set tariffs as necessary to address congestion on their systems, so long as the railroads were prepared to discuss and, if possible, reach agreement with

individual shippers regarding their needs at specific locations. BNSF agreed to establish a process for such discussions, and did so.

Despite its considerable success with other shipper organizations in ameliorating their concerns, BNSF was unable to reach agreement with NAFCA.<sup>4</sup> Thus, NAFCA continues to claim that BNSF's charges constitute "departure tariffs." And now NAFCA suggests that BNSF's "intransigence" in assessing those charges threatens the entire Ex Parte No. 328 regime.<sup>5</sup>

NAFCA's escalating rhetoric only underscores the weakness of its position on the merits. Few of its compatriots in the shipper and car owner community appear to share its avowed concern that BNSF's position in this case threatens the Ex Parte No. 328 regime. Indeed, they appear to recognize that the biggest threat to that regime is posed by over-reaching efforts like NAFCA's to characterize independent, market-based rates

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<sup>4</sup> Although NITL has been an intervenor in Docket Nos. 42060 and 42060 (Sub-No. 1) from the outset, it permitted NAFCA to take the lead in settlement discussions. ACC did not enter an appearance in any proceeding until it belatedly filed intervention papers in both dockets on September 20, 2002.

<sup>5</sup> NAFCA's concern appears only to be with the use of tank cars to transport grain products. UP's storage charges do not apply to grain products transported in tank cars. Although NAFCA claims that any storage charges applied to an empty tank car constitutes a "departure tariff" under the Ex Parte No. 328 Agreement, NAFCA withdrew its protest against UP's charges on the condition that UP would notify NAFCA if and when UP applied its storage charges to cars transporting grain or grain products. Letter from Andrew P. Goldstein, NAFCA Counsel, to STB Secretary, dated August 14, 2002, in Docket No. 42064.

While UP's storage charges apply to tank cars carrying certain chemicals, oil, and other industrial products, neither NITL nor ACC has pursued a challenge to UP's charges. Thus, no party is any longer challenging the application of UP's storage charges to empty tank cars as "departure tariffs." Needless to say, the Ex Parte No. 328 regime has not collapsed as a result.

for separate rail serves as “departure tariffs.” If the Ex Parte No. 328 regime collapsed, it would be due to NAFCA’s intransigence, not BNSF’s.

**B. Even Assuming The Demise Of Ex Parte No. 328, NAFCA’s Prediction Of “Bitter Litigation Cycles” Is Difficult To Credit, Since Car Hire For All Other Car Types Has Been Deprescribed In The Wake Of The Staggers Act Without Any Such Strife**

NAFCA argues that if the negotiated Ex Parte No. 328 tank car allowance system were dissolved and tank car allowances deprescribed, it would result in “bitter litigation cycles” over such allowances. NAFCA Submission at 3-4. NAFCA apparently wants the Board to believe that BNSF is unwilling to live with the Agreement that the industry made, but in fact it is NAFCA that is attempting to expand the scope of that Agreement beyond anything the parties to that Agreement intended or that the ICC prescribed. In any event, NAFCA’s threat of endless litigation is an empty one. The ICC deprescribed allowance payments for other private rail cars a long time ago and there have been no “bitter litigation cycles” concerning them. See Lo Shippers Action Committee v. Aberdeen and Rockfish Ry. Co., 4 I.C.C. 2d 1 (1987); RVS Robinson at 7.

In fact, for the past several years, railroads and shippers have been moving away from allowance payments for all empty private car types in favor of zero-rated rates which factor the allowance into the freight rate. RVS Langston at 12; RVS Robinson at 8. Railroads and shippers have done this because of the administrative costs and burdens both shippers and railroads incur making allowance payments. RVS Langston at 12-13. Moving traffic under zero-rated rates eliminates the need for maintaining records regarding the movement and amount of mileage incurred by private cars and eliminates the need for calculating and paying individual allowance rates. RVS Langston at 12-13; RVS Robinson at 8. Moreover, where private car shippers have

elected to receive a mileage allowance payment rather than move traffic under zero-rated rates, they have been able to negotiate an appropriate allowance level with the railroads without resorting to litigation. RVS Langston at 12; RVS Robinson at 7-8.

As shown by the testimony of both Mr. Langston and Mr. Robinson, the tank car allowance formula prescribed in Ex Parte No. 328 has become less and less relevant over time. Railroads and private car owners have moved away from individual allowance payments and toward zero-rated rates by negotiating mutually beneficial commercial agreements and without resorting to litigation. RVS Langston at 12-13; RVS Robinson at 8.<sup>6</sup> If NAFCA's over-reaching claims in this case led to the demise of the Ex Parte No. 328 regime, there is no reason to believe that "bitter litigation cycles" would ensue.

**III. THE REASONS FOR PERMITTING INDEPENDENT, MARKET-BASED STORAGE AND DIVERSION CHARGES ARE JUST AS APPLICABLE TO TANK CARS AS TO OTHER TYPES OF PRIVATE CARS**

Some of the questions to which the Board sought responses in its April 28 Decision pertain to all types of private cars, not just tank cars, and NAFCA makes a number of arguments in its Submission that are unrelated to the "departure tariff" issue in this case. In effect, most of those arguments reduce to the proposition that it is "unfair" for railroads to assess separate charges for the storage or diversion of private

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<sup>6</sup> Over 94 percent of the tank cars operating on BNSF's system are zero-rated and do not receive any allowance. RVS Langston at 13. Less than five percent of the tank cars operating on BNSF's system today that still receive an allowance receive an allowance based on the mileage allowance formula contained in the Ex Parte No. 328 formula. *Id.* at 13, n.6. Further, over 80 percent of the tank cars operating on the systems of the four major U.S. carriers are zero-rated or are covered by an individually negotiated allowance rate and, therefore do not receive an allowance under the Ex Parte No. 328 formula. RVS Robinson at 8.

cars. We address each of those arguments below, but it bears emphasizing that none of them is unique to tank cars, and none implicates Section 8 of the Ex Parte No. 328 Agreement. The reasons for permitting independent, market-based storage and diversion charges are just as applicable to tank cars as to other types of private cars.

**A. There Is No Doubt That Demurrage, Storage, And Diversion Charges On All Car Types Contribute To The Efficient Functioning Of The Rail System**

NAFCA argues repeatedly in its Submission that BNSF is using storage and diversion charges unfairly to “transfer its infrastructure costs” to private car providers. NAFCA Submission at 14, 19, 30. In support of the idea that car storage is a necessary part of rail service for which private car providers should not pay separately, NAFCA attaches the testimony of a former BNSF employee, Gary T. Kurtz, who describes BNSF’s car management system for unassigned freight cars. He points out that BNSF stores its own freight cars from time to time and that no railroad in his experience can so exactly match car supply with car use that empties never pause awaiting the next load. VS Kurtz at 1-2. Since BNSF does not charge shippers separately for its storage of unassigned BNSF freight cars, NAFCA leaps from Mr. Kurtz’s unexceptional testimony to the conclusion that it is unfair for BNSF to charge separately for storage of any freight cars, whether unassigned or not, and whether privately owned and controlled or not. NAFCA Submission at 19-20.

The fundamental fallacy in NAFCA’s position is that it ignores the question of who controls the use of the car. Mr. Kurtz is very careful to point out that his testimony is limited to “free running” railroad-owned freight cars that are not assigned to a particular shipper and are not otherwise under that shipper’s control. Kurtz VS at 1. Where a railroad car has been assigned to a shipper, the management of that car’s

storage and diversion is under the shipper's control and BNSF charges separately for such storage and diversion. VS Langston at 3-4; RVS Langston at 10. By the same token, even a "free running" car is subject to demurrage charges when it has been constructively placed for a shipper, and the shipper does not timely take the car or holds the car beyond the free period. *Id.* at 10. Also, railroads charge for holding loaded cars, whether free running or not, that await movement to the destination designated by the shipper. In all of these circumstances, the shipper controls the use of the car, and separate demurrage, storage, and diversion charges give the shipper the incentive to manage its use of the car efficiently.

The application of storage and diversion charges to empty private cars has the same underlying rationale. The shipper or car owner controls the use of the car. Without separate storage charges, the car provider has little incentive not to leave the car sitting indefinitely on BNSF's tracks, congesting the rail system and increasing the costs of rail service to all shippers. Without separate diversion charges, the car provider has little incentive to avoid multiple diversions of its cars to new destinations, with the consequent significant administrative and operational costs associated with each diversion.<sup>7</sup> VS Langston at 18-19; RVS Langston at 10.

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<sup>7</sup> NAFCA emphasizes that BNSF's diversion rules and charges for empty private cars apply to any change in consignee and, therefore, could be applied to an empty car on industry track that has been released to BNSF but has not been yet been moved by BNSF. NAFCA Submission at 35. NAFCA argues, therefore, that BNSF's switching charges cannot be attributed only to the costs BNSF incurs switching out empty cars or blocks of cars that a shipper diverts mid-shipment. *Id.* at 36.

As we explained in BNSF's Opening Statement, diversion charges are assessed to compensate BNSF for both the operating and administrative costs BNSF incurs when it must redirect a car to a different destination, consignor, or consignee than was shown

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There is no unfairness, much less illegality, involved in such separate charges. Both 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, freeing up needed track space, and compensating railroads for the expenses and capital costs they incur in holding cars beyond a reasonable free period on their lines. 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). Further, the ICC Termination Act, 49 U.S.C. § 10722, expressly encourages the use of special charges to promote efficient car utilization. The policies favoring such charges are just as applicable to private cars as they are to railroad owned and controlled cars.

BNSF decided to adopt similar charges for empty private cars because its policy of not assessing charges simply was not working. In fact, instead of encouraging

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on the original bill of lading, and also to discourage shippers from making unnecessary diversion requests. BNSF Submission at 40; VS Langston at 19-20. Most diversions occur after BNSF has "classified" and switched the car or cars into a block of other cars that are moving in the same direction and, therefore, do require BNSF to perform additional services that increase BNSF's costs and can delay the movement of other cars. Moreover, there are always administrative costs associated with effecting a diversion. BNSF Submission at 41; VS Langston at 17. Shippers can easily avoid saddling BNSF with these costs, either by providing proper reverse routing instructions on the original bill of lading for the loaded move or by notifying BNSF of any changes in the destination, consignor, or consignee on the bill of lading before the car is released empty to BNSF at its unloading point. BNSF Submission at 41; VS Langston at 18, n.7. Even so, BNSF does not charge shippers for the first diversion; thus, BNSF would not charge the shipper in NAFCA's example for changing the consignee on the bill of lading.

efficient car use and the prompt turn around of equipment, it had the opposite effect. BNSF's prior policy of storing empty cars for free caused congestion on BNSF's system and hampered BNSF's ability to serve all of its customers efficiently. RVS Langston at 3-4. Moreover, BNSF incurred additional, unnecessary expenses moving empty private cars around its yards, and, in some cases, even between its yards. VS Langston at 2. After BNSF began charging shippers for storing their empty private cars on BNSF's track, the situation began to improve. Shippers began moving their empty cars off of BNSF's track instead of leaving them there for extended periods of time, and the congestion on BNSF's system was reduced. There are now fewer empty private cars sitting on BNSF's track today than there were before BNSF implemented its new private car policy.<sup>8</sup>

NAFCA's complaint that BNSF is improperly "transferring its infrastructure costs" to shippers makes no more sense in the context of empty private cars than in the context of assigned railroad cars. As we discuss further in Part III.C. below, there is no doubt that BNSF is entitled to set rates to cover its costs, including of course its

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<sup>8</sup> On April 31, 2001, shortly before the implementation of BNSF's private car storage policy, there were 2,686 empty private cars sitting on BNSF's tracks that had been there for more than 30 days. VS Langston at 2. These empty private cars were taking up over 31 miles of BNSF's track space. *Id.* Of these, 1,572 had been sitting on BNSF's track for over 100 days. *Id.* Just over two years later, the number of empty private cars being left on BNSF's tracks for more than 30 days had decreased by more than 60 percent. *Id.* at 5. Moreover, BNSF has seen a dramatic improvement in the average time empty private cars are stored on its track since the implementation of its private car storage policy. In May 2001, the average time for private industrial cars (*i.e.*, all cars transporting commodities other than agricultural commodities) was approximately two days. By May 2003, it was one-half of a day. *Id.* at 5 and Exh. A. Moreover, in May 2001, the average time for agricultural cars was one and one-third days. By May 2003, it was one-third of a day. *Id.* at 5 and Exh. B.

infrastructure costs. The only issue is whether BNSF can charge separately for its storage and diversion services or must bundle its charges into one line-haul rate. Suffice it to say here that far from discouraging such separate charges, the Staggers Act, the Interstate Commerce Commission Termination Act, and ICC and STB policy have all expressly encouraged them.<sup>9</sup>

NAFCA claims that private car providers do not have as much flexibility as shippers to which railroad-owned cars have been assigned to avoid storage and diversion charges by canceling their assignment agreements. NAFCA Submission at 20. But, contrary to NAFCA's suggestion, BNSF did not force private car providers to purchase or lease their own cars. As Mr. Langston has explained in some detail, they did so for their own business reasons, to give themselves maximum control over their car fleets and ensure themselves car availability even during peak loading periods. VS

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<sup>9</sup> NAFCA now appears to concede that railroads cannot be required to allow empty private cars to sit indefinitely on their tracks without charging for it, but suggests that the answer to how long they should be allowed to sit without charge may be devined from the archaic "instrumentality of transportation" doctrine. NAFCA Submission at 14. That, of course, was the doctrine that resulted in the "outmoded, impractical, and irrational prohibition against tariff charges for repair movements" that the ICC overturned in General American Transp. Corp. v. Indiana Harbor Belt R.R., 3 I.C.C.2d 599 (1987) ("IHB-II"), *aff'd sub nom. General American Transp. Corp. v. ICC*, 872 F.2d 1048 (D.C. Cir. 1989), *reh'g denied*, 883 F.2d 1029 (1989), *cert. denied*, 493 U.S. 1069 (1990). Docket No. 35404, General American Transp. Corp. v. Indiana Harbor Belt R.R. (served Feb. 22, 1988) at 2. As the ICC made clear there, the issue is not whether the railroads are "responsible" for providing a service, but whether they may charge separately for distinct components of their services. *Id.* A railroad may choose, for example, to separate a destination switching charge from its line-haul rate or it may bundle the entire service into one rate. By the same token, a railroad may offer to hold loaded or empty cars indefinitely, without any charge other than the charge for line-haul service, or it may assess separate charges for holding such cars. There is no logical or legal basis for attempting to compel railroads to bundle together all charges for services for which they are "responsible."

Langston at 21-23; RVS Langston at 10-11. *See also, 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). Shippers that wish to store their private cars on BNSF's tracks cannot have it both ways. They cannot require BNSF to utilize their cars for their movements, with no opportunity for BNSF to redeploy empty cars that are sitting on BNSF's tracks, yet refuse to take responsibility for the costs that such storage imposes on BNSF or for the congestion it creates.<sup>10</sup>

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<sup>10</sup> NAFCA spends considerable time in its Submission discussing BNSF's control over the movement of cars between origin and destination, but largely ignores the fact that the car owner dictates how the car is used. NAFCA Submission at 21-24. NAFCA complains about unpredictable car cycle times, but, as Mr. Langston discusses in his reply statement, that complaint is considerably overblown. RVS Langston at 7. Even NAFCA makes "no claim that either [Petitioners] or their customers are in all respects free from responsibility for unpredictable tank car cycle performance, and acknowledge that the allocation of responsibility for inconsistent or unpredictable car cycle times is a complicated issue." NAFCA Submission at 24.

NAFCA also cites Dana Corporation v. ICC, 703 F.2d 1297 (D.C. Cir. 1983) ("Dana"), for the proposition that it is difficult to apportion responsibility for car handling problems (NAFCA Submission at 24 n.5), and then makes the remarkable suggestion that Dana requires BNSF "to segregate and exclude from its storage charges all costs and penalties attributable to its own actions" (*id.* at 36). That is not, however, what Dana held. Rather, Dana held that when confronted with allegations that shippers had sometimes incurred storage charges through the fault of the carriers, "the Commission cannot approve these storage charges in gross as reasonable per se, but must permit the shippers to show that, in particular instances, the idle-car time for which charges are assessed is attributable to the fault of the carriers." 703 F.2d at 1305. BNSF has already made provision in its tariffs for shippers to be excused from the payment of storage charges that result from unreasonable "bunching" that is the fault of the railroad, but if any shipper believes in a particular instance that it should not have to pay storage charges because the storage requirement was the fault of the railroad, it is certainly entitled to challenge those charges as applied in that instance. *See, e.g., Cities Service Oil Co. v. Soo Line R.R.*, 356 I.C.C. 838 (1977); Prince Manufacturing Co. v. Norfolk and Western Ry. Co., 356 I.C.C. 702 (1978).

**B. Shippers And Car Owners Cannot Claim Any Entitlement To The Indefinite Continuation Of Past Charges And Practices, Particularly When Those Charges And Practices Foster Inefficiency And Cross-Subsidization**

NAFCA argues that because BNSF and other railroads have not assessed storage charges on empty private cars in the past, it would be unfair for them to do so now. NAFCA Submission at 15-17. But the whole point of Congress' mandate in the Staggers Act was to require the ICC (and now the Board) to "encourage the application of separate rates for distinct rail services, demand-based rates and revenue adequacy, and discourage cross subsidization and misallocation of costs." Docket No. 40194, ACF Industries, Inc. – Petition for Exemption (served May 1, 1989), at 12. Railroads were not only expected to change their business policies, especially to remedy inefficient and uneconomic pricing practices, but encouraged to do so.

The ICC long ago rejected the idea that railroads cannot assess separate charges for different services because shippers allegedly made capital investments on the assumption that rail industry practices would never change. See Docket No. 35404, General Amer. Trans. Corp. v. Indiana Harbor Belt R.R., (served Feb. 22, 1988). Even where private car providers claimed reliance on a regulatory "rule" that railroads could not charge for movements to repair facilities, the ICC rejected their "detrimental reliance" argument (*id.* at 3):

When parties negotiate under an existing regulatory scheme they do so at their own risk. That scheme may later be affected by regulatory reform. The fact that such reform may change the basis of past and present contractual relationships cannot be a bar to the normal evolution of the regulatory process. See, e.g., Exemption from Regulation – Boxcar Traffic, 367 I.C.C. 747, 771-772 (1983), *rev'd on other grounds*, Brae Corporation, et al. v. ICC & USA, 740

F.2d 1023 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1069 (1984). See also *American Airlines v. CAB*, 445 F.2d 891, 896 (2d Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972).

Here, there has never been a “rule” preventing railroads from assessing demurrage, storage, or diversion charges with respect to empty private cars. Moreover, despite NAFCA’s and Mr. Gasz’s arguments to the contrary, shippers had no basis for assuming that BNSF or any other railroad would never amend their storage policies for empty private cars.<sup>11</sup> Shippers have been operating in a post-Staggers environment for over two decades, where railroads are expressly encouraged to unbundle their charges and to develop innovative policies that improve car utilization. Railroads have increasingly done so with respect to all sorts of services, and the results have been positive. VS Langston at 5. Private car providers can claim no unfairness, much less illegality, from BNSF’s extension of these tried and true pricing principles to the storage and diversion of empty private cars.<sup>12</sup>

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<sup>11</sup> NAFCA’s assertion that private car owners had no reason to expect that BNSF would ever assess charges on empty private cars held on its tracks is particularly weak in the context of tank cars. As Mr. Robinson explains in his reply statement, private tank car owners had every reason to believe that railroads would at some point assess storage charges on empty private cars being held on their systems. RVS Robinson at 10. The idea of assessing charges on empty private cars being held on rail tracks was floated by the railroads on several occasions. *Id.* Moreover, the parties negotiating the Ex Parte No. 328 Agreement actively debated a wide range of issues regarding the treatment of empty private cars, but were only able to reach agreement with respect to the treatment of empty private cars held on railroad track outside of private car repair facilities. *Id.* The parties were unable to reach agreement and collectively resolve any other empty private car issues. The private tank car owners thus had every reason to expect that the individual railroads would eventually exercise their right of independent action to assess such charges.

<sup>12</sup> NAFCA claims that some sort of “transition period” is required before BNSF or another railroad may assess new charges, and it points to the phase-in period that the railroads provided for the depreservation of railroad car hire as an example. NAFCA

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**C. Unbundling Storage And Diversion Charges Is A Much More Equitable, Efficient And Effective Way To Charge For A Railroad's Services Than Attempting to Charge Higher Line-Haul Rates To All Shippers**

NAFCA recognizes that railroads today are free to set their line-haul rates at whatever levels they require to cover their costs. Thus, even if BNSF could not charge separately for its storage and diversion services, it could raise its freight rates to cover those costs. NAFCA Submission at 35-36. Of course, as we discussed in BNSF's Opening Statement, this "bundled" approach to ratemaking has the decidedly adverse effect of encouraging abusive storage and diversion practices by car owners and clogging the rail system with cars held on the railroads' tracks. By giving individual shippers and car owners no incentive to engage in efficient storage and diversion practices, bundled line-haul charges create costs for the entire industry and require shippers that do not create those costs to cross-subsidize those that do. BNSF

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Submission at 16-17. Aside from the fact that the ICC found in IHB-II that no such "phase-in period" was required, there are at least four additional fallacies in NAFCA's claim. First, storage and diversion charges are not at all equivalent to car hire compensation. Their principal purpose is not compensation, but deterrence. See, e.g., Railroads Per Diem, Mileage, Demurrage and Storage Agreement, 1 I.C.C.2d 924, 934 (1985) ("the primary purpose of demurrage and storage charges is not to compensate the owner of the car, but to enhance efficient car use by ensuring the prompt turnaround of equipment"). Second, private car providers have been on notice since even before passage of the Staggers Act that railroads might assess such charges. See note 11, *supra*. Third, shippers on BNSF's system were advised for some time before BNSF imposed its charges that they needed to take steps to help BNSF deal with the congestion caused by their actions. See VS Langston at 6, n.5; RVS Langston at 4, n.1. Fourth, both before and after BNSF imposed its charges, it worked closely with shippers to help ameliorate any significant transition problems that arose at individual facilities. See VS Langston at 3-4; RVS Langston at 4-5. Thus, NAFCA's "phase-in" complaint is not only legally baseless, but factually unfounded.

Opening Statement at 33; VS Langston at 11. It was precisely to reduce this kind of cross-subsidization that the Staggers Act encouraged railroads to unbundle their line-haul rates and to set separate charges for separate services.

In the face of this powerful legal and economic case for unbundled storage and diversion charges, NAFCA's primary justification for requiring continued bundling is remarkably weak. NAFCA argues that it makes it easier for shippers and receivers to negotiate about which of them will pay the freight rate, since it is "known to both in tariff form." NAFCA Submission at 37. NAFCA suggests that they cannot negotiate "amorphous overhead costs, such as ever-changing tank car storage charges." *Id.* But of course they can negotiate about such costs, and allocate them as they see fit. Parties to commercial contracts, including transportation contracts, make provision for overhead costs all the time, with no contractual difficulty. In this situation, those costs are likely to be allocated to the party causing them, which is exactly why they provide the intended incentive for that party to minimize those costs.

NAFCA also argues that if a railroad's charges are bundled together, they are subject to challenge if the freight rate violates Section 10701, but they might "escape scrutiny" if they are charged separately. *Id.* at 37-38. NAFCA cannot seriously contend that BNSF's storage and diversion charges have "escaped scrutiny," particularly given NAFCA's challenge to those charges in Docket No. 42060 (Sub-No. 1). NAFCA may be concerned that in fact little scrutiny is required to find that BNSF's separate charges are perfectly consistent with the law and the Board's regulatory policy, but that is certainly no reason to deny BNSF the right to set such charges. Rather, it provides every reason

for the Board to proceed to grant BNSF's pending Motion to Dismiss in Docket No. 42060 (Sub-No. 1).

**CONCLUSION**

The central issue in this proceeding is whether BNSF's storage and diversion charges on empty private tank cars constitute "departure tariffs" within the meaning of Section 8 of the Ex Parte No. 328 Agreement. For the reasons detailed in BNSF's Opening and Reply Statements, and confirmed in the ICC's Buffalo & Pittsburgh decision, BNSF's independent charges are not "departure tariffs." Accordingly, the Board should dismiss NAFCA's petition for investigation under Section 8.

The questions the Board has raised regarding private cars generally are pertinent to NAFCA's pending complaint in Docket No. 42060 (Sub-No. 1). The answers that BNSF and NAFCA have provided make it even clearer that NAFCA's position in that proceeding is also without merit and that the Board should proceed to grant BNSF's pending Motion to Dismiss there as well.

Respectfully submitted,



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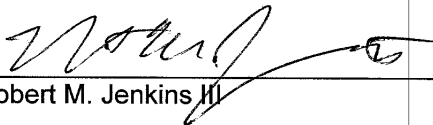
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Dated: July 7, 2003

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing "Reply Statement of The Burlington Northern and Santa Fe Railway Company in Response to STB Decision Served April 28, 2003" has been served by hand delivery on counsel for the North America Freight Car Association, Andrew P. Goldstein, counsel for the National Industrial Transportation League, Nicholas J. DiMichael, and counsel for the American Chemistry Council, Thomas E. Schick, this 7th day of July 2003.

  
Robert M. Jenkins III

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**DOCKET No. 42060**

**NORTH AMERICA FREIGHT CAR ASSOCIATION – PROTEST  
AND PETITION FOR INVESTIGATION – TARIFF PUBLICATIONS  
OF THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY**

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**REPLY VERIFIED STATEMENT OF JOHN J. ROBINSON**

My name is John J. Robinson. I am a railroad transportation consultant with over 40 years of experience in the rail industry. I previously submitted testimony in support of BNSF's Opening Statement in response to the Board's Decision served April 28, 2003, in the above-captioned proceeding. The purpose of my testimony here is to reply to certain of the statements made in the June 9, 2003, submission of Petitioner North American Freight Car Association ("NAFCA"), and Intervenor American Chemistry Council, and the National Industrial Transportation League in Docket No. 42060 ("NAFCA Submission"), as well as the statements of Mr. Joseph C. Gasz ("V.S. Gasz") and Mr. Gary T. Kurtz ("V.S. Kurtz").

As I explained in my opening statement, I served as Assistant Vice President for the Operations and Maintenance Department and Secretary to the Committee on Compensation of the Association of American Railroads ("AAR") and participated directly in the negotiations in Ex Parte No. 328, *Investigation of Tank Car Allowance System*. In addition, I submitted testimony in the proceedings in Docket No. 40200, *Charges for Movement of Empty Cars*,

*Buffalo & Pittsburgh Railroad, Inc.*, which the Board specifically asked the parties in this proceeding to comment upon.

As I explained in my opening verified statement, I was the AAR's representative to and one of the designated recorders for both the Joint Tank Car Task Force and the Joint Negotiating Committee. In that capacity, I worked closely with Mr. Gasz who was also one of the designated recorders for the JTCTF and represented the chemical shipper groups on the JNC. I have read NAFCA's June 9, 2003 submission, as well as the testimony of Mr. Gasz and Mr. Kurtz and have the following comments.

**I. There Was Never Any Agreement That The Cost Of Holding Empty Private Tank Cars Was The Responsibility Of The Railroads**

NAFCA asserts that the members of the Joint Tank Car Task Force ("JTCTF") and the Joint Negotiating Committee ("JNC") agreed that the railroads were responsible for covering the cost of holding empty private tank cars on railroad tracks and that, therefore, BNSF is prohibited under the Ex Parte No. 328 agreement from assessing storage charges on empty private tank cars being stored on its tracks in locations other than outside private repair facilities. NAFCA Submission at 8, 18-19, 24. NAFCA is wrong. There was never any such agreement. As I already explained in my opening statement, the railroads and private car owners floated a number of different proposals with respect to the treatment of private tank cars, including wide-ranging proposals for storage charges on empty private cars held anywhere on railroad tracks. See V.S. Robinson at 11. However, the only issue the parties ever agreed to with respect to holding empty private tank cars was with respect to empty cars held outside private repair facilities. *Id.*

**A. The Parties Never Agreed In Writing Or Otherwise That Railroads Were Responsible For The Cost Of Holding Empty Private Tank Cars**

NAFCA asserts that the railroads and tank car owners reached an unwritten agreement or understanding that railroads could not charge for storing empty private cars except where the cars were held outside repair facilities. NAFCA Submission at 8, 18-19, 24. NAFCA is wrong; the parties reached no such unwritten understanding. Indeed, as I explain below, the very structure of the negotiations made such agreements completely impracticable.

NAFCA's witness Mr. Gasz and I are in agreement that during negotiations concerning the original Ex Parte No. 328 agreement, the JTCTF agreed "not to adopt specific rules governing the holding of empty tank cars on carrier tracks except while awaiting maintenance or repair" and that this agreement was reflected in Section 5 of the Ex Parte No. 328 Agreement. V.S. Gasz at 9 (original emphasis). We disagree, however, with respect to the implications that are to be drawn from the complete absence in the agreement of any reference regarding storage charges on empty private tank cars held anywhere else on the railroads' systems. Mr. Gasz argues that this provision reflects the parties' unwritten understanding that railroads could only assess storage charges where the empty private tank cars are held outside private repair facilities and nowhere else. V.S. Gasz at 11-12. Mr. Gasz is incorrect. As I explained in detail in my initial verified statement, the parties never reached such an understanding. V.S. Robinson at 11.

**B. The Ex Parte No. 328 Documents Cited By Mr. Gasz Demonstrate That The Parties Never Agreed That Railroads Were Responsible For The Cost Of Storing Empty Private Cars**

NAFCA and Mr. Gasz assert that the cost of providing railroad tracks to hold empty private tank cars prior to loading was considered by the parties during the Ex Parte No. 328 negotiations to be a railroad cost for which railroads could not assess a charge. NAFCA Submission at 19; V.S. Gasz at 8. In support of this assertion, both NAFCA and Mr. Gasz quote

language from selected reports and meeting minutes from the first round of the Ex Parte No. 328 negotiations that refer to discussions within the JTCTF regarding empty private car storage charges. They argue that the quoted language demonstrates that the parties agreed that railroads would store empty private tank cars for free on their system except where the cars were held outside private repair facilities. Far from supporting their claim that the parties reached agreement regarding the issue of empty private cars stored on rail tracks in locations other than outside private repair facilities, the quoted language shows that there was significant debate and no resolution regarding the issue.

The language Mr. Gasz quotes in his statement does not provide any evidence that the parties ever agreed that the cost of holding empty private tank cars on railroad tracks was the responsibility of the railroads. Indeed, Mr. Gasz appears to realize this and refers to unwritten “understandings” between the railroads and the tank car owners. All the documents show is that the parties discussed the issue but were unable to reach any agreement except with respect to charges for empty private cars held outside private repair facilities. The documents simply do not support the conclusion that the railroads ever agreed to give up their right of independent action to assess such storage charges elsewhere on their rail system.

Moreover, the language cited by Mr. Gasz demonstrates that the parties had not reached any agreement. According to the minutes of the March 8, 1978 Ex Parte No. 328 meeting in St. Louis, the members of the subcommittee (as opposed to the full negotiating committee) “reached basic agreement on the need to jointly define the disciplines and responsibility areas under handling of empty tank cars in terminal movement and the associated problems of holding or storing empty private tank cars.” V.S. Gasz at 7-8. This language simply does not support Mr. Gasz’s assertion that the parties agreed that the railroads were responsible for the costs of

furnishing track to hold empty private cars. In fact, it supports the opposite conclusion that no agreement was ever reached regarding who would be responsible for covering the cost of empty private car storage.

**II. All Agreements Reached By The Joint Tank Car Task Force and Joint Negotiating Committee Were Reduced To Writing And Expressly Stated Within The Original And Revised Ex Parte No. 328 Agreements**

As explained in my opening statement, the negotiations that resulted in the adoption of both the original and revised Ex Parte No. 328 agreements were long and intense. V.S. Robinson at 10-11. During the course of both negotiations the joint committees reached agreement on a number of significant issues and everything the parties agreed to was reflected in the original and revised agreements that were submitted to the Commission for its approval. *Id.* at 11. Moreover, because the JNC intended to ask the Commission to not only approve but, once again, to expressly prescribe the terms of the revised agreement, the members of the JNC went to great lengths to ensure that everything the parties agreed to in the second round of negotiations was specifically spelled out within the revised agreement. The parties were also careful to ensure that everything the parties did not agree to was excluded from the terms of the revised agreement. Thus, the Ex Parte No. 328 Agreement prescribed by the ICC in 1986 contains everything to which the parties agreed and nothing else. It was never intended to include unwritten, undocumented “understandings” between members of the various subcommittees.

It must be remembered that the parties were well aware that the ICC would be prescribing the actual terms of the agreement itself. We understood that anything that was not included within the written language of the agreement could not, as a practical matter, be prescribed by the Commission because the Commission could not prescribe anything for which it had no knowledge. The Agreement was never intended to include unwritten, undocumented “understandings” between members of the various subcommittees.

I can assure the Board that if the parties had ever reached any agreement that the railroads would be responsible for the cost of holding empty private cars at locations other than outside private repair facilities, it would have been included in the written language of Section 5 of the Ex Parte No. 328 Agreement. Indeed, the tank car owners would have had every reason to insist on its inclusion. The reason we did not include such a statement is because there was no such agreement and NAFCA's arguments to the contrary are simply revisionist history.

**III. The Railroads Only Agreed To Be Bound By The Terms Contained Within The Ex Parte No. 328 Agreement And Not By Any Unwritten "Understandings"**

Additional practical proof for the point that there is simply no way that the railroads ever could have agreed to be bound by unwritten "understandings" can be found in the structure of the JTCTF and the way in which the AAR notified railroads that were not part of the JTCTF what was included in the proposed agreement.<sup>1</sup> As Mr. Gasz explained, the JTCTF established subcommittees to address certain issues and make recommendations to the full negotiating committee. The full committee would then consider the subcommittee's recommendations and once a tentative agreement concerning them had been reached, the members of the JTCTF would circulate the proposed language to members of their respective groups.

As Secretary for the Committee on Compensation, I circulated all written proposed agreements to the members of the AAR and any other railroads that would be subscribing to the agreement and, as such, would be bound by its terms. We provided rail carriers with an opportunity to comment on the proposed written agreement and specifically asked them to vote on whether they wished to accept or reject the terms of the proposed agreement. As a considerable number of the railroads who would be subscribing to the agreement, including all of

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<sup>1</sup> To the best of my knowledge, that the tank car owners followed similar procedures.

the regional and shortline railroads, were not participating directly in the negotiations, they relied on the proposed agreement's written language to determine whether they were willing to agree to its terms. In other words, the only terms the railroads were ever asked to agree to and could in fact agree to were contained within the written language of the proposed agreement. The railroads could not have known about any unwritten "understandings" made by members of the subcommittees and, therefore, could not have agreed to them. Nor, for that matter, could they have known about and agreed to any unwritten and undocumented "understandings" reached by the full Committee.

**IV. There Is No Reason To Believe That The Demise of Ex Parte No. 328 Will Spur "Bitter Litigation"**

NAFCA argues that "the demise" of the Ex Parte No. 328 agreement will spawn "bitter litigation cycles." NAFCA Submission at 3-4, 17. BNSF has not sought to dismantle Ex Parte No. 328. But, in any event, the experience of the U.S. rail industry following the ICC's decision not to prescribe allowances for any other private car types demonstrates that NAFCA's dire prediction lacks any foundation. See *Lo Shippers Action Committee v. Aberdeen and Rockfish Ry. Co.*, 4 I.C.C. 2d 1 (1987) ("LOSAC" Decision). I do not recall there being any protracted litigation cycles following the LOSAC Decision declining to prescribe allowances for private covered hopper cars. Indeed, by the time I retired from the AAR, complaints concerning allowances were nearly nonexistent.

As Assistant Vice President for the Operations and Maintenance Department and Secretary to the Committee on Compensation, I participated in the negotiations concerning private covered hopper car allowances that resulted in an agreement between the railroads and

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<sup>2</sup> Attached to my statement is an example of the type of notice we circulated to the railroads.

the private car owners. When the railroads declined to update the allowances due to deficiencies in the cost of ownership formula, the private covered hopper car owners petitioned the ICC for prescription of the agreement. The ICC declined to prescribe allowances, holding that the collective establishment of uniform allowances for private covered hopper cars was no longer necessary and contrary to the spirit of the Staggers Rail Act.

Railroads and shippers did not respond to the ICC's decision by engaging in "bitter litigation" over private covered hopper car allowances. Instead, railroads and private covered hopper car owners, like other private car owners, steadily moved toward a system of individually negotiated allowance levels and zero rated rates -- a system, I might add, that appears to be working very well.

My recent discussions with members of the four major U.S. rail carriers regarding the payment of tank car allowances today also demonstrate that NAFCA's claim is without merit. I recently spoke with representatives of the four major U.S. carriers, specifically Norfolk Southern, Union Pacific, CSX and BNSF, regarding the payment of mileage allowances for private tank cars operating on their rail systems today. The results of those discussions indicate that over 80 percent of the private tank cars operating on the four major U.S. rail carriers today are covered by allowance agreements or allowance rates other than that prescribed by the Ex Parte No. 328 formula.<sup>3</sup> It simply is not believable that shippers and railroads will engage in bitter disputes over tank car allowances when the vast majority of tank cars do not receive allowances pursuant to the Ex Parte No. 328 agreement.

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<sup>3</sup> Indeed, as noted in Mr. Langston's Reply Verified Statement at 2, BNSF's experience indicates that over 94 percent of all private tank cars operating on BNSF today are zero rated and do not receive a separate allowance payment from BNSF.

**V. The Ex Parte No. 328 Agreement Allows Lessees To Recover All of The Lessee Costs The Tank Car Owners Elected To Include In The Allowance Formula**

NAFCA and Mr. Gasz assert that BNSF's storage charges are departure tariffs because the allowance system does not allow car providers, including car lessees, to recover private car storage costs. NAFCA Submission at 31-32; V.S. Gasz at 16-18. They argue that these costs were not included because they were considered to be railroad costs. NAFCA Submission at 17-18; V.S. Gasz at 13. Once again, they are incorrect.

As I explained in my opening statement, the tank car owners took the lead with respect to determining what operating and maintenance costs would be considered in the tank car allowance formula. Everything the parties agreed to with respect to this issue is included in Section 3, *Maintenance and Operating Cost* of the revised agreement. Maintenance and operating costs were intended to cover the cost of repairs related to keeping the tank cars in good working order so that they could safely transport the commodity they were designed to haul (e.g., edible oils, chemicals, fuel oil, etc.). In addition to basic repair expenses, these costs include tank car linings, valves, certain retrofits, and required safety inspections. As previously explained, the revised agreement prescribed in Ex Parte No. 328 contains all of the major items that have traditionally been considered part of freight car ownership – namely interest, depreciation, and the cost of repairs and maintenance. These same items were reflected in the railroad car hire charges that railroads used to pay one another for the use of each other's rail cars before the ICC deprescribed such charges.

From the very beginning of the Ex Parte No. 328 negotiations, the parties agreed not to include every cost in the mileage allowance formula. For example, in the first negotiations the railroads refused to allow certain required safety inspection costs to be included in the tank car allowance formula. The railroads later changed their position in the second negotiations and

these costs were subsequently included in the revised agreement. Therefore, it is irrelevant that tank car owners cannot now recover the costs they incur for private car storage. Moreover, there is no reason the shippers cannot ask to reopen and renegotiate Ex Parte No. 328 to allow lessees to deduct such expenses.

Mr. Gasz also argues that the agreement was intended to apply to private tank cars when under movement and when idle. V.S. Gasz at 15. He asserts that it would be wrong to allow the railroads to assess charges on idle cars simply because the parties settled on a loaded miles formula for private car allowances. *Id.* My review of the AAR's files of the JNC and JTCTF negotiations make it clear that the railroads were the ones that wanted to come up with a transportation use formula that was based on a car's use cycle—not the shippers. It was the tank car owners that insisted on using loaded miles as a transportation use standard for the mileage allowance formula and Mr. Gasz is now trying to argue that the parties agreed to something different because the tank car owners do not like the bargain that they made. Again, the only difference is that the only area where the railroads agreed to give up their right of independent action to independently establish their own charges on "idle cars" was when the empty private tank cars were sitting outside private repair facilities.

**VI. Private Car Owners Had Every Reason To Believe That Railroads Might Exercise Their Right Of Independent Action To Assess Storage Charges on Private Cars Held On Railroad Tracks**

NAFCA and Mr. Gasz claim that shippers had no reason to expect that railroads would ever try to assess storage charges on private cars held on railroad tracks other than outside private car repair facilities. NAFCA Submission at 15; V.S. Gasz at 13. This claim simply is not credible. As I discussed in my opening statement, the railroads raised this issue several times over the course of the Ex Parte No. 328 negotiations as well as in the years spanning the two negotiation periods. In my opinion, the tank car owners were clearly on notice that the railroads

were interested in assessing storage charges on empty private cars held on their system in locations other than outside repair facilities. The railroads raised the issue on several occasions, including after the first Ex Parte No. 328 agreement. In my opinion, they had every reason to expect that railroads would one day exercise their right of independent charges and assess such storage charges.

**VERIFICATION**

I, John J. Robinson, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Reply Verified Statement.

Executed on July 3, 2003.

John J. Robinson  
John J. Robinson

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**DOCKET No. 42060**

**NORTH AMERICA FREIGHT CAR ASSOCIATION – PROTEST  
AND PETITION FOR INVESTIGATION – TARIFF PUBLICATIONS  
OF THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY**

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**REPLY VERIFIED STATEMENT OF DOUGLAS W. LANGSTON**

My name is Douglas W. Langston. I am a General Director of Demurrage, Storage, and Extended Services for The Burlington Northern and Santa Fe Railway Company (“BNSF”) with 13 years of experience in the railroad industry. I previously submitted testimony in support of BNSF’s Opening Statement in response to the Board’s Decision served April 28, 2003, in the above-captioned proceeding. The purpose of my testimony here is to reply to certain of the statements made in the June 9, 2003, submission of the North American Freight Car Association, the American Chemistry Council, and the National Industrial Transportation League (“NAFCA Submission”) in Docket No. 42060, as well as the statements of Mr. Joseph C. Gasz and Mr. Gary T. Kurtz.

**I. BNSF’s Private Car Storage Policy Makes Sense**

**A. BNSF’s Storage Policy Requires Shippers To Pay For Services They Use**

Over the past two decades, a number of the industries that use private cars to ship their products, such as the plastics and lube oil industries, have experienced tremendous growth in the demand for their products. For example, statistics from the American Chemical Manufacturers

show that from North American producers of major thermoplastic polymers increased their production capacity of various types of plastics by approximately 12 million metric tons (or approximately 38 percent) from 1994 to the year 2000. Although the plastics industry expanded their plant facilities and increased production to meet this increase in demand, many shippers did not increase the amount of available track space to hold empty private cars when they were not needed for loading. Instead, such shippers took advantage of the fact that BNSF was providing them with free storage service. As a result, these shippers began using up more and more of BNSF's track space to store their empty private cars and the amount of congestion on BNSF's system increased accordingly.

As discussed in my opening statement, prior to the adoption of its private car storage policy, BNSF had an excessive number of private empty cars sitting on its tracks. See VS Langston at 2-6. These cars caused significant congestion and hampered BNSF's ability to build trains efficiently and to readily move them through its yards. For example, BNSF was required to move empty cars around its yards and sometimes even between yards in order to create space to prepare blocks of cars for its linehaul trains on a regular basis. BNSF also had to stop empty private cars short of their final destination and store them between the cars' origin and destination because there was no room for them in the serving yard. These types of additional car movements unnecessarily increased the amount of handling and time BNSF needed to prepare its line haul trains, which adversely affected all of BNSF's customers and not just those who used BNSF's track to store their empty private cars, and forced BNSF to incur additional expense moving them around.

As the level of congestion caused by the empty private cars stored on BNSF's system grew, BNSF realized it would have to do something to encourage shippers to stop using BNSF's

track as a parking lot and to keep their cars moving efficiently through the rail system. BNSF wanted to develop a private car storage policy that would help BNSF recoup some of the costs it incurs providing storage service for some private car owners and shippers, curb shipper abuse, and encourage more efficient use of its system. BNSF already assessed storage charges on loaded private cars that were left on BNSF's track for more than a two-day period, and we reached the logical conclusion that a similar program for empty private cars was needed.

BNSF designed and adopted a private car storage policy that encourages shippers to keep their cars moving and helps BNSF recover the costs it incurs storing the empty cars on its tracks. As I discussed in my opening statement, the policy is working. There are fewer empty private cars sitting idle on BNSF's tracks today and clogging up its yards than there were before BNSF adopted its private car policy. Moreover, shippers that use BNSF's tracks to store their empty private cars are now paying for that service. We have also seen an increase in the number of private car shippers asking BNSF for assistance in managing their private car fleets.

I note that NAFCA has made much of BNSF's statement in its February 2, 2001 Service Advisory, announcing the new storage charge policy, that the new charges were intended to "Improve Asset Utilization For Our Customers and Effectively Expand Capacity Without Additional Capital Outlays." NAFCA argues that this statement shows that BNSF is trying to transfer its obligation to provide storage track to shippers. NAFCA Submission at 15. I am not aware of any obligation BNSF has to provide services, such as private car storage, for free. The only issue is whether BNSF may unbundle and establish a separate price for this service that causes shippers to "internalize" the cost of the service. As I explained in my opening statement, railroads have successfully been unbundling and charging separately for their services for a while now and the results have been positive. See VS Langston at 11-12.

As discussed more fully below, BNSF approached private car owners at various times to ask for their help in reducing the level of congestion caused by empty private cars sitting on BNSF's tracks. The majority of private car owners did not respond to these requests and essentially left BNSF with two options. Build or lease track to hold all of these cars and pass along those costs to all of BNSF's customers through an increase in freight rates or adopt a policy that requires those who use BNSF's tracks for storage to pay for that service. Building or leasing new track to store empty private cars would effectively require shippers who do not use BNSF's track to store their empty cars to cross-subsidize those shippers that do. BNSF determined that the most efficient, effective, and fair solution was to ask its customers who use its storage service to pay for that service.

BNSF's storage charges encourage shippers to manage and utilize their fleet more efficiently and to keep their cars off of BNSF's track. Charging shippers who use BNSF's track to store their empty private cars has helped expand the capacity that is available for all shippers by requiring those shippers who clog up the system to internalize the cost of using that service. As a result, fewer shippers are storing their empty private cars on BNSF's tracks today. Congestion on BNSF's system has been reduced and BNSF has been able to free up valuable track space in its yards. This has yielded benefits for both BNSF and all of its shippers.

**B. BNSF Has Worked With Shippers To Help Them Manage Their Cars And Reduce The Need To Store Empty Private Cars On BNSF's Tracks**

NAFCA claims that BNSF failed to give private tank car owners a sufficient amount of time to adjust to BNSF's new private car storage charge policy. NAFCA Submission at 16. This simply is not true. BNSF shared information on its new private car storage policy on numerous occasions well before its proposed effective date. BNSF had also originally intended to make its new storage policy effective on May 1, 2001 but postponed the effective date of the new policy

to July 1, 2001 at the request of several shippers and shipper organizations who wanted additional time to respond to the new policy. BNSF also took steps to help private car owners adjust to the new private car storage policy. BNSF also worked with shippers to help them lease track to hold their empty private cars and adopted a policy of forgiving storage charges for shippers who built holding track within their facilities during the first year of the policy.<sup>1</sup>

**II. NAFCA's Claim That Shippers Lack The Ability To Readily Manage The Size Of Their Fleet And Reduce The Amount Of Storage Charges They Pay Is Exaggerated**

NAFCA has argued that BNSF's private car storage policy places shippers who use private cars to transport their products at a disadvantage because unlike shippers who have assigned BNSF rail cars, private car owners and lessees cannot as readily terminate their car agreements to avoid paying storage charges when demand for them is low. See NAFCA Submission at 20. Moreover, NAFCA claims that shippers have no incentive to lease more cars than they need to meet business demands and that there is no reason to believe that the private tank car fleet would be any smaller if BNSF supplied all of the tank cars. *Id.* at 24. The fact is that the tank car fleet might very well be smaller if BNSF supplied all the tank cars. BNSF generally tries to have enough cars to meet average demand or tries to work with shippers to smooth their demand. In contrast, the vast majority of private tank car owners and private covered hopper car owners purchase or lease enough cars to handle peak demand. Therefore, during times of lesser demand, there will inevitably be a surplus of empty private cars.

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<sup>1</sup> Over the years, BNSF employees frequently spoke to tank car and other private car owners regarding the congestion problems BNSF was experiencing due to the excessive number of empty private cars sitting on BNSF's track. On numerous occasions, BNSF representatives discussed with private car owners the need to address the congestion problem caused by empty private cars being stored on BNSF's system. We offered to work with private car owners to help them manage their fleets, but for the most part shippers did not respond to our offers. A significant number of shippers continued to use BNSF's tracks for storage despite our repeated requests that they not do so.

The problems associated with maintaining a fleet to meet peak demands is readily apparent from the following example. It is my understanding that in the plastics industry, most shippers keep enough covered hopper cars on hand to handle their plants operating at 80 to 90 percent of capacity. When production drops significantly (as it has recently to 40 to 60 percent of production) due to a substantial decline in the demand for the products, the shippers have large numbers of empty cars sitting around waiting to be used. These cars create significant congestion problems for BNSF if they are simply left to sit empty on BNSF's tracks waiting for their next load or are preloaded only to wait shipment. Prior to the adoption of BNSF's private car storage policy, shippers lacked any incentive to move the empty cars off of BNSF's track until they were needed to transport product. Now, with BNSF's private car storage policy, shippers have the incentive (and are in fact currently working) to arrange for storage of the cars at a location other than BNSF's track. For example, a few of BNSF's plastics shippers have made arrangements to store their excess empty covered hoppers on shortline track in West Texas instead of on BNSF's tracks. It is unlikely that these shippers would be doing this in the absence of BNSF's private car storage policy.

NAFCA also asserts that private car owners have no incentive to lease more tank cars than they require. NAFCA Submission at 24. However, when shippers can store empty private cars for free, shippers can, under certain circumstances, have an incentive to lease more cars than needed. I note that the cost of leasing a tank car varies with the level of demand for tank cars. Tank car lessors generally have not maintained space to store their empty private cars. Therefore, during times of surpluses, tank car owners can lease their cars at a lower rate to encourage lessees to take the cars off their hands. When storage is essentially free, shippers are more inclined to take advantage of the lower rates and lease more tank cars.

Finally, contrary to the assertions of NAFCA, shippers do have the ability to adjust the size of their private tank car fleets to avoid incurring storage charges. Shippers can enter into short-term leases that allow them to respond more readily to swings in supply and demand. Shippers can also modify the terms of their existing leases. Finally, if a shipper is unable to reduce their fleet size, they can store the cars inside their facilities or lease track if they lack sufficient track space to avoid incurring storage charges.

NAFCA also argues that BNSF's inconsistent cycle times have induced shippers to purchase or lease additional private tank cars as insurance against BNSF's inconsistent service. See NAFCA Submission at 22-24. In support of its assertion, NAFCA claims that the number of days it takes BNSF to move both loaded and empty cars between the same origin and destination pairs vary by as much as 40 percent. *Id.* at 24. NAFCA argues that it is unfair for BNSF to charge shippers for buying or leasing extra cars when they were forced to do so because of BNSF's erratic service. *Id.* NAFCA does not explain the source of the data it used to determine average cycle times for empty and loaded movements from the same origins and destinations so BNSF is unable to determine the accuracy of NAFCA's data. Moreover, NAFCA admits that it did not subject the data to statistical analysis. *Id.* at 23-24. Nevertheless, NAFCA relies on this data to support its assertion that variations in tank car cycle times have forced shippers to maintain larger tank car fleets than necessary to ensure that they always have a sufficient number of cars on hand to transport their product. *Id.*

NAFCA makes the erroneous assumption that variations in cycle times between the same origins and destinations are always due to inconsistent service and that shippers cannot plan for them. However, cycle times from the same origin and destination pairs vary for a variety of reasons and the variations are not necessarily unexpected. For example, a car leaving a plant in

Houston on a Saturday destined for Los Angeles may have a longer transit time than a car leaving the same plant on a Tuesday for the same destination because of variations in scheduled switch times or “published” service plans. Thus, the fact that cycle times vary from the same origin and destination pairs does not indicate whether BNSF’s service is inconsistent and interfering with a shippers’ ability to manage their tank car fleet.<sup>2</sup> Therefore, NAFCAs claim that variations in BNSF’s cycle times require shippers to purchase extra cars is unsupported. Using the above example of a car moving from Houston to Los Angeles, if the shipper knows that the car will take 5 days to arrive if it leaves on a Saturday but only 3 days to arrive if it leaves on a Saturday, there is no reason the shipper cannot plan and size its fleet accordingly. Moreover, BNSF provides shippers with the tools they need to do so. BNSF publishes its train schedules and switch times and makes them available via the internet. Shippers can review BNSF’s schedules and switch times and plan their car needs accordingly. Moreover, BNSF is more than willing to assist shippers in managing their fleet more effectively--all the shippers have to do is ask. I note that many shippers have asked for and BNSF has provided such assistance.

### **III. BNSF’s Storage Charges Require Private Car Owners And Assigned Car Shippers To Internalize The Cost of Empty Car Storage And Effectively Manage Their Fleet**

I have also reviewed the statement of Mr. Kurtz and note that he worked for me in 1998 and 1999 as an Equipment Manager. I continued to work with Mr. Kurtz in the equipment group until his retirement from BNSF in 2001. I do note that while at BNSF Mr. Kurtz dealt mainly with covered and open top hopper cars and had very little to do with private tank cars. Mr. Kurtz’s statement generally provides an accurate description of how BNSF manages its own rail

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<sup>2</sup> Information concerning whether cars arrive as scheduled would be a better indicator of whether private car owners are forced to purchase extra cars as insurance against inconsistent service, however, it does not appear that NAFCAs considered such information.

car fleet and he is correct that BNSF must sometimes store its own empty cars on its tracks when they are not needed. However, NAFCA's assertion that it is unfair for BNSF to charge for storing empty freight cars, irrespective of whether BNSF or another party controls them, is specious. NAFCA Submission at 19-20. NAFCA's comparison completely ignores the fact that BNSF controls its own cars and, therefore, controls where they move and where and how long they are stored. In contrast, BNSF does not control the movement of private cars or rail cars that have been assigned to specific customers ("assigned rail cars"). Many shippers prefer to use private cars or assigned rail cars to transport their products because unlike rail provided and controlled equipment, the equipment is guaranteed to be available whenever they want it. In addition, such shippers take comfort in knowing what product the car previously contained.

BNSF receives demand forecasts from its various shippers regarding their projected car needs. BNSF reviews the demand forecasts and sizes its fleet to match the projected demand. BNSF will place its cars in assigned car pools depending upon where the demand for the cars is. For example, if BNSF receives a demand forecast from a shipper in Denver that it needs 50 covered hopper cars for the next six weeks, BNSF can move some of its cars closer to Denver so that they are available when needed. If the same shipper notifies BNSF that it needs only 25 cars due to reduced demand for its product, BNSF can either take the 25 cars that are no longer needed by the shipper and give them to another shipper or put them in storage. BNSF cannot do this with empty private cars or with its own rail cars that have been assigned to a specific BNSF customer because it does not control them. Instead, BNSF has to rely on the shipper to control them and to direct where and for how long the cars will be stored.

BNSF's demurrage, storage, and diversion charges give shippers the appropriate incentives to efficiently manage and use rail cars when the cars are not under BNSF's control.<sup>3</sup> For example, BNSF assesses demurrage charges on rail cars that are held beyond a reasonable free period after they have been constructively placed. Such charges encourage shippers to quickly load and unload BNSF's rail cars and are only assessed where the car has been placed within the control of the shipper.

BNSF's private car storage charges serve similar salutary purposes. Private cars and assigned rail cars are controlled by the shipper rather than by BNSF. BNSF has no control over what they are used for or how they are used. Absent the imposition of storage charges, such owners and shippers have every incentive to store their cars indefinitely on BNSF's track, where they congest BNSF's track and increase the costs it incurs providing rail service to all of its shippers. One need only look at the number of empty private cars that were left sitting on BNSF's track before BNSF began charging for empty car storage, as proof that this is true. BNSF's diversion charges serve a similar purpose in that they encourage shippers to avoid unnecessary empty private car diversions. Both types of charges serve the important goal of encouraging shippers to manage their fleets and use their cars more efficiently.

#### **IV. Shippers Use Private Tank Cars To Meet The Needs Of Their Business—Not Because BNSF Refuses To Provide Them**

NAFCA continues to insist that shippers use private tank cars because BNSF has refused to provide them. NAFCA Submission at 3, 12. This simply is not true. As with shippers of other private car types, the vast majority of shippers that use private tank cars to transport their products do so for business reasons, not because BNSF refuses to provide them. As discussed in

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<sup>3</sup> I note that private car shippers are now informing BNSF when they have a reduction in demand for their private cars and are working with BNSF to arrange long-term storage of the cars instead of just leaving them sitting in BNSF's yards and on its tracks. This rarely happened before BNSF adopted its private car storage policy.

my opening statement, tank cars are highly specialized equipment that are used to ship a wide variety of goods from food stuffs, such as edible oils and liquid sugars (e.g., soy bean oil and syrup), to industrial products, such as kaolin clay and porcelain, to chemicals, such as chlorine gas and liquid fertilizer. See VS Langston at 21-23. Tank cars generally cannot be readily interchanged to transport the products of different shippers or even different products of the same shipper because the characteristics of the products they transport makes it extremely difficult and expensive to share tank cars. Moreover, even where the same type of tank car can be used to transport different products, the cost of using it to transport different products is generally cost prohibitive. For example, tank cars must be cleaned before it they can transport a product that is different in grade or kind from the product the car had just transported. Tank cars are expensive to clean. They cannot simply be swept clean like a hopper car, but require special cleaning equipment, methods, (e.g. steam vs. cold) and agents. It simply is not cost effective to clean tank cars between every load so that they can transport different types of products back to back, even for the same shipper.

Finally, the desire of most shippers to control and protect the integrity of their products makes them unwilling to share tank cars even where sharing is possible between producers of the same type of product. For example, different shippers of corn syrup generally do not want to share the same tank cars to transport their individual products. Most tank car shippers are extremely concerned with ensuring the integrity of their product and prefer to have complete control over the use, repair, cleaning, and maintenance of cars. Shippers simply do not want to risk their product being contaminated by the presence of other products that were previously transported in the tank car. As a result, tank cars cannot readily be interchanged and used to transport the same commodities for different shippers or different commodities for the same or

different shippers. Instead, they must generally be used to transport the same product for the same shipper over and over again.

**V. BNSF's Experience With Private Car Allowances Demonstrates That NAFCA's Claim That Renegotiating Ex Parte No. 328 Will Lead To "Bitter Litigation Cycles" Over Private Tank Car Allowances Is Baseless**

NAFCA claims that BNSF's position in this case threatens to dismantle the Ex Parte No. 328 regime. NAFCA Submission at 3-4, 13. NAFCA emphasizes that BNSF and other railroads would still have to pay allowances on private tank cars even if allowances were no longer prescribed under the Ex Parte No. 328 allowance formula. *Id.* at 12. NAFCA asserts that the railroads and shippers will engage in "bitter litigation" over tank car allowances if the Ex Parte No. 328 regime collapses. *Id.* It is not BNSF, however, but NAFCA that threatens to upset the Ex Parte No. 328 Agreement with its obstinate claims that BNSF's storage and diversion charges constitute "departure tariffs." BNSF has not sought to renegotiate that Agreement.

In any event, BNSF's experience with respect to private car allowance payments demonstrates that NAFCA's alarmist claims are completely baseless. BNSF, as well as the other railroads, have been setting allowances individually for other types of private rail cars for nearly two decades and to the best of my knowledge neither BNSF nor any of the other railroads have been engaged in bitter disputes concerning them. BNSF and private car owners have successfully resolved any issues they may have had concerning allowances through commercial negotiations, not litigation. In addition, BNSF and private car owners have increasingly moved toward zero-rated rate agreements, meaning that BNSF does not pay any mileage allowance on the individual tank cars and the mileage allowance is instead reflected in the freight rates.<sup>4</sup>

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<sup>4</sup> Incorporating the allowance into the freight rate has enabled both BNSF and private car owners to avoid the administrative burdens and recordkeeping inherently involved in making separate allowance payments.

Today, nearly 98 percent of all types of private cars, such as private covered hoppers, operating on BNSF are zero-rated and do not receive a mileage allowance payment from BNSF.<sup>5</sup> Thus, NAFCA's claim that the demise of Ex Parte No. 328 will spawn bitter litigation lacks any factual basis.

Moreover, as already discussed in my opening statement, the vast majority of tank cars operating on BNSF's system today do not receive any allowance, much less an allowance pursuant to the Ex Parte No. 328 formula. Specifically, 94 percent of the tank cars running on BNSF today are zero rated. Further, a considerable number of the tank cars that still receive an allowance receive a commercially negotiated allowance rather than an allowance prescribed under the Ex Parte No. 328 tank car allowance formula.<sup>6</sup> Most private tank car owners have elected not to receive a mileage allowance under the Ex Parte No. 328 prescribed formula, because allowance payments are complicated to manage and track. Private tank car owners have preferred to avoid the administrative burdens and recordkeeping associated with the Ex Parte No. 328 mileage allowance formula and instead have the allowance reflected in the line haul rate or established under an individually negotiated contract. See VS Langston at 26. In light of these facts, I simply cannot see how the demise of the Ex Parte No. 328 Agreement would have any effect on the vast majority of tank car owners that have elected not to receive an allowance pursuant to the Ex Parte No. 328 formula. Nor can I see how the end of Ex Parte No. 328 would result in "bitter litigation" between railroads and private car owners over private car allowances

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<sup>5</sup> Only a few shippers, primarily those who qualify for certain Federal and state tax deductions on their products, prefer to pay the higher fully rated rate and receive a separate allowance payment. This is because the level of the tax benefit they receive is related to the level of the freight rate they pay; the greater the freight rates, the lower the amount of tax they pay on the particular product.

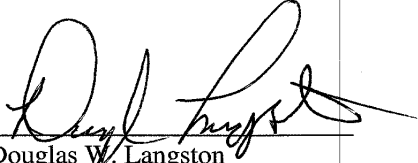
<sup>6</sup> Today, less than 5 percent of the tank cars operating on BNSF's system receive an allowance pursuant to the Ex Parte No. 328 formula.

when it is clear that commercial agreements have been used successfully to resolve issues concerning private car allowances.

**VERIFICATION**

I, Douglas W. Langston, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Reply Verified Statement.

Executed on July 3, 2003.

  
Douglas W. Langston