

206590

LAW OFFICES

WICK, STREIFF, MEYER, O'BOYLE & SZELIGO, P.C.

HENRY M. WICK, JR.
CHARLES J. STREIFF
CARL F. MEYER
DAVID M. O'BOYLE
VINCENT P. SZELIGO
LUCILLE N. WICK
RICHARD T. SCHADLE

1450 TWO CHATHAM CENTER
PITTSBURGH, PA 15219-3427
(412) 765-1600
FACSIMILE
(412) 261-3783
E-MAIL
wsmos@sgl.net

DUFF OFFICE CENTER, SUITE 203
10 DUFF ROAD
PITTSBURGH, PA 15235-3206
(412) 241-7227

November 11, 2002

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

UPS NEXT DAY



Re: North America Freight Car Association - Protest and
Petition for Investigation
Docket No. 42060

ENTERED
Office of Proceedings
NOV 12 2002

Dear Secretary Williams:

Part of
Public Record

On behalf of the U.S. Clay Producers Traffic Association, Inc. ("Clay Producers"), we write to supplement the comments set forth in Notice of Settlement and Withdrawal of Petition to Intervene by U.S. Clay Producers Traffic Association, filed May 18, 2002 concurrently filed in the above captioned proceeding together with a Joint Statement of the U.S. Clay Producers Traffic Association and the Burlington Northern and Santa Fe Railway Company.

Since Clay Producers Members do not conduct substantial shipping activity in the territory served by BNSF, they preferred a negotiated solution to their objections over BNSF's controversial publication of storage and diversion charges on private tank cars. Clay Producers believe that current congestion is most likely related to increased car fleets brought about in direct response to service disruptions caused by recent railroad consolidations and the needs of shippers to assure an adequate supply of cars for uninterrupted shipping activity. Any effort to compel industry-wide renegotiation over the intended scope of the 1986 Mileage Agreement to address this limited problem would be overkill.

The Board's October 18, 2001 decision required parties to negotiate for a period and, if negotiations failed to resolve the

WICK, STREIFF, MEYER, O'BOYLE & SZELIGO, P.C.

The Honorable Vernon A. Williams
November 11, 2002
Page -2-

dispute, a limited reopening of Ex Parte No. 328 for industry-wide negotiations solely addressing the storage and diversion issue would be invited. Clay Producers believe the BNSF storage charges are a matter of limited scope and do not rise to the level of importance which would call for an industry-wide negotiation of the Ex Parte No. 328 Agreement. Clay Producers urge the Board to reconsider use of the procedure outlined in the October 18th Order, but to delay formal action on such reconsideration until such time as the Senate has voted on the nomination of Roger Nober as the Board's third Commissioner. Since this matter could result in years of Board supervised negotiations, it is appropriate that the Board wait to allow Mr. Nober to come on board.

Clay Producers support the position taken by the North America Freight Car Association, the National Industrial Transportation League and the American Chemistry Council that storage and diversion charges published by BNSF constitute "Departure Tariffs" and as such must be processed under the procedures set forth in Section 8 of the Agreement appended to the 1986 order in Ex Parte No. 328. Clay Producers believe that the determinative question on whether storage and diversion charges are permissible will turn on the question of whether the specific private cars at the specific shipping location are presently required to provide an adequate supply of cars for uninterrupted shipping activity or, on the other hand, are being stored for a long period of time because car supply is in excess of demand. This presents a fact intense, location-by-location question, which is more appropriately handled through individual negotiation or individual litigation. An industry-wide proceeding does not appear to be the most efficient manner of resolving the dispute.

Since three parties have not petitioned the Board to reopen Ex Parte No. 328, the industry-wide renegotiations called for in the Board's October 18 order are not appropriate.

Very truly yours,

WICK, STREIFF, MEYER,
O'BOYLE & SZELIGO, P.C.


Vincent P. Szeligo

cc: All Parties of Record

vpe8518.wpd