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October 9, 2002

206361
Honorable Vernon A. Williams
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

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

Dear Secretary Williams:

Enclosed for filing are an original and 10 copies of Petition for Clarification and, Alternatively, for Reconsideration; and for Resumption of Processing in the above-referenced case and a disk in Microsoft Word format containing the same. Also enclosed is a check in the amount of \$150.00, which is the filing fee for a Petition for Reconsideration. If the Board determines to treat the enclosed Petition as one for clarification rather than for reconsideration, we request a refund of the filing fee.

Respectfully submitted,

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ORIGINAL

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



PETITION FOR CLARIFICATION AND, ALTERNATIVELY, FOR
RECONSIDERATION; AND FOR RESUMPTION
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Dated: October 9, 2002

PREFACE AND SUMMARY OF ARGUMENT

This Petition seeks clarification of the Board's October 18, 2001 Decision ("October 18 Decision") pursuant to 49 C.F.R. § 1117 or, alternatively, reconsideration pursuant to 49 C.F.R. § 1115.3. The Board also is requested to permit this proceeding to go forward as an investigation under Ex Parte No. 328, Investigation of Tank Car Allowance System, 3 I.C.C. 2d 196 (1986) as supplemented at 7 I.C.C. 2d 645 (1991) ("Ex Parte 328"), and to consolidate this case with Docket No. 42060 (Sub-No. 1), North America Freight Car Association v. The Burlington Northern and Santa Fe Railway Company.

Shippers who furnish their own cars are entitled by law to an "allowance" for doing so. The allowance payable for tank cars is the product of extensive negotiations in Ex Parte 328, which contains a formula designed to cover costs of private tank car acquisition, maintenance, and operation.

Effective July 1, 2001, The Burlington Northern and Santa Fe Railway Company ("BNSF") terminated unilaterally an established tenet of private freight car ownership: that railroads would furnish as part of the service included in the freight rate holding tracks for empty private cars prior to loading. Tracks to hold empty cars prior to loading are an essential component of car service, as no car use cycle, whether involving private or carrier cars, can be maintained without some logistical slack. Shippers who had acquired tank cars -- because BNSF declines to furnish them -- had not bargained for or calculated their costs of holding tracks for empty cars prior to loading when Ex Parte 328 was negotiated and the private tank car fleet was acquired. The new BNSF storage charge regime faced tank car shippers with the Hobson's choice of constructing holding

tracks on their own facilities at their own expense (in some cases construction is not even physically possible) or paying substantial storage fees to BNSF. Those costs reduce significantly the value of the allowances payable by BNSF to shippers who furnish their own tank cars. Another aspect of the July 1 changes imposed new diversion changes on return empty movements of tank cars.

Faced with BNSF's abrupt new provisions,* tank car shippers sought relief under Ex Parte 328, a comprehensive set of allowance rules prescribed by the Interstate Commerce Commission ("ICC") following years of negotiations between railroads and private tank car owners and operators. Expressly utilizing the provisions of Section 8 of Ex Parte 328, which calls for an investigation of a railroad tariff that "departs in any manner" from Ex Parte 328, North America Freight Car Association ("NAFCA") and certain other parties petitioned the Board to institute an investigation.

The Board has not yet acted on that request. Instead, without a full explanation, the October 18 Decision appears to have treated the investigation petitions under Section 8 as requests under Section 9 of Ex Parte 328 for renegotiation of the tank car allowance agreement. The Board held the proceeding in abeyance and directed the parties to pursue negotiations, which are now concluded.

It was erroneous and contrary to the plain terms of Ex Parte 328 for the Board to blur the distinction between petitions under Section 8 of Ex Parte 328 for investigation and petitions under Section 9 for renegotiation. The Board should clarify that it does not

* Ironically, when the railroad industry found it desirable to replace agency-prescribed car hire rates with market-based negotiated rates, the railroads recognized that it would be an undue economic hardship on some railroads that had acquired cars in reliance on the prescribed rates to make an abrupt change, so the railroads determined to cushion the impact of the new outlook through a ten-year phase-in of depreciation. See Ex Parte No. 334 (Sub-No. 8), Joint Petition for Rulemaking on Railroad Car Hire Compensation, 9 I.C.C. 2d 80 (1992). No similar phase-in consideration has been extended by BNSF to its customers.

regard a Section 8 investigation petition as a Section 9 renegotiation petition. If the Board did intend to treat a petition under Section 8 as one seeking renegotiation under Section 9, it should reconsider and revise its views. The Board cannot expect parties to expend substantial time, money, and effort to achieve negotiated solutions, if these solutions, and the parties' dispute resolution procedures, are not honored.

This proceeding should now move ahead. The new storage charge rules impose on shippers empty car costs that were excluded from the Ex Parte 328 formula because they specifically were regarded during the Ex Parte 328 negotiations as railroad costs. In addition, the new diversion charges applicable to return movements of empty tank cars increase empty car repositioning costs in violation of the "mileage equalization" provisions of Section 1 of Ex Parte 328, which compel tank car operators to pay for repositioning of empty cars only when empty miles exceed 106 percent of loaded miles. Both types of new tank car expenses reduce the value of the tank car allowances paid by BNSF. Carrier tariffs that depart from the Ex Parte 328 negotiated allowance system "in any manner" are subject to investigation.

Under these circumstances, the Board is obligated by the provisions of Ex Parte 328 to examine the new BNSF tariff matter in an Ex Parte 328 investigation. As those provisions have been interpreted in prior ICC cases, it is unnecessary and inappropriate at this point for the Board to resolve the merits of any party's position; that is a function to be performed in the investigation itself, as provided by Ex Parte 328. Ex Parte 328 does not bar "departures" from the mileage allowance system, but it does provide that departures must be justified by the publishing carrier in an investigation.

**PETITION FOR CLARIFICATION AND, ALTERNATIVELY, FOR
RECONSIDERATION; AND FOR RESUMPTION
OF PROCESSING**

I. BACKGROUND

This proceeding involves a Protest and Petition for Investigation (the "Protest"), filed on June 26, 2001 under the provisions of Ex Parte 328 by NAFCA, including 11 of its members.¹ NAFCA is an unincorporated association of companies that manufacture, lease, or operate private rail cars, including tank cars.

The Protest asserts that certain rules and tariff provisions of BNSF applicable to privately-owned tank cars, that became effective on July 1, 2001 (the "July 1 Changes"), are subject to the mandatory investigation terms of Ex Parte 328. The challenged BNSF provisions represented a new regime for private tank cars which (1) required the operators of such cars to terminate their use of BNSF tracks for the holding of empty cars prior to loading and to furnish their own tracks, or face substantial daily storage charges; (2) replaced free diversions of empty tank cars with new charges for each bill of lading directing such a diversion; and (3) imposed storage charges on empty private tank cars awaiting repair or maintenance on railroad tracks. BNSF moved to dismiss the Protest, on the grounds that the July 1 Changes are legally acceptable and do not require investigation under Ex Parte 328. NAFCA replied.

¹ The National Industrial Transportation League ("NITL") and the American Chemistry Council ("ACC") have notified the Board they will participate in this proceeding in support of NAFCA. NITL and ACC have joined in this Petition.

On October 18, 2001, the Board issued a decision (the "October 18 Decision") addressing NAFCAs Protest and a series of related protests and petitions for investigation under Ex Parte 328.²

The October 18 Decision set aside the Protest and investigation requests of NAFCAs and other parties in the identified proceedings, instead holding all such proceedings in abeyance, including BNSF's Motion to Dismiss. The Board provided the following rationale for its action:

The 1986 [Ex Parte 328] Agreement [prescribed by the Board's predecessor] expressly provides for us to require the parties to reopen the negotiations [that led to the Ex Parte 328 prescription] when more than three interested parties file petitions at the agency. Here, petitions have been filed by numerous parties. A broad base of affected parties has raised concerns and BNSF and UP have responded to the challenges of their publications. We will resolve this matter, if it becomes necessary for us to do so. At this time, however, we believe that the parties are in a better position than we are to determine how best to resolve the issues raised in these proceedings. Therefore, we will hold these proceedings in abeyance and require the parties to engage in negotiations as provided for in the 1986 Agreement.

October 18, Decision, Slip op. at 3.

The October 18 Decision also required the parties to notify the Board on the progress of the required negotiations. Vice Chairman Burkes entered a Comment suggesting that the

² Docket No. 42061, Railway Progress Institute Committee on Tank Cars Petition for Investigation and Protest pursuant to Ex Parte 328 (challenging storage charges of BNSF applicable to private tank cars on railroad tracks awaiting placement for repair or maintenance); Docket No. 42062, The Chlorine Institute, Inc. -- Protest and Petition for Investigation -- Tariff Publications of Union Pacific Railroad Company (challenging storage charges of Union Pacific Railroad Company ("UP") applicable to empty private tank cars on railroad tracks awaiting placement for loading); Docket No. 42063, Railway Progress Institute Committee on Tank Cars Petition for Investigation and Protest Pursuant to Ex Parte 328 (challenging storage charges of UP applicable to private tank cars on railroad tracks awaiting placement for repair or maintenance); Docket No. 42064, E. I. DuPont de Nemours and Company -- Protest and Petition for Investigation (challenging storage charges of UP applicable to empty private tank cars on railroad tracks awaiting placement for loading).

renegotiation provisions of Ex Parte 328 are inapplicable to this case. Vice Chairman

Burkes stated:

The only "petitions" before the Board are those expressly under Section 8 of Ex Parte 328 seeking an investigation of rules changes alleged to be "departure tariffs." The "renegotiation" provisions of Section 9 referenced in this decision are thus inapplicable. Parties actually desiring renegotiation appear to me to be fully capable of saying so, and none has done that. In any event, even if a Section 9 renegotiation request has been made, the other provisions of Ex Parte 328 would remain in effect, so that we would still be obligated to investigate "departure tariffs" if petitioned to do so.

The ICC was faced with a similar dispute in 1988 when Buffalo & Pittsburgh Railroad Inc., established charges for the movement of empty cars to repair facilities. Protests were filed by three parties under Section 8 of Ex Parte 328. The ICC instituted an investigation to determine whether the departure provisions in Section 8 applied.... I believe the same approach could have been applied here.

Following the October 18 Decision, discussions took place between BNSF and NAFCFA and between BNSF and the Railway Progress Institute Committee on Tank Cars ("RPI"), the petitioner in Docket No. 42061. In addition, certain other private car operators who had notified the Board of their intent to participate in Docket No. 42060 conducted discussions with BNSF. On November 20, 2001, the Board issued a decision stating that the time for seeking clarification or reconsideration of the October 18 Decision would be postponed until 20 days after the conclusion of negotiations. Periodically, the parties filed progress reports and related comments with the Board. Certain parties who had evinced an intent to participate in this proceeding revised those intentions during the course of their discussions with BNSF. As recited in various decisions of the Board in this case, such parties have withdrawn from this proceeding in order to pursue private negotiations with BNSF.

As a result of the negotiations directed by the October 18 Decision, only one issue addressed in the Protest has been resolved. In the spring of 2002, as a result of an agreement reached between BNSF and RPI in Docket No. 42061, BNSF amended Items 1000 and 150 of BNSF Storage Book 6005 (the storage charge tariff) to exclude "[c]ars held for placement to private repair facilities" from the application of storage charges. Consequently, the holding of empty private cars on railroad tracks awaiting placement at private repair facilities has reverted to the rates and rules set forth in § 5 of Ex Parte 328, just as prior to July 1, 2001. For that reason, the provisions of paragraphs 16, 17, and 18 of the Protest will not be pursued at this time.

On May 20, 2002, NAFCA and certain other parties in Docket No. 42060 (and related proceedings) filed a letter with the Board reporting on the status of negotiations. The May 20 letter reported that negotiations in Docket No. 42060 had concluded without any agreement other than that reached between BNSF and RPI in Docket No. 42061. The May 20 letter advised the Board that BNSF had determined to make, and had made, certain tariff changes unilaterally, effective April 1, 2002, but had declined to make such changes retroactive to July 1, 2001, had declined to place a fixed term on the changes, and had reserved the right to make further storage or diversion charge changes through tariff publications.

The unilateral changes made by BNSF effective April 1, 2002 included revisions to two tariff provisions described in the Protest. BNSF amended Item 1700 of Storage Book 6005 to reflect new storage rates as shown in new Item 1800 of Storage Book 6005. As a result, effective April 1, 2002, some of the storage charges that had been set at \$25.00 per car per day on July 1, 2001, were reduced to either \$15.00 or \$10.00 per car per day, depending on the geographic location of the car holding point. Additionally, BNSF granted a

credit for one storage charge day to each empty private tank car from which BNSF receives a revenue line-haul movement. The facts recited in paragraph 10 of the Protest should be regarded as amended by BNSF's April 1, 2002 changes to Items 1700 and 1800 of Storage Book 6005, without completely reversing the allegations in those paragraphs.

The second relevant change made by BNSF on April 1, 2002 affects paragraphs 12-15 of the Protest, challenging BNSF's institution of a new bill of lading charge of \$150.00, subject to a maximum of \$450.00 per bill of lading, for any diversion request applicable to an empty tank car. On April 1, 2002, BNSF amended Item 1000 of Diversion Book 6200 to permit one free diversion per tank car (also without retroactivity to July 1, 2001 and subject to future change), and the Protest should be regarded as amended accordingly.

II. CLARIFICATION OR RECONSIDERATION OF THE OCTOBER 18 DECISION IS APPROPRIATE

Two related matters are at stake in this case. The first is whether parties, such as NAFLA, that protest and petition for investigation expressly under the provisions of Section 8 of Ex Parte 328, will find themselves forced by the Board into unrequested renegotiation of the national mileage allowance formula and system under Section 9 of Ex Parte 328. The second is whether the Board now will proceed with the investigation that has been requested in this case under Section 8 of Ex Parte 328.

A. Ex Parte 328 is a Negotiated and Prescribed Agreement and its Terms Should be Applied as Negotiated and Prescribed

BNSF, like other railroads, furnishes virtually no tank cars to its customers, and bulk liquid shipments on BNSF accordingly are made in private cars. When shippers furnish their own cars, they are entitled to receive an "allowance" from railroads that use the private

cars pursuant to the provisions of 49 U.S.C. § 10745. See, e.g., Terminal Charges at Pacific Coast Ports, 255 I.C.C. 673 (1943).

Before Ex Parte 328 was adopted, the determination of appropriate allowances was accomplished only through "protracted litigation" before the Interstate Commerce Commission ("ICC"), Ex Parte 328, supra, 3 I.C.C. 2d at 196, fn. 3. The present provisions of Ex Parte 328 are the product of two extended negotiations between railroads and tank car suppliers. The first of these negotiations consumed three years and concluded in a 1979 agreement, Investigation of Tank Car Allowance System, 367 I.C.C. 48, 49 (1982). In 1982, the railroads sought renegotiation of the 1979 agreement, and those renegotiations consumed another three years, Ex Parte 328, supra, 3 I.C.C. 2d at 197. As the ICC observed when adopting Ex Parte 328:

* * * The [1986] agreement is the product of three years of intense Commission-directed and supervised negotiations between the railroads and virtually all tank car owners and users. As the [shipper and railroad negotiators are] careful to point out, it is definitely a compromise in which virtually all parties acquiesce but no party prevailed unequally. ...

We have before us an agreement that is the result of a process of negotiations that we initiated and encouraged, that commands the almost unanimous support of rail, shipper and tank car interests, and that is a marked improvement over the 1979 agreement. In light of the virtually unanimous desire of the parties to address tank car allowances with a nationwide formula, and their belief that this formula will prove more workable than the one negotiated and approved in 1979, we will, consistent with our interest in encouraging private solutions, allow the agreement to take effect.

3 I.C.C. 2d at 200-201.

The Ex Parte 328 negotiations produced a detailed agreement containing, among other things, separate and distinct provisions for challenging a "tariff that departs in any

manner from the allowance system prescribed herein" (Section 8), and for reopened negotiations on the "national mileage allowance formula and system" (Section 9).

Section 8 begins with the statement that:

No tariff that departs *in any manner* from the allowance system described herein may be filed or will be permitted except as provided below. (Emphasis added)

3 I.C.C. 2d at 209. The Ex Parte 328 Decision explains that the intent of Section 8 is that "[a] departure tariff *will* be investigated ... at the request of any party on which the tariff's provisions have a direct impact" (emphasis in text). 3 I.C.C. 2d at 198.

Section 8(c) provides that "[n]o reply to protests ... or any justification statement or other explanation document, however denominated, may be filed by the railroad publishing a departure tariff. Such railroad will conclusively be presumed to have concurred in the request for investigation...." These provisions were explained by the ICC to mean that "while the railroads retain the right to depart from the national agreement, each departure, whatever the form, must be justified by the publishing railroad and *an investigation proceeding must be instituted if a petition for investigation (protest) is filed*" (emphasis supplied). 3 I.C.C. 2d at 198.³

Thus, where a railroad tariff purports to depart *in any manner* from the tank car allowance system, an investigation proceeding is mandatory upon protest under the negotiated Ex Parte 328 rules, regardless of whether the Board might be inclined to approve the "departure" after consideration on the merits. See Charges for Movement of Empty Cars, B&P RR Inc., 7 I.C.C. 2d 18 (1990) ("B&P RR"), where the ICC, in response to protests filed under Section 8 of Ex Parte 328,⁴ instituted an Ex Parte 328 investigation even though the ICC

³ Under Section 8(a) of the Agreement, a protest can also be filed by an association.

⁴ The cited decision does not refer to such protests, but protests under Section 8 were filed and are available for review in the case docket files.

ultimately found in the investigation proceeding that the protested tariff changes did not amount to "departure tariffs" within the meaning of Ex Parte 328.

Section 9 of Ex Parte 328 is distinctly different from Section 8. Section 9 provides that the Board "will reopen negotiations on the national mileage allowance formula and system ... whenever the [Board] receives petition(s) by any three or more interested parties." 3 I.C.C. 2d at 211. The Board has received no Section 9 petitions in this case. NAFCA, including its 11 members who are participating in their own names, protested and petitioned expressly and solely under Section 8(h). Neither they nor any other parties -- including railroad parties -- have made a Section 9 request for renegotiation.

The October 18 Decision appears to have relied on the provisions of Section 9 without saying so explicitly. The Decision contends that "[t]he 1986 agreement expressly provides for us to require the parties to reopen the negotiations when more than three interested parties file petitions at the agency." Only Section 9, and not Section 8, has a "three party" requirement. The Board, therefore, seemingly could have been referring only to Section 9 when it ordered the parties to commence negotiations. To the extent the Board regarded the Protest under Section 8 or any similar submission by other tank car users as constituting Section 9 renegotiation requests, the Board has committed material error within the meaning of 49 C.F.R. § 1115.3.

Inasmuch as the October 18 Decision directed renegotiation of Ex Parte 328 even though the only petitions before the Board were those under Section 8, the possibility arises that the Board may have interpreted Ex Parte 328 as allowing it to treat a protest and petition under Section 8 as a renegotiation petition under Section 9. Any such view, however,

would be an untenable interpretation and application of Ex Parte 328 and likewise would constitute material error within the meaning of 49 C.F.R. § 1115.3.

As observed by the ICC and noted above, Ex Parte 328 is a carefully crafted compromise. There is no reason to accord it an implied construction that is so clearly at odds with its plain language. The Agreement recognizes two distinct types of petitions: those for investigation under Section 8 and those for renegotiation under Section 9. Section 9 states that the Board "will reopen negotiations on the national mileage allowance formula and system adopted in this order whenever the [Board] receives petitions by three or more interested parties, without requiring that such parties demonstrate good cause for reconsideration." It is difficult, if not impossible, to read Section 9 without concluding that the "petitions" therein referenced are petitions for renegotiation and not for some other form of relief under Ex Parte 328. If renegotiation is triggered by *any* petition for relief under Ex Parte 328, then even such things as unopposed, joint petitions to alter some ministerial requirement (e.g., the frequency of update adjustments) would result in renegotiation. Section 9 plainly should not be brought into play automatically whenever relief is sought elsewhere under Ex Parte 328 by three or more persons.

Any interpretation of Ex Parte 328 which blurs the distinction between Section 8 and Section 9 petitions nullifies the Ex Parte 328 structure as negotiated. Further, any such construction will have a chilling effect on -- and may freeze out altogether -- protests and petitions for investigation by those who do not intend to, or are not prepared to, renegotiate the tank car allowance system in whole or substantial part. Renegotiation of the mileage allowance system prescribed in Ex Parte 328 is not a trifling matter, as indicated by the fact that the last two efforts at renegotiation each consumed three years, required intense involve-

ment on the part of both tank car suppliers and the railroad industry, and no doubt would cost those industries very large sums of money in personnel time, fees, and expenses were those negotiations to be conducted today.

Negotiations between parties prior to potential litigation generally is a welcome occurrence, and the institution of litigation most often is preceded by an effort at negotiations. NAFCA recognizes that the Board pursues a policy of preference for privately-negotiated solutions rather than those resulting from litigation, and appreciates the Board's interest in creating an opportunity for negotiations. Nevertheless, NAFCA believes it would be a serious mistake and misconstruction of Ex Parte 328 were the Board automatically to construe, as it appears to have done, any three or more protests and petitions for investigation under Section 8 as renegotiation petitions under Section 9. The Board, which frequently urges parties to reach private solutions and advocates negotiations in preference to regulatory litigation, should appreciate the need for it to honor negotiated solutions that the parties reach, such as Ex Parte 328. If the terms of a negotiated solution are ignored, there is no incentive for parties to expend substantial resources on negotiated solutions, as was done in Ex Parte 328.

NAFCA requests the Board to clarify that the October 18 Decision does not represent the Board's view that Protests under Section 8 will be regarded as Section 9 petitions. If the Board did, indeed, intend to render such an interpretation, then NAFCA asks the Board to reconsider and revise its position for the reasons set forth above.

**B. The Board Should Permit an Investigation to Proceed Under
Section 8 of Ex Parte 328**

Now that negotiations with BNSF regarding the Protest have concluded, there is no reason to continue to hold this proceeding in abeyance and the Board should permit the investigation process to commence.⁵

At this time, it is neither necessary nor appropriate for the Board to resolve on the merits those issues raised in the Protest. As noted previously, the procedure followed by the ICC in B&P RR to implement the Section 8 investigation provisions was to permit an investigation to go forward and to resolve the "departure" issues on the merits within the framework of the investigation. Under Section 8(e), BNSF can explain and attempt to justify its actions once a proceeding is commenced.

If those procedures are not followed, and if the Board attempts to determine at the time a Protest is filed and before a complete record is made whether it regards a railroad tariff action as appropriate or inappropriate under Ex Parte 328, the clearly evinced intent of the Ex Parte 328 negotiators, reflected unambiguously by the ICC in its Ex Parte 328 statement that there "will be" an investigation of any railroad tariff that "departs in any manner from the allowance system," will be rendered meaningless. That is not to say that departures from the tank car allowance system are barred. But, as the ICC noted in Ex Parte 328, "each departure, whatever the form, must be justified by the publishing railroad and an investigation proceeding must be instituted if a petition for investigation (protest) is filed." 3 I.C.C. 2d at 198. Thus, an investigation should be instituted to address in the first instance whether the tariff involved departs "in any manner from the allowance system." If it does so

⁵ NAFA is constrained to observe that not even the pendency of a Section 9 renegotiation request suspends the operation of the allowance system, including the provisions of Section 8. Section 9 expressly

depart, then the Board must determine whether the departure is justified under the standards of Section 8(e).

Although, as stated, NAFCA does not believe that it must prove the unlawfulness of BNSF's July 1 Changes, either as initially established or as since modified, in order to justify an investigation, NAFCA does not wish to leave the Board with the impression that NAFCA's Protest is simply a procedural ploy without substantive merit. The July 1 Changes do in fact "depart in some manner" from Ex Parte 328.

It should be recalled that NAFCA presently is challenging two areas of BNSF tariff changes applicable to private tank car use. These changes took effect on July 1, 2001 and reversed certain long-standing, deeply rooted precepts under which shippers made decisions to acquire tank cars.

The first such challenge was to the institution of storage charges if a shipper holds empty tank cars on railroad tracks awaiting loading beyond the limited free time or credits that BNSF offers. Some shippers may be able to avoid these charges if they are able to construct holding tracks on their own property; but at certain facilities it is impossible to do so. In those cases, payment to BNSF is the only alternative. Either form of expense -- storage charges or track construction -- adds substantially to the cost of operating private tank cars. If not compensated for through mileage allowances, these expenses plainly will reduce the value of the allowances that are paid under Ex Parte 328.

The second BNSF departure from established practices under Ex Parte 328 involves diversion charges applicable to the return of empty tank cars. Until the July 1 Changes, there were no such charges. The movement of empty tank cars was governed entirely by

provides that when renegotiation requests are received by the Board, "the provisions of this order will remain in effect until revised," with certain exceptions not here relevant.

Section 1 of Ex Parte 328, establishing a "mileage equalization formula". Under that formula, car owners must pay a stated fee per car mile for each empty mile incurred in excess of 106% of loaded miles. This excess empty mileage fee was negotiated as the sole cost to car owners for the repositioning or other handling of empty tank cars. The July 1 Changes add to the cost of empty tank car repositioning by imposing a fee each time car repositioning is altered through a diversion request. The diversion request fee thus adds to the car owner's cost of empty tank car movement over and above the excess mileage fee; in fact, even if that fee is not incurred at all. Under Ex Parte 328, the fact that the cost increase is imposed through a bill of lading charge rather than through an increased mileage charge is immaterial; "each departure" from the Ex Parte 328 agreement, "whatever the form", must be investigated.

Mileage allowances derived under Ex Parte 328 rely on a complicated formula that recognizes a number of elements that must be considered to arrive at an appropriate and lawful allowance. The formula is set forth in Ex Parte 328. As can there be seen, private car compensation is not merely a function of car costs and operating miles, but of many other factors which influence the costs of furnishing and operating private cars.

Section 3 of Ex Parte 328 requires inclusion of certain maintenance and operating costs in the allowance calculation to the extent agreed upon by the railroad and tank car negotiators. The cost of tracks on which to hold empty private tank cars prior to loading plainly is an "operating cost" associated with the furnishing and use of such cars, but that cost is not in the formula because the negotiators deliberately treated those costs as railroad costs. NAFCA is prepared to prove that, at the time Ex Parte 328 was negotiated, the cost of operating and maintaining holding tracks for empty private cars prior to loading was dis-

cussed and negotiated. As a result of those negotiations, the only storage track charges that were to be paid by car suppliers are those incurred for cars awaiting repair or maintenance, and that bargain is reflected in Section 5 of Ex Parte 328. Holding tracks for empty private tank cars awaiting loading and movement costs between those tracks and the loading point were determined to be railroad costs and were treated as such under Ex Parte 328. Accordingly, mileage allowances payable under Ex Parte 328 do not compensate tank car owners or users for the costs of maintaining or leasing holding tracks for empty cars awaiting loading. This means that the BNSF storage charges, or the costs that might be incurred by private car operators for obtaining private storage tracks to avoid payment of BNSF's storage charges, are not reimbursable as part of a mileage allowance payment under Ex Parte 328.

Whether or not the costs of maintaining private tank car holding track charges are recoverable under Ex Parte 328 is pivotal to whether BNSF's storage charge tariff provisions "depart in any manner" from Ex Parte 328. That fact has been made clear by two decisions of the ICC: B&P RR, *supra*, which held that "[t]ariffs charging for moving privately owned empty rail cars on their own wheels for ordinary repair or maintenance ... [are] not to be departure tariffs subject to automatic investigation under a standard of review" in Ex Parte 328, relying on Gen. Amer. Transp. Corp. v. Ind. Harbor Belt RR Co., 3 I.C.C. 2d 599 (1987) ("IHB-II").⁶ See 7 I.C.C. 2d at 18.

In B&P RR, the ICC concluded that railroad tariffs containing charges for moving empty private cars to or from repair facilities were not "departure tariffs" within the meaning of Ex Parte 328. The ICC reached that conclusion mainly in reliance on IHB-II, which

⁶ IHB-II was affirmed in General American Transp. Corp. v. ICC, 872 F.2d 1048 (DC Cir. 1989), *reh'g. denied*, 883 F.2d 1029 (1989), *cert. denied*, 110 S. Ct. 1112 (1990).

had authorized railroads to publish tariffs containing such charges, and because the costs of those empty moves could be recovered under Ex Parte 328. As the ICC stated:

We adopted [in IHB-II] a system permitting railroads to impose tariff charges for repair moves and a potential "pass back" to the car owners of such charges through the mileage allowance system. In this regard, we noted that § 3 of the 1986 allowance agreement now provided for the inclusion of such charges as an item of maintenance costs, that such charges were, in fact, already being included in allowance computation data derived from the study fleet, and that in the future, car owners would thus recoup through the mileage allowance a significant portion of the charges paid pursuant to IHB-II tariffs. In other words, empty repair moves, instead of being free to the owner (and the basis for a reduced allowance to *all* owners) would now be paid by each owner, who would be reimbursed (at least in part) through increased allowances. We acknowledge that under the new system, car owners might not recover all of their repair move charges, but held that a dollar-for-dollar equivalency was not required by the statute (emphasis in text).

7 I.C.C. 2d at 23. BNSF's storage charges can readily be distinguished from the empty movement charges in B&P RR because the storage charges, unlike the empty movement charges, are not recoverable through the mileage allowance formula. The car storage charges truly devalue the mileage allowance payment by requiring the supplier of the private car to incur an essential cost of private car ownership formerly and properly borne by BNSF.

Petitioners are aware of no ICC or STB decision which concludes that the transfer of an essential private tank car operating or maintenance cost from railroad to car supplier, without compensation, fails to alter, or cannot alter as a matter of law, tank car allowances paid under Ex Parte 328. The Board accordingly should not conclude in advance of an in-

vestigation that BNSF's tariff changes, imposing on tank car suppliers the costs of tracks for holding empty cars prior to loading, do not "depart in some manner" from Ex Parte 328.

A similar conclusion is warranted with respect to the BNSF diversion charges. They, too, add to the costs of operating private tank cars and, in particular, to the costs for repositioning empty cars. Section 1 of Ex Parte 328 was intended as a comprehensive resolution of empty car movement charges. BNSF is simply attempting to obtain additional compensation for handling empty private cars in the same manner that those cars have always been handled, and should not be allowed to avoid scrutiny under Ex Parte 328 simply because it has labeled its new source of revenue as a "diversion charge."

III. THIS INVESTIGATION SHOULD PROCEED ON A CONSOLIDATED RECORD WITH DOCKET NO. 42060 (SUB-NO. 1)

This proceeding and Docket No. 42060 (Sub-No. 1) (the "Sub-No. 1 Proceeding") are closely related. The Sub-No. 1 Proceeding, although not confined to tank car issues, questions many of the same BNSF practices as are challenged in Docket No. 42060, albeit on different legal grounds. Nevertheless, there is a clear overlap and congruity between the two cases.

The BNSF storage charge regime challenged in Docket No. 42060 applies to tank cars.⁷ Privately-operated covered hopper cars and gondola cars (which, along with tank cars, represent the bulk of the private car fleet) were made subject to BNSF storage charges effective July 1, 2001, in most cases by virtue of the same BNSF tariff provisions that applied the storage charges for tank cars.⁸ For purposes of this discussion, both the Docket

⁷ The Docket No. 42060 diversion charge issues have application just to private tank cars.

⁸ Private covered hopper cars handling grain or grain products on BNSF have also been made subject to the July 1, 2001 storage charge regime, but under different tariff provisions than are applicable to other private cars. Whereas the storage charge regime instituted by BNSF regarding all private cars (tank

No. 42060 and the Sub-No. 1 Proceeding tariff provisions will be referred to jointly as "storage charges", unless otherwise indicated.

The two cases are closely intertwined. Even though the complaint in the Sub-No. 1 Proceeding asserts violations of various statutory provisions, while Docket No. 42060 is an investigation under the terms of Ex Parte 328, each case is bound to involve the consideration of a number of common critical facts. Together, the two cases are likely to influence, if not determine, the nature of the obligations of both private car suppliers and railroads regarding a significant aspect of car supply -- holding tracks for empty cars prior to loading.

The supply and operation of private cars, like the supply and operation of railroad-owned cars, is not a simple undertaking. The nature and extent of the fleet depends on a number of considerations, including market demand, loading and unloading practices, and carrier performance, most especially cycle time and reliability.

In many cases, the empty private tank cars involved in Docket No. 42060 and the other types of private cars involved in the Sub-No. 1 Proceeding are loaded at the same facilities and share the same holding track areas prior to loading. A single facility that processes petrochemicals may generate shipments in both tank cars and covered hopper cars, as do facilities that process certain agricultural commodities. At such facilities, decisions regarding empty private car logistics, including holding track capacity, affect all types of equipment awaiting loading, regardless of type or ownership.

cars, covered hoppers and gondolas) other than those handling grain or grain products was established through BNSF Storage Book 6005, those storage charge provisions established for grain and grain products cars are contained in BNSF Demurrage Book 6004, and are called demurrage charges. See Sub-No. 1 Proceeding complaint, paragraph 8. The challenged demurrage charges have somewhat different free time provisions than do the other holding charges.) Since the complaint in the Sub-No. 1 Proceeding was filed, BNSF has reduced, but not eliminated, the demurrage charges made applicable on July 1, 2001 for holding private empty grain and grain product covered hopper cars on railroad tracks prior to loading. BNSF has indicated that it regards these demurrage charges as subject to continuing fluctuations.

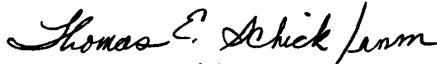
Although there has not yet been any discovery in either case, NAFCA ventures to say that a single set of BNSF policy and operating objectives are driving, at least in part, the July 1, 2001 changes made by BNSF toward the holding of all types of empty private cars prior to loading. NAFCA intends to pursue the basis for these BNSF policies and objectives through discovery. It would be wasteful and inefficient to pursue discovery separately in the two cases when there are likely to be common factual underpinnings in both proceedings. Consideration of both proceedings on a common record will conserve the resources of NAFCA and the Board. NAFCA can see no reason why a consolidated handling of the two cases would impose any undue burden on BNSF.

The challenged BNSF storage charge regime for tank cars may or may not end up presenting legal issues in common with the storage charge regime for other types of equipment. If it is determined that the BNSF storage charges applicable to tank cars are impermissible under Ex Parte 328, the Sub-No. 1 Proceeding will not have to consider tank cars issues. On the other hand, if the Board concludes that the tank car practices challenged in this case are not subject to Ex Parte No. 328, those practices would be reviewable under the complaint in the Sub-No. 1 Proceeding. Absent consolidation, processing of the Sub-No. 1 Proceeding therefore may be further delayed for an extended period of time.

As asserted in a separate filing being made contemporaneously in the Sub-No. 1 Proceeding, continued delay in the processing of that case is unwarranted, prejudicial to the interests of the complainants, and the source of confusion among shippers who are not certain of their holding track rights or obligations. Moreover, as previously, indicated, it would be in the interest of procedural efficiency for both cases to proceed in a manner which al-

lows the use of discovery in common and consideration of carrier objectives in common to both cases.

For the foregoing reasons, petitioners urge the Board to permit the investigation in Docket No. 42060 to go forward, and to do so on a common record with the Sub-No. 1 Proceeding. Petitioners ask the Board to establish a procedural schedule (1) allowing 15 days for the parties to attempt to negotiate and to file, whether agreed to or not, a proposed protective order, (2) 15 days following the entry of a protective order for the service of written discovery requests, (3) 180 days from the entry of a protective order for the completion of discovery, including depositions, and (4) the filing of evidence and argument thereafter on a schedule to be mutually agreed by the parties, such schedule to be proposed to the Board within 165 days from the entry of a protective order or, in the absence of agreement, to be proposed separately by the parties by the same date.



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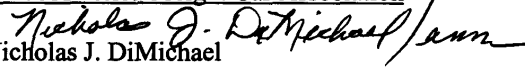
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has, this 9th day of October 2002, been served on all parties of record, by first-class mail, postage prepaid.



Andrew P. Goldstein