Attachment 2

Part 9 of 9

Minnesota Power’s response to DOC discovery related to rail delivery issues.

The Bemidji Pioneer

Commentary: Time to put railroads under anti-trust

By Lori Swanson, Minnesota Attorney General
January 25, 2008

A little over 100 years ago, some famous names — J.P. Morgan, John D. Rockefeller and Minnesota's James J. Hill — got together and formed the Northern Securities Co., a trust to control the Northern Pacific Railway, the Great Northern Railway, the Chicago, Burlington and Quincy Railroad, and other lines.

The nation's rail system west of Chicago became a monopoly, and there was great public outcry. President Teddy Roosevelt took umbrage, filed a law-suit against the trust and the U.S. Supreme Court in 1904 held that the Sherman Anti-trust Act forbid such monopolistic control. The Northern Securities Co. was dissolved.

Out of this, President Roosevelt earned the reputation as a "trustbuster." Unfortunately, we seem to have forgotten why he was one.

The railroads then became regulated by the federal Interstate Commerce Commission. Because of this high degree of regulation, the railroads got an antitrust exemption from Congress. In 1980, however, Congress deregulated most railroad activities, and the ICC was eventually replaced by the federal Surface Transportation Board, or STB.

Today's STB is little more than a revolving door whose members come from the railroads or want a job with them afterwards. As a result, since 1980, 40 major railways have consolidated down to seven, with just four controlling 90 percent of the rail traffic.

Government studies point out that rail costs have skyrocketed, with customers paying triple the cost of shipping by rail due to the lack of competition or effective regulation.

Look at the experience of the city of Lafayette, La., a municipality that uses coal for its power plant. The city's power plant gets its coal from the Powder River Basin in Wyoming, which is 1,500 miles away. Both the BNSF and the Union Pacific railways haul coal out of the Powder River Basin. Both railways can move the coal in competition with one another for 1,480 of the 1,500 miles between Wyoming and Lafayette.

The last 20 miles of track into Lafayette, however, are exclusively owned by Union Pacific. With the assent of the Surface Transportation Board, the Union Pacific will not provide a quote for the 20 mile short line. In other words, because of the 20-mile "bottleneck," Lafayette is a captive of the Union Pacific for all 1,500 miles of track from Louisiana to Wyoming. This means higher costs, less service and little efficiency.

Consumer Federation of America

June 12, 2008

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
H-232 Capitol Building
Washington, DC 20515

The Honorable Steny Hoyer
Majority Leader
U.S. House of Representatives
H-107 Capitol Building
Washington, DC 20515

The Honorable John Boehner
Minority Leader
U.S. House of Representatives
H-204 Capitol Building
Washington, DC 20515

Dear Speaker Pelosi, Majority Leader Hoyer and Minority Leader Boehner:

We are writing in support of H.R. 1650, the Railroad Antitrust Enforcement Act. This legislation will correct a public policy oversight that currently allows the railroad industry to operate outside the antitrust laws of the nation, and we ask that you schedule floor time for its consideration.

In 1980, the Congress deregulated the competitive activities of the nation's railroads and made it easier for the nation's railroads to downsize their systems and merge. Since then, the forty major railroads in existence in 1980 have consolidated into four major railroad systems that move over 90% of the nation's freight. Today, few rail customers have access to more than one rail system and the federal agency that is charged with the responsibility of constraining railroad market power has chosen to exercise its responsibilities in a very passive manner.

According to an October 2006 report of the Government Accountability Office, the national railroad system suffers from a lack of competition and an increasing number of rail customers are being forced to pay prices that are three times and more the cost to the railroad of moving their freight. Some of these exorbitant rates are being paid by electric utilities to move coal to their generating facilities. These inflated prices, which many utilities are powerless to restrain, are being passed along to electric ratepayers in the form of higher electric bills. These higher electricity bills and inflated rail transportation costs of other commodities and finished products are driving up the costs consumers pay for a wide range of goods produced in our nation. Meanwhile, the railroads are enjoying a golden age of profitability at the expense of their customers, American consumers and the nation's economy.

We believe very strongly that the railroad industry, like other private sector American industries, should be subject to the nation's antitrust laws. Investor owned electric utility companies are subject to the nation's antitrust laws, even though all are subject to wholesale rate regulation by the Federal Energy Regulatory Commission and most are subject to retail rate regulation by state public service commissions. We see no good public policy reason that the railroads should continue to enjoy immunity from the nation's antitrust laws.

We ask that you support House consideration and passage of H.R. 1650 so that rail customers may see relief during this Congress. Thank you for your attention to this important matter.

Sincerely,

Marsha H. Smith
Commissioner, Idaho Public Utilities Commission
President, National Association of Regulatory Utility Commissioners

David Springe
Consumer Counsel, Citizens Utility Ratepayer Board of Kansas
President, National Association of State Utility Consumer Advocates

Stephen Brobeck
Executive Director, Consumer Federation of America

The same thing occurs in Minnesota with Blandin, a paper mill in Grand Rapids. While there are multiple lines operating out of Duluth, there is only one "bottleneck" line between Grand Rapids and Duluth.

Blandin is owned by UPM, a company based in Finland. UPM can produce paper at a mill in Finland, ship it across the Atlantic Ocean, then deliver it by competitive rail to customers in the Southeastern United States — a distance of 5,000 miles — for about the same cost as it can ship it by a monopoly rail carrier to the same customers — a distance of 1,400 miles.

Electrical cooperatives get the same bottleneck experience on the shipment of coal from the Powder River Basin in Wyoming. Similarly, rural grain elevators are forced to consolidate to regional sites because the monopoly railway controls the stops, causing farmers who rail their grain to face lower margins.

The additional costs to the consumer are reflected in higher electricity bills, higher costs of consumer goods, higher cost of food and lower margins for manufacturers.

Unlike most other industries, today's railroads continue to be exempt from the antitrust laws, despite the lack of competition or effective regulation. Because of the antitrust exemption, the short line railroads and the major railroads enter into "paper barrier" agreements, which essentially pass control of the railways to the bottleneck operators.

These paper agreements essentially accomplish the same objectives as the Northern Securities Co. tried to accomplish 100 years ago: the elimination of competition and control over the rail system. This control was bad 100 years ago. It is bad today.

A bill introduced in Congress — the Railroad Antitrust Enforcement Act — would remove the antitrust exemption for the railroads, and hopefully begin a process where our nation's railways will become more responsive to the needs of our economy.

The Railroad Antitrust Enforcement Act is co-sponsored by a number of Minnesota public officials, including Reps. Collin Peterson and Tim Walz, and Sen. Norm Coleman.

Another bill — the Railroad Competition and Service Improvement Act — co-sponsored by Reps. Jim Oberstar, Jim Ramstad, Betty McCollum, Walz and Sen. Amy Klobuchar, attempts to breathe new life into the regulatory authority of the STB.

Rail customers who lack access to competitive rail transportation face higher rates and inadequate service. Ultimately, the price is passed on to all of us as consumers. The Railroad Antitrust Enforcement Act merits our support, because those who fail to remember the lessons of history are bound to repeat its mistakes.

Lori Swanson, DFL, is Minnesota's attorney general.

STATE ATTORNEYS GENERAL
A Communication from the Chief Legal Officers of the States of Montana, Ohio, South Dakota, Arizona, Arkansas, California, Connecticut, Delaware, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, and Utah

March 17, 2009

Via Facsimile

Honorable Harry Reid
Majority Leader
United States Senate
Washington, DC 20510

Honorable Mitch McConnell
Minority Leader
United States Senate
Washington, DC 20510

Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, DC 20515

Honorable John Boehner
Minority Leader, House of Representatives
Washington, DC 20515

RE: Support for the Railroad Antitrust Enforcement Act of 2009 (S. 146 and H.R. 233)

We, the undersigned Attorneys General, are writing to urge you to help consumers by eliminating the exemption from the antitrust laws currently enjoyed by the railroad industry. We urge you to enact the Railroad Antitrust Enforcement Act of 2009 (S. 146 and H.R. 233), which has been approved by the Senate Judiciary Committee and is pending before the House Judiciary and Transportation and Infrastructure Committees.

The antitrust laws have helped provide consumers with lower costs, a greater variety of products and services and robust innovation. Unfortunately, the railroad industry has not benefited from the application of these laws because of antitrust exemptions created in an era when railroads were subject to extensive regulation. That regulatory regime has been dismantled by the Railroad Revitalization and Regulatory Reform Act[1] and the Staggers Act[2] and the railroad industry's exemption from the antitrust laws is no longer necessary or desirable.

---

[1] Pub.L. No. 94–210 (1976).
[2] Pub.L. No. 96–448 (1980)

Currently, transactions approved by the Surface Transportation Board (STB) under 49 U.S.C. §11321–11328, including mergers, acquisitions and consolidations, pooling arrangements, some leases, trackage rights and agreements to divide traffic, are exempt from antitrust challenge by the federal agencies, state Attorneys General, or private parties. Some rate- and charge-related agreements approved by the STB under 49 U.S.C. § 10706 are also exempt. With respect to mergers and acquisitions, the Federal Trade Commission is precluded by statute from reviewing rail mergers,[3] and the Department of Justice is only able to offer its views of a transaction to the STB, which is not bound to follow the recommendation. In reviewing mergers, the STB applies a "public interest" standard which is not focused on competitive issues.[4]

The National Association of Attorneys General (NAAG) long has disfavored antitrust exemptions for specific industries. A unanimous 2005 Resolution adopted by NAAG notes that NAAG has "consistently opposed legislation that weakens antitrust standards for specific industries because there is no evidence that any such exemptions would either promote competition or serve the public interest." The resolution states that NAAG, "opposes establishing weakened antitrust standards for specific industries as such weakened standards would affirmatively harm consumers, and as there has been no demonstration that such weakened standards would in any way benefit competition."

The antitrust exemption currently enjoyed by the railroad industry does not seem to have benefited competition. Since 1980, the major freight railroad industry has consolidated from over 40 Class I providers to seven Class I's, four of which control over 90% of the nation's rail traffic. In this concentrated market, shippers have reported that they are subjected to supra-competitive rates on monopoly routes. In other contexts, shippers report that the rail carriers enter into contracts with operators of connecting short line tracks that unduly punish those short lines for doing business with competing carriers. Still others have cited the rail carriers' refusals to segment long-haul transportation quotes so as to permit interconnecting rail carriers to compete on some portions. All of these practices, approved by the STB, and exempt from antitrust challenge, may be anticompetitive.

The Railroad Antitrust Enforcement Act of 2009 seeks to remedy this anticompetitive situation by prospectively authorizing the federal agencies and state Attorneys General to challenge anticompetitive business practices and mergers and acquisitions in the railroad industry. Enactment of the Railroad Antitrust Enforcement Act is an important step toward the goals of improving the financial viability and efficiency of our nation's rail system, protecting shippers from anticompetitive practices, and ensuring that consumers benefit from lower prices and more innovation.

---

[3] 15 U.S.C. §21(a)

[4] Union Pac. Corp., 1 S.T.B. at 86–88.

We respectfully urge you and your colleagues to report and pass this important legislation as soon as possible.

Sincerely,

Steve Bullock
Attorney General of Montana

Richard Cordray
Attorney General of Ohio

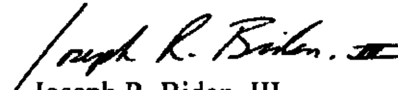
Larry Long
Attorney General of South Dakota

Terry Goddard
Attorney General of Arizona

Dustin McDaniel
Attorney General of Arkansas

Edmund G. Brown, Jr.
Attorney General of California

Richard Blumenthal
Attorney General of Connecticut



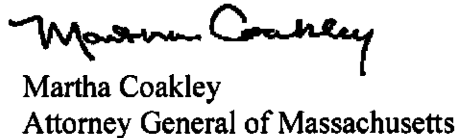
Joseph R. Biden, III
Attorney General of Delaware

Tom Miller
Attorney General of Iowa

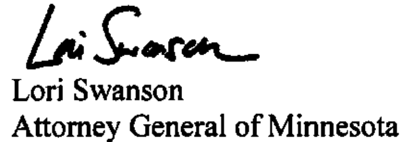
Jack Conway
Attorney General of Kentucky

Janet T. Mills
Attorney General of Maine

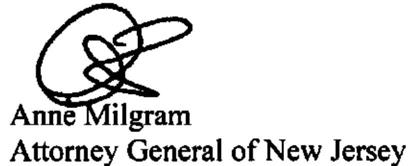
Douglas F. Gansler
Attorney General of Maryland



Martha Coakley
Attorney General of Massachusetts

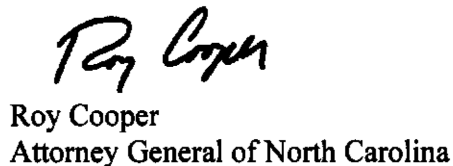


Lori Swanson
Attorney General of Minnesota

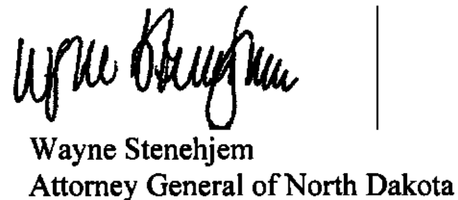


Anne Milgram
Attorney General of New Jersey

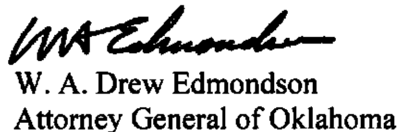
Gary K. King
Attorney General of New Mexico



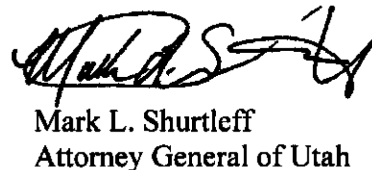
Roy Cooper
Attorney General of North Carolina



Wayne Stenehjem
Attorney General of North Dakota



W. A. Drew Edmondson
Attorney General of Oklahoma



Mark L. Shurtleff
Attorney General of Utah

cc:

Honorable Patrick Leahy
Chairman
Senate Committee on the Judiciary

Honorable Arlen Specter
Ranking Member
Senate Committee on the Judiciary

Honorable John Conyers
Chairman
House Committee on the Judiciary

Honorable Lamar Smith
Ranking Member
House Committee on the Judiciary

Honorable James Oberstar
Chairman
House Committee on Transportation and Infrastructure

Honorable John L. Mica
Ranking Member
House Committee on Transportation and Infrastructure

minnesota power / 30 west superior street / duluth, minnesota 55802-2093 / 218-723-3958 / www.mnpower.com

David J. McMillan
Executive Vice President
Fax 218-723-3989
Cell 218-590-4287
E-mail dmcmillan@allete.com

July 21, 2011

The Honorable Al Franken
United States Senate
Washington, D.C. 20510

Dear Senator Franken,

On behalf of ALLETE and Minnesota Power I want to thank you for your recent appearance and testimony at the Surface Transportation Board's (STB) public hearing on the current state of competition in the railroad industry ("Competition in the Railroad Industry," Docket No. EP 705, June 22-23).

Your comments were spot-on. Specifically, your observation that businesses large and small are being forced to pay more to ship their goods because of lack of competition in the railroad industry is accurate.

In most business sectors increased competition would result in better prices and services. In today's rail industry that is not always the case. Because the rail industry is now so concentrated, rail customers who have access to two rail carriers technically have "competition" but are not necessarily seeing the type of benefits that head-to-head competition should produce. And because these types of customers are not "captive", even the STB's admittedly flawed regulatory authority is not available in these cases. This lack of competition in what should be a competitive situation is clearly a troubling development.

Minnesota Power's coal-fired electric generating plants are "captive" to one railroad. Our iron mining and forest products customers also are captive when moving much of their raw materials in and their finished products out to markets. So collectively we are all dependent on the STBs regulatory process to assure that our rail rates and service are reasonable. As you well know, the STB's process to seek regulatory relief is at best byzantine and the track record of customers achieving meaningful regulatory relief at the STB is not stellar.

We appreciate your call for greater STB oversight and a competitive rail industry that provides affordable rates and reliable service for America's rail customers. Your support of legislation such as Senator Kohl's antitrust measure (S.49) is a direct demonstration of this commitment and we thank you for your leadership in this area.

Sincerely,

Dave

David J. McMillan

News Releases

Klobuchar, Vitter Introduce Legislation to Address Captive Shipping and Promote Fairness and Competition in the Railroad Industry

Bill would require the railroad industry to comply with the same antitrust laws as other industries, helping to ensure competitive prices that keep costs down for shippers and consumers

March 21, 2013

WASHINGTON – U.S. Senators Amy Klobuchar (D-MN) and David Vitter (R-LA) today introduced bipartisan legislation to address so-called "captive shipping" and help promote fairness and competition in the railroad industry. The Railroad Antitrust Enforcement Act removes the railroad industry's obsolete exemption from the antitrust laws. Doing so will require the railroad industry play by the same antitrust rules as other industries, resulting in more competitive pricing that helps keep costs down for shippers and customers. Captive shipping has been a concern in rural communities across the country, where many businesses and agricultural producers only have access to one rail company to ship their goods to market. Klobuchar chairs the Judiciary Antitrust Subcommittee.

"It's simply unfair that companies like Blandin Paper Company in Minnesota pay higher prices because railroads enjoy an exemption from the antitrust laws," said Klobuchar. **"This legislation makes commonsense reforms that will require the railroad industry play by the same antitrust rules as other industries and will help keep costs down for businesses, farmers and consumers."**

"Many of Louisiana's unique businesses rely on efficient shipping using railroads, and our bill will ensure they are not punished with higher rates, especially those in more rural areas or areas suffering from higher rail captivity," Vitter said.

Currently only four Class I railroads provide more than 90 percent of the nation's rail transportation, resulting in constant increases in rail rates for companies that rely on freight railroads to get their goods to market. These increased rail transportation costs are ultimately passed on to consumers and lead to higher prices. A recent study by the Consumer Federation of America estimated that rail rates are $3 billion higher for captive shippers than they would be if the market was competitive. The excess charges can cost consumers as much as $100 per year per household.

The Railroad Antitrust Enforcement Act would eliminate the railroad antitrust exemptions that allow freight railroad companies to take advantage of their market dominance, resulting in higher shipping rates for companies like Blandin Paper Company in Minnesota that rely on freight railroad to ship their products. Blandin Paper Company has a plant in both Grand Rapids and in Finland, and pays less to ship paper from their Finland plant to customers in Georgia, Pennsylvania, and South Carolina than it pays to ship to those same three locations from the local mill in Grand Rapids along a captive rail line.

Klobuchar chairs the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer rights and has been a leader in pushing for policies that boost competition and protect businesses and consumer from anti-competitive behavior. Last year, she authored a provision that was included in the 2012 Farm Bill to authorize a joint study by the U.S. Departments of Agriculture and Transportation to examine rural transportation issues, including captive shipping issues, to help farmers and ranchers move their products more quickly and efficiently. The provision would require the study to be updated every three years and directs the Secretary of Agriculture to report his recommendations for improvements in rural transportation policy to the Senate and House Agriculture Committees.

###

Alan R. Hodnik
Chairman, President and
Chief Executive Officer

March 29, 2013

The Honorable Amy Klobuchar
United States Senate
Washington D.C. 20510

Re: Railroad Antitrust Enforcement Act of 2013

Dear Senator Klobuchar:

Thank you very much for introducing the Railroad Antitrust Enforcement Act of 2013. Keeping the cost of rail service as low as possible, while still maintaining a strong and robust railroad industry, is absolutely necessary if Northeastern Minnesota is going to survive and thrive.

Our nation's economy is built on the premise of competition where robust markets exist, or regulated monopolies as a proxy for competition where they do not. Railroads need to play by the same rules and in a manner consistent with every other competitive business market in the United States.

As you well know, today the railroad industry operates much like an unregulated monopoly. They are exempt from a number of our nation's antitrust laws, yet there are only four major carriers serving rail customers across the United States. The Railroad Antitrust Enforcement Act is intended to assure that the market the railroads operate in is more competitive by deterring anticompetitive conduct in a concentrated industry.

The railroad business market regulatory model, as overseen by the Surface Transportation Board (STB), is premised on competition. Yet, even where competition is possible, robust rail-to-rail competition is largely nonexistent and the STB's regulatory process, from a rail customer's perspective, is all but broken. There remains an essential need for improvements to the existing complementary backstop regulatory protections for captive customers seeking relief against unreasonable rates and practices even if the antitrust law is reformed.

I don't need to tell you that a cost-competitive railroad market, along with meaningful regulatory protections for captive shippers, is extremely important to Northeastern Minnesota's economy. The health and welfare of our region's energy, forest products and mining sectors depends on it.

I'm happy to assist you in any manner to help you achieve your goal of passing this bill for the good of Minnesota and our nation. Please feel free to contact me, Dave McMillan or Bill Libro in our Washington office if we can be of any service.

Sincerely,

Alan R. Hodnik
Chairman, President & CEO

c: Dave McMillan

30 West Superior Street | Duluth, Minnesota 55802-2093 | 218.355.3642 | Fax 218.723.3960 | ahodnik@allete.com

Alan R. Hodnik
Chairman, President and
Chief Executive Officer

March 29, 2013

The Honorable Al Franken
United States Senate
Washington, D.C. 20510

Re: Railroad Antitrust Enforcement Act of 2013

Dear Senator Franken:

Thank you very much for cosponsoring the Railroad Antitrust Enforcement Act of 2013. Keeping the cost of rail service as low as possible, while still maintaining a strong and robust railroad industry, is absolutely necessary if Northeastern Minnesota is going to survive and thrive.

Our nation's economy is built on the premise of competition where robust markets exist, or regulated monopolies as a proxy for competition where they do not. Railroads need to play by the same rules and in a manner consistent with every other competitive business market in the United States.

As you well know, today the railroad industry operates much like an unregulated monopoly. They are exempt from a number of our nation's antitrust laws, yet there are only four major carriers serving rail customers across the United States. The Railroad Antitrust Enforcement Act is intended to assure that the market the railroads operate in is more competitive by deterring anticompetitive conduct in a concentrated industry.

The railroad business market, as overseen by the Surface Transportation Board (STB), is premised on competition. Yet, even where competition is possible robust rail-to-rail competition is largely nonexistent and the STB's regulatory process, from a rail customer's perspective, is all but broken. There remains an essential need for improvements to the existing complementary backstop regulatory protections for captive customers seeking relief against unreasonable rates and practices even if the antitrust law is reformed.

I don't need to tell you that a cost-competitive railroad market, along with meaningful regulatory protections for captive shippers, is extremely important to Northeastern Minnesota's economy. The health and welfare of our region's energy, forest products and mining sectors depends on it.

I'm happy to assist you in any manner to help you achieve your goal of passing this bill for the good of Minnesota and our nation. Please feel free to contact me, Dave McMillan or Bill Libro in our Washington office if we can be of any service.

Sincerely,

Alan R. Hodnik
Chairman, President & CEO

c: Dave McMillan

Alan R. Hodnik
Chairman, President and
Chief Executive Officer

March 29, 2013

The Honorable Heidi Heitkamp
United States Senate
Washington, D.C. 20510

Re: Railroad Antitrust Enforcement Act of 2013

Dear Senator Heitkamp:

I am writing to encourage you to cosponsor the Railroad Antitrust Enforcement Act of 2013 that was introduced by Senators Klobuchar and Vitter. Keeping the cost of rail service as low as possible, while still maintaining a strong and robust railroad industry, is absolutely necessary for North Dakota, our region and our nation.

Our nation's economy is built on the premise of competition where robust markets exist, or regulated monopolies as a proxy for competition where they do not. Railroads need to play by the same rules and in a manner consistent with every other competitive business market in the United States.

Today the railroad industry operates much like an unregulated monopoly. They are exempt from a number of our nation's antitrust laws, yet there are only four major carriers serving rail customers across the United States. The Railroad Antitrust Enforcement Act is intended to assure that the market the railroads operate in is more competitive by deterring anticompetitive conduct in a concentrated industry.

The railroad business market, as overseen by the Surface Transportation Board (STB), is premised on competition. Yet, even where competition is possible robust rail-to-rail competition is largely nonexistent and the STB's regulatory process, from a rail customer's perspective, is all but broken. There remains an essential need for improvements to the existing complementary backstop regulatory protections for captive customers seeking relief against unreasonable rates and practices even if the antitrust law is reformed.

The health and welfare of our region's energy and agriculture sectors depends on a cost-competitive railroad market along with meaningful regulatory protections for captive rail customers.

Please feel free to contact me, Dave McMillan or Bill Libro in our Washington office if we can be of any service.

Sincerely,

Alan R. Hodnik
Chairman, President & CEO

c: Dave McMillan

30 West Superior Street | Duluth, Minnesota 55802-2093 | 218.355.3642 | Fax 218.723.3960 | ahodnik@allete.com

Alan R. Hodnik
Chairman, President and
Chief Executive Officer

March 29, 2013

The Honorable Ron Johnson
United States Senate
Washington, D.C. 20510

Re: Railroad Antitrust Enforcement Act of 2013

Dear Senator Johnson:

I am writing to encourage you to cosponsor the Railroad Antitrust Enforcement Act of 2013 that was introduced by Senators Klobuchar and Vitter. Keeping the cost of rail service as low as possible, while still maintaining a strong and robust railroad industry, is absolutely necessary for Wisconsin, our region and our nation.

Our nation's economy is built on the premise of competition where robust markets exist, or regulated monopolies as a proxy for competition where they do not. Railroads need to play by the same rules and in a manner consistent with every other competitive business market in the United States.

As you well know, today the railroad industry operates much like an unregulated monopoly. They are exempt from a number of our nation's antitrust laws, yet there are only four major carriers serving rail customers across the United States. The Railroad Antitrust Enforcement Act is intended to assure that the market the railroads operate in is more competitive by deterring anticompetitive conduct in a concentrated industry.

The railroad business market, as overseen by the Surface Transportation Board (STB), is premised on competition. Yet, even where competition is possible robust rail-to-rail competition is largely nonexistent and the STB's regulatory process, from a rail customer's perspective, is all but broken. There remains an essential need for improvements to the existing complementary backstop regulatory protections for captive customers seeking relief against unreasonable rates and practices even if the antitrust law is reformed.

The health and welfare of our region's energy, agriculture and manufacturing sectors depends on a cost-competitive railroad market along with meaningful regulatory protections for captive rail customers.

Please feel free to contact me or Bill Libro in our Washington office if we can be of any service.

Sincerely,

Alan R. Hodnik
Chairman, President & CEO

30 West Superior Street | Duluth, Minnesota 55802-2093 | 218.355.3642 | Fax 218.723.3960 | ahodnik@allete.com

Alan R. Hodnik
Chairman, President and
Chief Executive Officer

March 29, 2013

The Honorable Tammy Baldwin
United States Senate
Washington, D.C. 20510

Re: Railroad Antitrust Enforcement Act of 2013

Dear Senator Baldwin:

Thank you very much for cosponsoring the Railroad Antitrust Enforcement Act of 2013. Keeping the cost of rail service as low as possible, while still maintaining a strong and robust railroad industry, is absolutely necessary for our region and our nation. As a leader in the House of Representatives on this issue, I am pleased that you are staying engaged in the U.S. Senate.

Our nation's economy is built on the premise of competition where robust markets exist, or regulated monopolies as a proxy for competition where they do not. Railroads need to play by the same rules and in a manner consistent with every other competitive business market in the United States.

As you well know, today the railroad industry operates much like an unregulated monopoly. They are exempt from a number of our nation's antitrust laws, yet there are only four major carriers serving rail customers across the United States. The Railroad Antitrust Enforcement Act is intended to assure that the market the railroads operate in is more competitive by deterring anticompetitive conduct in a concentrated industry.

The railroad business market, as overseen by the Surface Transportation Board (STB), is premised on competition. Yet, even where competition is possible robust rail-to-rail competition is largely nonexistent and the STB's regulatory process, from a rail customer's perspective, is all but broken. There remains an essential need for improvements to the existing complementary backstop regulatory protections for captive customers seeking relief against unreasonable rates and practices even if the antitrust law is reformed.

I don't need to tell you that a cost-competitive railroad market, along with meaningful regulatory protections for captive shippers, is extremely important. The health and welfare of our region's energy, agriculture and forest products sectors depends on it.

I'm happy to assist you in any manner to help you achieve your goal of passing this bill for the good of our region and our nation. Please feel free to contact me or Bill Libro in our Washington office if we can be of any service.

Sincerely,

Alan R. Hodnik
Chairman, President & CEO

30 West Superior Street | Duluth, Minnesota 55802-2093 | 218.355.3642 | Fax 218.723.3960 | ahodnik@allete.com

Alan R. Hodnik
Chairman, President and
Chief Executive Officer

March 29, 2013

The Honorable John Hoeven
United States Senate
Washington, D.C. 20510

Re: Railroad Antitrust Enforcement Act of 2013

Dear Senator Hoeven:

I am writing to encourage you to cosponsor the Railroad Antitrust Enforcement Act of 2013 that was introduced by Senators Klobuchar and Vitter. Keeping the cost of rail service as low as possible, while still maintaining a strong and robust railroad industry, is absolutely necessary for North Dakota, our region and our nation.

Our nation's economy is built on the premise of competition where robust markets exist, or regulated monopolies as a proxy for competition where they do not. Railroads need to play by the same rules and in a manner consistent with every other competitive business market in the United States.

Today the railroad industry operates much like an unregulated monopoly. They are exempt from a number of our nation's antitrust laws, yet there are only four major carriers serving rail customers across the United States. The Railroad Antitrust Enforcement Act is intended to assure that the market the railroads operate in is more competitive by deterring anticompetitive conduct in a concentrated industry.

The railroad business market, as overseen by the Surface Transportation Board (STB), is premised on competition. Yet, even where competition is possible robust rail-to-rail competition is largely nonexistent and the STB's regulatory process, from a rail customer's perspective, is all but broken. There remains an essential need for improvements to the existing complementary backstop regulatory protections for captive customers seeking relief against unreasonable rates and practices even if the antitrust law is reformed.

The health and welfare of our region's energy and agriculture sectors depends on a cost-competitive railroad market along with meaningful regulatory protections for captive rail customers.

Please feel free to contact me, Dave McMillan or Bill Libro in our Washington office if we can be of any service.

Sincerely,

Alan R. Hodnik
Chairman, President & CEO

c: Dave McMillan

30 West Superior Street | Duluth, Minnesota 55802-2093 | 218.355.3642 | Fax 218.723.3960 | ahodnik@allete.com

235662

ENTERED
Office of Proceedings
March 20, 2014
Part of
Public Record

Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC 20515

March 14, 2014

Bill Shuster
Chairman

Nick J. Rahall, II
Ranking Member

Christopher P. Bertram, Staff Director

James H. Zoia, Democrat Staff Director

The Honorable Daniel R. Elliot, III
Chairman
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

The Honorable Ann D. Begeman
Vice Chairman
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Dear Chairman Elliot and Vice Chairman Begeman:

The Surface Transportation Board (STB) has announced that it will hold a public hearing on March 25-26, 2014 on a petition by the National Industrial Transportation League to modify the Board's standards for mandatory competitive switching.

In connection with this hearing, we would like to express our collective view about the importance of the freight rail industry as a critical component of our nation's transportation system, and impress upon you the importance of maintaining the existing regulatory balance between the railroads and the shipping community.

As the Committee has previously expressed, the United States has the most efficient, affordable and environmentally-friendly freight rail network in the world. With nearly 140,000 miles of track carrying approximately 1.8 trillion ton-miles annually, freight rail is an immense jobs generator and a major economic driver. The industry supports directly or indirectly 1.2 million jobs, including some 180,000 well-paying jobs in the freight rail industry itself. Railroads account for approximately 40 percent of all freight ton-miles in the U.S. – more than any other mode.

The passage of the Staggers Act in 1980 provided for a balanced regulatory system that has allowed the rail industry to build the world's best freight rail system, while protecting shippers in areas where there is no effective competition. Since its passage, average inflation-adjusted rates are down substantially and freight railroads have reinvested $550 billion to increase capacity, maintain existing capacity, and maximize efficiency on their operating networks. In fact, despite a weak economy, railroads have invested more back into their networks over the past five years – approximately $115 billion – than in any five-year period in their long history. This could not have been done, and will not happen in the future, in the absence of the current policy of balanced regulation by the STB that is called for in the Staggers Act – a policy that also has

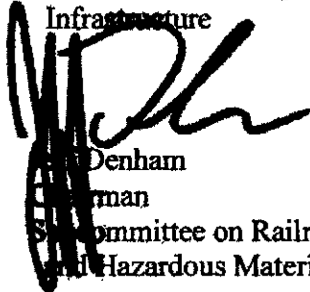
allowed railroads to concentrate traffic onto efficient routes, promote safer operations, and create fluid transportation systems.

The Department of Transportation estimates that total freight shipments will increase by 62 percent between 2011 and 2040. It is critical that the freight rail industry be able to make the necessary investments to meet this rising demand. Any policy change made by the STB that decreases the railroads' efficiency, and limits their ability to reinvest, grow their networks and meet the nation's freight transportation demands both today and in the future will be opposed by this Committee.

We look forward to hearing from you about how the STB plans to ensure that the freight railroad industry will continue to play a major role in contributing to a strong and vibrant U.S. economy.

Sincerely,

Bill Shuster
Chairman
Committee on Transportation and
Infra[illegible]ure



[illegible]Denham
[illegible]man
[illegible]mmittee on Railroads, Pipelines,
[illegible]Hazardous Materials

Nick J. Rahall, II
Ranking Member
Committee on Transportation and
Infrastructure

Corrine Brown
Ranking Member
Subcommittee on Railroads, Pipelines,
and Hazardous Materials

Alan R. Hodnik
Chairman, President and
Chief Executive Officer

Congressman Nolan (Rick), I very much appreciate the time you have invested in our BNSF RR challenges. This in behalf of our LP customers and broader way of life.
Sincerely,
Al

January 13, 2015

Congressman Rick Nolan
House of Representatives
2366 Rayburn House Office Building
Washington, DC 20515

Dear Congressman Nolan:

I wanted to personally thank you and your staff for shining a light on the rail delivery service issues that Minnesota Power, other utilities in Minnesota, and utilities across the country have experienced over the past year. Your willingness to engage on this matter is greatly appreciated by all rail customers.

The Burlington Northern Santa Fe Railway (BNSF) has, in their own words, "not lived up to our customers' expectations." But the BNSF didn't just fall short of Minnesota Power's expectations. Their failure to deliver coal when needed last winter and inconsistent performance over the summer and fall of 2014 meant that we could not run our coal plants when needed. In fact, we temporarily shuttered four coal units this fall in an effort to rebuild the coal stockpile at our largest plant, the Boswell Energy Center in Cohasset.

With our coal-fired plants either closed or running at a minimum level, Minnesota Power was forced to purchase energy in wholesale electricity markets. While we did not experience any power disruptions, we also incurred an additional $27 million in purchased power costs – costs that will be borne by our electric customers in Northern Minnesota.

When the Staggers Rail Act passed in 1980 Congress intended it to rescue a flagging rail industry and substitute competition in place of what was then expansive federal regulation. Since the Staggers Rail Act was enacted the rail industry has undergone a dramatic transformation. Mergers and acquisitions have altered the rail industry landscape, and today there are really just four major railways in the United States that remain to "compete" against one another.

Times have dramatically changed – but Staggers has not.

The Staggers Rail Act remains a regulatory framework governing our nation's freight railroads that is side-tracked in a 35 year old setting that no longer exists. It's seems clear that the competitive market that Staggers sought to create over 30 years ago didn't envision the level of rail industry consolidation the country has experienced. Nor did Staggers anticipate some of the regulatory interpretations that the Surface Transportation Board (STB) would subsequently make that further eroded rail-to-rail competition.

Compounding the dramatic change in the rail industry, and the lack of meaningful rail-to-rail competition, is a timid and largely ineffective regulatory body in the Surface Transportation Board (STB).

The STB has repeatedly said that it "has a range of available tools" under its governing statute to address service problems. Yet a year and a half after severe coal service problems emerged the STB has only recently taken any meaningful action to address coal delivery issues. The STB's order, dated December 30, 2014, requires the BNSF to submit a detailed description of the contingency plans it would use to mitigate an acute coal inventory shortage at one or more generating stations in a region.

These actions by the STB, while welcome, do not inspire confidence from rail customers that coal service disruptions will be meaningfully addressed. In fact, in its December 30, 2014 order the STB states that it in fact may <u>not</u> have the

30 West Superior Street | Duluth, Minnesota 55802-2093 | 218.355.3642 | Fax 218.723.3960 | ahodnik@allete.com

necessary authority to address service problems that move under a contract. The order states in part that "Section 10709 states that transportation provided under private contract is not subject to the Board's governing statute; parties are not subject to statutory duties with respect to contract service; and the "exclusive remedy" for breach of contract is in a court of competent jurisdiction. 49 U.S.C. § 10709(b) and (c)."

This is clearly troubling.

As you know, from a cost perspective, the STB has no authority over rail rates that are agreed to in a contract between the railway and shipper. Where the STB does have authority is when shippers seek a "common carrier" rate. But even here, after the rail shipper goes through several rounds of data submissions and jumps through other regulatory hoops, the best rate outcome available for large movements is the greater of 1) the cost that a hypothetical and highly efficient new railroad would charge, called the Stand Alone Cost, or 2) a rate calculated to be a ratio set a 180% of the revenue to variable cost, called the Jurisdictional Threshold.

The STB's rate setting process is complex, convoluted, and costly – and in the best case still results in rail rates that enrich the railroads at the expense of American consumers. These problems are well known and well documented, and rail customers have called on Congress to enact meaningful reform of the STB's rate process for over a decade.

Minnesota Power believes that rail service delivery failures have also proven that, in the case of assuring adequate levels of service, the STB either lacks the courage to fully utilize the powers it has, lacks the ability or willingness to effectively exercise those powers, or lacks both.

Congress needs to step up and step in. The STB lacks a credible process to set rail transportation rates; competition across the railroad network is in name only; and it appears that the STB may even lack the authority to meaningfully address service problems for transportation services that move under a contract. Minnesota Power strongly believes Congress must examine the STB's entire statutory framework and pass comprehensive legislation to address these obvious shortcomings.

Minnesota Power thanks you for all the work you have done on behalf of rail customers in Minnesota and across the country. We look forward to working with you to pass a long-overdue overhaul of the STB's regulatory framework that will ensure a strong, vibrant and profitable rail industry while meeting rail customers' needs for cost-effective and reliable rail service.

Sincerely,
ALLETE, Inc.

Alan R. Hodnik
Chairman, President & CEO

/cll

Alan R. Hodnik
Chairman, President and
Chief Executive Officer

Senator Franken, I very much appreciated your personal phone call as we struggled in behalf of our customers with the BNSF.
Sincerely
Al

January 13, 2015

The Honorable Al Franken
United States Senate
302 Hart Senate Office Building
Washington, DC 20510

Dear Senator Franken:

I wanted to personally thank you and your staff for shining a light on the rail delivery service issues that Minnesota Power, other utilities in Minnesota, and utilities across the country have experienced over the past year. Your willingness to engage on this matter is greatly appreciated by all rail customers.

The Burlington Northern Santa Fe Railway (BNSF) has, in their own words, "not lived up to our customers' expectations." But the BNSF didn't just fall short of Minnesota Power's expectations. Their failure to deliver coal when needed last winter and inconsistent performance over the summer and fall of 2014 meant that we could not run our coal plants when needed. In fact, we temporarily shuttered four coal units this fall in an effort to rebuild the coal stockpile at our largest plant, the Boswell Energy Center in Cohasset.

With our coal-fired plants either closed or running at a minimum level, Minnesota Power was forced to purchase energy in wholesale electricity markets. While we did not experience any power disruptions, we also incurred an additional $27 million in purchased power costs – costs that will be borne by our electric customers in Northern Minnesota.

When the Staggers Rail Act passed in 1980 Congress intended it to rescue a flagging rail industry and substitute competition in place of what was then expansive federal regulation. Since the Staggers Rail Act was enacted the rail industry has undergone a dramatic transformation. Mergers and acquisitions have altered the rail industry landscape, and today there are really just four major railways in the United States that remain to "compete" against one another.

Times have dramatically changed – but Staggers has not.

The Staggers Rail Act remains a regulatory framework governing our nation's freight railroads that is side-tracked in a 35 year old setting that no longer exists. It's seems clear that the competitive market that Staggers sought to create over 30 years ago didn't envision the level of rail industry consolidation the country has experienced. Nor did Staggers anticipate some of the regulatory interpretations that the Surface Transportation Board (STB) would subsequently make that further eroded rail-to-rail competition.

Compounding the dramatic change in the rail industry, and the lack of meaningful rail-to-rail competition, is a timid and largely ineffective regulatory body in the Surface Transportation Board (STB).

The STB has repeatedly said that it "has a range of available tools" under its governing statute to address service problems. Yet a year and a half after severe coal service problems emerged the STB has only recently taken any meaningful action to address coal delivery issues. The STB's order, dated December 30, 2014, requires the BNSF to submit a detailed description of the contingency plans it would use to mitigate an acute coal inventory shortage at one or more generating stations in a region.

These actions by the STB, while welcome, do not inspire confidence from rail customers that coal service disruptions will be meaningfully addressed. In fact, in its December 30, 2014 order the STB states that it in fact may <u>not</u> have the

30 West Superior Street | Duluth, Minnesota 55802-2093 | 218.355.3642 | Fax 218.723.3960 | ahodnik@allete.com

necessary authority to address service problems that move under a contract. The order states in part that "Section 10709 states that transportation provided under private contract is not subject to the Board's governing statute; parties are not subject to statutory duties with respect to contract service; and the "exclusive remedy" for breach of contract is in a court of competent jurisdiction. 49 U.S.C. § 10709(b) and (c)."

This is clearly troubling.

As you know, from a cost perspective, the STB has no authority over rail rates that are agreed to in a contract between the railway and shipper. Where the STB does have authority is when shippers seek a "common carrier" rate. But even here, after the rail shipper goes through several rounds of data submissions and jumps through other regulatory hoops, the best rate outcome available for large movements is the greater of 1) the cost that a hypothetical and highly efficient new railroad would charge, called the Stand Alone Cost, or 2) a rate calculated to be a ratio set a 180% of the revenue to variable cost, called the Jurisdictional Threshold.

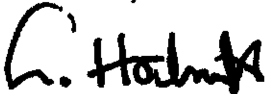
The STB's rate setting process is complex, convoluted, and costly – and in the best case still results in rail rates that enrich the railroads at the expense of American consumers. These problems are well known and well documented, and rail customers have called on Congress to enact meaningful reform of the STB's rate process for over a decade.

Minnesota Power believes that rail service delivery failures have also proven that, in the case of assuring adequate levels of service, the STB either lacks the courage to fully utilize the powers it has, lacks the ability or willingness to effectively exercise those powers, or lacks both.

Congress needs to step up and step in. The STB lacks a credible process to set rail transportation rates; competition across the railroad network is in name only; and it appears that the STB may even lack the authority to meaningfully address service problems for transportation services that move under a contract. Minnesota Power strongly believes Congress must examine the STB's entire statutory framework and pass comprehensive legislation to address these obvious shortcomings.

Minnesota Power thanks you for all the work you have done on behalf of rail customers in Minnesota and across the country. We look forward to working with you to pass a long-overdue overhaul of the STB's regulatory framework that will ensure a strong, vibrant and profitable rail industry while meeting rail customers' needs for cost-effective and reliable rail service.

Sincerely,
ALLETE, Inc.



Alan R. Hodnik
Chairman, President & CEO

/cll

Alan R. Hodnik
Chairman, President and
Chief Executive Officer

January 13, 2015

Senator Klobuchar, I very much appreciate the extensive personal time you invested with me and our mineral customers as we struggled with BNSF.

The Honorable Amy Klobuchar
United States Senate
302 Hart Senate Office Building
Washington, DC 20510

Dear Senator Klobuchar:

I wanted to personally thank you and your staff for shining a light on the rail delivery service issues that Minnesota Power, other utilities in Minnesota, and utilities across the country have experienced over the past year. Your willingness to engage on this matter is greatly appreciated by all rail customers.

The Burlington Northern Santa Fe Railway (BNSF) has, in their own words, "not lived up to our customers' expectations." But the BNSF didn't just fall short of Minnesota Power's expectations. Their failure to deliver coal when needed last winter and inconsistent performance over the summer and fall of 2014 meant that we could not run our coal plants when needed. In fact, we temporarily shuttered four coal units this fall in an effort to rebuild the coal stockpile at our largest plant, the Boswell Energy Center in Cohasset.

With our coal-fired plants either closed or running at a minimum level, Minnesota Power was forced to purchase energy in wholesale electricity markets. While we did not experience any power disruptions, we also incurred an additional $27 million in purchased power costs – costs that will be borne by our electric customers in Northern Minnesota.

When the Staggers Rail Act passed in 1980 Congress intended it to rescue a flagging rail industry and substitute competition in place of what was then expansive federal regulation. Since the Staggers Rail Act was enacted the rail industry has undergone a dramatic transformation. Mergers and acquisitions have altered the rail industry landscape, and today there are really just four major railways in the United States that remain to "compete" against one another.

Times have dramatically changed – but Staggers has not.

The Staggers Rail Act remains a regulatory framework governing our nation's freight railroads that is side-tracked in a 35 year old setting that no longer exists. It's seems clear that the competitive market that Staggers sought to create over 30 years ago didn't envision the level of rail industry consolidation the country has experienced. Nor did Staggers anticipate some of the regulatory interpretations that the Surface Transportation Board (STB) would subsequently make that further eroded rail-to-rail competition.

Compounding the dramatic change in the rail industry, and the lack of meaningful rail-to-rail competition, is a timid and largely ineffective regulatory body in the Surface Transportation Board (STB).

The STB has repeatedly said that it "has a range of available tools" under its governing statute to address service problems. Yet a year and a half after severe coal service problems emerged the STB has only recently taken any meaningful action to address coal delivery issues. The STB's order, dated December 30, 2014, requires the BNSF to submit a detailed description of the contingency plans it would use to mitigate an acute coal inventory shortage at one or more generating stations in a region.

These actions by the STB, while welcome, do not inspire confidence from rail customers that coal service disruptions will be meaningfully addressed. In fact, in its December 30, 2014 order the STB states that it in fact may <u>not</u> have the

30 West Superior Street | Duluth, Minnesota 55802-2093 | 218.355.3642 | Fax 218.723.3960 | ahodnik@allete.com

necessary authority to address service problems that move under a contract. The order states in part that "Section 10709 states that transportation provided under private contract is not subject to the Board's governing statute; parties are not subject to statutory duties with respect to contract service; and the "exclusive remedy" for breach of contract is in a court of competent jurisdiction. 49 U.S.C. § 10709(b) and (c)."

This is clearly troubling.

As you know, from a cost perspective, the STB has no authority over rail rates that are agreed to in a contract between the railway and shipper. Where the STB does have authority is when shippers seek a "common carrier" rate. But even here, after the rail shipper goes through several rounds of data submissions and jumps through other regulatory hoops, the best rate outcome available for large movements is the greater of 1) the cost that a hypothetical and highly efficient new railroad would charge, called the Stand Alone Cost, or 2) a rate calculated to be a ratio set a 180% of the revenue to variable cost, called the Jurisdictional Threshold.

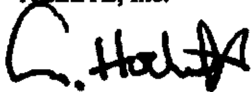
The STB's rate setting process is complex, convoluted, and costly – and in the best case still results in rail rates that enrich the railroads at the expense of American consumers. These problems are well known and well documented, and rail customers have called on Congress to enact meaningful reform of the STB's rate process for over a decade.

Minnesota Power believes that rail service delivery failures have also proven that, in the case of assuring adequate levels of service, the STB either lacks the courage to fully utilize the powers it has, lacks the ability or willingness to effectively exercise those powers, or lacks both.

Congress needs to step up and step in. The STB lacks a credible process to set rail transportation rates; competition across the railroad network is in name only; and it appears that the STB may even lack the authority to meaningfully address service problems for transportation services that move under a contract. Minnesota Power strongly believes Congress must examine the STB's entire statutory framework and pass comprehensive legislation to address these obvious shortcomings.

Minnesota Power thanks you for all the work you have done on behalf of rail customers in Minnesota and across the country. We look forward to working with you to pass a long-overdue overhaul of the STB's regulatory framework that will ensure a strong, vibrant and profitable rail industry while meeting rail customers' needs for cost-effective and reliable rail service.

Sincerely,
ALLETE, Inc.



Alan R. Hodnik
Chairman, President & CEO

/cll

Senator Tammy Baldwin

U.S. Senator Tammy Baldwin Introduces Bill to Help Businesses Move Made In Wisconsin Goods to Market

Rail Shipper Fairness Act Supported by Broad Coalition of Wisconsin Farmers, Manufacturers and Utilities

Tuesday, March 24, 2015

Washington, D.C. – U.S. Senator Tammy Baldwin today introduced legislation to address challenges faced by Wisconsin businesses when shipping by rail. The *Rail Shipper Fairness Act* aims to reduce costs and improve service problems faced by a broad coalition of Wisconsin rail shippers, including farmers, manufacturers and utilities.

"Our Wisconsin businesses need a quality and responsive railroad system to effectively get their goods to market," said **Senator Baldwin**. "In order to continue building a strong *Made in Wisconsin* economy that is fair to farmers, manufacturers, and consumers, we need to give these shippers a seat at the table. This legislation will address the challenges faced by local businesses and help drive our Wisconsin economy forward."

"Senator Baldwin's Rail Shipper Fairness Act would make much needed reforms to the freight rail industry," **said Casey Kelleher, President of the Wisconsin Corn Growers Association.** "These reforms will help Wisconsin's Corn Growers better get their goods to market. We thank her for her leadership on this issue."

"We commend Senator Baldwin for standing up for Wisconsin businesses and consumers. Efficient and reliable freight rail service at a reasonable price is vital to the economic well- being of our State," **said Matt Bromley, Coordinator for Badger**

CURE (Wisconsin Consumers United for Rail Equity). "Senator Baldwin's Rail Shipper Fairness Act provides more balance to our nation's freight rail transportation policy that has for far too long been tilted against rail customers."

Businesses and consumers throughout Wisconsin have endured years of subpar rail service. Grain elevators across the Midwest are full due to farmers being left without means to move their goods to market. Wisconsin's paper industry routinely faces high rates and poor service on the railroads. Several Wisconsin power plants have had to reduce production or shutdown altogether because they can't get fuel by rail. These shutdowns pass higher rates on to their consumers with electricity costs set to reach their highest levels since 1999. These additional costs add up to make *Made In Wisconsin* products less competitive internationally.

The Rail Shipper Fairness Act increases rail shipping competition, reforms rate case regulations and restructures the Surface Transportation Board (STB). The legislation will require railroads to be more responsive to their customers by honoring their contractual obligations. The bill includes provisions to implement competitive switching, which Senator Baldwin previously called for in a bipartisan letter to the STB. Additionally, the bill requires the Board membership to increase from three to five members, two of whom must have experience as a consumer or rail shipper advocate.

The Rail Shipper Fairness Act is supported by Badger CURE (Wisconsin Consumers United for Rail Equity) a coalition that includes: Alliant Energy, Checker Logistics, Inc., Chippewa Valley, Bean Co., Citizens Utility Board, Cooperative Network, Customers First! Coalition, Dairyland Power Cooperative, Domtar Industries, ERCO Worldwide (USA) Inc., Georgia Pacific, Great Lakes Timber Professionals Assoc., Green Bay Area Chamber of Commerce, Green Bay Packaging, IBEW Local 2150, Lake States Lumber Assoc., Leicht Transfer & Storage, Louisiana-Pacific, Madison Gas & Electric, Manitowoc Grey Iron Foundry, Manitowoc Public Utilities, Menasha Utilities, Midwest Food Processors Assoc., Municipal Electric Utilities of Wisconsin, Neenah Foundry, NewPage, Ort Lumber, Packaging Corporation of America, Procter & Gamble, Sadoff Iron & Metal Company, Tomahawk Regional Chamber of Commerce, Wausau Paper, We Energies, Wisconsin Cast Metals Association, Wisconsin Corn Growers Association, Wisconsin Crop Production Association, Wisconsin Electric Cooperative Association, Wisconsin Farm Bureau Federation, Wisconsin Farmers Union, Wisconsin Industrial Energy Group, Wisconsin Manufacturers & Commerce, Wisconsin Paper Council, Wisconsin Public Service Corp, Wisconsin Utilities Association and WPPI Energy. The Rail Shipper Fairness Act is also supported by the Wisconsin Soybean Growers.

41166 SERVICE DATE – LATE RELEASE JANUARY 11, 2011
DO

SURFACE TRANSPORTATION BOARD

NOTICE

Docket No. EP 705

COMPETITION IN THE RAILROAD INDUSTRY

Decided: January 11, 2011

AGENCY: Surface Transportation Board.

ACTION: Notice.

SUMMARY: The Surface Transportation Board will receive comments and hold a public hearing to explore the current state of competition in the railroad industry and possible policy alternatives to facilitate more competition, where appropriate. The Board is seeking written comments prior to the hearing addressing the legal, factual, and policy matters described below.

DATES: Initial comments are due on February 18, 2011. Reply comments are due 28 days thereafter, on March 18, 2011. The hearing will begin at 9:30 a.m., on Tuesday, May 3, 2011, in the Board's hearing room at the Board's headquarters located at 395 E Street, S.W., Washington, DC. The Board plans to hold the hearing in a single day, but may extend the hearing if the number of participants or the breadth of submitted written testimony so requires. The hearing will be open for public observation. However, only parties who have notified the Board of their intent to participate will be permitted to speak. Any party wishing to speak at the hearing shall file with the Board a notice of intent to participate (identifying the party, the proposed speaker, and the time requested) no later than April 4, 2011. With the notice of intent, the party shall provide written testimony on the issues it will address at the hearing.

ADDRESSES: All filings may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the "E-FILING" link on the Board's "www.stb.dot.gov" website. Any person submitting a filing in the traditional paper format should send an original and 10 copies of the filing to: Surface Transportation Board, Attn: Docket No. EP 705, 395 E Street, S.W., Washington, DC 20423-0001.

Copies of written submissions will be posted to the Board's website and will be available for viewing and self-copying in the Board's Public Docket Room, Suite 131. Copies of the submissions will also be available (for a fee) by contacting the Board's Chief Records Officer at (202) 245-0236 or 395 E Street, S.W., Washington, DC 20423-0001.

FOR FURTHER INFORMATION, CONTACT: Amy Ziehm at (202) 245-0391. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877-8339.

SUPPLEMENTARY INFORMATION: The rail network in the United States is a series of interconnected lines owned by various rail carriers. Because of the high fixed cost associated with building a rail network, sometimes there is only one railroad serving a particular destination and origin. Some companies that either ship by rail, or would like to do so, have complained about being physically limited to a single rail carrier and would like to have greater access to competition from other railroads. Some shippers have suggested that mandated access by a second carrier to singly served businesses would be in the public interest. Railroads have responded that such an action would undermine their ability to price their services differentially based on demand and that, as a result, they would be unable to earn enough revenue to invest sufficiently in their networks. Over the years, various possible measures that would change the way rail shippers currently obtain access to rail service have been debated, including: (1) requiring railroads to quote a rate between any two points they serve to allow another railroad to serve the shipper from an intermediate point to the final destination; and (2) imposing new rules for competitive access, such as mandated reciprocal switching or mandated terminal use arrangements, including trackage rights.

It has been some time since the agency has conducted a thorough analysis of these issues. More than a decade ago, the Board conducted a comprehensive analysis of "captive shippers" and their available remedies for rate relief, as well as the incumbent railroad's rights and obligations. This analysis culminated in a series of decisions collectively known as the "Bottleneck" cases. Cent. Power & Light v. S. Pac., et al., 1 S.T.B. 1059 (1996) (Bottleneck I), clarified, 2 S.T.B. 235 (1997) (Bottleneck II), aff'd sub nom. MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999).

The Board also conducted a review of its competitive access standards in Review of Rail Access & Competition Issues, 3 S.T.B. 92 (1998).[1] More recently, in response to a recommendation of the United States Government Accountability Office (GAO),[2] the Board commissioned Christensen Associates, Inc. (Christensen Associates), to perform an independent study to examine these issues. The resulting report, A Study of Competition in the U.S. Freight

---

[1] The competitive access standards were originally adopted by the Interstate Commerce Commission (ICC), the Board's predecessor agency, in the mid-1980s. Intramodal Rail Competition, 1 I.C.C. 2d 822 (1985), aff'd sub nom. Balt. Gas & Elec. v. United States, 817 F.2d 108 (D.C. Cir. 1987); and applied in Midtec Paper Corp. v. Chi. & Nw. Transp. Co., 3 I.C.C. 2d 171 (1986), aff'd sub nom. Midtec Paper Corp. v. United States, 857 F.2d 1487 (D.C. Cir. 1988).

[2] Government Accountability Office, Freight Railroads: Industry Health Has Improved, but Concerns about Competition and Capacity Should Be Addressed, GAO-07-94, October 6, 2006, pp. 1-2. The GAO stated: "We are recommending that STB conduct a rigorous analysis of the state of competition nationwide and, where appropriate, consider the range of actions available to address problems associated with the potential abuse of market power."

Railroad Industry and Analysis of Proposals That Might Enhance Competition (November 2009), is available on the Board's website or at http://www.lrca.com/railroadstudy/.[3]

The United States railroad industry has changed in many significant ways since the Board's competitive access standards were originally adopted in the mid-1980s. Among the more salient developments have been the improving economic health of the railroad industry, increased consolidation in the Class I railroad sector,[4] the proliferation of a short line railroad network, and an increased participation of rail customers in car ownership and maintenance, as well as other activities previously undertaken by the carrier. Since 1980, railroad productivity improved dramatically, resulting in lower transportation rates. However, productivity gains appear to be diminishing and, since 2004, overall rail transportation prices have increased. See Christensen Update at i & 3-26. Taken together, these events suggest that it is time for the Board to consider the issues of competition and access further.

The Bottleneck Issue. A rail bottleneck rate issue arises when more than one railroad can provide service over at least a portion of the movement of a shipper's goods from an origin to a destination, but where either the origin or destination is served by only one carrier, i.e., the bottleneck carrier. In each of the Bottleneck cases, an electric utility company sought to require the bottleneck carrier to establish a "local rate" for a segment of the through movement that was served only by that carrier, so that the utility could combine that local rate with a rate for the

---

[3] In addition to the original November 2008 report (which was revised as of November 2009), Christensen Associates has provided the Board with two supplemental reports: An Update to the Study of Competition in the U.S. Freight Railroad Industry (January 2010) (Christensen Update); and Supplemental Report to the U.S. Surface Transportation Board on Capacity and Infrastructure Investment (March 2009). These reports are also available in the E-Library on the Board's website under "Studies," and at the URL provided above. In this notice, "Christensen Study" refers collectively to the original and supplemental reports.

The Board solicited and received public comments on the Christensen Study. Supplemental Report on Capacity & Infrastructure Inv., EP 680 (Sub-No. 1) (STB served Apr. 8, 2009); Study of Competition in the Freight R.R. Indus., EP 680 (STB served Nov. 6, 2008). Many of the issues discussed in the Christensen Study are also relevant to the proceeding that is being initiated here. As such, parties are invited to discuss in EP 705 any aspect of the Christensen Study that is relevant to the topic of competition in the railroad industry. Because EP 680 and EP 680 (Sub-No. 1) have served their limited purpose of initiating a discussion on competition and capacity in the United States freight rail industry, and because a significant portion of that discussion can continue in the proceeding being initiated here, EP 680 and EP 680 (Sub-No. 1) will be discontinued on the service date of this decision.

[4] The Board designates 3 classes of freight railroads based upon their operating revenues, for 3 consecutive years, in 1991 dollars, using the following scale: Class I – $250 million or more; Class II – less than $250 million but more than $20 million; and Class III – $20 million or less. These operating revenue thresholds are adjusted annually for inflation. 49 C.F.R. pt. 1201, 1-1. Today, there are 7 Class I carriers and approximately 550 short line carriers (i.e., Class II and Class III carriers) operating in the United States.

remainder of the movement by another carrier. The utilities further sought to be able to separately challenge the reasonableness of the rate for the bottleneck segment of the movement, rather than having to challenge the origin-to-destination rate in its entirety. Each of the utilities in the Bottleneck cases sought to divide the bottleneck carrier's long-haul and through rate into smaller portions that could be priced and, accordingly challenged, independently. The utilities believed that the total charges would be lower if the reasonableness of the rates were adjudicated only for the bottleneck portion of the movement (with the rate set by head-to-head rail competition for the remainder of the movement), rather than for the entire movement. Because the Bottleneck cases raised issues of broad importance, the Board provided for extensive public input and held an oral argument.

In the resulting decisions, the Board concluded that a shipper could not routinely direct a bottleneck carrier that was capable of providing origin-to-destination rail service for that shipper to "short-haul" itself by routing traffic over the lines of the non-bottleneck carrier. Rather, the Board held that a shipper could seek to force an alternative routing that would include the line of the non-bottleneck carrier only if it could show, under 49 U.S.C. § 10705 and the Board's "competitive access" rules developed in Intramodal Rail Competition, that there would be sufficient benefits associated with the alternative routing.[5] The Board also held that, under 49 U.S.C. §§ 11101(a) and 10742, a bottleneck carrier generally cannot refuse traffic from other carriers originating at sources that the bottleneck carrier *does not* serve, even if the bottleneck carrier can carry the identical commodity in its own single-line service from another source. Bottleneck I, 1 S.T.B. at 1063-64.

Finally, for either type of movement—same-source movements for which a shipper has successfully obtained an alternative routing, or different-source movements that the bottleneck carrier cannot handle in single-line service—the Board held that it could not force the bottleneck carrier to quote a separately challengeable rate for the bottleneck segment unless the requesting shipper had already entered into a rail contract for the non-bottleneck segment at the time that the bottleneck rate was requested. In so ruling, the Board relied on the Supreme Court decision in Great Northern Railway v. Sullivan, 294 U.S. 458, 463 (1935), which held that the reasonableness of through rates established by carriers should in general be evaluated from origin-to-destination, rather than on a segment-by-segment basis.[6]

---

[5] Specifically, the Board's rules state that the shipper must, in such a case, demonstrate the requested alternative route "is necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. § 10101 or is otherwise anticompetitive, and otherwise satisfies the criteria of 49 U.S.C. § 10705 . . . ." The Board will also consider several other enumerated factors, including efficiency, revenues, costs, and rates charged. The Board must further find that the complaining shipper (or carrier) would use the alternative route for a "significant portion of its current or future service . . . ." See 49 C.F.R. § 1144.2.

[6] The Board rejected the notion that the shipper could first request the bottleneck rate, and then enter into a contract for the remaining portion of the route. Rather, under Great Northern Railway, the Board considered the contract to be a condition antecedent to the request for the bottleneck tariff quote.

Competitive Access. Competitive access can take the form of mandated reciprocal switching, terminal use, or trackage rights. Reciprocal switching involves the incumbent railroad transporting traffic, usually for a short distance, over its own track on behalf of a competing railroad for a fee. Reciprocal switching thus enables the competing railroad to offer its own single-line rate, even though it cannot physically serve the shipper's facility, to compete with the incumbent's single-line rate. The agency has in the past held that reciprocal switching should not be ordered absent a showing of competitive abuse. More specifically, the complaining party must show that the incumbent railroad has used its market power to extract unreasonable terms or, because of its monopoly position, has disregarded the shipper's needs by rendering inadequate service. Midtec, 3 I.C.C. 2d at 181.

Unlike reciprocal switching, forced terminal arrangements (including some forms of trackage rights) involve the physical presence of a competing carrier on a host carrier's facilities owned by the incumbent railroad. Under terminal agreements, an incumbent railroad grants access to its terminal facilities or tracks to another carrier's trains for a fee so that the non-incumbent can serve traffic it would otherwise be unable to access.

Interchange Commitments. Interchange commitments can also fall under the broad rubric of competition and competitive access in the railroad industry. These are contractual provisions included with a sale or lease of a rail line that limit the incentive or the ability of the purchaser or tenant carrier to interchange traffic with rail carriers other than the seller or lessor railroad. The Board has addressed interchange commitments in Review of Rail Access and Competition Issues–Renewed Petition of the Western Coal Traffic League, EP 575, et al. (STB served Oct. 30, 2007), and Disclosure of Rail Interchange Agreements, EP 575 (Sub-No. 1) (STB served May 29, 2008). There are also several pending cases before the Board that will continue to develop, on a case-by-case basis, the Board's policies. Because we will continue to consider these issues and look to improve the processes associated with transactions involving interchange commitments, this hearing will not focus on interchange commitments or the approach adopted in EP 575.

PROCEDURES:

This proceeding is intended as a public forum to discuss access and competition in the rail industry, and with a view to what, if any, measures the Board can and should consider to modify its competitive access rules and policies; whether such modification would be appropriate given changes over the last 30 years in the transportation and shipping industries; the effects on rates and service these rules and policies have had; and the likely effects on rates and service of changes to these policies. The Board is providing an opportunity for any person or entity that wishes to participate to file written prepared comments in advance of the hearing, and the Board will provide an opportunity to parties to file replies to those comments. Subsequently, the Board will hold an oral hearing at the agency to explore the issues in more depth.

In particular, we urge the parties to focus their comments, and subsequent testimony and statements for the hearing, as follows:

1. **The Financial State of the Railroad Industry**. Parties are invited to comment on the evolving economic state of the railroad industry. The industry has changed significantly since 1980, when Congress passed the Staggers Act of 1980, Pub. L. 96-448, 94 Stat. 1895 (1980) (Staggers) and the ICC began the process of devising the current competitive access rules and policies. Today, the industry is in substantially stronger condition financially. In this regard, parties should address both the findings and conclusions of recent studies of the railroad industry, including (but not limited to) the Christensen Study and the joint study of United States Departments of Agriculture and Transportation.[7]

2. **49 U.S.C. § 10705** (alternative through routes). Parties are invited to discuss how to construe this provision in light of current transportation market conditions. In this regard, parties may address pre-Staggers practice, Staggers' effect on this issue, and whether there are statutory constraints on the Board's ability to change policy at this time. Parties are specifically invited to comment on the differences between §§ 10705(a)(1) and 10705(a)(2), the circumstances under which carriers may seek to protect their long hauls under § 10705(a)(2), and whether § 10705(a)(2) should apply where multiple carriers can originate the traffic, but only a single carrier can deliver the traffic to its destination.

3. **49 U.S.C. § 11102(a)** (terminal facilities access). Parties are invited to discuss how to construe the terminal access provision in light of current transportation market conditions. Again, parties may address pre-Staggers practice, Staggers' effect on this issue, and whether there are statutory constraints on the Board's ability to change policy at this time. The Board is also interested in how the definition of "terminal facility" evolved over time.

4. **49 U.S.C. § 11102(c)** (reciprocal switching agreements). Parties are invited to discuss, separately from the terminal facilities access provision, how to construe this provision in light of current transportation market conditions. Again, parties may address pre-Staggers practice, Staggers' effect on this issue, and whether there are statutory constraints on the Board's ability to change policy at this time. In particular, parties should address whether the broad "practicable and in the public interest" standard in the statute should be constrained by the provision permitting relief "where . . . necessary to provide competitive rail service." Finally, parties may discuss the distance limitations, if any, associated with this provision.

5. **Bottleneck Rates**. Parties are invited to discuss whether the Board could and should change its precedent finding only narrow authority to compel a railroad to quote a separately challengeable rate for a portion of a movement. Parties are also asked to comment on how the Great Northern Railway decision—holding that the reasonableness

[7] Study of Rural Transportation Issues, http://www.ams.usda.gov (follow "Publications" hyperlink; then follow "Agricultural Transportation" hyperlink; then follow "Congressional Studies" from the dropdown menu; then follow "04-10: Study of Rural Transportation Issues" hyperlink).

of a through rate established by carriers is only relevant to the shipper as to the total rate charged, and thus should be evaluated from origin to destination rather than on a segment-by-segment basis—can reasonably be applied in today's transportation world. In particular, we want to explore how the agency would evaluate the reasonableness of the more elaborate through rates used in today's global transportation industry including, for example, a local truck movement at origin, a transload to rail for shipment to a port, an international water movement, and finally a foreign rail or truck movement to destination. In such an example, do Great Northern Railway and other precedent require the agency to evaluate the reasonableness of the rates exclusively from origin to destination? If so, how could the agency evaluate the entire through rate when a portion of that rate includes transportation outside the Board's jurisdiction? Or does the agency have the discretion to permit the shipper to challenge just the rail carrier's division of the international through rate? Does the agency have discretion in other purely domestic settings? Participants may also address the role that short lines play in through rates, and whether the reasoning in Great Northern Railway encompasses "bottleneck" situations and a more highly concentrated rail industry. Should freight rail customers be allowed to determine intermediate origin and destination points that would enable a competing carrier or mode to serve the shipper's final destination?

6. **Access Pricing**. If the Board were to modify its competitive access rules, it would also need to address the access price. The Board seeks comments on what tools it can and should consider using (within statutory and constitutional limits) in evaluating how the carriers can assess terminal access prices, reciprocal switch fees, or segment rates, such as Constrained Market Pricing principles, or an alternative set of principles, such as cost-based pricing principles or Efficient Component Pricing. What role, if any, should a carrier's current financial standing and future prospects bear in this determination?[8]

7. **Impact**. Finally, we invite comments from all interested parties on the positive and negative impact any proposed change would have on the railroad industry, the shipper community, and the economy as a whole. The introduction of greater rail-to-rail competition could improve service and lower rates for captive shippers. But a loss of revenue could lead to less capital investment, constraining capacity and deteriorating service for future traffic. Any party advocating a change should address these impacts.

In addition to the guidance provided above, parties are welcome to offer their comments on any other aspect of our competitive access rules. Parties are also invited to comment on the specific questions in our prior order on this similar subject. Policy Alts. to Increase Competition in the R.R. Indus., EP 688 (STB served Apr. 14, 2009).

BOARD RELEASES AND LIVE VIDEO STREAMING AVAILABLE VIA THE INTERNET: Decisions and notices of the Board, including this notice, are available on the Board's website at

[8] A basis for the Board's historic pricing policy under Staggers and ICCTA was to permit demand-based differential pricing and allow captive shippers to bear a greater share of the carriers' fixed and common costs to help the railroads achieve revenue adequacy.

"www.stb.dot.gov." This hearing will be available on the Board's website by live video streaming. To access the hearing, click on the "Live Video" link under "Information Center" at the left side of the home page beginning at 9:00 a.m. on May 3, 2011.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. A public hearing in this proceeding will be held on Tuesday, May 3, 2011, at 9:30 a.m., in the Surface Transportation Board Hearing Room, at 395 E Street, S.W., Washington, DC, as described above.

2. Initial comments are due on February 18, 2011.

3. Reply comments are due on March 18, 2011.

4. By April 4, 2011, parties wishing to speak at the hearing shall file with the Board a notice of intent to participate identifying the party, the proposed speaker, and the time requested. With the notice of intent, the party shall provide written testimony on the issues it will address at the hearing. Written submissions by interested persons who do not wish to appear at the hearing are also due by April 4, 2011.

5. This decision is effective on the date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

BEFORE THE
SURFACE TRANSPORTATION BOARD

COMPETITION IN THE RAILROAD INDUSTRY	)	STB Ex Parte No. 705

COMMENTS OF THE WESTERN COAL TRAFFIC LEAGUE

WESTERN COAL TRAFFIC LEAGUE

William L. Slover
John H. LeSeur
Robert D. Rosenberg
Peter A. Pfohl
Stephanie A. Archuleta
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Its Attorneys

Of Counsel:

Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

April 12, 2011

BEFORE THE
SURFACE TRANSPORTATION BOARD

COMPETITION IN THE RAILROAD INDUSTRY	)	STB Ex Parte No. 705

COMMENTS OF THE WESTERN COAL TRAFFIC LEAGUE

PREFACE

The Western Coal Traffic League ("WCTL" or "League") hereby submits the following comments in response to the Notice ("Notice") that the Board served in the above-captioned proceeding on January 11, 2011. The Notice seeks comments on "the current state of competition in the railroad industry and possibly policy alternatives to facilitate more competition, where appropriate." Notice at 1. WCTL appreciates the opportunity to submit these comments.

These Comments consist of (1) a statement by member representative Duane L Richards, Chief Executive Officer of Western Fuels Association, Inc., who also serves as President of the League; (2) a joint statement by Frederick R. Warren-Boulton and Kenneth C. Baseman, economists and Principals with MiCRA, an economics consulting and research firm; and (3) counsel's legal argument, which is accompanied by exhibits prepared by L.E. Peabody and Associates, Inc., an economic consulting firm.

LEGAL ARGUMENT
TABLE OF CONTENTS

Page

I. SUMMARY 2

II. DISCUSSION 4

A. Lesson Learned Part One: The Best Way to Promote a Strong And Vibrant Railroad Industry Is To Promote Competition And Access 5

1. The ICC made The Correct Decision To Promote Competition In Its CNW Access Decisions 6

2. The ICC/STB Made The Correct Decision To Protect Destination Competition In Their Rail Construction Decisions 9

B. Lessons Learned Part Two: The ICC/STB's Administration Of The Competitive Access Provisions In The Staggers Act Has Stifled Competition, And The Staggers Act's Competitive Goals Remain Unfulfilled 14

C. Possible Solutions To The Competitive Problems Facing The Railroad Industry 18

1. Addressing The Competitive Market Structural Flaws 18

a. Market Dominance Test Clarification 23

b. Access Remedies 26

D. Carrier Revenue And Infrastructure "Needs" Arguments Should Not Be Permitted To Be Used As A Means To Obstruct Competitive Relief 31

CONCLUSION 35

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

COMPETITION IN THE RAILROAD INDUSTRY	))))))	STB Ex Parte No. 705

LEGAL ARGUMENT

The Board's Notice served in this proceeding on January 11, 2011 ("Notice"), seeks public comments on the "current state of competition" for railroad freight transportation services and on "possible policy alternatives to facilitate more competition, where appropriate." Notice at 1 ("Notice").

In its Notice, the Board states that "[o]ver the years, various possible measures" to potentially improve the competitive climate for consumers who purchase rail freight transportation have been evaluated by the Board and the Interstate Commerce Commission ("ICC"). However, none have ever been implemented, and it has been over a decade since the agency conducted a proceeding to thoroughly analyze these issues.[1] WCTL, which has participated in all of the major proceedings involving rail competition

[1] In recent years the Board did commission a study by Laurits R. Christensen Associates, Inc., to examine certain competitive issues, culminating in the report: *A Study of Competition in the U.S. Freight Railroad Industry and Analyses of Proposals that Might Enhance Competition* ("*Christensen Study*"). WCTL previously submitted comments on the *Christensen Study* on December 22, 2008, May 8, 2009, and on May 28, 2009.

and access since the enactment of the Staggers Act in 1980[2] ("Staggers Act"), appreciates the opportunity to file these comments.

I.

SUMMARY

Western coal rail transportation consumers today are being harmed by a lack of market competition in a highly concentrated railroad industry. The Chicago and North Western Railway's ("CNW's") entry into the southern Powder River Basin ("PRB") coal fields in 1984 in affiliation with the Union Pacific Railroad Company ("UP") resulted in vigorous competition between UP and the BNSF Railway Company ("BNSF") for coal business, for several decades. The Interstate Commerce Commission ("ICC"), over the strong objections of the incumbent monopolist, was instrumental in first enabling that competition in the PRB, and history has proven that the ICC made the right decision in its CNW access decisions.

Unfortunately, apart from granting rail line construction applications, the ICC and STB have not followed through in promoting policies to encourage intra-carrier competition in the West (or the East). Instead, the agency has been unfailing in its support of policies and decisions that have led to further consolidation and an entrenched duopoly, producing the following:

- With rail mergers, western rail transportation is now a duopoly between BNSF and UP, reducing competition and service options for western coal shippers;

[2] Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980).

- The ICC and STB's revenue adequacy rules have produced a flawed financial portrait of rail carriers like BNSF and UP, and the other remaining mega-carriers, who today are the financial titans of Wall Street;

- Over the past 30 years, all captive shipper attempts to improve their competitive plight (besides construction of rail lines) have been denied, and the Staggers Act competitive access provisions have been administratively gutted, based in large part on an acceptance of rail carrier arguments that access-produced competition would unduly undermine railroad "revenue adequacy";

- Today's western coal transportation market is a mature duopoly, with UP and BNSF tacitly satisfied with equal market shares, and unwilling to aggressively compete for individual customers' business; and

- ICC/STB decisions on competitive access, combined with the market developments resulting from massive industry consolidation, have emboldened the railroads today to extract significant rate increases from western coal customers – even from shippers with theoretical access to "competition" from two carriers and who have no effective remedy available to protect themselves against market abuse by dominant rail carriers.

WCTL respectfully submits that administrative actions and inactions have caused harm to consumers and significantly tilted the balance of carrier and shipper interests that lies at the heart of the Staggers Act. Also, given the current shift in competitive market dynamics for western coal transportation, WCTL has serious concerns that, even if the Board reversed all of its competitive access decisions of the 1980s and 1990s (*e.g.*, on bottleneck relief, terminal access/reciprocal switching, etc.), the end result may not produce any meaningful relief for rail consumers.

Perhaps not surprisingly, given three decades of unwavering "just say no" tactics, the railroads have been urging public officials and some of their customers to tell the Board that increased competitive remedies will lead to the economic downfall/demise of the industry or harm their ability to reinvest, etc. These continuing scare tactics are

without basis and are preposterous. These are the same arguments that were raised by the market dominant incumbent prior to the opening of the PRB to competition 27 years ago, and that were fully and soundly rejected by the ICC on the basis that protecting competition, and not protecting monopolists, is necessary to meet the goals of the Staggers Act and the national Rail Transportation Policy. The railroads' "financial ruin" arguments ring especially hollow given the current financial renaissance of the rail industry and the stagnant market structure that exists today.

WCTL supports the Board's re-examination of access remedies, but if it is going to do so, the Board should spend equal time and resources in examining ways to remedy the structural problems of this market. While it does so, the Board should clarify its standards for establishing "market dominance," through the issuance of an appropriate policy statement informing the public that if a shipper, even one with two-carrier access, can show that a challenged rate is above the STB's 180% revenue-to-variable cost jurisdictional threshold, it should be presumed that there is market dominance over the service, and the shipper should be entitled to bring a rate case to the Board. The very fact that WCTL is seeking this policy statement clarification should signal to the Board loud and clear that there is something wrong in the market that requires immediate redress.

II.

DISCUSSION

The Board has asked parties to focus their comments on the following issues: (i) the financial state of the railroad industry; (ii) 49 U.S.C. § 10705 (alternative through routes); (iii) 49 U.S.C. § 11102(a) (terminal facilities access); (iv) 49 U.S.C. §

11102(c) (reciprocal switching agreements); (v) bottleneck rates; (vi) access pricing; and (vii) impact. Notice at 5-7. In addition, the Board has asked for comments "on any other aspect of our competitive access rules," or on the questions raised in the Board's decision in STB Ex Parte No. 688, *Policy Alternatives to Increase Competition in the Railroad Industry* (STB served April 14, 2009). *Id.* at 7.

Prior to addressing these specific statutory provisions, and the current financial state of the railroads, it is useful to briefly review the ICC/STB's decisions on competition, which should shed light on where the agency has run afoul in some of its access decisions, and where WCTL respectfully submits the Board should return in revisiting this topic.

A. Lesson Learned Part One: The Best Way To Promote A Strong And Vibrant Railroad Industry Is To Promote Competition And Access

In the early years of western coal transportation, prior to the development of the PRB, several major railroads participated in the market for coal transportation, including UP, Southern Pacific Transportation Company, Burlington Northern, Inc. ("BN") one of the predecessors of present-day BNSF; Denver and Rio Grande Western Railroad; and the Atchison, Topeka and Santa Fe Railway. *See* Verified Statement of Duane L. Richards ("Richards V.S.") at 5-6. In part as a result of the 1973 Arab Oil Embargo, which restricted the use of fuel oil for meeting consumer demand, and legislation such as the Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. § 8301, *et seq.*, western coal production began to flourish. *Id.* at 4-5. At this time (between the

mid-1970s and mid-1980s), competition in the west was moderate, in part because of the widespread captivity of coal shippers at destination. *Id.*

1. The ICC Made The Correct Decision To Promote Competition In Its CNW Access Decisions

In the early 1980s, shortly after the passage of the Staggers Act, the ICC faced a watershed moment with regard to western coal transportation. BN enjoyed monopoly, origin bottleneck control over the important southern PRB mines in Wyoming, the nation's largest coal producing region. Richards V.S. at 7. Because of the importance of this region, and the need for low-priced delivered fuel to meet the nation's electric generation needs, the ICC took great pains to promote competition at origin. In this respect, even after CNW's initial failure to meet some of its financial obligations under the parties' PRB joint line construction agreement, the ICC steadfastly protected the CNW's position as a participant in the joint line construction project to access the Wyoming PRB mines, over the strong objections of BN. *See Chicago & N. W. Transp. Co. – Const. & Operation of a Line of R.R.*, 363 I.C.C. 906 (1981).

The ICC emphasized correctly in its 1981 decision authorizing CNW's access to the Wyoming PRB that competition for coal transportation was a vital public interest that should be promoted to provide for more efficient and responsive railroad service, and to further the Nation's rail transportation and energy policies:

> [T]he existence of an additional rail carrier is likely to result in more efficient and responsive service than that currently available. . . .
>
> Our decision . . . is supported by the recently enacted Rail Transportation Policy Statement, 49 U.S.C. 10101a, which

> was added by the Staggers Act. Its first directive is to "allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." (Section 10101a(1).) The policy statement also instructs us to reduce regulatory barriers to entry into the industry (section 10101a(7)) and to prohibit predatory pricing and practices and to avoid undue concentration of market power (section 10101a(13)). Approving CNW's application and thus allowing another carrier to serve the basin furthers all of these goals.
>
> Our decision . . . also furthers our national energy policy. . . . The public interest requires that these coal resources be made available to consumers under the most favorable terms possible. Ensuring competition for the transportation of coal is the best means to guarantee that result.

Id. at 927.

Additionally, in 1985, the ICC approved CNW's request to build a new rail line parallel to BN's solely-owned line to access three additional PRB mines then solely-served by BN. BN again strenuously opposed CNW's construction proposal. The arguments BN made to protect its PRB monopoly position are the same arguments the railroads make today, 25 years later, in fighting against *any* pro-competitive policies. BN argued then that the line construction, if approved, would unduly cut into its profits; require it to raise rates elsewhere; "discourage future entrepreneurial risk taking"; cause the loss of BN jobs as a result of CNW's diversion of BN traffic; and cause BN other commercial harm.

The ICC rejected all of BN's "financial needs" arguments, finding in part that "BN has resorted to rhetoric in attempting to demonstrate . . . anticompetitive impacts, such as saying CNW's proposal reduces competitive benefits consumers would

otherwise obtain while increasing social costs to consumers." *Chicago & N. W. Transp. Co. et al. – Notes & Assumption of Obligations*, ICC Finance Docket No. 29975, 1985 ICC LEXIS 9 at *43 (ICC decided Dec. 27, 1985) ("*CNW Construction*") (CNW and BN subsequently agreed to extend the Joint Line 10 miles to the Caballo Mine, so the new line was never constructed.). The ICC also found that BN's job loss objections were without merit and "overstated":

> CNW's proposed operations may result in BN employee layoffs, but . . . BN's . . . projections of the number of employees who may be affected are overstated. While one of the elements of the rail transportation policy is to encourage fair wages and safe and suitable working conditions in the railroad industry, other policies such as reliance on competition to the maximum extent possible, reduction of regulatory barriers to entry into the industry, and avoidance of undue concentrations of market power, must also be considered. *49 U.S.C. 10101a.*

Id. at *41-*42. Finally, even though BN had spent considerable sums to construct the Joint Line, and its overall financial position was much less solid as compared with BNSF's robust financial position today, the Commission soundly rejected BN's contentions that it had a "right to traffic," that BN was entitled to "entrepreneurial awards" for agreeing to construct the line in the first instance, and that the public interest in competition was outweighed by the potential for BN revenue losses:

> Both BN and CNW had rail lines in the vicinity of the PRB when demand for PRB coal exploded in the 1970's. Given the history of the joint line and the joint certificate authorizing its construction, BN's entrepreneurial risk arguments are not persuasive. Indeed, a railroad does not have a right to traffic. A railroad is an instrumentality of commerce that must earn and retain its traffic by providing efficient, effective, and competitive service. In addition, one

> of the cornerstones of the Staggers Rail Act of 1980 was the emphasis on increased railroad competition. Finally, BN has received handsome returns while it was the only railroad serving the PRB.
>
> BN's . . . right to entrepreneurial awards [argument] is without merit. BN has not provided any financial analysis or other specific evidence demonstrating that increased rail competition would inhibit BN from recovering and earning an adequate return on its coal-related investment.

Id. at *42-*43. While the ICC was unquestionably right in its CNW access decisions in the 1980s, BN's revenue needs and "right to traffic" contentions ring especially hollow in light of the acknowledged huge profitability of today's BNSF coal business, even with having to share the PRB coal markets with its co-duopolist, UP, during a period when the two carriers aggressively competed for business. *See* Richards V.S. at 3.

2. The ICC/STB Made The Correct Decision To Protect Destination Competition In Their Rail Construction Decisions

Though western coal shippers in the mid-1980s had several origin carrier choices, and the CNW PRB access cases created origin competition for the Wyoming PRB coal transportation market, most western coal shippers still remained captive to a single carrier at destination. *See id.* at 6. The ICC recognized in the *CNW Construction* decision "that destination monopoly carriers can have substantial power to control rates and service and would often have the economic incentive to use it." *Id.*, 1985 ICC LEXIS 9 at *46.

In light of the ICC's decision gutting competitive access remedies in the *Midtec* case (discussed below), captive coal receivers had only one choice to break destination rail monopolies – rail construction. Several utilities, or carrier subsidiaries of

utilities, spent considerable sums to build new rail access lines to break their destination captivity. *See* Richards V.S. at 8. However, once again, the railroads strenuously resisted shipper efforts to engage in self-help competitive remedies.

To its credit, the ICC/STB consistently rejected various pleas from the involved incumbent carriers that the construction projects should be rejected (or at least subjected to onerous conditions that would cause the projects to fail). The agency approved the projects, without onerous conditions, finding that such pro-competitive actions furthered the agency's statutory obligations and the public interest.[1] The ICC/STB also routinely approved petitions filed by carriers constructing new rail lines to cross the lines of incumbent carriers, without the imposition of any of the draconian crossing fees that were sought by the incumbent carriers.[2]

In these destination build-out decisions, the ICC/STB correctly rejected monopoly rail carrier objections that they could not afford to compete and the agency flatly refused to protect the incumbent carrier's monopoly control over consumers. The agency also correctly rejected the carrier contentions that the agency's statutory goal to

---

[1] *See, e.g., WFEC R.R. – Constr. & Operation Exemption – Choctaw and McCurtain Ctys., Okla.*, ICC Finance Docket No. 32607 (ICC served Sept. 1, 1995), 1995 WL 517645 at *5-*6; *S. Gulf Ry. – Const. Exemption – In Calcasieu Parish, LA*, ICC Finance Docket No. 32321 (ICC served Sept. 9, 1993), 1993 WL 343947 at *1-*2.

[2] *See, e.g., Omaha Pub. Power Dist. – Petition Under 49 U.S.C. § 10901(d)*, STB Finance Docket No. 32630 (Sub-No. 1) (STB served Aug. 1, 1996), 1996 WL 428901 at *3-*5 ("*OPPD*"); *Chicago & N. W. Ry. – Constr. & Operation Exemption – City of Superior, WI – Petition for Issuance of an Order Pursuant to 49 U.S.C. 10901(d)*, ICC Finance Docket No. 32433 (Sub-No. 1) (ICC served Aug. 11, 1995), 1995 WL 472967 at *3-*6.

promote revenue adequacy trumped or should otherwise be elevated above the goal of promoting intramodal competition. As the STB observed in its crossing case decision involving WCTL Member Omaha Public Power District:

> [T]he rail transportation policy (RTP) found at 49 U.S.C. 10101a states that, in regulating the railroad industry, it is the policy of the United States Government "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail; . . . and to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers . . . to meet the needs of the public . . . ."
>
> *　　*　　*
>
> We recognize that carriers in competitive markets are less able to price differentially than carriers in monopoly situations, and that differential pricing is one way in which carriers can move toward revenue adequacy. But, while it was aware of the potential conflict between revenue adequacy and competition, Congress determined that the public would benefit from increased competition. Staggers Act Conference Report at 114. Indeed, while it clearly sought to promote railroad earnings, Congress concluded that the best "way to attain revenue adequacy [was] by means of the interaction of competitive forces." *American Short Line R.R. Ass'n v. United States*, 751 F.2d 107, 113 (2d Cir. 1984).
>
> Thus, we do not believe that we should administer the Congressional policy directing us to promote revenue adequacy at the expense of the clearly articulated policy, in the RTP . . . that we advance competition.

OPPD, 1996 WL 428901 at *3-*4.

In these build-out/line crossing cases, the incumbent railroads, among other things, argued that they were entitled to millions of dollars in "lost profits" for a single crossing, which the railroads contended was necessary to "adequately compensate the

incumbent carrier at a level that recognizes the goals of railroad revenue adequacy when that carrier's rights are altered by regulatory action"; to provide for "opportunity costs"; and to minimize "the risk of inducing the building of wasteful facilities when incumbents have long-lived investments and face real cost of giving up service to particular locations." *Id.* Such efforts to stifle competition were properly rejected by the ICC and STB, on the basis that competition *furthers* efficient and competitive rail operations and does not *destroy* the incumbent monopolist railroad's economic well-being:

> [I]n expressing the broad goals of the Staggers Act, Congress directed us to encourage efficient operations. Staggers Act Conference Report at 80. Actions that we take to facilitate efficient and competitive rail operations are consistent with, not at odds with, the [national Rail Transportation Policy].
>
> Additionally, compensation based on potential lost future earnings is not warranted because the right to construct a rail line that crosses another carrier's line does not deprive the incumbent carrier of the ability to earn future revenues on its line. Contrary to BN's assumption, BN, as the incumbent railroad, will not automatically lose its traffic base once the new line is in place. Nothing prevents BN from competing for all or some of OPPD's future coal traffic. . . . As the ICC stated in *CNW Crossing*, "BN has every opportunity to haul all other coal traffic for which it may compete . . . by charging better prices or offering better service."

Id. at *4 (footnotes and citations omitted).

Additionally, in the early 2000s, the STB approved the Dakota, Minnesota & Eastern Railroad's ("DM&E's") application to construct and rebuild approximately 880 miles of rail lines to enable it to reach the Wyoming PRB. WCTL strongly

supported the DM&E line construction. The STB approved the DM&E transaction as a means of providing new, competitive, and efficient rail service to the PRB. *See, Dakota, Minn. & E. R.R. Constr. into the Powder River Basin*, Finance Docket No. 33407 (STB served Dec. 10, 1998) at 44 ("the DM&E project would establish another PRB transportation competitor, which should have a positive impact on rates and service for the increasing volumes of PRB coal").

Given the Class I railroads' assertions that increased investments in capacity are essential to meeting forecasted traffic demand, one would have expected the railroads to fully support the DM&E's rail line capacity expansion project. However, once it appeared that the project could actually substantially enhance capacity by a potential competitor and possibly threaten their PRB market power, one of the Class I carriers, BNSF, began to publicly oppose public funding through a program (the Federal Railroad Administration's Railroad Rehabilitation and Improvement Financing loan program) that it had previously strongly supported. In 2005, BNSF's CEO stated that "[DM&E's] now turning to look for government money. You know, we continue to believe this would be very, very bad public policy especially now that the industry is really improving its returns and allowing more expansion capital to be put in." BNSF CEO Matt Rose, BNSF 4Q05 Investors' Conference.

Just as BNSF's predecessor fought to retain its monopoly market position in the PRB 25+ years ago, and the western carriers fought destination rail construction access, so too does the railroad industry today fight competition as a threat to its private investment. However, intra-carrier competition in the PRB has been an absolute

economic success for the railroads. *See* Richards V.S. at 7. The expansion of competition for PRB coal during the 1980s and 1990s proves agency decisionmaking aggressively promoting marketplace competition, and not protecting entrenched duopolists, should be favored, and it is in the Nation's interest to have a sound railroad system built on reasonable – not monopoly or protected duopoly – pricing and service practices. The agency's actions in its western coal rail construction cases represents a correct, pro-competitive reading of the Staggers Act.

B. Lessons Learned Part Two: The ICC/STB's Administration Of The Competitive Access Provisions In The Staggers Act Has Stifled Competition, And The Staggers Act's Competitive Goals Remain Unfulfilled

Besides destination rail construction build-outs, the other Congressionally-approved option that captive shippers have attempted to utilize to achieve competitive rail service – pursuing a competitive-access case – is unfortunately unavailable because the Board has put in place a huge roadblock for shippers seeking to pursue such an option. Specifically, as codified at 49 U.S.C. § 11102, Congress explicitly granted the ICC/STB the authority to grant a carrier the right to operate over the line of a destination railroad in a terminal area to deliver freight (*i.e.*, terminal trackage rights). *Id.* at § 11102(a). Under the same statutory section, Congress also granted the STB the authority to require the destination railroad to perform delivery service for shipments received in interchange with another carrier for a specified fee (*i.e.*, reciprocal switching). *Id.* at § 11102(c). Unfortunately, the STB's present rules governing the exercise of its competitive access

jurisdiction make clear that the Board will not grant requests for access solely to create or promote competition, or to enable a shipper to obtain lower rates.

In an abrupt departure from the ICC's construction access decisions, in the ICC's landmark *Midtec* decision, the agency concluded that the public interest favors protecting railroads from intramodal competition, as such competition may hinder railroad efforts to obtain revenue adequacy.[3] Following the *Midtec* decision, and the ICC's adoption of its current access rules, no shipper has obtained any trackage rights or reciprocal switching access relief under the agency's oppressive standards and very few have even tried.

In short, the STB has the clear statutory authority to afford competitive access relief for shippers as set forth by Congress under governing statutes. However, in practice, the Board's regulations and policies have precluded shippers from gaining competitive relief under these congressionally-authorized, but Board-rejected, competitive provisions.

Another competitive avenue of relief sought by captive shippers is a bottleneck rate case. In markets with adequate carrier competition at either origin or destination, with a bottleneck rate (or rate prescription) in hand, a captive shipper can theoretically use the forces of competition to obtain market-driven, competitive rates over the non-bottleneck line segments used to transport their shipments. However, in practice,

[3] *Midtec Paper Corp. v. Chicago & N. W. Transp.Co.*, 1 I.C.C.2d 362 (1985), *as superseded*, 3 I.C.C. 171 (1986), *aff'd sub nom. Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988).

the railroads in such situations almost always establish rates only on a through (total) movement basis and refuse to establish rates for their individual segments.

In the *Bottleneck* cases,[4] western coal shippers argued that their request for bottleneck rates fully complied with congressional intent under the Staggers Act to permit competition to set prices in competitive origin markets (with competition-set rates being incorporated into transportation contracts), while leaving regulation as a backstop to set rates only in the non-competitive rail bottleneck markets. This effort to curb the monopoly pricing powers of bottleneck rail carriers was unfortunately thwarted by the STB. In its *Bottleneck* decision, the Board again elected to tilt the balance in favor of railroad monopolies and against competition, just as the agency had done in *Midtec*.

Additionally, Class I carriers have frequently spun-off lower density lines to short-line railroads, but imposed "paper barriers" that suppressed competition by preventing the short-line carriers from diverting business to other railroads. WCTL first formally brought this problem to the Board's attention in a rulemaking petition in 1998. *See* STB Ex Parte No. 575, Petition for Further Rulemaking to Eliminate Unreasonable Paper Barriers to Interchange (filed Dec. 21, 1998). However, the Board deferred action on the petition pending the Board's review of experience under the rail carriers' "Railroad Industry Agreement."

Because the Railroad Industry Agreement had clearly not solved the paper barrier problem, and because the agency had taken no further action on the matter,

[4] *Cent. Power & Light Co. v. S. P. Transp.*, 1 S.T.B. 1059 (1996) ("*Bottleneck*").

WCTL filed a second petition six years after the Board's decision to hold WCTL's petition in abeyance. On March 21, 2005, WCTL filed a Renewed Petition for Rulemaking to Eliminate Unreasonable "Paper Barriers" to Interchange. In response, the Board held a hearing and sought comments on the matter, and in October 2007, nine years after WCTL first brought this matter to the Board's attention for attention, the STB issued a decision addressing paper barriers. *See Review of Rail Access & Competition Issues Renewed Petition By the Western Coal Traffic League*, STB Ex Parte No. 575 (STB served Oct. 30, 2007). While the STB did not prohibit the use of paper barriers across-the-board, the decision allowed shippers, on a case-by-case basis, to bring an individual complaint that a particular line sales agreement (new or existing) is in violation of the law. *Id.* at 7-8 ("a particular interchange commitment may be contrary to the public interest because it is unduly restrictive or unwarranted under the circumstances").

To date, no paper barrier restrictions have been determined by the STB to be unreasonable. A decision has been reached in only one proceeding brought on complaint, by WCTL member Entergy Services, Inc.[5] The case, denominated *Entergy Ark., Inc. and Entergy Servs. Inc. v. Union Pac. R.R.* (STB Docket No. 42104) was first filed over three years ago on February 19, 2008. In a decision served on March 15, 2011, the Board confirmed the shipper's right to obtain a through route from Northern PRB

[5] WCTL Member Ameren Energy Fuels and Services has recently filed a second paper barrier complaint, in *Union Elec. Co. v. Union Pac. R.R., et al.*, STB Docket No. 42126 *et al.*, (complaint filed Nov. 22, 2010). Evidence has not been filed in the case yet.

origins, but declined to prescribe a Southern PRB through route to plant destination and declined to revoke the exemption authorizing the lease of the short-line (and imposing the paper barrier). *Id.* at 16-17; *but see id.* at 20 (Commissioner Mulvey commenting that the combination of two aspects of a short line paper barrier: (i) requiring $117,000,000 in annual rent for short line access to competition, and (ii) containing a lengthy lease term of up to 80 years, warranted a partial revocation). WCTL respectfully submits that the anti-competitive aspects of the paper-barrier problem have never been fully resolved or addressed by the Board.

C. Possible Solutions To The Competitive Problems Facing The Railroad Industry

1. Addressing The Competitive Market Structural Flaws

WCTL respectfully submits that the ICC/STB's access decisions, in combination with the massive consolidation that has occurred in the industry with the approval of the ICC/STB (over the strong objections of WCTL), have resulted in significant harm to competition in the western coal transportation markets. UP and BNSF today operate as a protected duopoly. With markets largely protected from competition, and customers largely without effective regulatory remedies (and "competitive" shippers without any remedies), rail rates have skyrocketed. *See* Richards V.S. at 16.

The history of rail competition in the West for coal shippers is set forth in the accompanying Statement of Mr. Richards, who has spent his entire carrier in

positions involved in the transportation of western coal, and related coal supply matters, and has vast experience in the western rail transportation market. Richards V.S. at 1. As Mr. Richards explains, the western coal transportation markets can be broken down into several discrete time periods:

Period 1 (1974-1984):	"Coal rush" – Growth in western coal market and coal traffic, moderate rail competition in form of origin competition
Period 2 (1984-2004):	Full Competition – Access of CNW to PRB, shipper build-outs, low market transportation rates and railroad profitability; but emergence of rail duopoly in West, and competitive access remedies denied by ICC
Period 3 (2004-present):	Shipper rail consolidation concerns are realized; demise of competition in West; carrier public pricing, spike in rail rates and profits; "competitive" shippers' rates reach captive shipper levels.

See Richards V.S. at 4-21.

In a market with full competition, and if the full slate of access remedies the Board is considering in this proceeding were made available, *e.g.*, alternative through route orders (49 U.S.C. § 10705); bottleneck access; terminal trackage rights (49 U.S.C. § 11102(a)), or reciprocal switching (49 U.S.C. § 11102(c)), a shipper could theoretically obtain competitive rates and service terms by using limited regulation to spur competition among carriers. However, in order for access remedies to work, there needs to be a market where willing and able players are seeking to effectively and aggressively compete. WCTL members are extremely concerned that, in light of industry

consolidation, and the protected duopoly status of the two principal Western railroads, simply "fixing" the competitive access remedies (*e.g.*, bottleneck, terminal access), may not be enough to solve the structural competitive problems that exist in the western coal transportation market today.

WCTL's concerns about market structure are confirmed in the accompanying Verified Statement of Dr. Frederick R. Warren-Boulton and Kenneth C. Baseman, experts in industrial organizations, regulation, antitrust policy, and on the economics of exclusionary practices. ("Warren-Boulton/Baseman V.S."). As described in their statement, the competitive market structure for western coal transportation is deeply flawed, and at a minimum, the current market situation is fraught with the potential for market abuse because of the existing "duopoly that has been able to avoid competition and has set prices far above competitive levels." Warren-Boulton/Baseman V.S. at 2.

These market structure experts also examined recent price increases in the western coal transportation markets (since 2004) concluding that the carriers' "cost" and "capacity" explanations for rising prices are not valid. Dr. Warren-Boulton and Mr. Baseman conclude that "there is strong evidence that BNSF and UP have successfully exercised market power in markets for transportation of western coal." *Id.* at 9. They further conclude that "[s]ome sort of collusion, either tacit or explicit, provides a far better explanation for the rapid escalation in the coal transportation prices after 2004." Indeed, based on a review of the market and the behavior of the carriers, Dr. Warren-

Boulton and Mr. Baseman find that "there is strong evidence that in about 2004 BNSF and UP successfully colluded to raise prices." *Id.* at 6.

Similarly, as set forth in Mr. Richards' Statement, WCTL strongly opposed the UP/SP merger, (as did the United States Department of Justice) for fear that the merger would produce the protected duopoly that exists today, leading to the "collusive demise of competition and higher rates for the coal shipping public." Richards V.S. at 10-11. In its *UP/SP* merger decision, relying largely on the railroads' own assertions, the STB promised that the marketplace would not be harmed, in part because of the "heterogeneity of rail service," the "secrecy about rail price and service offerings," "detailed [contract] specifications" for service, etc. *Union Pac. Corp. et al. – Control & Merger – S. Pac. Rail Corp. et al.*, 1 S.T.B. 233 (1996) ("*UP/SP*"). Unfortunately, the Board's prediction of flourishing competition resulting from the era of rail mergers has not come to fruition. Richards V.S. at 13-20.

The current market conditions are at direct odds with the Board's findings in the *UP/SP* decision and raise serious doubts about whether those findings are valid today in the current western coal transportation marketplace. In this respect, Dr. Warren-Boulton and Mr. Baseman find that, in the ICC/STB merger decisions, the agency made a "mistake[]" by "focus[ing] solely on the difficulties of agreeing on price" instead of focusing on the potential for market collusion and allocation. Warren-Boulton/Baseman V.S. at 6. These market structure experts conclude that, if the Board looks past "the difficulty of sustaining a naïve, price-only conspiracy," it will find that the facts

demonstrate that the competitive market has indeed been corrupted by collusive carrier behavior by the duopoly western rail carriers. *Id.*

As discussed by Mr. Richards, the advent of public pricing by UP and BNSF in the early 2000s signaled a new era of competition in the West. By publishing standard terms and public prices, (through UP Circular 111 and BNSF Pricing Authority 90068) rather than in confidential rail transportation contracts, the railroads could effectively communicate their pricing decisions, not just to their customers, but also to their competitor, thus placing western coal shippers in competitive jeopardy. *See* Richards V.S. at 13-15. The changes in railroad market behavior that confront many shippers in the post-consolidated market for railroad services today have become so problematic that even "competitive" shippers now are faced with the need to seek the option of regulatory relief to protect themselves against competitive abuses. *Id.* at 19-21

While the phenomena of public pricing has largely ceased today for western coal shippers, its effects still linger, and in fact have grown. *Id.* at 19-20. Today, a leading consultant's figures show that so-called "competitive" shippers are facing railroad rates that have reached captive rates, and indeed, this is something BNSF's CEO recently predicted. *Id.* at 20-21. The market has been turned upside-down. If competition truly existed in the consolidated western rail transportation markets today as the Board promised it would in its rail merger decisions, then certainly competitive rates would not be skyrocketing in the manner they are today. *See* Richards V.S. at 19-20.

Also, the contentions being made by the railroads, and in the *Christensen Study*, that increased costs (and lower productivity) are largely triggering the increased rail rates in the West and elsewhere do not hold water. What these analyses ignore by examining costs on a marginal basis, is net operating income (revenues less operating costs). If prices were being driven up by higher costs and lower productivity, one would expect operating income to remain flat as higher prices only offset higher costs. However, as shown in *Exhibit 1*, operating incomes have been at all time highs in the last few years when measured on a ton-mile basis. In addition, as further discussed below in Section II.C., the average revenue per ton-mile for rail transportation has stayed far above the carriers' operating expenses. The same is true for western coal transportation, producing significant coal shipper annual contributions.

WCTL takes no pride in being "right" in predicting competitive problems from railroad mergers and in predicting the lack of competitive relief that would be afforded by the Board's "compromise" access decisions (as further discussed below). However, it is clear that the situation today stands in stark contrast to the competitive promises made to rail customers through these decisions.

a. Market Dominance Test Clarification

WCTL respectfully submits that immediate attention is necessary to clarify and reaffirm the STB's "market dominance" test. In particular, the Board should make clear that all shippers without *effective* rail competition, including those who have access to two-carrier service, may bring a rate case to the Board. *See* Richards V.S. at 21-23.

This is extremely important because, if the remaining rail duopolists are not competing for business for a shipper with two carrier access, then that shipper may be without any regulatory remedy. *Id.* In essence, the shipper faces the worst of all markets: a deregulated monopoly. To address this matter, WCTL requests that the Board issue a policy statement to clarify and reaffirm its market dominance rules in the form set forth in *Exhibit 4*.

"Market dominance" is defined as "an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies." 49 U.S.C. § 10707(a). The policy statement contained in *Exhibit 4* retains the current market dominance test as applied by the Board. However, it clarifies that:

> . . . the market dominance standard is a threshold test, and as such, should not be used as a barrier to unreasonably deny shippers lacking effective competition access to regulatory relief remedies. Additionally, *nominal* competition is not *effective* competition. If the evidence shows that one or more serving railroads are not effectively competing for the business (e.g., where a shipper is dually served, one carrier is not providing a bid, or each of the potential competitors is offering rates above 180% of variable costs) then the market dominance test is met.

This proposal is entirely consistent with Congressional intent. Prior to 1976, all rail carrier rates were subject to ICC maximum rate regulations. In the 4R Act,[6] Congress decided to change prior law by limiting the ICC's maximum rate jurisdiction to those cases where the railroad assessing the challenged rate exerted "market dominance"

[6] Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976)

over the involved transportation. While Congress clearly intended the market dominance standard to limit the ICC's prior maximum rate jurisdiction, which extended to all rail rates, Congress also clearly intended that the ICC/STB, and parties to ICC/STB maximum rate cases, be able to access relief in the absence of "truly competitive markets":

> The major innovation of this section, is that Commission regulation of maximum rate levels will apply only when the railroad or railroads publishing a rate increase set market dominance over the service involved. Otherwise, *in truly competitive* markets, the railroads will have freedom, absent discrimination and prejudice, to raise prices as they choose.

S. Rep. No. 94-499, at 47 (emphasis added). Congress was explicit that the "key to this new provision is the definition of market dominance," that Congress had carefully defined market dominance "in terms of the lack of *effective competition*," and that this did not require a finding of "monopoly power." *Id.* (emphasis added). As clarified by Congress:

> The key to this new provision is in the definition of market dominance. Market dominance is defined in terms of the lack of effective competition by any mode. Defining market dominance in terms of lack of effective competition avoids the problem of defining monopoly power . . . . Under this definition, the publishing carrier need not have monopoly power. Rather, the test will be whether the market itself is sufficiently competitive to insure just and reasonable rates. *Thus, the Commission will be able to regulate maximum rates in oligopoly or concentrated markets as well as in monopoly markets*

Id. (emphasis added).

WCTL respectfully submits that its proposed policy statement is entirely consistent with Congressional intent, and in implementing its policy statement, the Board would be simply confirming existing law and rules that where there is a lack of "effective competition" as there is in today's western coal markets, that even a shipper with two-carrier access should be eligible to bring a rate case. Congress intended the market dominance standard not be "an ultimate regulatory standard," but instead "a threshold test to direct the Commission's regulatory activities into areas where the public interest needs protection." *Id.* To ensure that this intent was carried out, Congress directed the ICC to publish rules "designed to provide for a practical determination [of market dominance in a particular case] without administrative delay." 4R Act § 202(d). Issuing the proposed policy statement is fully consistent with this Congressional directive.

b. Access Remedies

Again, WCTL has serious concerns about whether access remedies *alone* can solve the problems of the market for western coal transportation. However, that does not mean that the Board should not closely look at these remedies, and the basis of its decisions rejecting these remedies, in exploring potential pro-competitive market fixes. For example, in *Bottleneck*, WCTL informed the Board that the "contract first" approach was unlikely to be of any practical benefit to western utility coal shippers because UP and BNSF would not enter into such contracts unless the STB first entered prescriptive rate relief over the bottleneck segment. The STB disagreed with WCTL. The STB found that there was no factual "basis" to conclude that UP and BNSF (or other carriers) would

refuse to offer contracts in those instances where the shipper intended to use the contract to perfect STB maximum rate jurisdiction over the bottleneck segment. *Id.*, 1 S.T.B. 1059, 1070 (1996).

The STB portrayed its *Bottleneck* decision as pro-competitive because it allowed a shipper to get a rate over the bottleneck segment (in some circumstances) if it first obtains a contract for the rest of the movement from one of the competing carriers. STB Chairman Morgan promised that competition would flourish under the *Bottleneck* decision:

> Some of the shippers have expressed their concern that the Board has not afforded them meaningful relief. I disagree. The Board has given the shippers the opportunity to obtain significant relief . . . .
>
> [T]he railroads' rate and route initiative is not absolute and must be balanced against the statutory objective of promoting competition. Businesses are resourceful, and they will compete if given the opportunity to do so. Our decisions are significant because they encourage railroads to compete for bottleneck traffic in response to the needs of the shippers.
>
> I recognize that the relief that these decisions provide is not self-executing. . . . Moreover, shippers, to secure separate bottleneck-segment rate review, will have to enter into contracts with non-bottleneck railroads. However, if history is any guide, and if shippers are diligent in negotiating, *railroads will seek out contracts to capture new business. Initiative can produce positive results.*
>
> . . . I believe that the Board has addressed [bottleneck issues] in a fair and evenhanded manner. If shippers and competing railroads pursue the competitive avenues afforded them in these decisions, they will find that our decisions have provided real opportunities.

Id., 2 S.T.B. 235, 250 (1997) (on reconsideration) (emphasis added).

Chairman Morgan's statement that the Board's *Bottleneck* decision would work, and would produce competition, was premised on the assertion that the rail carriers "will compete." Since the *Bottleneck* decision, we are not aware of any Class I railroad offering a non-bottleneck contract when the bottleneck carrier operates in the same geographic region, even on unit-train coal movements that provide very high profits.

The relief the Board promised shippers in *Bottleneck* is illusory. The "contract first" doctrine did and does not work in practice for the reasons WCTL stressed to the Board in *Bottleneck*: the carriers will not offer "contracts first." The factual "basis" to conclude that the western carriers (or eastern carriers) will not offer such contracts has been documented in the 15 years since *Bottleneck*. Yet the STB has done nothing to address this matter. STB regulation and industry practice thus combine to suppress competition in bottleneck situations.

WCTL submits that, if the Board is going to move forward to pursue its current access remedies, it should make sure that the access rules work to promote competition. This may be done by encouraging the granting of new through routes,[7] by

[7] The alternative through route provisions of 49 U.S.C. § 10705 are designed to protect shippers in providing for the prescription of through routes, but the Board's competitive access rules (at 49 C.F.R. § 1144), have blocked shippers from using the statute to obtain relief. WCTL supports the Comments being filed by the Concerned Captive Coal Shippers in this proceeding, which comments advocate replacing the Board's access rules to allow section 10705 to be used to promote rail competition.

reversing the *Bottleneck* decision,[8] and by repealing the competitive access rules and reinstating the pro-access principles embodied in the initial post-Staggers Act access decisions described in Section II.A. above.[9] In revisiting these rules/decisions, the STB needs to return to the guiding principles of its *CNW Access* decision that "a railroad does not have a right to traffic," that "[a] railroad is an instrumentality of commerce that must earn and retain its traffic by providing efficient, effective, and competitive service," and that the best way to promote effective and efficient rail service and further railroad financial health, is to promote competition. *Id.*, 1985 ICC LEXIS 9 at *42-*43.[10]

WCTL supports revisiting these access remedies with some trepidation given the current mature duoply market for western coal. As market structure experts Dr. Warren-Boulton and Mr. Baseman conclude, while these access remedies offer the "potential" for relief, "individually or collectively . . . they appear to be unlikely to have a

[8] The STB has maintained that its *Bottleneck* decision is mandated by law. WCTL urges the STB to reconsider its legal position, for the reasons set forth in its Brief in the Eighth Circuit appeal of *Bottleneck*, appended as *Exhibit 2*.

[9] The Board could effectuate this action by issuing a policy statement declaring that in future cases, it will reinstate the pro-access principles embodied in the initial post-Staggers Act access decisions and advocated by WCTL in its 1985 Ex Parte No. 445 Comments, appended as *Exhibit 3*.

[10] The Board has inquired about access pricing. WCTL previously addressed this matter in its comments in Ex Parte No. 575, *Review of Rail Access & Competition Issues* (filed Mar. 26, 1998), and it continues to support the establishment of cost-based compensation for the use of facilities under 49 U.S.C. § 11102 on a usage basis, based on a sharing of the total costs incurred (total costs to include roadway maintenance expenses, dispatching expenses, and return on and of net book investment on road property). The STB should set fees in all cases, which is needed to prevent carriers from agreeing amongst themselves to set high fees that will discourage competition.

fundamental effect on performance in this particular market," including for the reasons stated above: if railroads do not offer "contract first" rates today, permitting bottleneck relief "is unlikely to change the railroads' reluctance to compete over the non-bottleneck segments," and because in the present market "the western coal duopolists (with roughly equal shares) will find it easy to avoid 'access-based' competition with one another, since detection and retaliation would be quick and certain." Warren-Boulton/Baseman V.S. at 11-12.

In this respect, when examining individual access remedies, the Board must also be mindful to examine the structural aspects of the market in determining whether more intense or additional protective competitive conditions and oversight might be necessary to ensure that any remedial action being considered will work as intended. WCTL respectfully submits that, simply waiting another 15+ years for any new or revised competitive access remedy to "work" is not sufficient oversight given the current condition of the market. Additionally, the Board must be mindful going forward in this proceeding, or related proceedings, that carrier pronouncements of economic demise caused by any pro-competitive remedy that might be considered by the Board must be examined with healthy skepticism in light of the protected duopoly market that exists today for western rail transportation of coal.

D. Carrier Revenue And Infrastructure "Needs" Arguments Should Not Be Permitted To Be Used As A Means To Obstruct Competitive Relief

The Board has sought comment "on the evolving economic state of the railroad industry." As discussed above, this issue has been an underlying factor in all of the agency's access proceedings, essentially because the railroads have contended that they cannot afford to compete. The railroads have publicly claimed that, as private companies that must invest in their own systems, still more revenues and increased rates will be required from customers in the future in order to provide capacity to meet expected increases in demand for rail service. WCTL submits that, at least with regard to western coal service, nothing could be further from the truth. As explained above, coal contributes significantly to the railroads' bottom lines (*see* Richards V.S. at 3), and market dominant carriers do not need to extract heightened revenues from their coal customers under the guise of "capacity" investment requirements.

Even if there were arguably some additional contribution needed from coal customers (which the carriers have not in any way shown is necessary) one need only look to the manner in which the carriers are behaving in the marketplace to understand that the carriers' market behavior is unreasonable. Additionally, the railroads certainly have sufficient revenues to compete under any reasonable standard, and there is an obvious incongruity between the results of the STB's "revenue adequacy" standards and the reality of the rail and financial marketplaces.

The railroads have significantly improved their performance since 1980, and more dramatically in recent years. It is a common refrain of many market analysts

that railroads are enjoying an "economic renaissance," which renaissance was further bolstered in 2010 with the legendary investor Warren Buffet acquiring "revenue inadequate" BNSF at a substantial multi-billion dollar premium above market value. In Warren Buffet's recent annual letter to shareholders, Mr. Buffet gushed over the BNSF acquisition and the exceedingly high returns that BNSF produced for Berkshire Hathaway's shareholders:

> The highlight of 2010 was our acquisition of Burlington Northern Santa Fe, a purchase that's working out even better than I expected. It now appears that owning this railroad will increase Berkshire's "normal" earning power by nearly 40% pre-tax and by well over 30% after-tax. Making this purchase increased our share count by 6% and used $22 billion of cash. Since we've quickly replenished the cash, the economics of this transaction have turned out very well.

Berkshire Hathaway Inc., 2010 Chairman's Letter to Shareholders (filed Feb. 26, 2011).

Overall, the railroads' financial position is very robust, by any reasonable measure. As the attached *Exhibit 5* shows, the Class I railroads' average operating ratios improved significantly in the early years following the Staggers Act, have remained strong, and have improved very significantly again recently. Overall, the railroads have experienced significant reductions in operating expenses per ton mile since 1980, and even recent increases in expenses have been more than offset by the railroads' revenues, as shown in *Exhibit 6*. The railroads have engaged in a dramatic rationalization of their systems since the passage of the Staggers Act. Since 1980, Class I rail carriers have sought and been allowed to reduce their physical rail route structure by over 40% through

abandonment or sale of non-essential facilities[11] – which the railroads profess has been a resounding success in promoting their ability to profitably and efficiently serve their customers. With this significant rationalization of their systems, the railroads are no longer retaining unprofitable assets that have the potential to drain their resources.

Railroads frequently point out to the Board and Congress that their revenue per ton-mile has been falling over time – intimating that they are losing ground financially. But as the attached *Exhibit 7* shows, the western railroads' variable costs per ton-mile for coal[12] have remained consistently and substantially below revenues per ton-mile, with the differential between revenues and variable costs remaining relatively stable over time, allowing the railroads to become more financially secure, and leading to annual western coal contributions approaching $3.5 billion.[13]

The railroads' financial performance versus the market has been stellar. For example, as *Exhibit 8* shows, the equity returns on BNSF and UP railroad stock are

[11] In 1980, Class I railroads operated 164,833 miles of road. By 2009, Class I railroads' route miles declined to 94,048 miles. AAR Railroad Facts (2010) at 45.

[12] In addition, railroads have enjoyed cost savings because many investments in track and equipment (railcars) that have traditionally been made by the railroads have been shifted to shippers in the case of PRB coal movements. Most PRB coal cars are provided by shippers, and the shippers (and the coal producers) have invested many millions of dollars in track at the origin and destination to improve loading and unloading of coal unit trains.

[13] Additionally, as shown on this Exhibit, the western railroads' coal revenues on a ton-mile basis have been accelerating dramatically in recent years.

far greater than market returns as a whole over the last ten years.[14] And even with the economic recession, railroad revenues remain at close to all-time highs.

The railroads often point to their infrastructure investments, and they frequently assert that that they pour more money back into their infrastructure than any other industry. The railroads contend that, because of these considerable infrastructure investments, they need special protective treatment from competition or revised regulatory policies that might harm their ability to meet their substantial infrastructure investment needs. However, the industries to which the railroads compare themselves are cherry picked; the railroads generally do not highlight other capital intensive industries. As shown in *Exhibit 9*, a number of other industries that are similar in structure to the railroads (*e.g.*, trucking, maritime, network industries) have reinvested in themselves at similar or higher levels. Thus, although substantial, railroad investments are not out of line with other comparable industries.

Perhaps more importantly, even after paying for these investments, the railroads have still been able to generate enormous amounts of cash. As shown in *Exhibit 10*, collectively, the Class I railroads' free cash flow has been approaching or exceeding $5 billion dollars annually in recent years. This cash is available to the railroads *after* providing for all of their capital investments, and it shows that the railroads have more than enough cash to pay for all their capital program initiatives.

[14] *Exhibit 8* reflects the appreciation in railroad split-adjusted stock prices since 2000, before consideration of dividends. If total returns, including dividends, were considered, the return on the railroad stocks would be even higher.

All of the above aptly demonstrates that the railroads can certainly "afford" to compete. The railroads continuing scare tactics as to financial ruin should they be forced to more effectively compete are no more valid today than they were over two decades ago when the ICC fully and soundly rejected them in deciding to promote and expand competition in the PRB.

CONCLUSION

WCTL appreciates the opportunity to address important competition and access issues, and urges the Board to restore competitive balance to the western coal transportation market.

Respectfully submitted,

WESTERN COAL TRAFFIC LEAGUE

William L. Slover
John H. LeSeur
Robert D. Rosenberg
Peter A. Pfohl
Stephanie A. Archuleta
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Its Attorneys

Of Counsel:

Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Dated: April 12, 2011

VERIFIED STATEMENT

Frederick R. Warren-Boulton
Kenneth C. Baseman

I. Qualifications

My name is Frederick R. Warren-Boulton. I am an economist and Principal with Microeconomic Consulting and Research Associates, Inc. (MiCRA), an economics consulting and research firm with offices at 1155 Connecticut Avenue, N.W., Washington, D.C. I received a B.A. degree from Yale University, a M.P.A. from the Woodrow Wilson School of Princeton University, and a Ph.D. in Economics from Princeton University. From 1972 to 1983, I was an Assistant and then Associate Professor of Economics at Washington University in St. Louis. From 1983 to 1989, I served as the chief economist for the Antitrust Division of the U.S. Department of Justice, first as Director of its Economic Policy Office and then as Deputy Assistant Attorney General for Economic Analysis. Since leaving the government, I have served as a Resident Scholar at the American Enterprise Institute, a Visiting Lecturer of Public and International Affairs at the Woodrow Wilson School at Princeton University, and as a Research Associate Professor of Psychology at the American University. I have served as an expert witness or consultant on a number of antitrust matters, including as an expert witness for the Department of Justice in United *States v. AT&T,* for the Federal Trade Commission in *FTC v. Staples and Office Depot*, and for the States and the Department of Justice in *United States v. Microsoft*. My full curriculum vitae is attached as Exhibit A.

MY name is Kenneth C. Baseman. I am an economist and principal with (MiCRA), an economic consulting firm in Washington D.C. I have extensive experience in economic analysis of antitrust issues and competitive issues. I have consulted and published on costing, cross-subsidy and competitive issues in regulated markets. These publications include articles in a MIT Press/National Bureau of Economic

Research volume and in the *American Economic Review.* I hold a Masters' Degree in Economics (plus two years of additional graduate work) from Stanford University. I was employed as an economist by the Antitrust Division of the United States Department of Justice for eight years, and have been an economic consultant for over twenty-five years, the last twenty with MiCRA. My full curriculum vitae is attached as Exhibit B.

II. Assignment

We have been asked by the Western Coal Traffic League (WCTL) to respond to the Surface Transportation Board's (STB) request for comments on the current state of railroad competition and the possible policy alternatives to facilitate more competition. In particular, we have been asked to focus specifically on the market structure, competitive behavior, and economic performance in the market for western coal transportation, and on to analyze, from an economic perspective, WCTL's proposal to clarify that the protections of market dominance regulation also apply to duopoly-served shippers facing rates above the STB's jurisdictional cost threshold.

III. Background And History: Western Coal Markets Are Poorly Served By A Duopoly That Has Been Able To Avoid Competition And Has Set Prices Far Above Competitive Levels.

Shippers of western coal face at best a seller's duopoly. Approximately 90% of Western coal is shipped out of the Powder River Basin (PRB), and the only railroads serving the PRB are BNSF Railway Company (BNSF) and Union Pacific Railroad Company (UP). We understand that other railroads have at best very minor positions in non-PRB sources of Western coal, and even then, usually must connect with either UP or BNSF in interline service to reach the end customer. This duopoly structure, protected by high entry barriers, will be inherently susceptible to supracompetitive pricing, especially where, as here, the rivals have good information about each other's costs, prices, volumes and transactions , and the service being performed is virtually identical (unit train service), usually in shipper-provided cars), no

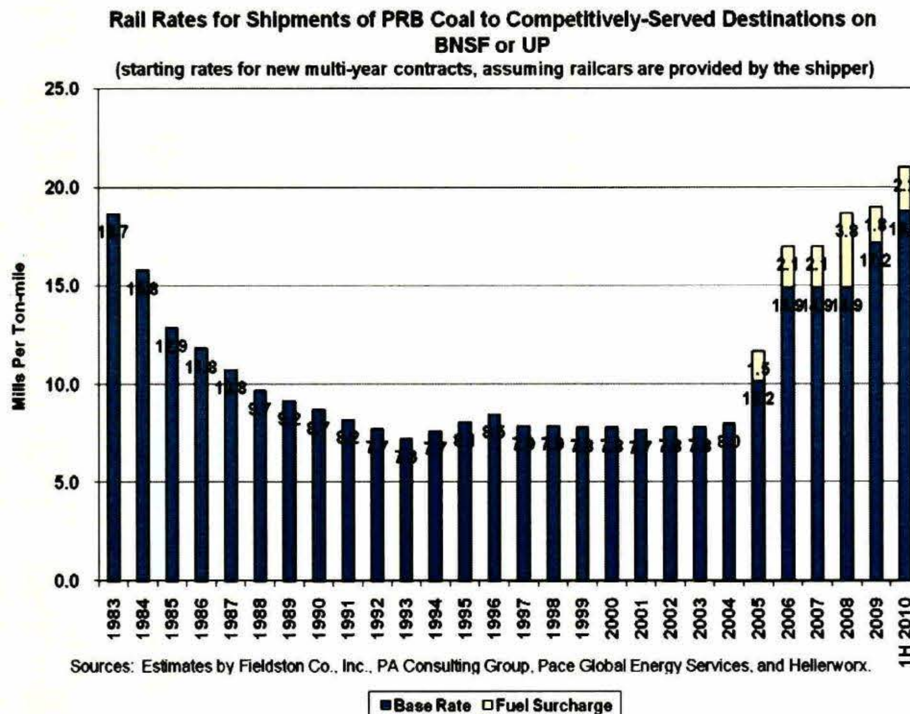
individual customers are large enough (or their orders are not "lumpy" enough) to trigger "cheating" just to get their business,[1] and where the railroads' behavior on one aspect of a transaction (e.g. contract length) can significantly change the extent to which other characteristics of transactions are susceptible to tacit or explicit collusion.

In fact, the western coal duopoly has been able to avoid effective competition, at least since 2005. The clearest conduct evidence is the adoption of "public pricing" by BNSF and UP in about 2004, which resulted in massive price increases on duopoly routes. As shown in Figure 1, after substantial and sustained declines in market prices for transportation of western coal from the early 1980s through around 2004, market performance deteriorated substantially, with prices rising dramatically relative to costs. Prices for new contracts for western coal on competitive destinations more than doubled by 2006-7, and almost tripled by 2010.

[1] Nobel Laureate George Stigler identified conditions conducive to maintaining a collusive agreement in his classic article "A Theory of Oligopoly," Journal of Political Economy, Vol. 72, No. 1, Feb. 1964, pp. 44-61. Textbooks of industrial organization routinely provide lists like Stigler's of conditions which make collusion more likely.

Figure 1

PRB Rate Increases Affect PRB Reach



(Source: American Coal Council's Implementing Fuel Flexibility Strategies Conference, July 20-21, 2010, Chicago, Presentation of Jamie Heller, "The Market for Fuel & Transportation").[2]

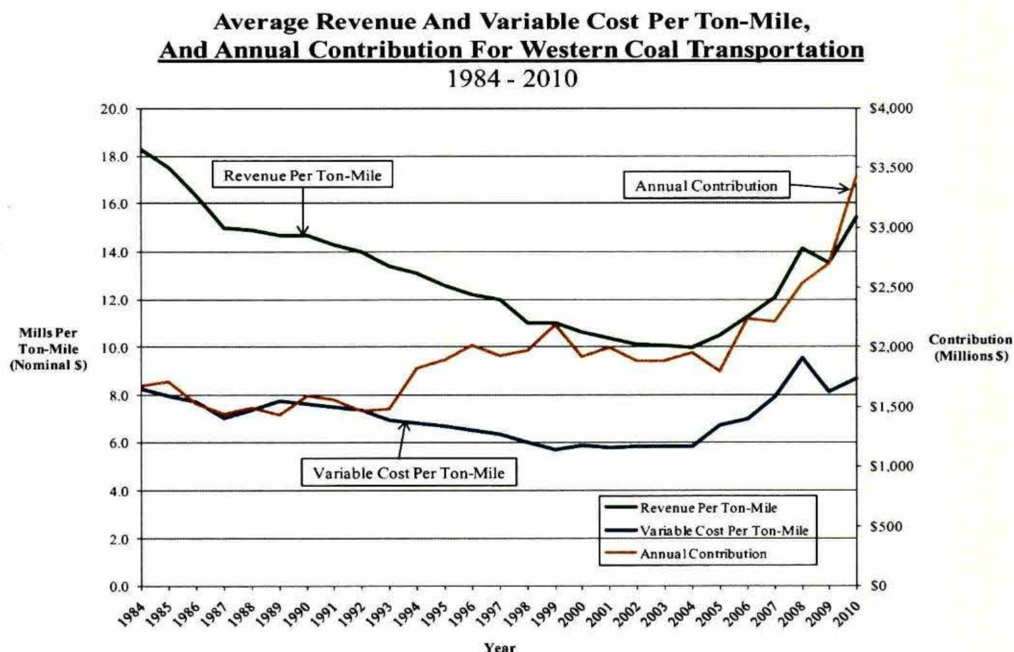
As Figure 1 shows, prices remained roughly stable between the early 1990s and 2004, even though the volume of shipments increased by 80% between 1990 and 2005 and by 50% between 1995 and 2005.[3] Pre-2004 price levels were thus clearly sufficient to sustain the investment necessary for dramatic output increases.

[2] The U.S. Interior Department has relied on Heller's analysis in its assessments of coal market conditions. See Attanasi, E.D., and Freeman, P. A., 2009, Coal marketability—Current and future conditions, *in* Pierce, B.S., and Dennen, K.O., eds., The National Coal Resource Assessment Overview: U.S. Geological Survey Professional Paper 1625–F, Chapter E, p. 30.

[3] Statement of Duane Richards, Chart II, p. 5.

As shown in Figure 2, the rate increases after 2004 far exceeded the increases in the costs of railroad inputs.[4]

Figure 2



It is worth spending some time considering the causes of the substantial deterioration in market performance after 2004. We understand that some have argued that the price increases were "consistent" with competition, because marginal costs were increasing and capacity was tightening during period. To begin with, prices continued to increase in 2010 despite a fall in demand, a trend not to be expected under competition in a homogeneous product market when capacity utilization is falling. Moreover, as shown in Figure 2, annual contribution (and thus operating income per ton mile) has risen dramatically since 2004. The increase in contribution demonstrates that the railroads have been able to achieve through their pricing considerably more than a "pass through" of their increased costs. We are

[4] Figure 2 is taken from research by L.E. Peabody and Associates, Inc. (L.E. Peabody). Figure 2 also appear in the accompanying statement of Duane Richards, Chart VI, p. 19.

thus highly skeptical of the railroads' "cost" and "capacity" arguments as providing an explanation for the full magnitude of the price increases since 2004.

Some form of collusion, either tacit or explicit, provides a far better explanation for the rapid escalation in coal transportation prices after 2004. In understanding collusion, it is a major mistake to focus solely on the difficulties of agreeing on price while failing to agree on anything else. It is true that price-only collusion may fall apart quickly in certain markets because customers may switch suppliers for reasons having nothing to do with a supplier's cheating on a tacit or explicit agreement or understanding on prices. Common examples of reasons include product differentiation, changing customer needs, or longer term contracts, which makes the contracts more "lumpy" and therefore more likely to elicit bids that cheat on the cartel agreement. Successful collusive agreements therefore focus on ways to identify and prevent cheating and to make it less profitable to the potential cheater. A common cartel strategy is to allocate customers – then you know your rival has cheated when he or she takes your customer. Another cartel strategy is to agree on market shares, for it is well known that an effective agreement among sellers on market shares will lead them to the profit-maximizing monopoly price.[5] In its past decisions, the STB has committed the error of focusing only on the difficulty of sustaining a naïve, price-only conspiracy.[6]

There is strong evidence that in about 2004 BNSF and UP successfully colluded to raise prices. Mr. Richards provides a lengthy and very interesting summary of this history. From an economics perspective, the most interesting features of that history are[7]:

- the public announcement of massive price increases by both suppliers, and the fact that the announced price increases "took", i.e., the two railroads were in fact able to double prices for new contracts between 2004 and 2006,

[5] For example, see D.K. Osborne, "Cartel Problems," *American Economic Review,* 66:835-44 (1976)
[6] Richards Statement at pp. 11-12.
[7] Richards Statement at p. 13-21.

- The fact that the public pricing announcements included both sharp price increases, and standardization (at lower levels) of various components of service quality This is important evidence because, when fixing prices, cartel members have to worry that their rivals will cheat by giving the customer better service. So restrictions on service (or on service guarantees) make sense as practices that facilitate price collusion. If price increases were truly just a necessary response to competitive market conditions, we should observe no changes in the levels of service, or in the degree to which customers can get heterogeneous and individually negotiated terms of service.
- After 2004, the railroads sharply reduced the length of contracts under which they would sell. Contract lengths fell from 5-10 years to 1-3 years. Each contract then became less lumpy, reducing the incentives for either railroad to cut prices to win business from the other. Aggregating its purchases by entering into longer term contracts is an effective way for a buyer to elicit price discounts, and the railroads' change in contract practice post 2004 would reduce the effectiveness of that strategy.
- The evidence that the collusive agreement extended to customer allocation. Mr. Richards reports that after the massive price increases under "public pricing", BNSF and UP effectively stopped competing for the other's customers. In 1996-2004 "accounts changed hands regularly" whereas "after 2004 the incumbent carrier invariably prevailed."[8]

In 2009, BNSF's CEO Matthew Rose gave very interesting evidence confirming customer allocation between BNSF and UP in an on-the-record discussion with Wall Street analysts. He was asked whether pricing discipline might be breaking down between BNSF and UP because, the analyst believed, BNSF had just taken some business away from UP. Rose told the analysts (and also UP, if it read the transcript or monitored the call) that it was a third party with some rights to BNSF capacity that took the

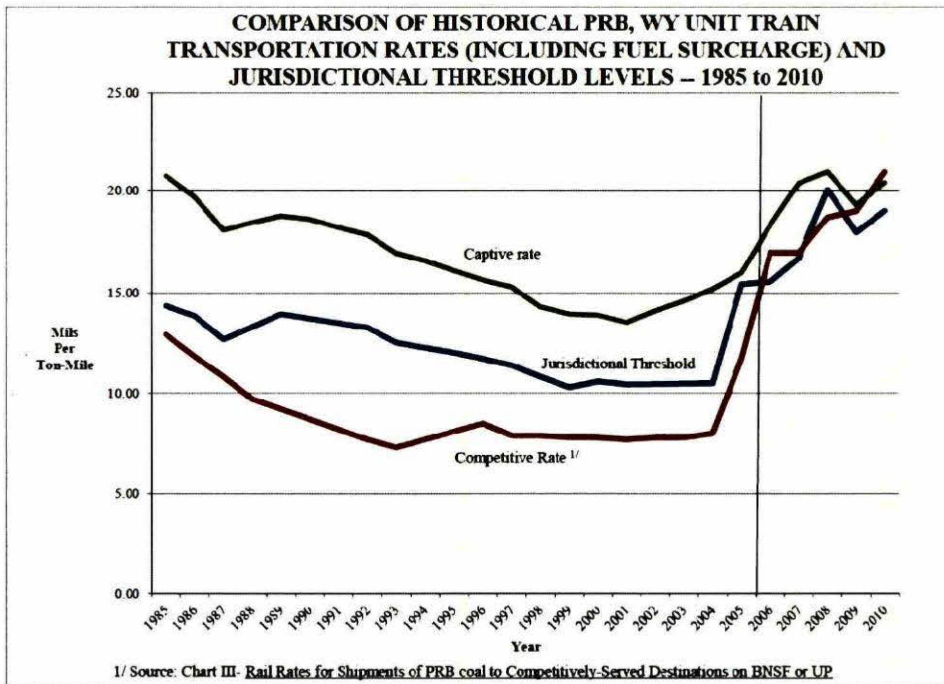
[8] Richards Statement at p 18.

business away from UP, and that BNSF did not know about it until it was a done deal. The implication, of course, is that neither UP nor the analyst should infer that BNSF was starting to compete on price. He concluded that BNSF has kept its approach on pricing pretty similar to the recent past. Indeed, Rose indicated that he thought the day might come when rates on "non-captive traffic will return us significantly more than captive traffic."[9] Mr. Richards concludes that that Mr. Rose's prediction has now come true for western coal transportation rates – levels for competitive rates have reached levels of captive rates.[10]

Mr. Richards also points out that, based on figures from a leading consultant, duopoly rates for so-called competitive shippers before 2004 were well below the STB's 180% of variable cost threshold for market dominance, and were typically about one-half the level of captive rates, but, as shown in Figure 3, that so-called competitive shippers are now actually paying higher rates than captive shippers,:[11]

[9] FACTSET callstreet, March 11, 2009, analysts' call with Matthew Rose, pp. 9-10.
[10] Richards Statement, pp. 20-21.
[11] Figure 3 is taken from research by L.E. Peabody and the information shown in figure 2. Figure 3 also appears in the accompanying statement of Duane Richards.

Figure 3



We conclude that there is strong evidence that BNSF and UP have successfully exercised market power in markets for transportation of western coal.

IV. Public Policy Options For The STB To Remedy The Poor Economic Performance In Transportation Of Western Coal.

There are several public policy options when dealing with a poorly performing duopoly. One could, of course, do nothing. This would be appropriate only when regulatory costs outweigh potential benefits. Given the size of this market and the potential gains to consumers from better performance, however, the only relevant issue is the costs and effectiveness of alternative remedies.

Among the affirmative regulatory options, the WCTL recommends that the STB clarify its rules to give explicit guidance that non-captive shippers may challenge rates exceeding the 180% revenue to variable cost threshold for market dominance. Under the WCTL proposal, if the evidence shows that one or more serving railroads are not effectively competing for the business (e.g., where a shipper is

dually served, one carrier is not providing a bid, or both of the potential competitors are offering rates above 180% of variable costs) then the market dominance test is met. This proposal is sensible from an economics perspective. As a logical matter, if 180% is a reasonable threshold to apply for market dominance, it should not matter whether the customer is captive or non-captive. Indeed, non-captive customers should expect to receive rates below stand alone cost whenever competition is effective. So giving non-captive shippers the right to obtain pricing based on stand alone costs, while an insufficient replacement for true competition, may provide some relief for dual served customers facing market dominant rates.

Pricing based on stand alone costs is a test for the maximum any customer or customer group should pay to a "contestable" seller who benefits from economies of density, scale, and scope. If all separate customers or customer groups paid prices equal to their stand alone costs, then they would get none of the benefits from economies of density, scale and scope – the seller would keep all the scale and scope economies as excessive or monopoly profits.[12] With effective competition between two sellers, each benefitting from economies of scale and scope, customers will realize some of the economies of scale and scope in the form of prices below stand alone cost. If duopoly prices are actually above stand alone cost, however, this is clear evidence that competition between the duopolists is not effectively protecting customers' interests.

The fact that competitive shippers are now apparently paying as much as or more than captive shippers and that their rates have risen sharply relative to costs provides a compelling indication that the carriers are not competing. Given the absence of effective competition, the fact that a shipper may

[12] For completeness, we note that a coalition of all buyers paying stand alone costs (of serving all buyers) would not imply that the incumbent is earning monopoly profits. But that is because the coalition of the whole also realizes all economies of scale, scope and density. But so long as there are economies of scale, scope and/or density extending across discrete customer groups, the incumbent will earn excess profits if each customer group contributes revenues equal to or above stand alone costs.

theoretically be able to obtain service from two carriers should not suffice to establish in any way that the competition is effective or that the carriers lack market dominance.

If the STB declares that non-captive rates above 180% of variable costs can be challenged by shippers, this might, for several reasons, provide at least some meaningful relief from excessive prices for non-captive coal transport. First, some shippers might win lower rates after a full stand alone cost hearing and determination by the STB. Second, if shippers were successful in bringing such actions, railroads may be less likely to seek to implement rates that they would expect would be disallowed under stand alone cost criteria. Finally, in a duopoly setting, such a rate case need be brought against only one of the two railroads to be effective against both. This is significant because a shipper may wish to economize on litigation expenses by challenging one railroad rather than two at the STB, and because an order against one railroad limiting its rates will place competitive limits on the rates charged by competing railroads. Further, the railroads interests become less uniform when one is in litigation and the other is not. This asymmetry of interests may lead to a quicker erosion of cartel discipline than would otherwise be expected.

One can also look for relatively low cost or focused procompetitive measures or regulations. This is the focus of the STB's current efforts, which has asked for comments on ways of regulating access to bottlenecks facilities and/or mandating reciprocal switching, terminal use, or trackage rights. We refer to these proposals collectively as "access regulation." These measures deserve careful consideration, and potentially offer benefits that exceed their costs. Individually or collectively, however, they appear to be unlikely to have a fundamental effect on performance in this particular market, for a number of reasons.

First, access regulation can work well when the incumbent finds it difficult to retaliate against the rival seeking access. However, the western coal duopolists (with roughly equal shares) will find it

easy to avoid "access-based" competition with one another, since detection and retaliation would be quick and certain.

Further, improved or easier access to a rival's facilities will convert the market from 1 seller to 1+ sellers, but we would expect less competition from a 1+ market than from a duopoly market where each seller did not have to rely at all on the cooperation of its rival. In the PRB there have been substantial rate increases in recent years even in duopoly markets, where the carriers ostensibly compete against each other. This strongly suggests that tweaking access rules to make captive PRB markets more competitive will have a small payoff. It may be better than doing nothing, and it is very unlikely to result in any meaningful disruption to the railroads' financial condition, but it leaves unsolved the problem of abysmal duopoly performance.

The history of "bottleneck" access in the PRB also does not provide much hope for such measures. The STB's "Bottleneck" decision in 1996 established that, if a customer could get a "contract first" on the upstream "competitive" market segment, then the customer could then seek to obtain a regulated bottleneck rate over the bottleneck segment. Given the profitability of coal to the western railroads, carriers in a truly competitive market would seemingly have every incentive to provide such contracts first. However, we understand that 15 years after the *Bottleneck* decision, neither western railroad has offered any non-bottleneck contracts to shippers when the bottleneck carrier operates in the same region, even on highly profitable long-haul, unit-train bulk movements. If they are not competing for this business in the market today by offering contracts for the upstream non-bottleneck rail line segments, changing regulations to allow a customer to get a regulated rate first over the bottleneck segment is unlikely to change the railroads' reluctance to compete over the non-bottleneck segments.

V. Conclusion

The history described by Mr. Richards indicates that there have been excessive increases in the prices for the railroads' transportation of Western coal since 2004. These increases are consistent with tacit or explicit collusion, and cannot be reconciled with competitive markets. WCTL's proposal to apply the STB's market dominance rules to non-captive shipments of western coal is likely to improve market performance. Modest changes in the STB's rules for network access are unlikely to improve matters much in western coal transportation markets. The problem is a poorly performing duopoly, not a monopolist who needs to be nudged to offer more reasonable access to its network.

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 705
COMPETITION IN THE RAILROAD INDUSTRY

VERIFIED STATEMENT OF
DUANE L. RICHARDS
ON BEHALF OF THE
WESTERN COAL TRAFFIC LEAGUE

My name is Duane L. Richards and I am Chief Executive Officer of Western Fuels Association, Inc. My business address is 1100 West 116th Avenue, Westminster, Colorado 80234. I appear in this proceeding on behalf of the Western Coal Traffic League ("WCTL" or "League"). My company is a member of WCTL and I am the League's President. I have spent my entire career in positions directly involved with the production, sale, purchase, and transportation of western coal.

At the very outset, I will commend the Board for its institution of this formal proceeding titled COMPETITION IN THE RAILROAD INDUSTRY. Your decision to explore the current state of competition in the railroad industry is both timely and, in the view of our League, urgently necessary. Rail competition for western coal transportation business is a subject of intense concern to the League's membership. Indeed, I believe I can fairly say that the state of railroad competition in the west is the single most important issue to all but our few remaining members with captive stations. For the past several years, WCTL has itself investigated the status of rail competition in

the west and we welcome this opportunity to share our views, findings and fears with the Board. My comments today will focus solely upon the railroad carriage of coal mined in the West.

ABOUT WCTL

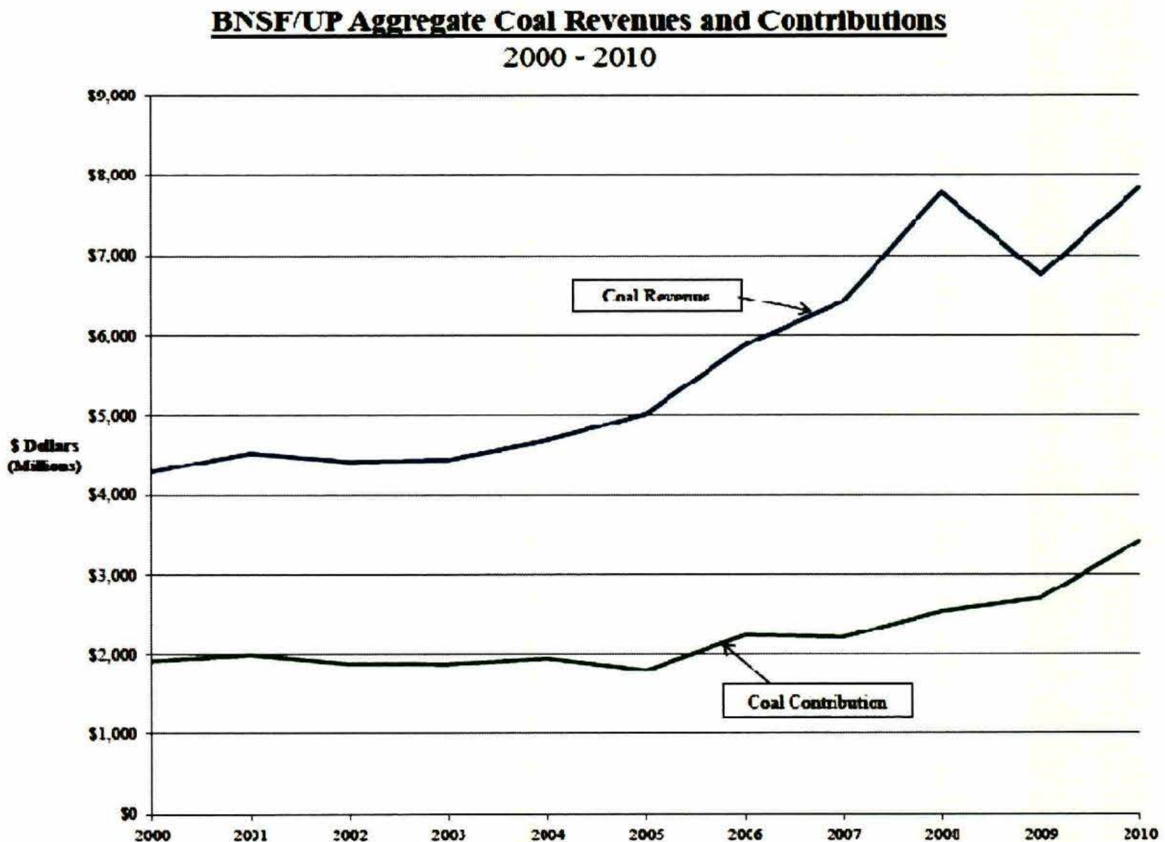
WCTL is a voluntary association whose membership is composed exclusively of organizations which purchase and transport coal from origins west of the Mississippi River. WCTL members collectively consume more than 170 million tons of western coal annually nearly all of which is moved by rail. Our members include investor-owned electric utilities, electric cooperatives, state power authorities and municipalities. I list our members in Exhibit 1 to this statement. Collectively we pay the railroads of the west over $1.7 billion each year in coal freight charges.

WCTL was formed in 1978 for the purpose of advancing and protecting the interests of electric ratepayers on whose monthly electric bills appeared all costs connected with the utilization of coal by their electric suppliers. Since its formation, WCTL has been active continuously before the Surface Transportation Board and its predecessor, the Interstate Commerce Commission, in nearly every major proceeding the agency has initiated and WCTL has initiated several proceedings on its own. WCTL was also an active participant in the hearings and related events which led up to the enactment of the Staggers Act in 1980. All of WCTL's energies are expended on behalf of the millions of electric ratepayers for whose interests it serves as steward.

THE TRANSPORTATION OF COAL BY RAIL IN THE WEST

I believe it is a fair statement to say that coal traffic is the Golden Goose of western railroading. Coal traffic is steady, voluminous, easily transportable and exceedingly profitable. Coal is far and away the leading revenue producer for both UP and BNSF. In 2008, they earned nearly $8 billion from transporting coal ($3.76 billion for UP and $4.19 billion for BNSF). More importantly, western coal traffic is highly profitable to the western roads as my Chart I reveals:

Chart I



(Source: L. E. Peabody & Associates, Inc.)

BNSF's Chairman has recognized the great value of coal traffic to his railroad:

> "As far as coal, I do know the numbers and understand the profitability. Coal is the most profitable commodity we haul." (Matt Rose Meets with Workforce at Town Hall, Powder River Reflection, p. 6 (September/October 2003)).

Because coal traffic is the most critical component of rail commerce in the west, the state of western rail competition for coal transportation business becomes the single most important consideration in evaluating the state of western rail competition generally.

The best place to begin an examination of the current state of rail competition for western coal traffic is with a brief review of the state of rail competition during the 10-year period between the inception of modern western coal movements *circa* 1974 and the introduction of head-to-head rail competition in the Powder River Basin ("PRB") in 1984.

RAILROAD COMPETITION IN THE WEST–1974-1984

Prior to the Arab Oil Embargo of the early 1970s, coal traffic in the west was a relatively minor player in the traffic mix of the rail carriers of the West. For example in 1970, BN hauled only 8.2 million tons of coal and UP 2.3 million. All of the western roads together hauled only 27 million tons. (Source: Minerals Yearbook – 1970, U.S. Bureau of Mines). Western coal was primarily consumed by a few cement plants and other industries which used small amounts of coal.

The "Coal Rush" in the west was ushered in by the United States government through its enactment of the Energy Policy and Conservation Act of 1975

and the Powerplant and Industrial Fuel Use Act of 1978. These new laws compelled the wholesale conversion by American industry from oil and gas to coal. Because the industries and utilities in the west were uniquely dependent upon oil and gas, the impact of these new laws on both western energy users and western railroads became a dramatic one in short order. My chart below shows the rapid growth in western coal production and western rail traffic following the intervention of the federal government into the national energy market:

Chart II

Western Coal Production and Coal Tons Originated by Western Railroads		
Year	Western Coal Production (million tons)	Western Railroad Originated Coal Movements (million tons)
1970	44.9	27.0
1975	110.9	64.1
1980	251.0	178.6
1985	324.9	227.4
1990	398.9	279.2
1995	488.7	337.2
2000	566.1	415.7
2005	637.7	501.0
2009	624.9	494.6

(Source: U.S. Dept. of the Interior, Bureau of Mines; U.S. Dept. of Energy, Energy Information Administration; individual railroad annual QCS statements filed with the ICC/STB).

Several major railroads participated in the surging market for coal transportation business in the west during this time including Burlington Northern, Union Pacific, Southern Pacific, MKT, Missouri Pacific, KCS, D&RGW, C&NW and Santa Fe. While nearly every new shipper and receiver of western coal was captive to a single

destination rail carrier, there was, nonetheless, a moderate level of rail competition in the west during this era in the form of origin competition. The principal coal hauling carriers of the west each served major western mining regions:

CARRIER	PRIMARY COAL ORIGIN(S)
Union Pacific	Hanna Basin, WY
Burlington Northern	PRB, WY & MT
D&RGW/Southern Pacific	Colorado, Utah
Santa Fe	San Juan Basin, NM

The various mines and producers at these coal producing origins competed for the coal purchase business of our members and the rail carriers serving the mines also competed to enable coal purchases and sales from mines on their respective lines. There was also a modicum of healthy rail competition for some of the intermediate legs of our members' mine to destination movements. For example, in the 1980s our member Arizona Electric Power Cooperative, Inc. purchased coals in Colorado which it originated on D&RGW and terminated in Arizona on Southern Pacific. However, both BN and Santa Fe could participate in the haul between SP and the D&RGW legs and they, in fact, competed vigorously for this bridge traffic

As I said, however, the overall state of competition in the west between 1974 and 1984 could at best be described as only lukewarm because of the widespread captivity of coal shippers at their destinations. Every then-member of our League was served by only a single railroad at destination in 1980. This widespread captivity of coal shippers at their destinations fostered monopoly rail pricing which in turn led to a torrent

of maximum reasonable rate cases before the Interstate Commerce Commission including cases brought by our members from Houston, San Antonio, Omaha, Corpus Christi and elsewhere. During this period coal traffic moved primarily in common carriage and the going market rate for a ton of coal in a unit train of shipper cars during the early 1980s was *circa* 17 mills per ton mile or $17.00 for a haul of 1000 miles. These were the rate levels which our members and others challenged before the agency as unreasonably high.

The rail transportation circumstances and conditions which I describe remained largely static until 1984. In that year, with WCTL's vigorous support, C&NW initiated new rail service to the so-called southern PRB mines and it immediately began to engage in head-to-head competition with BN for origin PRB coal traffic.

RAILROAD COMPETITION IN THE WEST 1984 - 2004

C&NW teamed up with UP on numerous joint movements out of the PRB and together they provided formidable competition to the incumbent BN. The introduction of rail competition to the nation's largest coal producing region inaugurated an era of vigorous rail competition for coal traffic amongst the western carriers. C&NW and UP were aggressive with both their prices and services in seeking new PRB coal customers. BN was compelled to try and meet or beat their price and service proposals in order to retain or to attract new PRB coal traffic. The superior prices and services which emerged from this new rail competition in the PRB also prompted SP, D&RGW and Santa Fe to become more competitive in order to try and keep the coals on their lines in the fuel mixes of the consumers.

Nor was the emergence of competition in the PRB lost on the very large number of captive railroad transportation customers who immediately began looking for ways and means to end their captivity in order to access the new rail competition between BN and CNW/UP. Regrettably, it soon became apparent that meaningful assistance in these endeavors was not to come from this agency which for reasons best known to itself took a highly restrictive view of the so-called Competitive Access Provisions of the Staggers Act (49 U.S.C. § 11102). While WCTL believes that the agency misinterpreted and misapplied these provisions, its members quickly became resigned to the fact that there would be no dissuading the agency from its mistaken view.

Accordingly, many of our captive members, as well as many other major shippers and receivers of western coal, undertook ambitious self-help projects to reach a second rail carrier by constructing new rail trackage (i.e., Nebraska Public Power District, Western Farmers); securing trackage rights (CPS of San Antonio); and creating short line rail carriers (MidAmerican). These types of self-help projects, aided where necessary by the agency, resulted in a greatly increased level of rail competition in the west. I list in my Exhibit No. 2 examples of the "competition" projects of the sort which I have in mind and which were undertaken after 1984.

As I observed earlier in my remarks, the pre-competition rate on PRB unit coal train traffic in shipper-owned railroad cars was *circa* 17 mills per ton mile or $17.00 for a 1000 mile haul. By the end of the century, competitive market rates had dropped dramatically. In Ex Parte 575, we presented evidence to the Board that competitive PRB coal rates had fallen from over 17 mills per ton mile in 1983 to under 10 mills and lower

in 2000. During this same period, other essential rail rate and service terms became extremely responsive to the requirements of the coal shipping community. Thus carriers offered to guarantee the delivery of agreed upon quantities of coal during agreed upon time frames in accordance with agreed upon monthly schedules. In some instances, they also offered to agree to adjust their rates each year to reflect true changes in service costs. Nearly all western coal moved pursuant to contract rates. All the while, as I have shown, the usage of western coal was increasing dramatically. Between 1980 and 2004 western coal production rose from 250 million tons to over 600 million tons. Nearly all of this enormous volume of coal moved by rail or partially by rail to destination.

Had the Board held this hearing in 2003, the then President of our League, the late David Laffere of Kansas City Power & Light, would have appeared before you and he would have extolled the high quality of rail transportation in the west for most of our members' coal transportation business and the resultant reasonable rates. He would also have expressed content with the carriers' service offerings, even if at times, the actual service did not meet expectations. He would have portrayed a competition state where all but the captive coal shippers were fully satisfied. At the same time, the railroads were highly profitable and were making the capital investments which their profitable coal traffic required and warranted. Life was good!

While the range and scope of competitive rail services grew steadily after 1984 as more and more coal receivers terminated their captivity, a parallel development was taking place in the rail industry in the west which greatly concerned and troubled our members; namely, a serial rail merger movement. While WCTL has been a very active

proponent of pro-competitive rail initiatives such as the extension of services by the C&NW and the DM&E into the PRB, it has been equally vigorous in its opposition to the many different rail mergers, amalgamations and acquisitions which took place by and between various western railroads during this same period.

Most of WCTL's members had been exploited in the late 1970s and early 1980s by a western railroad with market power. Having thereafter enjoyed, for many years, the multiple benefits of healthy railroad competition, they did not want to see a return to the "bad old days" of monopoly rail pricing. For this reason, WCTL vigorously opposed the CNW/UP, the BN/Santa Fe and the UP/SP mergers. WCTL averred that these mergers threatened to directly diminish competition in the west by eliminating CNW, SP and Santa Fe from the competitive rail mix. More importantly, WCTL was convinced that the permission of a rail duopoly in the west would lead directly to anti-competitive practices and the inevitable return to the same sort of monopoly pricing of coal traffic in the west with which the modern western coal transportation era had begun in the early 1970s.

In his opposition testimony before the Board in the UP/SP merger proceedings, WCTL witness, Professor George H. Borts, was unequivocal in his assertions that conditions and circumstances in the western rail market for coal transportation were such that the end products of a rail duopoly would be the collusive demise of competition and higher rates for the coal shipping public:

> "Most economists, including myself, subscribe to the theory that the more concentrated a market is, the more likely it is that producers will engage in anti-competitive activities

> intended to increase consumer prices." (UP/SP Merger, Fin. Docket No. 32760, V.S. of George Borts, p. 4)
>
> x x x
>
> "The conditions in this market are conducive to market sharing and tacit acceptance of rate increases by the carriers." (UP/SP Merger, Fin. Docket No. 32760, V.S. of George Borts, p. 21).

To the same effect, Dr. W. R. Majure testifying for the United States Department of Justice stated:

> "... because the merger leaves only two major railroads throughout the West and significantly increases the number of markets where they are the only two competitors, it also increases the likelihood of tacit collusion and higher prices...." (UP/SP Merger, Fin. Docket No. 32760, V.S. of W. Robert Majure, p. 54).

Notwithstanding the straightforward predictions by these distinguished economists of future rail collusion and higher prices, based upon extensive factual data and economic theory, the Board chose instead to go along with the railroad vision of the future of western competition as presented by their spokesman, Dr. Robert Willig. Dr. Willig argued that after the mergers there would be intense competition "in which each railroad independently pursues its own interests ...." (UP/SP Merger, Fin. Docket No. 32760, V.S. of Robert Willig, p. 601).

In dismissing the fears, claims and evidence of WCTL and DOJ that its endorsement of the mergers would lead to collusion, higher prices, and fewer services on western coal rail traffic, the Board reasoned as follows:

> It is true that tacit collusion is more likely in two-firm markets, where one firm can anticipate the other's response, than in multi-firm markets. Multi-market contact, which will

> take place here, can also facilitate tacit collusion. Nevertheless, other important factors indicate that these carriers [BNSF and UP] are more likely to compete than tacitly collude. One significant factor here is the heterogeneity of rail service, which would make it very difficult to maintain a tacitly agreed rate level.
>
> Another factor making tacit collusion unlikely is the secrecy about rail price and service offerings that now characterizes the rail industry. Contracts between railroads and shippers for major movements are now the rule, and railroads are no longer required to file public tariffs for the remainder of their traffic. Contracts often incorporate detailed specifications for a wide variety of service aspects. Confidentiality clauses in those contracts effectively deter collusive action because information about these competitive actions is shielded from competitors.
>
> The significant economies of density and of scope exhibited by railroads also make tacit collusion less likely.... Given all these factors, we do not think that tacit collusion is a likely outcome for this traffic. (UP/SP Merger, 1 S.T.B. 233, 570) (emphasis supplied).

History would prove that both Dr. Willig and the Board had it right – **but not for long!**

Following the emergence of the railroad duopoly in the west in 1997, BNSF and UP continued as the "intense competitors" which Dr. Willig predicted and they vied with each other in the PRB for both new coal movements and for movements whose contracts were expiring. Many of our members happily benefitted from this intense competition and would, for example, first place their contract business with BNSF and at the expiration of a contract place it with UP.

Despite the intense level of competition between BNSF and UP for coal transportation business they continued to enjoy enviable growth and profitability. Nonetheless, by 2000 the carriers were becoming increasingly unhappy and began to

complain publicly about what they perceived as the low level of their PRB coal rates. BNSF's Mr. Rose appeared before the Congress to bemoan the fact that "competitive pressures" were forcing coal rates downwards such that they were 42 percent lower in 2001 than in 1980 (Statement of Matthew K. Rose, Before the US Senate Committee on Commerce, Science, and Transportation, Subcommittee on Surface Transportation and Merchant Marine, at p. 34 (May 9, 2001). UP complained similarly. Their joint solution to their claimed problems with these low coal rates and their perceived ill effects of intense competition for coal traffic was the creation and implementation of the so-called practice of **"Public Pricing"** for their coal transportation services.

THE DEMISE OF COMPETITION FOR COAL TRAFFIC IN THE WEST 2004 -?

In early 2003, BNSF announced it was ending its practice of contracting for the movement of all PRB coal and instituting the mandatory new use of a common carrier schedule instead. The schedule was BNSF 90068 which set forth common carrier rates to various BNSF destinations. All of the rates therein were markedly higher than the previous market level for PRB rates. Whereas market rates at the time were in single digit mills per ton mile, BNSF's rates in No. 90068 were very much higher. BNSF made no secret of why it had turned to public pricing. In a speech to another western coal group in which Mr. Rose announced BNSF's intention to switch to tariffs, he underscored BNSF's needs to raise its coal rates (BNSF CEO Matt Rose Addresses WTCA Today (Sept. 10, 2002)). Unlike a conventional tariff, No. 90068 also set forth in some detail, similar to that found in contracts, the other terms and conditions of BNSF's

coal carriage under No. 90068. These terms were of course, non-negotiable and applicable to all shippers.

BNSF's attempt to force its public pricing on competitive PRB coal movements could, of course, succeed only if UP followed suit, since no rational coal shipper with two carrier service would use the exceedingly high rates and inferior service terms in No. 90068 if UP were still offering single digit market rates not to mention the many various other transportation terms more favorable than the ones in BNSF's tariff.

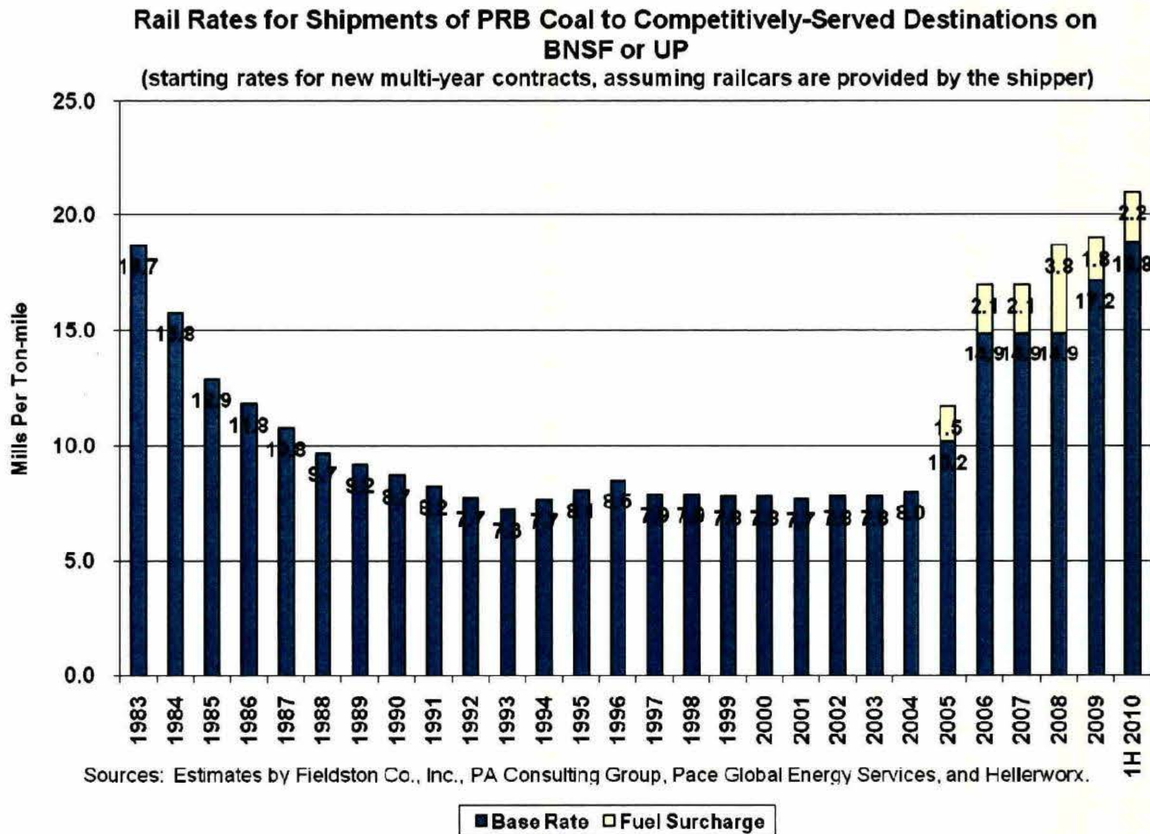
UP was still so offering, and as a consequence in 2003, after BNSF's promulgation of No. 90068, UP quickly captured the contract business of our member, OPPD, a former BN customer. Thereafter, BNSF itself immediately resumed contracting for coal traffic and secured new contracts with other former UP customers. While BNSF's public pricing program failed to gain traction in the market in 2003, BNSF continued to hold out to the public the high rates listed in schedule No. 90068 while at the same time it was entering into new contracts.

The other shoe dropped in early 2004 when UP decided to pursue its own version of public pricing. It did so by sending a letter to all of its customers announcing, like BNSF had previously, its intention to cease completely the future contracting for coal traffic and to commence all carriage of coal exclusively by publicly posted rates and terms (see my Exhibit No. 3). With UP's decision in early 2004 to cease contracting, both of the western roads were on record as willing to haul coal only in accordance with the prices (high) and terms (minimal services) set forth in their public tariffs.

While BNSF and UP introduced their mandatory public pricing programs with great fanfare, the truth of the matter is that other than serving as vehicles for signaling specific prices to one another these schedules were more ignored than employed in actual coal transportation transactions. While I have not attempted to determine how much coal traffic moved or moves under the respective public schedules, I believe it to be fairly minimal because each carrier, without any public announcements, soon returned to its former practices of using private contracts when customers sought their coal transportation services. Today, as prior to 2004, contracting is the primary medium whereby each western carrier furnishes its competitive rail services on western coal originations. Nonetheless, they continue to hold out their public prices.

The post-2004 contracting process, however, bore no resemblance to the pre-2004 process and practice. In the first place, all of the carrier rate proposals, after 2004, to potential customers were sky high in comparison to the pre-2004 market levels. My next chart depicts this disparity (i.e., 2004 vs. 2009).

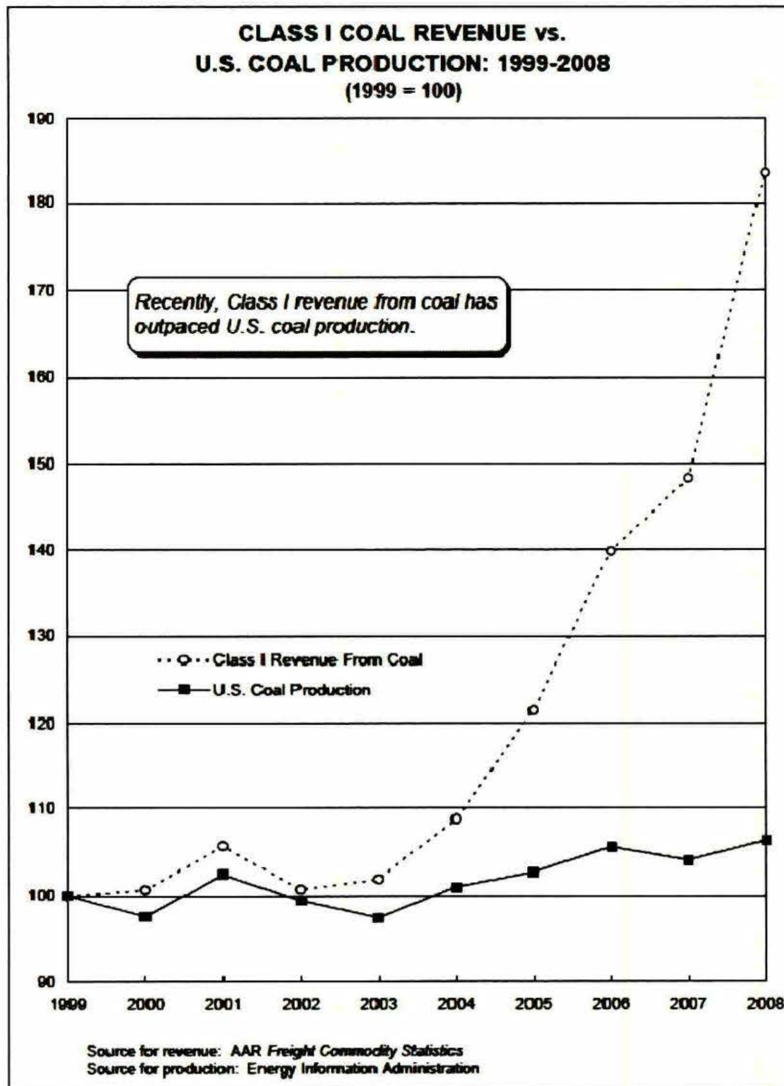
Chart III



(Source: American Coal Council's Implementing Fuel Flexibility Strategies Conference, July 20-21, 2010, Chicago, Presentation of Jamie Heller, "The Market for Fuel & Transportation.")

As my Chart III reveals, between 2003 and 2010 the going rate level for coal transportation in the west nearly **tripled**. Even AAR's own generalized data confirms these same enormous increases in the prices for railroad coal transportation after 2004.

Chart IV



(Source: The Rail Transportation of Coal – Vol. 11, p. 39.)

Not only did the price proposals for services go skyrocketing after 2004, the competitive tenor changed as I detail in my Chart V.

Chart V

Railroads Pre-Consolidation Competitive Behavior	Railroads Pubic Pricing Behavior
Two carriers aggressively competing for business.	Major increases in base rates
Negotiated, longer term contracts (e.g., 5-10 years)	Insistence upon short term agreements
Negotiated, the rate adjustment provisions promulgated by the STB, incorporating carrier productivity savings (e.g., RCAF-A) and reflecting actual fuel costs	Imposition of carrier-favorable rate adjustment mechanisms promulgated by the AAR, unadjusted for productivity savings and excluding fuel
Negotiated, reasonable service standards, cycle times, etc., with shippers receiving make-up service for missing movements, liquidated damages, etc.	General refusal to establish any service standards, cycle times, etc.
No surcharges	Imposition of fuel surcharges through carrier tariffs
Negotiated, reasonable accessorial fees/standards	Imposition of accessorial fees/standards through carrier tariffs

Additionally, unlike competition in the 1996-2004 period in which big coal transportation accounts changed hands regularly, after 2004 the incumbent carrier invariably prevailed in keeping its account. While the railroads impose needless and unreasonable secrecy and confidentiality on their pricing and contracting activities, one has to assume that if the winning railroad bid after 2004 for a shipper's business was nearly triple the old contract price, the losing bid had to have been even higher. What a reversal in form!

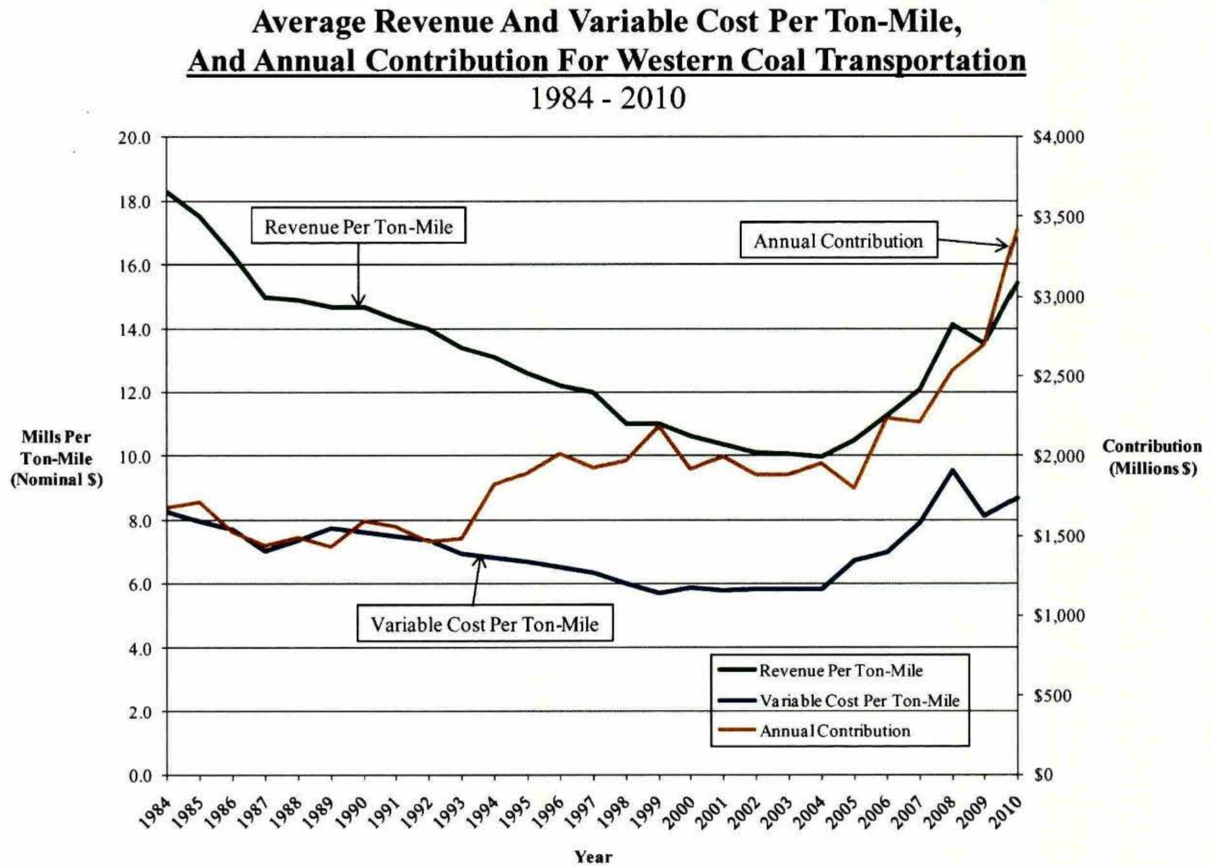
In recent STB hearings, Professor Willig has argued that the enormous increases in rail prices which began in 2004 were offset by increasing costs:

> Price increases in the face of increasing marginal costs are not indicative of an abuse of market power. Rather, they are entirely consistent with – and expected in – competitive markets. (STB Ex Parte No. 704, V.S. of R. Willig, AAR Testimony filed Jan. 31, 2011, p. 54).

The facts do not support Dr. Willig's claims. While western coal rates have indisputably gone ballistic since 2004, there is no evidence that service costs have

increased proportionately. As my next chart discloses, average prices for coal transportation after 2004 rose far more than did the underlying service costs. The result? Burgeoning western rail profits!

Chart VI

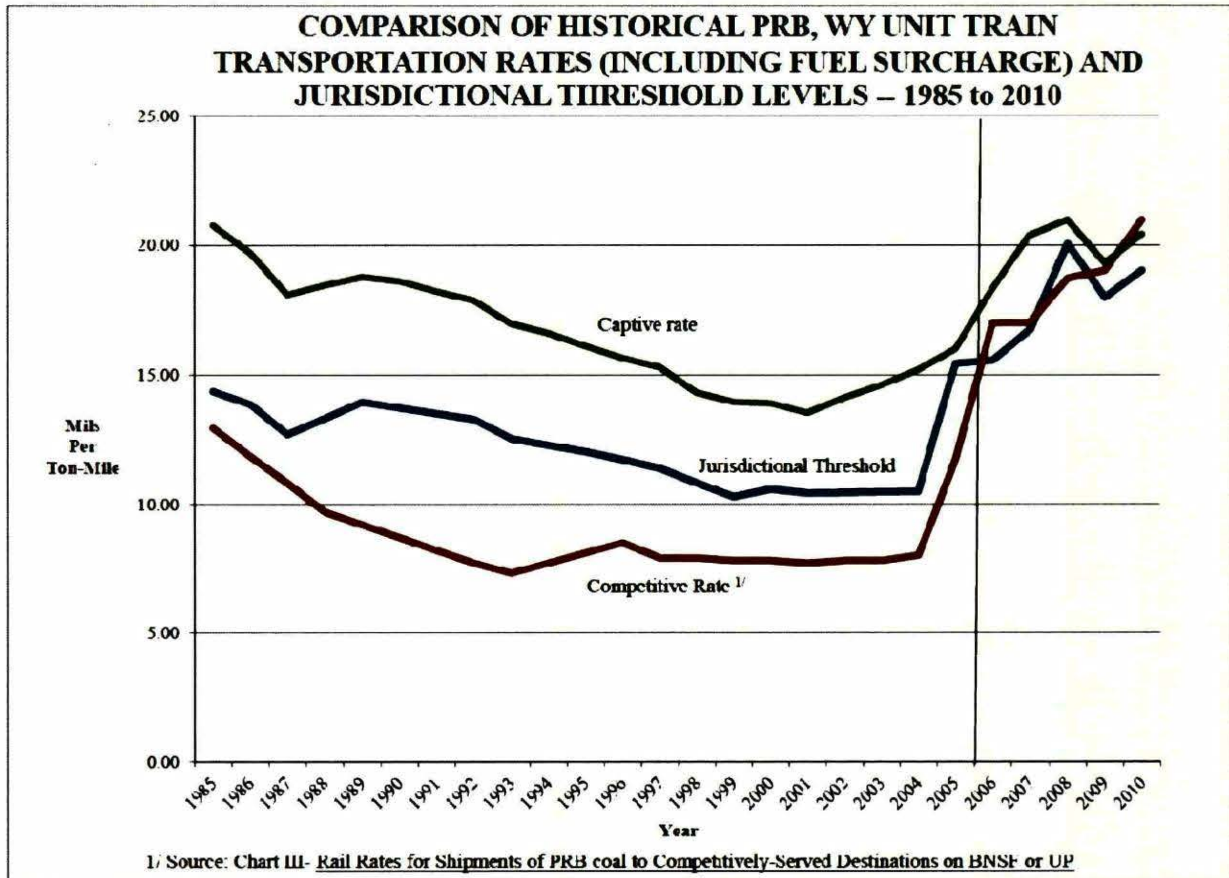


(Source: L. E. Peabody & Associates, Inc.)

Today, 2011, rail competition for coal traffic in the west has **ceased**. The best proof of this fact is that a captive western coal shipper is better off today than a shipper with two carrier ("competitive") service. This is so because, as I can attest from personal experience, a captive shipper has the right and ability to try to secure relief from predatory rail prices from this agency pursuant to the Coal Rate Guidelines. Competitive

shippers have no alternative to collusive prices. As my final chart confirms, the market ("competitive") rates for coal transportation in the west are now at **higher** levels than the ceilings which the Board imposes under the Coal Rate Guidelines for captive traffic.

Chart VII



(Source: L. E. Peabody & Associates, Inc.)

It bears noting that the anomalous situation I describe has come as no surprise to BNSF whose Chairman presciently predicted it in 2009:

> "... one of the reasons that we have had pressure from customers and markets is that the percent of captive traffic produced a higher margin than the non-captive traffic to, in some cases, 20, 25, 30% and that cost caused a lot of disconcern. And I can see us in a period of time in the future,

> where non-captive traffic will actually return significantly more than captive traffic." (Corrected Transcript from the JP Morgan Aviation & Transportation Conference, March 11, 2009, p. 10) (emphasis supplied).

I appear before you today to say that the time of which Mr. Rose spoke has come!

As I believe I have made very clear on our members' behalf, rail competition for western coal transportation business no longer exists and so-called competitive shippers are being made to pay more than those shippers whose rates are regulated by this agency. Under the circumstances that exist today, I trust the Board will find it easy to understand that most of our members who are without the service of two carriers are not eager to join their competitive brethren by gaining access to competition and thereby losing the protections of your Coal Rate Guidelines. Accordingly, while our counsel will comment on several of the specific items listed in the Notice, I will instead turn to what we as a League believe the Board must do to rectify the deplorable competitive conditions which exist in the west today and which I have described and documented for you.

MARKET DOMINANCE REVISION

As it is administered today, the Board equates service from two rail carriers with effective competition. As I have demonstrated, this view is a fallacious one insofar as western coal transportation is concerned. In order to achieve the goals of the Staggers Act, given the transportation circumstances and conditions which now exist in the west, the Board must clarify its Market Dominance rules so as to find BNSF and UP to be

Market Dominant over western coal transportation. The blueprint for so administering the provision was supplied by the Congress when it created Market Dominance:

> "The key to this new provision is in the definition of market dominance. Market dominance is defined in terms of the lack of effective competition by any mode. Defining market dominance in terms of lack of effective competition avoids the problem of defining monopoly power .... Under this definition, the publishing carrier need not have monopoly power. Rather, the test will be whether the market itself is sufficiently competitive to insure just and reasonable rates. Thus, the Commission will be able to regulate maximum rates in oligopoly or concentrated markets as well as in monopoly markets." 1976 4R Act, Senate Rep. 94-499, p. 47 (emphasis added).

The rates which the Board imposes on captive traffic in maximum reasonable rate cases are by definition "maximum reasonable" rates. The many rates higher than these prescribed rates, which are now being imposed by BNSF and UP on so-called competitive movements are *a fortiorari* unreasonable. Because competition can no longer be relied upon to advance and fulfill the goals of the Staggers Act, the Board must step in to insure that those goals are reachable. The Board cannot cure the anti-competitive circumstances in the west which it enabled by unscrambling the mergers so as to restore more competition. The only viable solution lies in a clarification of the Board's administration of the Market Dominance concept so that the Board finds that coal shippers in the west are served by Market Dominant railroads.

CONCLUSION

While, in some quarters, coal is in disfavor today, coal is nonetheless the bedrock of our nation's energy supply and coal will so remain for the foreseeable future,

and perhaps forever. Western coal, and PRB coal in particular, dwarf all other sources of domestic coals. Because reasonably priced energy is critical to the national interest and because western coal is our most important and reliable source of reasonably priced energy, the Board must immediately take the steps our League recommends so as to prevent the western railroads from further exploitation of their valuable resource and its users.

I thank you for this opportunity to present our League's views and position on this most timely subject and I hope for the sakes of the nation's electric rate payers that the Board takes steps to oversee the restoration in the west of reasonable rail rates and services responsive to the needs of coal shippers.

Exhibit 1

WCTL Membership

Ameren Energy Fuels & Services

Arizona Electric Power Cooperative

Central Louisiana Electric Company

City of Austin, Texas

CPS Energy

Entergy Services, Inc.

Fayette Power Project

Kansas City Power & Light

MidAmerican Energy Company

Minnesota Power

Nebraska Public Power District

Omaha Public Power District

Texas Municipal Power Agency

Western Farmers Electric Cooperative

Western Fuels Association, Inc.

Wisconsin Public Service Corp.

Xcel Energy, Inc.

Exhibit 2

Representative Line Construction Projects

Utility/Plant	Line Length	Incumbent Rail Carrier	New Carrier
MidAmerican/Council Bluffs	3 miles	BN	UP
Nebraska Public Power District/Gentleman	9.2 miles	BN	UP
Houston L. & P./Parish	10.7 miles	BN	UP
Western Farmers/Hugo	14 miles	Kiamichi	TOE

Exhibit 3

Energy

Circular 111 Overview

Simplified SPRB Coal Pricing

On March 3, 2004, Union Pacific began introducing a new pricing mechanism for coal shipped from the Southern Powder River Basin (SPRB) in Wyoming. It is found in UP Circular 111. Circular 111 went into effect March 31, 2004.

The program will eventually expand to include all of Union Pacific's SPRB business. Initially, it covers specific destinations to which Union Pacific currently is, or could be, transporting coal and where contracts are set to expire during the next three years. The covered destinations are listed in UP Circular 111.

The program consists of standard terms and conditions set forth in UP Circular 111 and a separate set of non-confidential rate items applicable to specific destinations covered by the Circular. Union Pacific will share the rate items only with customers who are eligible to ship under Circular 111.

Under Circular 111, Union Pacific's customers will have two basic options: a spot market option and a three-year commitment option. The first option is a basic plan intended for infrequent coal moves. The second option reflects commitments from both parties for term, volume, rates and, when shippers furnish their own equipment, service. Rates with annual escalators are set for the commitment period. Both options include a fuel recovery mechanism.

Union Pacific adopted this program to simplify the way customers do business with Union Pacific for SPRB coal rail service. Instead of very complicated and lengthy contracts that consume significant resources to negotiate and manage, Circular 111 and the associated rate items set forth straightforward and fair terms and conditions that Union Pacific believes will meet the needs of all coal shippers. The rate items communicate to current and potential customers in a more straightforward way the revenue needs that Union Pacific has concluded it must achieve from the coal business to those destinations in order to support ongoing capital investments to handle existing and growing coal volumes. The rate items provide Union Pacific's customers with sufficient information so they can evaluate their position relative to other rail users covered by the program. This mechanism also allows Union Pacific to better respond to large price swings in the price of fuel used to transport coal.

Coal transportation demands substantial capital for track and equipment. Union Pacific can continue to invest in SPRB coal transportation as long as the financial returns on that transportation are sufficient to justify the necessary level of investment. Union Pacific has designed this program so that its customers will understand that their rates, terms and conditions reflect a fair sharing in the overall financial burden associated with Union Pacific's significant coal-related capital needs.

EXPEDITED CONSIDERATION REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

UNITED STATES RAIL SERVICE ISSUES	)))	Docket No. EP 724

PETITION OF THE WESTERN COAL TRAFFIC LEAGUE FOR AN ORDER REQUIRING BNSF RAILWAY COMPANY TO SUBMIT A COAL SERVICE RECOVERY PLAN

WESTERN COAL TRAFFIC LEAGUE

William L. Slover
John H. LeSeur
Peter A. Pfohl
Daniel M. Jaffe
Slover & Loftus LLP
1224 Seventeenth Street, NW
Washington, D.C. 20036
(202) 347-7170

Of Counsel:

Slover & Loftus LLP
1224 Seventeenth Street, NW
Washington, D.C. 20036

Dated: October 22, 2014

BEFORE THE
SURFACE TRANSPORTATION BOARD

UNITED STATES RAIL SERVICE ISSUES	)	Docket No. EP 724

PETITION OF THE WESTERN COAL TRAFFIC LEAGUE FOR AN ORDER REQUIRING BNSF RAILWAY COMPANY TO SUBMIT A COAL SERVICE RECOVERY PLAN

Members of the Western Coal Traffic League ("WCTL") served by the BNSF Railway Company ("BNSF") continue to face severe coal shortages caused by inadequate transportation service by BNSF. Regrettably, no immediate relief is in sight, and winter is coming. The Board must now take immediate action to ensure that the supply of electricity to the communities that WCTL's members serve is secure, reliable and cost-effective during the winter months when electricity usage often soars. For these reasons, WCTL petitions the Board for an order requiring BNSF to submit a coal-specific service recovery plan, which the Board should then review, approve or revise, and, most importantly, enforce. In support of its petition, WCTL states as follows:

BACKGROUND

Despite assurances made by BNSF to WCTL members that no utilities will run out of coal and that it will fix its service deficiencies, BNSF has failed. Minnesota Power (Allete, Inc.), a WCTL member, has been forced to shutter four electric generating units as a last and costly resort to preserve coal stockpiles for the winter. Additionally, WCTL members, such as Texas Municipal Power Agency, have had to file emergency

notices of coal shortages with the U.S. Department of Energy (OE-417). Most BNSF-served WCTL members find their stockpiles are well below target levels. Moreover, BNSF has not transported millions of tons of coal that WCTL members have requested.

Other BNSF-served utilities have experienced similar difficulties to those faced by WCTL's members. We Energies has filed several OE-417 notices relating in part to poor BNSF service.[1] Xcel Energy has written three times to the Board concerning inadequate service.[2] Members of Congress sought the STB's help to improve BNSF's service to Dairyland Power Cooperative in light of critical coal shortages,[3] and TUCO indicated that through August 2014, poor BNSF service resulted in a 1.7 million ton shortfall of coal deliveries.[4]

The limited coal deliveries and the uncertainty of adequate future deliveries have caused most of the WCTL membership to curtail coal-fired production. These curtailments have forced the utilities to seek alternative generation at significantly higher costs, which in turn has cost electric consumers and ratepayers hundreds of millions of dollars.

Electric utilities generally use the milder fall season to build stockpiles for increased generation required in winter and to hedge against possible service disruptions

---

[1] *See* https://www.oe.netl.doe.gov/download.aspx?type=OE417PDF&ID=50.

[2] *See* Letters from Xcel Energy Inc. dated Apr. 9, July 31, and Sept. 11, 2014.

[3] *See* Letter from Hon. Cheri Bustos to Hon. Daniel R. Elliott III, STB Chairman (Aug. 6, 2014); Letter from Hon. Tim Walz and Hon. Ron Kind to Hon. Daniel R. Elliott III, STB Chairman (July 24, 2014).

[4] *See* Public Statement of Mr. Mark Adkins, Vice President, TUCO, INC., Docket No. EP 724, at 2 (Sept. 4, 2014).

during severe winter weather. However, WCTL's BNSF-served members will have little or no opportunity to rebuild stockpiles in the fall given current BNSF service levels. Indeed, WCTL has just been informed that BNSF intends to remove approximately **60 coal train sets** from service. Thus, at a time when WCTL's members are in significant need of coal, BNSF is further cutting back service. This latest development combined with BNSF's service performance last winter and BNSF's public statements that service will not return to normal anytime soon, strongly supports the view that BNSF service this winter will be no better than during the last.

What is different this year from last is that many utilities will be entering the winter with less coal in storage then they had at the end of 2013. Thus, if another harsh winter occurs, WCTL's members will face a situation far worse than last winter.

WCTL's concerns were starkly echoed in a recent letter to Chairman Elliott from Governor Mark Dayton and Senators Al Franken and Amy Klobuchar wherein they expressed their grave concerns that the "railroads have not provided even minimally adequate levels of service," and that they are "hearing daily from . . . [utilities that] cannot secure delivery of enough coal to run power plants . . . ."[5] Indeed, their letter notes that: "each of the utilities in our state are restricting the operation of coal-fired power plants for the sole reason of conserving existing stockpiles – stockpiles that have grown precipitously and dangerously low due to BNSF's ongoing system delivery problems;" that the service situation is not improving as winter approaches; and that it is

---

[5] Letter from Gov. Mark Dayton, Senators Al Franken and Amy Klobuchar to the Hon. Daniel R. Elliott III, STB Chairman, at 1-2 (Oct. 13, 2014).

unacceptable to have "fuel stockpiles fall to under one week – as they did last winter."[6] Ultimately, the Governor and Senators recommend that the "Board immediately require carriers like BNSF to submit publicly-available coal service recovery plans to the Board, hold the carriers responsible for implementing these plans, and monitor carriers' implementation progress through weekly public reporting."[7]

WCTL's concerns were also echoed just last week by Federal Energy Regulatory Commissioner Philip Moeller, who expressed concerns about the reliability of the electric transmission system if substandard rail service continues, and he queried FERC staff as to whether the Board and the railroads were doing enough to rectify the situation.[8] Likewise, from the same FERC meeting, it appears that FERC staff have brought their reliability concerns to the Board's attention.[9]

WCTL submits that past and ongoing amorphous claims from BNSF about service recovery that provide no recovery milestones, no specific dates for such milestones, and no true timeline for when service will return to normal are insufficient for utilities that are collectively spending billions of dollars each year on such rail service; must carefully plan each year to meet the demand of its customers; and, are obligated to

---

[6] *Id.* at 1.

[7] *Id.* at 1-2.

[8] *See* FERC Commission Meeting, Oct. 16, 2014, available at http://ferc.capitolconnection.org/101614/fercarchive_flv.htm (Commissioner Moeller speaking at minute 40).

[9] *Id.*

provide reliable and cost-effective electricity to businesses and residences across America.

REQUESTED ACTIONS

The Board is well aware of the myriad service problems that BNSF has experienced in the past year. Through hearings, filings of concerned parties,[10] and through the many shippers that have sought help from the Board's Rail Customer and Public Assistance Program, the Board has repeatedly heard that coal transportation service from BNSF has been inadequate. Significantly, the Board itself has emphasized that reliable coal transportation service is critical to the nation's economic and national security:

> The Board views the reliability of the nation's energy supply as crucial to this nation's economic and national security, and the transportation by rail of coal and other energy resources is a vital link in the energy supply chain.[11]

---

[10] WCTL, for example, has submitted a letter, a petition to institute a proceeding, and presented three witnesses at Board hearings. All of these communications expressed serious problems with BNSF's coal service. *See* Letter from Bette Whalen, WCTL President, to Hon. Daniel R. Elliott III, STB Chairman (Mar. 14, 2014); *Petition of the Western Coal Traffic League to Institute a Proceeding to Address the Adequacy of Coal Transportation Service Originating in the Western United States*, Docket No. EP 723 (filed Mar. 24, 2014); Testimony of David McMillan and Bob Kahn on behalf of WCTL, Allete and TMPA, *United States Rail Service Issues*, Docket No. EP 724 (filed Apr. 17, 2014); Tr. of Apr. 4, 2014 Hearing at 23-39; Testimony of Dave Wanner on behalf of WCTL and WPS, *United States Rail Service Issues*, Docket No. EP 724 (filed Sept. 5, 2014).

[11] *See Establishment of a Rail Energy Transportation Advisory Committee*, Docket No. EP 670, slip op. at 2 (Decision served July 17, 2007).

While the Board has recently requested that BNSF provide additional data reporting,[12] including some coal-specific reporting, the time for mere data reporting has passed. WCTL's members cannot keep waiting for the tide to turn, and the Board should no longer accept vague promises from BNSF. Therefore, WCTL requests that the Board take the following actions.

A. Coal Service Recovery Plan

WCTL requests that the Board require BNSF to publicly file a coal service recovery plan within 10 days of the issuance of an appropriate order by the Board. The service recovery plan should include, at a minimum:

1. A detailed plan describing the short-term and long-term steps the carrier is taking or will take to handle current and future demand for coal on its network. The plan should include, at a minimum, details of track maintenance and infrastructure projects, crew hiring, and equipment purchases that are designed to improve, *inter alia*, average coal train speeds or increase capacity. The plan should include specific milestones for each aspect of the plan and specific dates those milestones will be reached.

2. Detailed plans to handle severe weather events and other potential service disruptions, including holiday crew shortages.

3. Detailed schedules for the restoration of adequate coal service, including particular milestones for improved service metrics over specific, heavily-traveled coal routes such as mine origins in Wyoming and Montana to Kansas City, MO,

---

[12] *See United States Rail Service Issues – Data Collection*, Docket No. EP 724 (Sub-No. 3), slip op. at 3-4 (STB served Oct. 8, 2014).

Minneapolis, MN, and Ft. Worth, TX, including average coal train speed targets by date, coal car miles per day by date, and coal sets in service (private and railroad-provided), as well as plans to reduce coal sets held for more than eight hours by cause (*i.e.*, locomotives, crews, and traffic congestion) and plans to reduce recrew rates.

4. Detailed plans on how the railroad will handle seasonal variations in coal transportation requirements.

The Board has the undisputed authority to direct the submission of coal service recovery plans, and the immediate need for such plans is clear. *See, e.g.*, *United States Rail Service Issues – Data Collection*, Docket No. EP 724 (Sub-No. 3), slip op. at 2 (STB served Oct. 14, 2014) (citing the Board's authority under 49 U.S.C. §§ 721(b) and 11145(a) to order Canadian Pacific Railway Company to provide a similar recovery plan).

B. Board Review and Approval of the Coal Service Recovery Plan

The Board should carefully review BNSF's service recovery plan to: (i) ensure that the plan meets the requirements of the Board's order for specificity and transparency; (ii) ensure that the plan is aggressive, but feasible; and (iii) ensure that the plan meets the short-term and long-term needs of coal shippers. If the Board finds that any element of the coal service recovery plan is deficient, it should require appropriate revisions by BNSF. The Board should also invite public comments on the sufficiency of the plan if needed.

The Board has the power to review, revise and approve any such plan. Indeed, the Board's power extends to specific directed service orders if need be. *See* 49 U.S.C. § 11123(a) authorizing the Board to issue emergency service orders whenever it determines that any "failure of traffic movement exists which creates an emergency situation of such magnitude as to have substantial adverse effects on shippers, or on rail service in a region of the United States" and authorizing the Board to "direct the handling, routing, and movement of the traffic of a rail carrier and its distribution over its own or other railroad lines." *Accord Joint Petition for Service Order*, 2 S.T.B. 725, 729-30 (1997) (providing for directed service orders in the UP/SP service crisis and noting that while UP's service recovery plan might be "gradually breaking the logjam," it was not enough and the Board therefore "concluded that the recovery effort must be more aggressive than that proposed by UP/SP"). Thus, upon approval of the plan, the Board should issue an order directing BNSF to comply with the Board-approved plan.

C. Oversight and Enforcement of Coal Service Recovery Plan

The Board should closely monitor BNSF's compliance with the Board-approved service recovery plan by ordering BNSF to publicly file weekly compliance updates that include all the specific service metrics needed to verify compliance with the plan. If the Board finds that BNSF is not meeting its obligations under the service recovery plan, the Board should enforce compliance with the plan by using its "range of available tools,"[13] including fines as appropriate. *See, e.g., Canadian National Railway*

[13] *United States Rail Service Issues*, Docket No. EP 724, slip op. at 6 (STB served Aug. 18, 2014).

Co. & Grand Trunk Corp. – Control – EJ&E West Company, Docket No. FD 35087, slip op. at 1 (STB served Dec. 21, 2010) (imposing a $250,000 fine for failing to make required reports and noting that the Board has authority under 49 U.S.C. § 11901(a) to fine railroads for failing to comply with Board orders).

The Board's willingness to enforce the service recovery plan through the application of fines and other measures is critical given the fact that, at the very time it is failing to meet the service needs of its customers, BNSF continues to realize record earnings. BNSF's owner has stated that BNSF is "the most important artery in our economy's circulatory system."[14] The evidence presented herein and brought to the Board's attention elsewhere demonstrates that our economy's most important transportation artery is failing to meet the needs of the shipping public. The irony of the transportation facts and circumstances which confront the Board is that while BNSF has failed and continues to fail to render adequate coal transportation services, its owner describes it as a "sainted"[15] "powerhouse"[16] in its ability to generate massive profits and akin to the biblical Noah in "anticipating the needs of its customers."[17]

Something is very, very wrong with this picture which has BNSF generating massive profits at the same time it provides substandard service to WCTL

---

[14] *See* Berkshire Hathaway Inc., Letter to Shareholders, at 11 (Feb. 28, 2014), available at http://www.berkshirehathaway.com/letters/2013ltr.pdf.

[15] *Id.* at 4.

[16] *Id.*

[17] *Id.* at 12.

members and numerous other coal shippers resulting in increased costs to millions of electric ratepayers.

There must be consequences for BNSF. The Board cannot continue to countenance such an absurd situation. The Board has a responsibility to protect the public interest and Congress has given it the power to ensure that BNSF faces appropriate consequences if it fails to comply with a sound service recovery plan.

CONCLUSION

Congress has tasked the Board with ensuring that consumers of rail transportation receive adequate and efficient service. The Board is now faced with the anomalous circumstance in which a major transportation provider, subject to its jurisdiction, earns enormous profits, yet fails to meet the legitimate service needs of WCTL members as well as numerous other coal shippers. The time has come for decisive action from this agency.

Wherefore, WCTL respectfully requests that its petition be granted for the reasons set forth herein.

Respectfully submitted,

WESTERN COAL TRAFFIC LEAGUE

William L. Slover
John H. LeSeur
Peter A. Pfohl
Daniel M. Jaffe

Slover & Loftus LLP
1224 Seventeenth Street, NW
Washington, D.C. 20036
(202) 347-7170

Of Counsel:

Slover & Loftus LLP
1224 Seventeenth Street, NW
Washington, D.C. 20036

Dated: October 22, 2014

BEFORE THE
SURFACE TRANSPORTATION BOARD

UNITED STATES RAIL SERVICE ISSUES – PERFORMANCE DATA REPORTING	))))	Docket No. EP 724 (Sub-No. 4)

OPENING JOINT COMMENTS OF THE WESTERN COAL TRAFFIC LEAGUE, AMERICAN PUBLIC POWER ASSOCIATION, NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, AND NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

Of Counsel:

Slover & Loftus LLP
1224 Seventeenth Street, NW
Washington, D.C. 20036

William L. Slover
Robert D. Rosenberg
Peter A. Pfohl
Daniel M. Jaffe
Slover & Loftus LLP
1224 Seventeenth Street, NW
Washington, D.C. 20036
(202) 347-7170

Their Attorneys

Dated: March 2, 2015

BEFORE THE
SURFACE TRANSPORTATION BOARD

UNITED STATES RAIL SERVICE ISSUES – PERFORMANCE DATA REPORTING	Docket No. EP 724 (Sub-No. 4)

OPENING JOINT COMMENTS OF THE WESTERN COAL TRAFFIC LEAGUE, AMERICAN PUBLIC POWER ASSOCIATION, NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, AND NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

Western Coal Traffic League ("WCTL"), American Public Power Association ("APPA"), National Association of Regulatory Utility Commissioners ("NARUC"), and National Rural Electric Cooperative Association ("NRECA") (collectively "Coal Shippers/NARUC") hereby submit their Opening Joint Comments in accordance with the Board's order served December 30, 2014 in this Notice of Proposed Rulemaking ("NPRM") proceeding.

BACKGROUND

The importance of reliable rail service to electric utilities, the agricultural community, other rail shippers, and the public was once again demonstrated in 2013 and 2014. The breakdown in rail service by some of the nation's largest rail carriers during this period had a profound impact on utilities, businesses and communities across the United States and especially in the Midwest, Texas, and the Southwest. Many utilities experienced severe coal shortages that forced the idling or curtailing of coal electric generating units, which resulted in utilities and their ratepayers, members and citizens

incurring millions of dollars in costs for the purchase of replacement fuel and/or power. While the railroads were publicly apologetic, they took no financial responsibility for their service failures and even resisted requests for service plans and service reporting data that were urged by shippers.

The STB held two public hearings in 2014 to address the severe service deficiencies experienced by so many rail shippers, including coal shippers. Through those hearings and public comments filed throughout 2014, it became apparent that the STB lacked in-depth data into the performance of the railroads under its jurisdiction because the Board did not collect any service-related metrics and was, instead, reliant on limited industry data disseminated by the Association of American Railroads ("AAR"). WCTL's members and many other shippers urged the Board to require the railroads to report important service-related metrics to the Board and the public on a regular basis. On June 20, 2014, the Board ordered CP and BNSF to provide certain grain shipment data.[1] However, after the second public hearing, the Board ordered, on October 8, 2014, that all the Class I railroads report a broader spectrum of data on a weekly basis, and the Board, with this proceeding, proposes to make the October 8, 2014 order permanent with certain modifications.[2]

Coal Shippers/NARUC support the Board's efforts. However, Coal Shippers/NARUC submit that certain crucial data, such as cycle times in key corridors, is

---

[1] The Board had required certain grain service-related reports. *U.S. Rail Serv. Issues—Grain*, Docket No. EP 724 (Sub-No. 2) (STB served June 20, 2014).

[2] *U.S. Rail Serv. Issues—Data Collection*, Docket No. EP 724 (Sub-No. 3) (STB served Oct. 8, 2014) ("*Interim Data Order*").

absent from the Board's proposal, and, herein, Coal Shippers/NARUC detail the additional rail performance data that the Board should collect as well as modifications the Board should make to the current proposal.

IDENTITY AND INTEREST[3]

WCTL is a voluntary association, whose membership is comprised exclusively of organizations that purchase and ship coal from origins west of the Mississippi River. WCTL members collectively consume more than 150 million tons of coal annually that is moved by rail. Its members include investor-owned electric utilities, electric cooperatives, state power authorities, municipalities, and a non-profit fuel supply cooperative.

APPA is the national service organization representing the interests of over 2,000 municipal and other state- and locally-owned electric utilities in 49 states (all but Hawaii). Collectively, public power utilities deliver electricity to one of every seven electric consumers (approximately 48 million people), serving some of the nation's largest cities, but also many of its smallest towns. Over 40% of the power generated by public power utilities is from coal.

NARUC is the national organization of State commissions responsible for economic and safety regulation of utilities. NARUC members in the 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands have the obligation under State law to ensure the establishment and maintenance of such energy utility services as may

[3] Coal Shippers/NARUC previously participated in *United States Rail Service Issues*, Docket No. EP 724. However, in the interest of full disclosure, the identity and interest of each of participant in these comments is detailed herein.

be required by the public convenience and necessity, as well as ensuring such services are provided at just and reasonable rates. NARUC is consistently recognized by Congress, the Courts, and a host of federal agencies (including the Federal Energy Regulatory Commission), as the proper entity to represent the collective interests of State utility commissions.

NRECA is the national service organization for more than 900 not-for-profit rural electric utilities that provide electric energy to approximately 42 million consumers in 47 states or 13% of the nation's population. Kilowatt-hour sales by rural electric cooperatives account for approximately 11% of all electric energy sold in the United States. NRECA members generate approximately 50% of the electric energy they sell and purchase the remaining 50% from non-NRECA members. The vast majority of NRECA members are not-for profit, consumer-owned cooperatives. NRECA's members also include approximately 65 generation and transmission ("G&T") cooperatives, which generate and transmit power to 668 of the 841 distribution cooperatives. The G&Ts are owned by the distribution cooperatives they serve. Remaining distribution cooperatives receive power directly from other generation sources within the electric utility sector. Both distribution and G&T cooperatives were formed to provide reliable electric service to their owner-members at the lowest reasonable cost.

COMMENTS

I. The Need for STB Oversight of Railroad Performance

The past 20 months have provided a clear and irrefutable demonstration that the Board must require the Class I railroads to regularly provide service metrics to

the Board and the public. As the service challenges facing many railroads became acute, the public and the Board had only a limited amount of data available, mostly metrics published by the AAR, namely cars online; trains speeds; train speeds by train type; and terminal dwell time. Some shippers also provided data on their specific service problems. This limited set of data severely hampered evaluation of the service problems, and the lack of data collection also allowed the crisis to build without forewarning the Board.

Coal Shippers/NARUC note that it is common in the utility industry to collect a wide variety of data to ascertain the ability of utilities to provide reliable electric service at a reasonable cost. Given the significant regulatory protection afforded to the rail industry, it is incumbent on the Board to ensure the railroads meet the needs of the shipping public – many of whom are captive to railroads.

As the Board is charged with regulating the service of a transportation mode that is vital to our nation's economy, relying on the AAR's limited data – that could be discontinued at any time[4] – is untenable. In addition, transparency of railroad performance is important. The AAR data are not subject to independent verification. The railroads have complete discretion to disclose, or not disclose, whatever data they

[4] The AAR is responsive to its members and not the shipping public. The performance data provided by the AAR could be discontinued at any time leaving all stakeholders in the dark if the Board does not otherwise act. Already, some pertinent data has disappeared from certain railroad publications. For example, BNSF used to publish data in its online employee newsletter detailing its performance in certain categories (*e.g.*, coal car miles per day (plan vs. goal)), but it ceased publishing such data in 2014.

choose through the AAR.[5] The Board's adoption of reporting requirements will hopefully bring not only more critical information to light, but improve the way it is reported through specific standards that the railroads must meet. Coal Shippers/NARUC are, therefore, relieved that the Board has decided to formally require regular service metric reporting from the Class I railroads.

II. The Board's Proposed Regulations

The Board's service metric reporting NPRM covers nine (9) categories of service metrics:

1. System average train speed by train type;
2. Weekly average terminal dwell time for the reporting carrier's system and its 10 largest terminals;
3. Total cars on line by car type;
4. Weekly average unit train dwell time at origin and interchange by train type;
5. Weekly number of trains held short of destination or interchange for longer than six (6) hours, organized by train type and reason;
6. Weekly number of empty and loaded cars that have not moved for more than (i) 48 hours but less than or equal to 120 hours or (ii) more than 120 hours by commodity;
7. Weekly number of grain cars loaded and billed, broken down by certain STCC number;
8. For cars identified in item No. 7, additional details by state; and

---

[5] The railroads resisted providing more data during 2014 as well. Coal Shippers/NARUC note that increased secrecy has been a hallmark of recent actions by some railroads. For example, BNSF has moved all of its generally applicable tariff publications into a section of its website that is not publicly accessible – even the tariff publication that covers its mileage-based fuel surcharge, which is at issue, *inter alia*, in *Rail Fuel Surcharges (Safe Harbor)*, Docket No. EP 661 (Sub-No. 2).

9. Weekly coal unit train or coal car loadings.[6]

The Board's proposal tracks its *Interim Data Order* except it makes certain modifications that Coal Shippers/NARUC assert are important to better understanding the level of service provided by the railroads and identifying certain choke points that may be hindering carrier performance. Coal Shippers/NARUC also support the Board's addition of a quarterly reporting requirement on major rail infrastructure projects. *U.S. Rail Serv. Issues—Performance Data Collection*, Docket No. EP 724 (Sub-No. 4), slip op. at 13 (STB served Dec. 30, 2014) ("*NPRM*"). However, the Board's proposal also weakens certain reporting requirements from the *Interim Data Order* that should be retained.

A. Weekly Average Dwell Time and Major Interchanges

For Item No. 4, weekly average dwell time, the Board's *Interim Data Order* only applied to dwell time experienced at origin. *NPRM*, slip op. at 5. The Board's revised proposal in this proceeding correctly adds dwell time at interchange locations to the reporting requirements. *Id.*

As the Board is aware, dwell time at interchange is a potentially critical bottleneck. Major interchange locations such as Chicago and Kansas City can be a considerable source of frustration to many shippers as their trains arrive in these busy hubs and then sit, sometimes for days, awaiting a pickup or a delivery to a receiving carrier. And while a shipper can usually track its own cargo, insight into average dwell times will help shippers better understand and plan for long (or short) dwell times.

[6] The Board has also proposed certain reporting requirements for the Class I railroads operating in Chicago, which Coal Shippers/NARUC support. *NPRM*, slip op. at 12-13.

Major terminals are not the only places where interchange times can be long. For example, Wisconsin Public Service Corporation (a WCTL member) testified to the Board, at its September 4, 2014 hearing in Fargo, ND, about an increase in cycle times on a joint Union Pacific Railroad ("UP") and Canadian National Railway coal movement where some of that cycle time increase was attributable to increased interchange time in Wisconsin Rapids.

Coal Shippers/NARUC, therefore, urge the Board to retain the reporting of interchange times in its final regulations.

The Board should, however, modify its proposed regulations to require the carriers to report interchange dwell times at each of their 10 largest interchange locations in addition to system-wide dwell times the proposal currently requires. This reporting requirement would track the Board's proposal in Item No. 2, which requires the reporting of terminal dwell times at the 10 largest terminals for each carrier. In addition, for unit coal trains, where many shippers own and supply their own equipment, the Board should require the carriers to report average dwell times at individual interchanges for empty coal unit trains.

B. Trains Held Short

The Board's NPRM requires that the carriers report the cause for trains that are held short of destination or interchange for more than six consecutive hours. *Id.*, slip op. at 11-12. Coal Shippers/NARUC support this requirement and its inclusion in the final regulations. However, Coal Shippers/NARUC note that the cause "other (explain)" is frustratingly vague. *Id.*, slip op. at 11. Indeed, a review of the weekly service reports

that UP and BNSF have filed since the *Interim Data Order* indicate that they have done little to break out the causes. For example, BNSF has simply used "Road, Terminal, Other" and UP has used "Customer, Foreign Road, Incidents/Weather, Other."[7]

Such generic explanations – particularly "other" in a category already labeled "other" – are not especially instructive. Compounding the problem, the "other" category represents a large portion of the causes for trains being held short. Thus, Coal Shippers/NARUC urge the Board to either clarify the regulations by requiring more detailed breakdowns within the "other" category, or create more categories, such as "Foreign Road" and "Weather."

C. Weekly Coal Unit Train Loadings

The Board's NPRM proposes to require the railroads to report total coal unit train or car loadings for the reporting week by coal production region. The Board's proposal unnecessarily undermines the *Interim Data Order*, which required that the railroads report the number of unit train loadings versus plan for the week. *Id.*, slip op. at 4. The Board's revision in the NPRM makes the service metric far less informative because it would be difficult to determine if the railroads are keeping up with demand in general or even their own loading plans. BNSF, CSX Transportation ("CSXT"), and Norfolk Southern Railway ("NS") have all been reporting this metric since October.[8]

---

[7] *See, e.g.*, BNSF's and UP's Weekly Service Reports filed Nov. 26, 2014 and Feb. 18, 2015.

[8] *See* BNSF, NS, and CSXT weekly service reports filed in *U.S. Rail Serv. Issues—Data Collection*, Docket No. EP 724 (Sub-No. 3).

Only UP objected to providing this data, arguing that reporting this data somehow violated its confidentiality obligations to shippers.[9] UP's argument is a red herring. All of the data is aggregated, and no shipper-specific information is implicated. Thus, Coal Shippers/NARUC urge the Board to retain the requirement that the coal loadings be reported versus the plan for the reporting week.

D. Quarterly Reporting on the Progress of Major Rail Infrastructure Projects

The Board's proposal requires that the Class I railroads report the progress and purpose of major rail infrastructure projects exceeding $25 million. *See*, *NPRM*, slip op. at 13. Coal Shippers/NARUC support this reporting requirement. The Class I railroads regularly laud their capital spending plans, but it is often difficult to determine the degree to which such work actually expands or enhances the capacity of the railroads. In addition, Coal Shippers/NARUC urge the Board to review such data with an eye towards whether the railroads' investments are sufficient to meet their common carrier obligations in the long term.[10]

III. Coal Shippers/NARUC Proposed Additional Data Collection

WCTL, through its testimony and written submissions to the Board, emphasized the need for the Board to collect certain information that is critical to its

[9] *See* Letter of Louise A. Rinn (UP), *U.S. Rail Serv. Issues—Data Collection*, Docket No. EP 724 (Sub-No. 3) (filed Oct. 22, 2014).

[10] The Board's proposed service metric data can also aid in determining whether carriers are able to meet their common carrier obligations.

members and coal shippers in general.[11] The Board's *Interim Data Order* and its NPRM do include, in part, some of the metrics identified by WCTL, including: (i) actual number of coal cars loaded; (ii) limitation on crews for coal trains (only partially captured in the trains holding metric); and (iii) shortages in locomotive power (only partially captured in the trains holding metric). *NPRM*, slip op. at 11-12. However, Coal Shippers/NARUC are concerned that the proposed regulations continue to omit important information that coal shippers rely on and which aid in understanding the railroads' coal shipment performance.

Before turning to the specific data the Board should collect, Coal Shippers/NARUC note that detailed reporting for coal trains is vital. The Federal Energy Regulatory Commission ("FERC"), NARUC and others have expressed concerns that the consistent supply of coal via rail is critical to the reliability of the electric grid.[12] Indeed, the Board itself has recognized its critical nature:

---

[11] *See* Letter from Bette Whalen, WCTL President, to Hon. Daniel R. Elliott III, STB Chairman (Mar. 14, 2014); *Petition of the Western Coal Traffic League to Institute a Proceeding to Address the Adequacy of Coal Transportation Service Originating in the Western United States*, Docket No. EP 723 (filed Mar. 24, 2014); Testimony of David McMillan (Allete) and Bob Kahn (TMPA) on behalf of WCTL, Allete and TMPA, *U.S. Rail Serv. Issues*, Docket No. EP 724 (filed Apr. 17, 2014); Testimony of Dave Wanner on behalf of WCTL and WPS, *U.S. Rail Serv. Issues*, Docket No. EP 724 (filed Sept. 5, 2014); Petition of the Western Coal Traffic League for an Order Requiring BNSF Railway Company to Submit a Coal Service Recovery Plan, *U.S. Rail Serv. Issues*, Docket No. EP 724 (filed Oct. 22, 2014).

[12] *See* FERC Meeting Agenda Item, Docket No. AD15-3-000, *Discussion on Coal Delivery* (Dec. 18, 2014); FERC Commission Meeting, Oct. 16, 2014, available at http://ferc.capitolconnection.org/101614/fercarchive_flv.htm (Commissioner Moeller speaking at minute 40); Letter of NARUC, APPA, EEI and NRECA, *U.S. Rail Serv. Issues—Data Collection*, Docket No. 724 (Sub-No. 3) (filed Oct. 31, 2014).

> The Board views the reliability of the nation's energy supply as crucial to this nation's economic and national security, and the transportation by rail of coal and other energy resources as a vital link in the energy supply chain.[13]

In addition, coal shipments are, by volume, the single largest commodity handled by the nation's Class I railroads.[14] The Board's proposal must better reflect the outsized impact that coal train service has on the railroads, coal shippers, and the public.[15]

Coal Shippers/NARUC propose that the Board's final regulations include the following coal-specific service metrics:

1. Weekly average cycle times for coal trains over any portion of the carrier's ten (10) most frequently used coal train corridors (*e.g.*, Powder River Basin ("PRB") mines to Kansas City);
2. The weekly average number of coal trainsets in service broken down between shipper-supplied (private trainsets) and carrier-supplied trains sets;
3. Any restriction on the utilization of shipper-provided equipment in coal service;
4. General restrictions on the availability of crews for coal service; and
5. General restrictions on the availability of locomotives for coal service.

Item No. 1 is vital to coal shippers. The railroads, such as BNSF and UP, have key coal corridors. Understanding how coal trains are moving through those corridors is vital to all the stakeholders in understanding how the railroads are

---

[13] *See Establishment of a Rail Energy Transportation Advisory Committee*, Docket No. EP 670, slip op. at 2 (STB served July 17, 2007).

[14] *See, e.g.*, Presentation of the AAR, slide 4, available at http://onlinepubs.trb.org/onlinepubs/railtransreg/Gray031414.pdf (coal represented 40% (727 million ton out of 1.8 billion tons) of the freight handled by the Class I railroads in 2012). *See also* https://www.aar.org/Documents/Railroad-Statistics.pdf.

[15] Coal Shippers/NARUC note that the Board's proposal provides for detailed reporting by state for a number of grain-related service metrics. Implementing additional reporting for coal is also warranted.

performing. For example, if a railroad is struggling to reach Chicago, but is having no trouble reaching Fort Worth, attention from customers and the Board can be paid to the problem areas. In addition, coal shippers track their individual cycle times very carefully, but it is often difficult to determine if service issues are isolated or widespread. Cycle time reporting by corridor can help pinpoint isolated versus widespread problems. In addition, coal train cycle time issues identified over a specific corridor can provide insight into service difficulties that other commodities sharing that corridor may face. This information will assist the Board in evaluating whether service and resources are being allocated fairly and efficiently, and whether the carriers are able to meet their common carrier obligations.

Item Nos. 2 and 3 reflect the importance of sets in service and restrictions thereto when evaluating coal service. For example, a reduction in sets in service coupled with increased train speeds and cycle times may indicate that the railroad is performing well and less equipment will be needed. Conversely, a reduction in trainsets, coupled with decreases in train speeds and cycle times may suggest a railroad is parking sets and that a decline in coal deliveries is imminent.

Item Nos. 4 and 5 would aid in determining whether there are systemic crew or locomotive shortages for coal trains service. While the trains holding reporting requirement in the NPRM does identify crews and locomotives as possible causes for six (6) hours or longer delays, item Nos. 4 and 5 would focus on overall shortages. For example, if there are crew or locomotive shortages due to diversions to other service, such information is vital to impacted coal shippers.

CONCLUSION

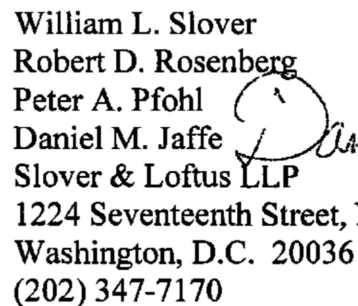
The Board has recognized the urgent need for regular reporting of railroad service metrics. Coal Shippers/NARUC agree and urge the Board to adopt such metrics with the modifications proposed herein.

Respectfully submitted,

WESTERN COAL TRAFFIC LEAGUE
AMERICAN PUBLIC POWER ASSOCIATION
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

Of Counsel:

Slover & Loftus LLP
1224 Seventeenth Street, NW
Washington, D.C. 20036

William L. Slover
Robert D. Rosenberg
Peter A. Pfohl
Daniel M. Jaffe

Slover & Loftus LLP
1224 Seventeenth Street, NW
Washington, D.C. 20036
(202) 347-7170

Their Attorneys

Dated: March 2, 2015

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OXBOW CARBON & MINERALS LLC, et al., Plaintiffs,	)	
v.	)	Civil Action No. 11-1049 (PLF)
UNION PACIFIC RAILROAD COMPANY, et al., Defendants.	)	

OPINION AND ORDER

This Court previously dismissed plaintiffs' complaint without prejudice for failure to state a claim. After plaintiffs filed a substantially revised amended complaint, defendants Union Pacific Railroad Company ("UP") and BNSF Railway Company ("BNSF") again have moved to dismiss for failure to state a claim and for lack of Article III standing. After carefully considering the arguments made by the parties in their papers and the oral arguments presented by counsel in court on January 8, 2015, the Court concludes that plaintiffs' amended complaint sufficiently states a claim on all counts and it therefore denies defendants' motions to dismiss.[1]

[1] The papers reviewed in connection with the pending motions include the following: plaintiffs' first amended complaint ("Am. Compl.") [Dkt. No. 53]; UP's motion to dismiss ("UP Mot.") [Dkt. No. 54]; BNSF's motion to dismiss ("BNSF Mot.") [Dkt. No. 55]; plaintiffs' opposition to defendants' motions to dismiss ("Opp.") [Dkt. No. 57]; UP's reply in support of its motion to dismiss ("UP Reply") [Dkt. No. 58]; and BNSF's reply in support of its motion to dismiss ("BNSF Reply") [Dkt. No. 59].

I. BACKGROUND

The facts of this case are described in detail in this Court's February 26, 2013 Opinion granting defendants' prior motions to dismiss. Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co. ("Oxbow I"), 926 F. Supp. 2d 36, 39-40 (D.D.C. 2013). They are summarized here as relevant.

Plaintiffs are five related companies (collectively referred to as "Oxbow") — Oxbow Carbon & Minerals LLC, Oxbow Mining, LLC, Oxbow Midwest Calcining LLC, Oxbow Calcining LLC, and Terror Creek LLC — that mine, sell, and ship coal and petroleum coke.[2] They allege that UP and BNSF engaged in anticompetitive conduct, both in concert and, in the case of UP, independently, that harmed plaintiffs. In short, plaintiffs allege that defendants conspired to (1) fix prices above competitive levels through a uniform fuel surcharge and (2) allocate certain markets to each other, granting UP a monopoly in at least one region.[3]

Plaintiffs' original complaint was dismissed without prejudice for failure to state a claim. Oxbow I, 926 F. Supp. 2d at 41-42. In Oxbow I, this Court held that (1) plaintiffs failed to allege sufficient facts under Section 1 of the Sherman Act regarding each Oxbow plaintiff's payment of the illegal fuel surcharges, id. at 42-44; (2) plaintiffs' allegations that UP and BNSF shared a monopoly could not support a Section 2 Sherman Act conspiracy claim, id. at 45-47;

[2] Oxbow Calcining International LLC, a plaintiff in the original complaint, has been removed from the amended complaint.

[3] The price-fixing allegations are virtually identical to those previously alleged in a related class action before this Court. In re Rail Freight Fuel Surcharge Antitrust Litig., Misc. No. 07-0489 (PLF). In that suit, a class of direct and indirect purchasers of rail freight transportation services claim that BNSF and Union Pacific, along with two other railroad companies, violated Section 1 of the Sherman Act by conspiring to raise freight prices above competitive levels through the imposition of a uniform fuel surcharge. In re Rail Freight Fuel Surcharge Antitrust Litig., 587 F. Supp. 2d 27, 29-31 (D.D.C. 2008) (direct purchasers); see also In re Rail Freight Fuel Surcharge Antitrust Litig., 593 F. Supp. 2d 29 (D.D.C. 2008) (indirect purchasers).

(3) even if the complaint was construed to allege a conspiracy to allocate an entire market to UP only, Oxbow had nevertheless failed to state a claim because Oxbow omitted basic information about the Section 2 conspiracy, id. at 46-47; and (4) the complaint failed to state a claim of monopolization or attempted monopolization against UP because allegations of "insufficient assistance in the provision of service to rivals" could not support such a claim. Id. at 48 (citing Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 410 (2004)).

In response to the Court's Opinion, Oxbow filed a substantially amended complaint which brings claims under Section 1 and Section 2 of the Sherman Act. Count I, the fuel surcharge conspiracy claim, and Count II, the conspiracy not-to-compete claim, are brought under Section 1. Count III, which alleges both monopolization or attempted monopolization by UP and a conspiracy to monopolize by both defendants, is brought under Section 2. Counts II and III concern two specific markets for coal and petcoke, the Uinta Basin and the Powder River Basin. The final count, for breach of contract, is brought under state law. Oxbow alleges that UP breached the "Tolling Agreement," an agreement to, among other things, toll the statute of limitations for Oxbow's claims while the parties negotiated a potential settlement for those claims that did not come to fruition.

UP and BNSF then filed motions to dismiss. Importantly, neither UP nor BNSF requests that this Court dismiss Count I of the amended complaint in its entirety, but rather only that it dismiss those claims that go beyond the allegations in In re Rail Freight Fuel Surcharge Antitrust Litig. (the "Rail Freight Action"), Misc. No. 07-0489 (PLF), which this Court has already found sufficient under Rule 8 of the Federal Rules of Civil Procedure. See 587 F. Supp. 2d 27 (D.D.C. 2008); 593 F. Supp. 2d 29 (D.D.C. 2008), aff'd, 602 F.3d 444 (D.C. Cir. 2010).

II. ARTICLE III STANDING

Defendants UP and BNSF move to dismiss the amended complaint for (1) lack of standing and (2) for failure to state a claim. The Court first addresses the threshold issue of standing, finding that plaintiffs have sufficiently alleged facts establishing standing on all counts, with the exception of certain plaintiffs' claims for breach of contract, Count IV. On that count, the Court dismisses two plaintiffs, Oxbow Midwest Calcining LLC and Terror Creek LLC, because they are not parties to the contract.

A. Legal Standard

Federal jurisdiction is limited under Article III of the Constitution to "Cases" and "Controversies." Massachusetts v. EPA, 549 U.S. 497, 516 (2007). The doctrine of standing flows directly from this limitation. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). That doctrine assures that "the litigant is entitled to have the court decide the merits of the dispute or of particular issues," Warth v. Seldin, 422 U.S. 490, 498 (1975), by demanding that he or she "possess a 'direct stake in the outcome' of the case." Hollingsworth v. Perry, 133 S. Ct. 2652, 2662 (2013) (quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997)).

To establish the requisite standing, each plaintiff must show, at an "irreducible constitutional minimum," that (1) it has suffered an "injury in fact" through the "invasion of a 'legally protected interest;'" (2) the injury is "fairly traceable" to the defendant's conduct; and (3) a favorable decision on the merits likely will redress the injury. Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 273-74 (2008) (citing Lujan v. Defenders of Wildlife, 504 U.S. at 560-61). In addition to an "injury in fact," plaintiffs bringing federal antitrust claims also must show an "antitrust injury" — that is, "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Meijer, Inc. v. Biovail

Corp., 533 F.3d 857, 862 (D.C. Cir. 2008) (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (emphasis omitted)).

B. Analysis

This Court previously dismissed plaintiffs' complaint, in part because "plaintiffs ha[d] not alleged adequate facts about their payment of surcharges to support an inference of injury" caused by the alleged fuel surcharge conspiracy, and because "each plaintiff must demonstrate that it has suffered injury in order to establish standing." Oxbow I, 926 F. Supp. 2d at 43. Specifically, the original complaint "fail[ed] to specifically allege that each entity paid a surcharge at all." Id. The amended complaint corrects that deficiency by alleging that each plaintiff paid "fuel surcharges . . . that they would not have paid in the absence of the conspiracy." Am. Compl. ¶ 135.[4] The amended complaint, however, neglects to state to *whom* plaintiffs Oxbow Mining, LLC, Oxbow Midwest Calcining LLC, Oxbow Calcining LLC, and Terror Creek LLC paid those surcharges.[5]

Defendants argue that this failure is fatal and that those four plaintiffs must be dismissed from Count I. Defendants, however, are jointly and severally liable under Section 1 for any injury suffered by plaintiffs. In re Uranium Antitrust Litig., 617 F.2d 1248, 1257 (7th Cir. 1980). Plaintiffs therefore need not identify, at this stage, to which co-conspirator they paid fuel surcharges. See In re NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 508 (S.D.N.Y. 1996) (holding that "[b]ecause antitrust liability is joint and several, a Plaintiff injured

[4] In Oxbow I, this Court also noted that Oxbow's original "[c]omplaint provide[d] only a one or two sentence description of each entity and include[d] very little information about the business operations of the individual plaintiffs." The amended complaint corrects this problem. Compare Am. Compl. ¶¶ 9–13, with Compl. ¶¶ 12-17.

[5] There is no such deficiency regarding plaintiff Oxbow Carbon & Minerals, as defendants concede. Am. Compl. ¶ 9; see, e.g., BNSF Mot. at 14.

by one Defendant as a result of the conspiracy has standing to represent a class of individuals injured by any of the Defendant's co-conspirators") (citing Rios v. Marshall, 100 F.R.D. 395, 404 (S.D.N.Y. 1983)); In re Motor Fuel Temperature Sales Practices Litig., 271 F.R.D. 221, 230 (D. Kan. 2010) (holding that, under a Kansas law imposing joint and several liability, "even if plaintiffs did not purchase motor fuel directly from some defendants, it appears that they would have standing to assert claims for civil conspiracy claims against them"). At this stage, plaintiffs "need not show more than general factual allegations laying out a good faith basis for how one or more of the defendants injured plaintiffs. Nor must each plaintiff allege facts against all defendants, nor each defendant's relationship with a plaintiff be explicitly identified." Bodner v. Banque Paribas, 114 F. Supp. 2d 117, 125 (E.D.N.Y. 2000). Instead, plaintiffs need only allege, as they have in the amended complaint, that they suffered damages as a result of the conspiracy in which defendants participated. See Am. Compl. ¶¶ 8-13, 134-42. Plaintiffs therefore have established sufficient standing to bring their Count I claim for price-fixing under Section 1 of the Sherman Act.

As to Count II, the Section 1 conspiracy not-to-compete claim, UP argues that Oxbow Carbon & Minerals and Oxbow Mining — the only two plaintiffs to bring this claim — lack standing as to any allegations concerning the Powder River Basin because they solely reside in the Uinta Basin. UP Mot. at 22. According to UP, Oxbow thus "does not have standing to maintain an action for an alleged antitrust violation affecting a relevant market in which it does not participate." UP Mot. at 23. But the alleged conspiracy not-to-compete encompasses *two* relevant markets: the Uinta and Powder River Basins. That alleged conspiracy therefore does affect the relevant market in which Oxbow participates. The fact that it also affected another market that plaintiffs do not participate in does not deprive plaintiffs of standing; nor does it bar

them from making allegations concerning that market. This reasoning applies equally to Count III, the Section 2 conspiracy to monopolize claim, which is brought by the same two plaintiffs.

Plaintiffs' claim for breach of contract (Count IV), however, is a different story. The amended complaint states that Count IV (Breach of Contract: Tolling Agreement) is brought "[b]y all Plaintiffs against UP." Am. Compl. ¶¶ 163-72. Although defendants failed to raise the argument, a review of the Tolling Agreement reveals that plaintiffs Oxbow Midwest Calcining LLC and Terror Creek LLC are not parties to the contract. See Lee's Summit v. Surface Transp. Bd., 231 F.3d 39, 41 (D.C. Cir. 2000) ("When there is doubt about a party's constitutional standing, the court must resolve the doubt, *sua sponte* if need be."). And neither the amended complaint nor Oxbow's briefs suggest that those plaintiffs were intended third-party beneficiaries to the contract, such that they would possess Article III standing. See generally Beckett v. Air Line Pilots Ass'n, 995 F.2d 280, 286 (D.C. Cir. 1993). Oxbow Midwest Calcining and Terror Creek's claim for breach of contract therefore is dismissed.

III. FAILURE TO STATE A CLAIM

A. Rule 12(b)(6) of the Federal Rules of Civil Procedure

Rule 12(b)(6) of the Federal Rules of Civil Procedure allows dismissal of a complaint if a plaintiff fails "to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). Although "detailed factual allegations" are not necessary to withstand a Rule 12(b)(6) motion to dismiss, the facts alleged must be "enough to raise a right to relief above the speculative level." Id. The complaint

"must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. at 570) (internal quotations omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." In re Interbank Funding Corp. Sec. Litig., 629 F.3d 213, 218 (D.C. Cir. 2010) (quoting Ashcroft v. Iqbal, 556 U.S. at 678).

In deciding a motion to dismiss under Rule 12(b)(6), the Court "must accept as true all of the factual allegations contained in the complaint." Bell Atl. Corp. v. Twombly, 550 U.S. at 555 (quoting Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508 n.1 (2002)). The complaint is considered in its entirety, Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007), and construed liberally in plaintiffs' favor. Hettinga v. United States, 677 F.3d 471, 476 (D.C. Cir. 2012) (quoting Schuler v. United States, 617 F.2d 605, 608 (D.C. Cir.1979) (internal quotations omitted)). The Court must grant plaintiffs "the benefit of all inferences that can be derived from the facts alleged." Id. (quoting Schuler v. United States, 617 F.2d at 608). Nevertheless, the Court need not accept inferences drawn by the plaintiff if those inferences are unsupported by facts alleged in the complaint, nor must the Court accept the plaintiffs' legal conclusions. Id. (citing Kowal v. MCI Commc'ns Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994)).

B. Oxbow Alleges One Fuel Surcharge Conspiracy, Not Two

Defendants concede that Count I states a valid Section 1 claim with respect to the illegal fuel surcharges imposed for the shipment of petcoke. See UP Mot. at 4-5; BNSF Mot. at 1. Defendants instead argue that Oxbow has pled no facts in Count I that plausibly suggest the existence of a separate conspiracy to impose higher fuel surcharges for the shipment of coal. See UP Mot. at 8 ("Oxbow does not identify when this alleged agreement on coal surcharges was

supposedly formed; who was involved; how it was communicated; or what its terms included."); BNSF Mot. at 11-12 ("[T]he [amended complaint] lacks sufficient allegations regarding the formation, timing, nature, or operation of this supposed separate conspiracy."). Oxbow responds that the amended complaint, fairly read, alleges only one solitary conspiracy. Opp. at 8 ("The fuel surcharges for coal were part of the same conspiracy.").

The Court agrees with Oxbow. Contrary to defendants' portrayal, there is no separate conspiracy regarding coal surcharges — plaintiffs have not alleged one, and the amended complaint does not indicate that coal fuel surcharges should be treated separately. Instead, plaintiffs allege the existence of "a conspiracy to increase revenue by . . . imposing across-the-board, non-negotiable 'fuel surcharges' on *all* customers and for *all* products." Am. Compl. ¶ 49 (emphasis added). Oxbow further clarifies that each plaintiff paid a fuel surcharge for the shipment of coal, petcoke, or both, see id. ¶ 8, and that "for the duration of the conspiracy, coal fuel surcharges either exceeded or (for the first year of the conspiracy) equaled the illegal fuel surcharges applied to all other products, including petcoke." Id. ¶ 84; see also id. ¶¶ 146-49.

That UP and BNSF later increased the fuel surcharge for the shipment of coal, whether unilaterally or in concert, is irrelevant at this stage. Either way, the amended complaint is clear that coal fuel surcharges were part and parcel of the overall fuel surcharge conspiracy. There may be a separate issue regarding damages, but it is inappropriate to address that issue at this stage of the litigation.

C. Oxbow Has Sufficiently Alleged a Conspiracy Not-to-Compete

Defendants argue that Oxbow's allegations in Count II regarding a Section 1 conspiracy not-to-compete (1) contradict the allegations in the original complaint, UP Mot. at

9-10; BNSF Mot. at 19-20; (2) are conclusory, UP Mot. at 10-11; BNSF Mot. at 15-23; and (3) are explained by natural market factors, rather than by conspiracy. UP Mot. at 17-22; BNSF Mot. at 24-30.[6]

1. The amended complaint does not contradict Oxbow's original allegations

Defendants argue that the original complaint alleged a "conspiracy to divide a broad western coal market, with each railroad agreeing not to compete for the other's existing customers in that broad market." UP Reply at 12; see also BNSF Mot. at 19-20. In contrast, defendants claim that the amended complaint alleges a much more complicated agreement in which BNSF "agreed to give up its customers in the Uinta Basin (which Oxbow now alleges is a separate market) . . . just to preserve the status quo in the Powder River Basin." UP Reply at 12. According to defendants, these allegations are contradictory, requiring the Court to either strike the new allegations or "take account of such blatant inconsistencies in evaluating the plausibility of Oxbow's new allegations." BNSF Mot. at 20; see also UP Mot. at 10.

The Court will do neither. Defendants fail to acknowledge that a relevant market may include "cognizable submarkets which themselves [may] constitute the appropriate market for antitrust analysis." Geneva Pharm. Tech. Corp. v. Barr Labs, Inc., 386 F.3d 485, 496 (2d Cir. 2004) (citing Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962)). Plaintiffs have

---

[6] At the outset, it is important to delineate that Oxbow has alleged two distinct conspiracies, apart from the fuel surcharge price-fixing conspiracy: a Section 1 conspiracy not-to-compete (Count II); and a Section 2 conspiracy to monopolize (Count III). UP and BNSF frequently conflate the two in their arguments, although some arguments appear directed towards one or the other. See UP Mot. Part III.C ("Oxbow's Second and Third Claims For Relief Must Be Dismissed, Because Oxbow's Amended Complaint Fails to Allege Facts Supporting A Conspiracy Not To Compete"); BNSF Mot. Part III.C ("Oxbow Does Not Adequately Allege An Unlawful Market-Allocation Conspiracy Under Section 1 or Section 2").

simply narrowed their allegations from a larger market — the entire western United States — to a submarket — the Uinta and Powder River Basins. There is no contradiction.[7]

Cases cited by the defendants are inapposite. See UP Mot. at 9-10; UP Reply at 11-14; BNSF Reply at 7-15. In both Hourani v. Mirtchev, 943 F. Supp. 2d 159 (D.D.C. 2013), and Stanislaus Food Prods. Co. v. USS-POSCO Indus., 782 F. Supp. 2d 1059 (E.D. Cal. 2011), the amended and original complaints were irreconcilable — the allegations in both could not be true. See Hourani v. Mirtchev, 943 F. Supp. 2d at 170-71 (amended and original complaints alleged that different parties stole the same funds); Stanislaus Food Prods. Co. v. USS-POSCO Indus., 782 F. Supp. 2d at 1075-76 (original complaint alleged defendants conspired in 1986 to exit a certain market, while the amended complaint alleged defendants conspired to allocate that same market in 2006). That is not the case here.

2. Oxbow has stated a valid claim of a conspiracy not-to-compete

A plaintiff alleging a conspiracy in violation of Section 1 of the Sherman Act must plead "enough factual matter (taken as true) to suggest that an agreement was made." Bell Atl. Corp. v. Twombly, 550 U.S. at 556. In other words, Twombly "calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." Id. The Supreme Court in Twombly noted that:

> [L]awful parallel conduct fails to bespeak unlawful agreement. It makes sense to say, therefore, that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply

---

[7] Defendants also misstate plaintiffs' allegations. The amended complaint does not allege that BNSF had a significant customer base in the Uinta Basin prior to the formation of the conspiracy not-to-compete. Instead, Oxbow alleges that BNSF (1) possessed trackage rights, which applied competitive pressure, Am. Compl. ¶ 36, but (2) did not serve Colorado mines, id. ¶ 35, and (3) successfully bid to ship Utah coal only on "a number of occasions." Id. ¶ 42.

> facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

Id. at 556-57. Defendants argue that Oxbow's amended complaint fails to satisfy this standard and offers only conclusory allegations of parallel conduct that are readily explained by natural market forces. The Court disagrees.

a. Oxbow's allegations plausibly suggest conspiracy

As in Twombly, plaintiffs' amended complaint rests on circumstantial evidence of agreement. Bell Atl. Corp. v. Twombly, 550 U.S. at 564-65; see Opp. at 26. While this Court previously dismissed plaintiffs' conspiracy not-to-compete claim for failure to state a claim, see Oxbow I, 926 F. Supp. 2d at 46, this Court also found that "defendants overstate[d] the degree to which plaintiffs allege[d] only parallel conduct." Id. at 47. Defendants make the same mistake here.

In addition to the allegations in the original complaint (the defendants' involvement in the fuel surcharge conspiracy, the elimination of long-term contracts, and the simultaneous switch to public pricing), the amended complaint adds allegations that:

(1) Prior to 2003-2004, BNSF used its trackage rights in the Central Corridor and served as a competitive constraint on UP's prices in the Uinta Basin, Am. Compl. ¶¶ 40-45; and that, prior to 2003-2004, defendants "vigorously competed" in the Powder River Basin. Id. ¶ 92.

(2) At the same time defendants conspired to adopt the uniform fuel surcharges, they also agreed to stop competing for each other's customers, id. ¶ 91; specifically, BNSF agreed not to compete to serve shippers of Uinta Basin coal, id. ¶¶ 91, 157(a), in exchange for UP's agreement not to compete for BNSF's customers in the Powder River Basin. Id. ¶ 157(a).

(3) Defendants stopped offering competitive bids for one another's customers, id. ¶ 94, even as UP significantly raised its rates in the Uinta Basin. Id. at ¶ 102.

(4) Defendants dramatically increased their prices in both basins and reduced service. Id. ¶¶ 107-13.

It is difficult for the Court to surmise what more Oxbow could offer before discovery has commenced. See Anderson News, LLC v. Am. Media, Inc., 680 F.3d 162, 183 (2d Cir. 2012) (noting that "conspiracies are rarely evidenced by explicit agreements, but nearly always must be proven through 'inferences that may be fairly drawn from the behavior of the alleged conspirators'") (quoting Michelman v. Clark-Schwebel Fiber Glass Corp., 534 F.2d 1036, 1043 (2d Cir. 1976)). These allegations amply "raise a reasonable expectation that discovery will reveal evidence of illegal agreement" and place the allegations of parallel conduct "in a context that raises a suggestion of a preceding agreement." Bell Atl. Corp. v. Twombly, 550 U.S. at 556-57. Thus, they are far from conclusory.

b. Twombly did not create a heightened specificity requirement

Defendants assert that the amended complaint is deficient because Twombly requires plaintiffs to identify a "specific time, place, or person involved in the alleged conspirac[y]," and "when and where the illicit agreement took place." UP Mot. at 10-11 (alteration in original) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. at 565 n.10); see also BNSF Mot. at 17-18 (quoting the same). Defendants misread the Twombly footnote on which they rely. Footnote 10 of Twombly reads as follows:

> *If the complaint had not explained that the claim of agreement rested on the parallel conduct described,* we doubt that the complaint's references to an agreement . . . would have given the notice required by Rule 8. Apart from identifying a 7-year span in which the § 1 violations were supposed to have occurred . . . the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies. This lack of notice contrasts sharply with

> the model form for pleading negligence, Form 9 . . . . Whereas the model form alleges that the defendant struck the plaintiff with his car while plaintiff was crossing a particular highway at a specified date and time, the complaint here furnishes no clue as to which of the four [defendants] (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place. A defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to answer; a defendant seeking to respond to plaintiffs' conclusory allegations in the § 1 context would have little idea where to begin.

Bell Atl. Corp. v. Twombly, 550 U.S. at 565 n.10 (emphasis added).

Defendants correctly point out that some courts have interpreted this passage to require such heightened specificity for antitrust conspiracies. See UP Mot. at 14 n.6; BNSF at 17-18 & n.7. This Court, however, is not persuaded. Twombly expressly rejected the kind of particularity requirement that defendants seek to impose. Bell Atl. Corp. v. Twombly, 550 U.S. at 569 n.14 ("Here, our concern is not that the allegations in the complaint were insufficiently 'particular[ized];' rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible.") (alteration in original) (citations omitted). id. at 570 ("[We] do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."). Thus, many courts have rejected the argument defendants make here. See City of Moundridge v. Exxon Mobil Corp., 250 F.R.D. 1, 3 (D.D.C. 2008) ("Twombly did not purport to require a heightened fact pleading of specifics.") (citations and quotations omitted); id. at 4-5; see also Starr v. Sony BMG Music Entm't, 592 F.3d 314, 325 (2d Cir. 2010); In re Polyurethane Foam Antitrust Litig., 799 F. Supp. 2d 777, 792, 794-95 (N.D. Ohio 2011); Milliken & Co. v. CNA Holdings, Inc., No. 3:08-CV-578, 2011 WL 3444013, at *5 (W.D.N.C. Aug. 8, 2011); In re Packaged Ice Antitrust Litig., 723 F. Supp. 2d 987, 1005 (E.D. Mich. 2010); In re Se. Milk Antitrust Litig., 555 F. Supp. 2d 934, 943 (E.D. Tenn. 2008); In re Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007).

The amended complaint alleges when (late 2003-2004) and what (an agreement not to compete with each other's customers). Am. Compl. ¶ 91. That, in combination with allegations of parallel conduct and other circumstantial evidence, "raise[s] a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. at 555. That is all the specificity Twombly and Rule 8 of the Federal Rules of Civil Procedure require.

c. Oxbow need not rule out independent action at this stage

Finally, defendants argue that Oxbow's allegations of parallel conduct are "entirely consistent with" and "fully explained by" natural market forces. See BNSF Mot. at 24-28; UP Mot. at 17-22 (citing Bell Atl. Corp. v. Twombly, 550 U.S. at 566-67). Defendants are correct that conspiracy allegations may fail to state a claim "if there are 'obvious alternative explanation[s]' for the facts alleged." In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 322-23 (3d Cir. 2010) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. at 567). But "[i]t is also clear that allegations contextualizing agreement need not make any unlawful agreement more likely than independent action nor need they rule out the possibility of independent action at the motion to dismiss stage." Evergreen Partnering Grp., Inc. v. Pactiv Corp., 720 F.3d 33, 47 (1st Cir. 2013); see also Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d at 184.

Twombly — which defendants cite for support — is inapposite on this point. Plaintiffs there failed to allege *any* facts, circumstantial or otherwise, to render the alleged conspiracy plausible. Bell Atl. Corp. v. Twombly, 550 U.S. at 566 ("We think that nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy."). "[T]here [was therefore] no reason to infer that the companies had agreed among themselves to do what was only natural anyway." Id. Oxbow, in contrast, has alleged facts from which there is ample reason to infer that defendants engaged in a conspiracy.

See supra at 12-13.[8] Because Oxbow's allegations are plausible, Oxbow need not eliminate the possibility of independent action to survive defendants' motions to dismiss, even if defendants' allegations are also plausible.[9]

D. Oxbow Has Sufficiently Alleged that UP and BNSF Conspired to Grant UP a Monopoly

Count III's Section 2 conspiracy to monopolize claim directly dovetails with the above-discussed conspiracy not-to-compete claim brought under Section 1 — Oxbow alleges UP's monopolization of the Uinta Basin was a direct and intended result of the conspiracy not-to-compete. To state a cognizable claim for conspiracy to monopolize under Section 2 of the Sherman Act, plaintiffs must plead "(1) the existence of a combination or conspiracy to monopolize; (2) overt acts done in furtherance of the combination or conspiracy; (3) an effect upon an appreciable amount of interstate commerce; and (4) a specific intent to monopolize a designated segment of commerce." City of Moundridge v. Exxon Mobil Corp., 471 F. Supp. 2d 20, 41-42 (D.D.C. 2007) (quoting Genetic Sys. Corp. v. Abbott Labs., 691 F. Supp. 407, 420 (D.D.C. 1988) (internal quotation marks omitted)). Notably, as relevant for BNSF, "[a] defendant may be liable for conspiracy to monopolize where it agrees with another [company] to

---

[8] Even if one were to accept defendants' arguments, their alleged "natural market forces" fail to explain defendants' (1) significantly increased rates and decreased service terms; (2) simultaneous shift to public pricing and short-term contracts; (3) or participation in the fuel surcharge conspiracy.

[9] For this reason, among others, the summary judgment cases cited by BNSF are irrelevant. See, e.g., BNSF Mot. at 26 & n.11 (citing cases at the summary judgment and trial stage). At the summary judgment stage, plaintiffs must provide evidence that "tends to exclude the possibility of independent action." Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768 (1984). But "such a requirement at [the motion to dismiss] stage in the litigation would be counter to Rule 8's requirement of a short, plain statement with 'enough heft to sho[w] that the pleader is entitled to relief.'" City of Moundridge v. Exxon Mobil Corp., 250 F.R.D. at 5 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. at 557).

assist that [company] in its attempt to monopolize the relevant market." Discon, Inc. v. NYNEX Corp., 93 F.3d 1055, 1062 (2d Cir. 1996), vacated on other grounds, 525 U.S. 128 (1998).

Oxbow has sufficiently alleged the existence of a conspiracy, overt acts done in furtherance of that conspiracy, and an appreciable effect on interstate commerce. See supra at 12-13. As to specific intent, although the complaint states only that "UP and BNSF intentionally conspired to afford UP a monopoly," Am. Compl. ¶ 127, "[s]pecific intent is sufficiently pled where 'it is otherwise apparent from the character of the defendants' actions' alleged." City of Moundridge v. Exxon Mobil Corp., 471 F. Supp. 2d at 43 (quoting GTE New Media Servs., Inc. v. Ameritech Corp., 21 F. Supp. 2d 27, 45 (D.D.C. 1998)). Defendants' alleged conduct, if true, "has no legitimate business justification but to destroy or damage competition." Id. at 42-43. That alone satisfies the specific intent requirement.

E. Oxbow Has Sufficiently Alleged that UP Monopolized or Attempted to Monopolize

A violation of Section 2 of the Sherman Act requires allegations showing the acquisition or maintenance of monopoly power in the relevant market through exclusionary conduct. See United States v. Microsoft, 253 F.3d 34, 50 (D.C. Cir. 2001). UP argues that the amended complaint fails to allege such exclusionary conduct. UP Mot. at 23-26. Oxbow, in response, identifies two acts it asserts qualify: (1) UP's shift to public pricing; and (2) its participation in the fuel surcharge and not-to-compete conspiracies.

First, UP argues that Oxbow's allegations that UP "signaled" BNSF to cede the Uinta Basins cannot constitute exclusionary conduct because public pricing is a recognized means of rail pricing. UP Mot. at 24 (citing 49 U.S.C. §§ 11101(b), (e) (2012)). But the fact that public pricing is a "recognized means" fails to explain UP's allegedly sudden and unexplained shift from private to public pricing — particularly when UP previously asserted to the Surface

Transportation Board that "not knowing each other's actual prices, present or proposed," was crucial to competition. Am. Compl. ¶ 106. Such an unexplained shift from longstanding practice "reasonably appear[s] capable of making a significant contribution to creating or maintaining monopoly power," and thus qualifies as exclusionary conduct in this case. S. Pac. Commc'ns Co. v. Am. Tel. & Tel. Co., 740 F.2d 980, 999 n.19 (D.C. Cir. 1984) (citation omitted).

Second, UP asserts that the alleged Section 1 conspiracy cannot constitute exclusionary conduct because "price-fixing or market allocation schemes actually encourage competition from other firms." UP Mot. at 24 (citing FTC v. H.J. Heinz Co., 246 F.3d 708, 717 (D.C. Cir. 2001); JTC Petroleum Co. v. Piasa Motor Fuels, Inc., 190 F.3d 775, 777 (7th Cir. 1999)).[10] That may be true in markets with multiple competitors and a low barrier to entry. But it is not true in a closed market lacking non-co-conspirator competitors. BNSF was UP's only competitor in the Uinta Basin, which is why the federal government required UP to grant BNSF trackage rights in UP's merger with Southern Pacific Railroad. And the barrier to entry in the rail freight business is unquestionably high. Under such circumstances, price-fixing and market allocation harms "the competitive process and thereby harm[s] consumers." United States v. Microsoft Corp., 253 F.3d at 58 (citing Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993)).

F. Oxbow Has Sufficiently Alleged a Breach of the Tolling Agreement by UP

The amended complaint alleges that UP breached Paragraph 6(c) of the Tolling Agreement by refusing to provide Oxbow with discovery materials from the related Rail Freight

[10] Although this Court previously acknowledged this issue, it "d[id] not consider whether price-fixing or market allocation are 'exclusionary acts,' as required for monopolizing behavior." Oxbow I, 926 F. Supp. 2d at 46 n.7.

Action after Oxbow filed its initial complaint in this case.[11] UP argues, however, that the Tolling Agreement imposes no obligation on UP to facilitate access to the class action materials before Oxbow has filed a *viable* complaint and before discovery in this case has begun. UP Reply at 24; see also UP Mot. at 27- 28 (noting that this Court has already determined that the Tolling Agreement did not amount to an agreement to commence discovery) (citing Memorandum Opinion and Order, at 2 (Sept. 25, 2012) [Dkt. No. 47]).

UP's interpretation of the Tolling Agreement does not comport with the plain language of the contract. The word "viable" does not appear in Paragraph 6(c) or anywhere else in the Tolling Agreement. See Am. Compl. ¶ 166. And reading that term into Paragraph 6(c) would render that paragraph meaningless — Oxbow already would be entitled to discovery under the Federal Rules of Civil Procedure after surviving a motion to dismiss. See Beal Mortg., Inc. v. FDIC, 132 F.3d 85, 88 (D.C. Cir. 1998) ("We will not adopt an interpretation, which would be inconsistent with the cardinal interpretive principle that we read a contract to give meaning to all of its provisions."); see also Russell v. Harman Int'l Indus., Inc., 945 F. Supp. 2d

---

[11] Paragraph 6(c) of the Tolling Agreement states in full that:

> At such time as Oxbow files a complaint, it may initiate reasonable discovery as to all Claims in its complaint, consistent with the goals of this Agreement and the Federal Rules; provided, however: . . . in order for the parties to avoid being prejudiced for engaging in Discussions, and to avoid duplication of discovery, if Oxbow becomes a party to the class action or files a complaint, UP will take reasonable steps to facilitate Oxbow's access to discovery in the class action and the parties will be permitted to use any discovery taken of UP in the class action litigation with the same force as if adduced in Oxbow's suit against UP. This Agreement will not limit or otherwise impact the ability of Oxbow or UP to use any discovery taken or adduced of any party or non-party in the class action other than UP as may be approved by the Court.

Mot. to Compel, Ex. 1 [Dkt. No. 26-2].

68, 77-78 (D.D.C. 2013) (noting that "contract interpretation that would render any part of the contract surplusage or nugatory must be avoided"). As such, this Court cannot determine, as a matter of law, that Oxbow's interpretation of the Tolling Agreement is unreasonable and the motion to dismiss Count IV therefore must be denied.[12]

IV. CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that defendant Union Pacific Railroad Company's motion to dismiss [Dkt. No. 54] is DENIED; it is

FURTHER ORDERED that defendant BNSF Railway Company's motion to dismiss [Dkt. No. 55] is DENIED; it is

FURTHER ORDERED that plaintiffs Oxbow Midwest Calcining LLC and Terror Creek LLC are dismissed from Count IV of the amended complaint for lack of standing; and it is

---

[12] The amended complaint also alleges that UP breached Paragraph 5 of the Tolling Agreement, which states that "prior to Oxbow filing any complaint against UP, UP will keep Oxbow reasonably informed of the status of discovery proceedings in the fuel surcharge class action litigation." But Oxbow did not address Paragraph 5 in its opposition. See Opp. at 60-62 (only discussing the alleged Paragraph 6(c) breach); see also UP Mot. at 26-27. The Court therefore considers this claim conceded. Cureton v. U.S. Marshal Serv., 322 F. Supp. 2d 23, 27 (D.D.C. 2004) ("When a plaintiff files a response to a motion to dismiss but fails to address certain arguments made by the defendant, the court may treat those arguments as conceded . . . .").

FURTHER ORDERED that the parties shall meet and confer and file a joint report with the Court on or before March 24, 2015, explaining how they wish to proceed in this case and containing a proposed schedule for doing so.

SO ORDERED.

/s/______________________________
PAUL L. FRIEDMAN
United States District Judge

DATE: February 24, 2015

Rail Shipper Fairness Act of 2015 One Page Summary

When the Staggers Act of 1980 was enacted, the railroad industry was facing dire financial circumstances that threatened the long-term viability of freight rail transportation in the United States. The Staggers Act ushered in a new era of deregulation that allowed the railroads to price their services unilaterally and rationalize their systems. It also led to massive industry consolidation and ultimately to today's duopoly rail system in the East and West.

Circumstances facing the nation's railroads have improved dramatically since the passage of the Staggers Act. Under the directives of Staggers, the financial health of the railroads was consistently placed ahead of the financial impacts of railroad customers. As the graphic below makes clear, the underpinnings for the financial practices put in place first by the Interstate Commerce Commission (ICC) and its successor agency the Surface Transportation Board (STB) no longer exist. Far from being in financial danger, railroads have emerged as one of the highest performing sectors since the financial crisis.

The Rail Shipper Fairness Act seeks to expand competition and restore balance to the regulatory environment by recognizing the significant market power enjoyed by the railroads and the public interest in reasonable rail rates and service for rail customers. The bill achieves these modest reforms by:

IMPROVING RAIL SERVICE

- Requires rail service to be "efficient and reliable."
- Clarifies STB authority to address service emergencies for shipments moving under contract.
- Expands fines and equitable damages that railroads can be forced to pay for poor service.

IMPROVING COMPETITION

- Allows competitive switching for junctions within 100 miles
- Removes the presumption that market dominance cannot exist when a shipper is served by two carriers.
- Revises rail transportation policy to reflect shippers' priorities in addition to railroads'.

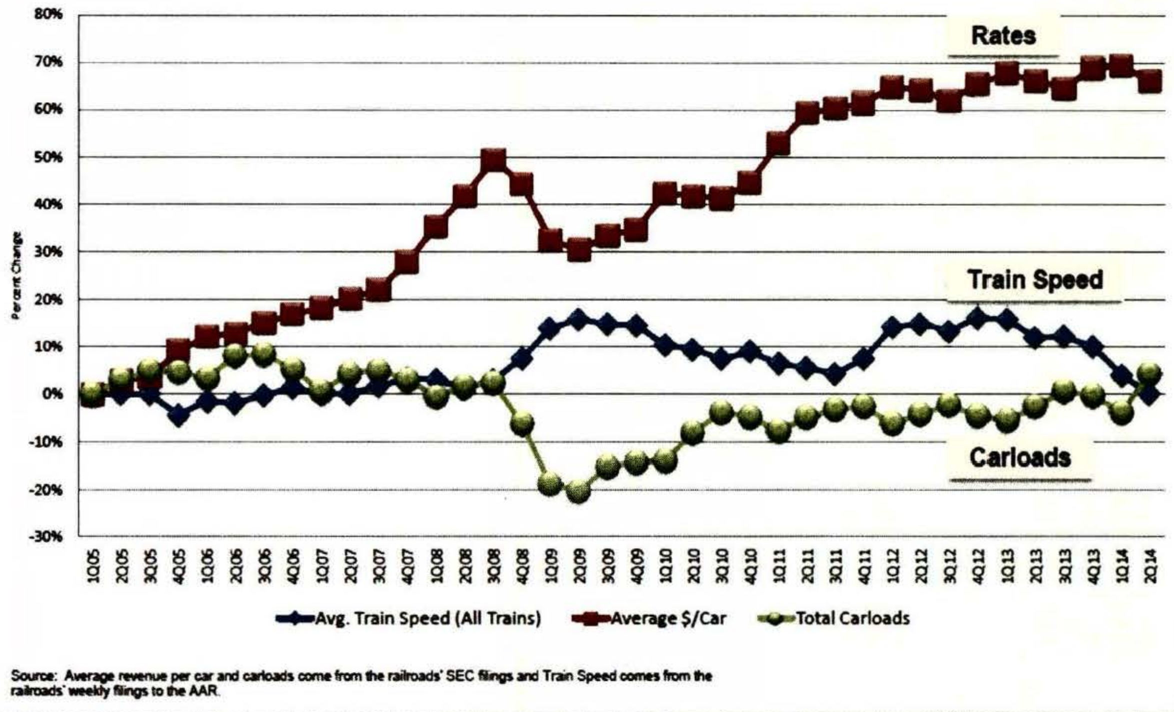
REFORM MAXIMUM RATE CASE REGULATIONS

- Suspends collection of rate increase while case is pending (or allows challenges two years in advance of when shipments are anticipated to begin).
- Require use of market-based revenue methodology in stand-alone rate cases.
- Shifts burden of proof to railroads in stand-alone cost cases.
- Eliminates the qualitative market dominance test.
- Removes the revenue adequacy test and caps railroad cost of equity at reasonable level.

STRUCTURAL REFORMS AT THE STB

- Expands STB membership from three to five and allows informal discussions.
- Requires regular public meetings.
- Two Board members must have some rail shipper or consumer advocacy background.

Source: Publicly available stock price data.



Source: Average revenue per car and carloads come from the railroads' SEC filings and Train Speed comes from the railroads' weekly filings to the AAR.

114TH CONGRESS
1ST SESSION

S. ______

To improve the efficiency and reliability of rail transportation by reforming the Surface Transportation Board, and for other purposes.

IN THE SENATE OF THE UNITED STATES

Ms. BALDWIN introduced the following bill; which was read twice and referred to the Committee on ________________

A BILL

To improve the efficiency and reliability of rail transportation by reforming the Surface Transportation Board, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 **SECTION 1. SHORT TITLE.**
4 This Act may be cited as the "Rail Shipper Fairness
5 Act of 2015".
6 **SEC. 2. IMPROVING RAIL SERVICE.**
7 (a) COMMON CARRIER OBLIGATIONS.—Section
8 11101(a) of title 49, United States Code, is amended by
9 inserting ", as necessary for the efficient and reliable

1 transportation based on the shipper's reasonable service
2 requirements," after "the transportation or service".
3 (b) EMERGENCY SERVICE ORDERS.—Section
4 11123(b) of such title is amended by adding at the end
5 the following:
6 "(4) The Board may issue emergency service orders
7 that cover shipments moving under contract if such ship-
8 ments are part of a regional service order issued in accord-
9 ance with this section.".
10 (c) REPORTS.—Section 11145(a) of such title is
11 amended—
12 (1) in paragraph (1), by striking "and" at the
13 end;
14 (2) by redesignating paragraph (2) as para-
15 graph (3); and
16 (3) by inserting after paragraph (1) the fol-
17 lowing:
18 "(2) reports, service plans, or other documents
19 that cover shipments moving under contract if such
20 shipments are part of a general report, service plan,
21 or other document that generally covers the geo-
22 graphic area or commodity; and".
23 (d) EQUITABLE RELIEF; DAMAGES.—Section 11704
24 of such title is amended—

1 (1) in subsection (a), by inserting "or subjected
2 to inadequate or deficient service" after "injured";
3 (2) by amending subsection (b) to read as fol-
4 lows:
5 "(b) A rail carrier providing transportation subject
6 to the jurisdiction of the Board under this part is liable—
7 "(1) for damages sustained by a person as a re-
8 sult of an act or omission of that carrier in violation
9 of this part;
10 "(2) to a person for amounts charged to that
11 person that exceed the applicable rate for the trans-
12 portation; and
13 "(3) to a person for damages or equitable relief
14 as a result of inadequate or deficient service in viola-
15 tion of this part."; and
16 (3) in subsection (c), by adding at the end the
17 following:
18 "(3) The Board may order a rail carrier to pay dam-
19 ages or to provide equitable relief, as appropriate, to a
20 person subjected to inadequate or deficient service as a
21 result of a violation of this part by that carrier.".
22 (e) FINES.—Section 11901 of such title is amend-
23 ed—
24 (1) in subsection (a), by striking "$5,000" and
25 inserting "$25,000";

1 (2) in subsection (c), by striking "$5,000" and
2 inserting "$25,000"; and
3 (3) in subsection (e), by striking "$100" each
4 place such term appears and inserting "$1,000".

5 **SEC. 3. IMPROVING RAIL COMPETITION.**

6 (a) RAIL TRANSPORTATION POLICY.—Section 10101
7 of title 49, United States Code, is amended—
8 (1) by redesignating paragraphs (14) and (15)
9 as paragraphs (15) and (16), respectively; and
10 (2) by inserting after paragraph (13) the fol-
11 lowing:
12 "(14) to provide for and promote the protection
13 of the shipping public;".
14 (b) RATES.—Section 10705 of such title is amended
15 by adding at the end the following:
16 "(d) Shippers may obtain rates to or from any inter-
17 change points of 2 or more rail carriers.".
18 (c) MARKET DOMINANCE.—Section 10707(b) of such
19 title is amended by inserting "A rail carrier could have
20 market dominance even in circumstances in which a ship-
21 per is served by 2 carriers." after "the rate applies.".
22 (d) TERMINAL FACILITIES.—Section 11102(c) of
23 such title is amended to read as follows:
24 "(c)(1) Except as provided in paragraph (2), the
25 Board shall require a Class 1 rail carrier to enter into

1 a competitive switching agreement if a shipper or receiver,
2 or a group of shippers or receivers, files a petition with
3 the Board that demonstrates, to the satisfaction of the
4 Board, that—

5 "(A) the facilities of the shipper or receiver for
6 whom such switching is sought are served by rail
7 only by a single, Class I rail carrier; and

8 "(B) subject to paragraph (4), there is, or can
9 be a working interchange between—

10 "(i) the Class I rail carrier serving the
11 shipper or receiver for whom such switching is
12 sought; and

13 "(ii) another rail carrier within a reason-
14 able distance of the facilities of such shipper or
15 receiver.

16 "(2) Competitive switching may not be imposed
17 under this subsection if—

18 "(A) either rail carrier between which such
19 switching is to be established demonstrates that the
20 proposed switching is not feasible or is unsafe; or

21 "(B) the presence of reciprocal switching will
22 unduly restrict the ability of a rail carrier to serve
23 its own shippers.

1 "(3) The requirement set forth in paragraph (1)(B)
2 is satisfied if each facility of the shipper or receiver for
3 which competitive switching is sought is—
4 "(A) within the boundaries of a terminal of the
5 Class I rail carrier; or
6 "(B) within a 100-mile radius of an interchange
7 between the Class I rail carrier and another carrier
8 at which rail cars are regularly switched.".

9 **SEC. 4. IMPROVING REASONABLE RATE STANDARDS.**

10 (a) STAND-ALONE COST CASES.—Section 10702 of
11 title 49, United States Code, is amended—
12 (1) by inserting "(a)" before "A rail carrier";
13 and
14 (2) by adding at the end the following:
15 "(b)(1) The Board shall prohibit a rail carrier pro-
16 viding transportation subject to the jurisdiction of the
17 Board under this part to charge the challenged rate for
18 providing such transportation to rail customers while a
19 maximum reasonable rate case brought by such rail cus-
20 tomers is pending before the Board.
21 "(2) A rail customer may file a maximum reasonable
22 rate case with the Board after the date that is 2 years
23 before the date on which a common carrier shipment rate
24 is anticipated to begin.

1 "(3) The Board may not use cross-subsidy tests in
2 deciding stand-alone cost cases.
3 "(4) The Board shall use market-based revenue divi-
4 sions methodology in deciding stand-alone cost cases.
5 "(5) In a stand-alone cost case, if the Board deter-
6 mines that the rail carrier is revenue adequate, the rail
7 carrier shall have the burden of proof to demonstrate that
8 the railroad carrier is charging a reasonable rate.".
9 (b) MARKET DOMINANCE.—Section 10707 of such
10 title, as amended by section 3(c), is further amended—
11 (1) in subsection (d)(1)(B), by adding at the
12 end the following "A shipper may introduce move-
13 ment-specific Uniform Rail Costing System cost cal-
14 culations."; and
15 (2) by adding at the end the following:
16 "(e) In making a determination under this section,
17 the Board may not utilize a qualitative analysis in which
18 the Board attempts to identify any feasible transportation
19 alternatives that could be used by the shipper.".
20 **SEC. 5. REVENUE ADEQUACY.**
21 (a) ELIMINATION OF REVENUE ADEQUACY TEST.—
22 Section 10704(a) of title 49, United States Code, is
23 amended by striking paragraph (3).

1 (b) RAILROAD COST OF CAPITAL.—Section 10704(a)
2 of such title, as amended by subsection (a), is further
3 amended by adding at the end the following:
4 "(3) In calculating a rail carrier's cost of capital, the
5 Board shall multiply the value of the capital by the sum
6 of—
7 "(A) the current annual yield on a 10-year
8 United States Treasury Bond; and
9 "(B) a prospective market risk premium, which
10 shall not exceed 5 percent per year.".
11 **SEC. 6. SURFACE TRANSPORTATION BOARD STRUCTURAL**
12 **CHANGES.**
13 Chapter 7 of title 49, United States Code, is amend-
14 ed—
15 (1) in section 701(b)—
16 (A) in paragraph (1)—
17 (i) by striking "3 members" and in-
18 serting "5 members"; and
19 (ii) by striking "2 members" and in-
20 serting "3 members";
21 (B) in paragraph (2)—
22 (i) by striking "time, at least 2 mem-
23 bers" and inserting the following: "time—
24 "(A) at least 2 members"; and

1 (ii) by striking "regulation, and at
2 least one member" and inserting the fol-
3 lowing: "regulation;
4 "(B) at least 2 members shall have a back-
5 ground in shipping or consumer advocacy; and
6 "(C) at least 1 member"; and
7 (2) in section 703, by amending subsection (b)
8 to read as follows:
9 "(b) MEETINGS.—
10 "(1) REGULAR MEETINGS.—The Board shall
11 meet regularly.
12 "(2) OPEN MEETINGS.—The Board shall be
13 deemed to be an agency of the United States Gov-
14 ernment and subject to the provisions set forth in
15 section 552b of title 5.".

PUBLIC DOCUMENT
TRADE SECRET DATA HAS BEEN EXCISED

State of Minnesota

Department of Commerce
Division of Energy Resources

Utility Information Request

Docket Number: E999/AA-14-579 | Date of Request: March 18, 2015

Requested From: Xcel, MP, IPL, OTP | Response Due: March 30, 2015

Analyst Requesting Information: Craig Addonizio

Type of Inquiry:

[ ] Financial	[ ] Rate of Return	[ ] Rate Design
[ ] Engineering	[ ] Forecasting	[ ] Conservation
[ ] Cost of Service	[ ] CIP	[ ] Other:

If you feel your responses are trade secret or privileged, please indicate this on your response.

Request No.	
28	Reference: Coal Consumption and Inventories a. Please provide actual coal consumption by month at each of the utility's plants. b. Please provide actual coal inventories by month at each of the utility's plants. c. Please provide the desired coal inventory level for each of the utility's plants. d. Please explain the reasoning behind the desired level of coal inventory for each of the utility's plants. Please explain any plant-specific considerations that influence the desired inventory.

RESPONSE:

a. See Attachment 28-a.

b. See Attachment 28-b.

c. **[TRADE SECRET DATA EXCISED]**

d. **[TRADE SECRET DATA EXCISED]**

Response by: Kathy Benham
Title: Director - Fuel Strategy & Sourcing
Department: Strategy and Planning
Telephone: 218-313-4402

List sources of information:

Table IR-28-A: Actual Coal Consumption by Month

[TRADE SECRET DATA EXCISED]

Table IR-28-B: Actual Coal Inventories by Month

[TRADE SECRET DATA EXCISED]

PUBLIC DOCUMENT
TRADE SECRET DATA EXCISED

State of Minnesota

DEPARTMENT OF COMMERCE
DIVISION OF ENERGY RESOURCES

Nonpublic [ ]
Public [x]

Utility Information Request

Docket Number: E999/AA-14-579 | Date of Request: 7/16/2015

Requested From: Minnesota Power | Response Due: 7/28/2015

Analyst Requesting Information: Craig Addonizio

Type of Inquiry:	[ ]......Financial	[ ]......Rate of Return	[ ]......Rate Design
	[ ]......Engineering	[ ]......Forecasting	[ ]......Conservation
	[ ]......Cost of Service	[ ]......CIP	[ ]......Other:

If you feel your responses are trade secret or privileged, please indicate this on your response.

Request No.	
45	Reference: MP's Responses to IRs 24 and 27 The Table below contains data provided in MP's response to DOC IR 24, and indicates that MP's **[TRADE SECRET DATA EXCISED]**. Table 1 MP's Declared Tonnage, Desired Deliveries and Actual Coal Deliveries (Tons) **[TRADE SECRET DATA EXCISED]**

Response by: Kathy Benham
Title: Director - Fuel Strategy & Sourcing
Department: Strategy and Planning
Telephone: 218-313-4402

List sources of information:

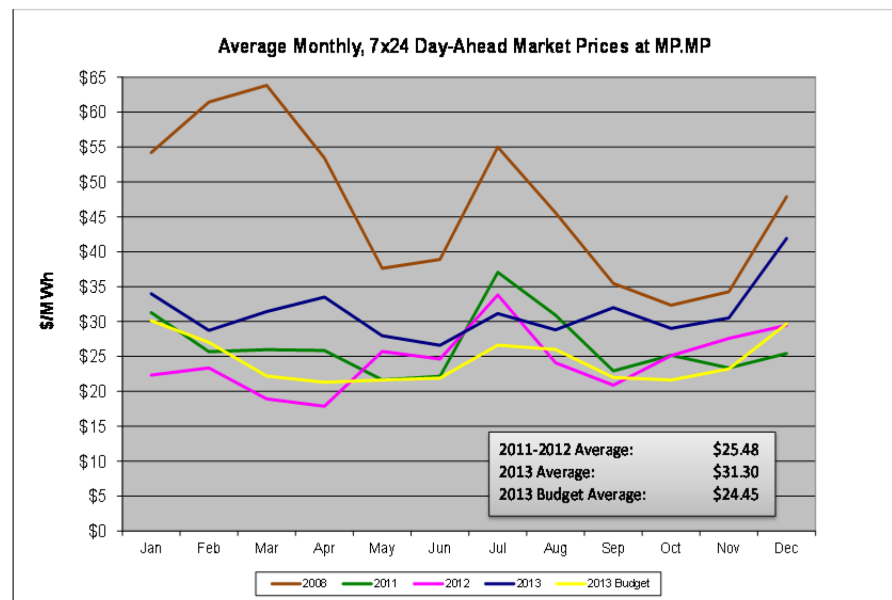
Additionally, the Department notes that MP's response to DOC IR 27 (Attachment A.1, pages 3 and 4) contains **[TRADE SECRET DATA EXCISED]**.

Please explain why **[TRADE SECRET DATA EXCISED]**.

Response:

2013 Response:

MP's 2013 Declared Tonnage nominations were due to BNSF in October 2012. When engaged in planning activities to make that nomination, the energy market was fairly soft, as shown in the chart below. Based on this and high coal inventory levels at that time, MP's nominations were made to meet anticipated coal needs.



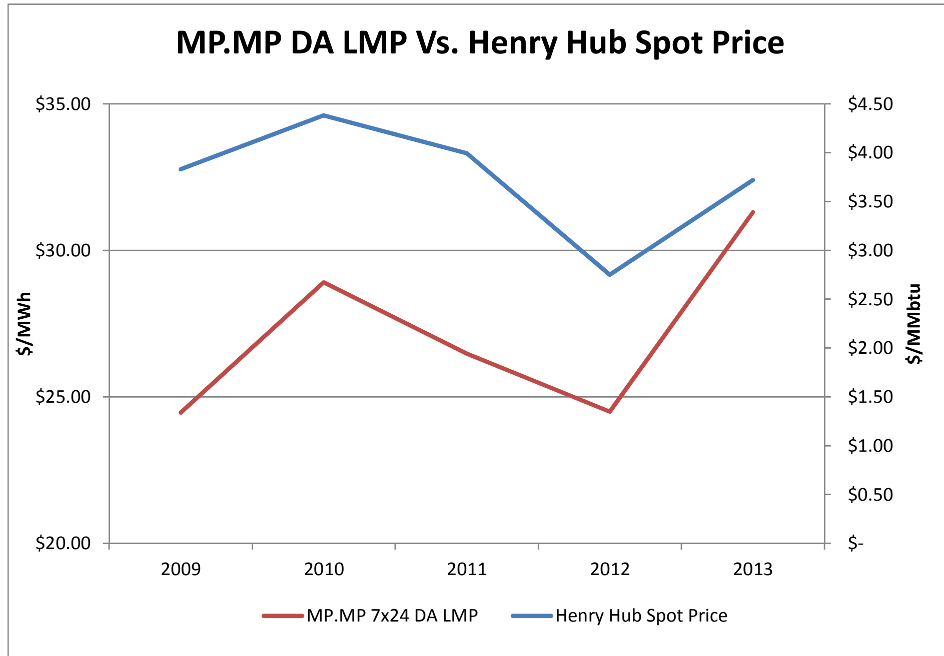
Following the October 2012 nomination, wholesale power prices in 2013, depicted in the chart above, averaged $31.30/MWh; this represented an increase of 27% over 2012 prices and a 29% increase over MP's budget estimate, and was higher than any of the previous four years.

The main drivers of the increase in power prices included: stronger natural gas prices, MISO generation unit outages, transmission outages and weather. Natural gas prices during 2013, illustrated in the chart below, averaged $3.72/MMbtu, which represented an increase of 36% over 2012 prices, and represented the first year-over-year increase since 2010.

Because of these market conditions in 2013, MP's thermal generation was greater than MP had anticipated at the time that MP made its October 2012 nomination.

Response by: Kathy Benham
Title: Director - Fuel Strategy & Sourcing
Department: Strategy and Planning
Telephone: 218-313-4402

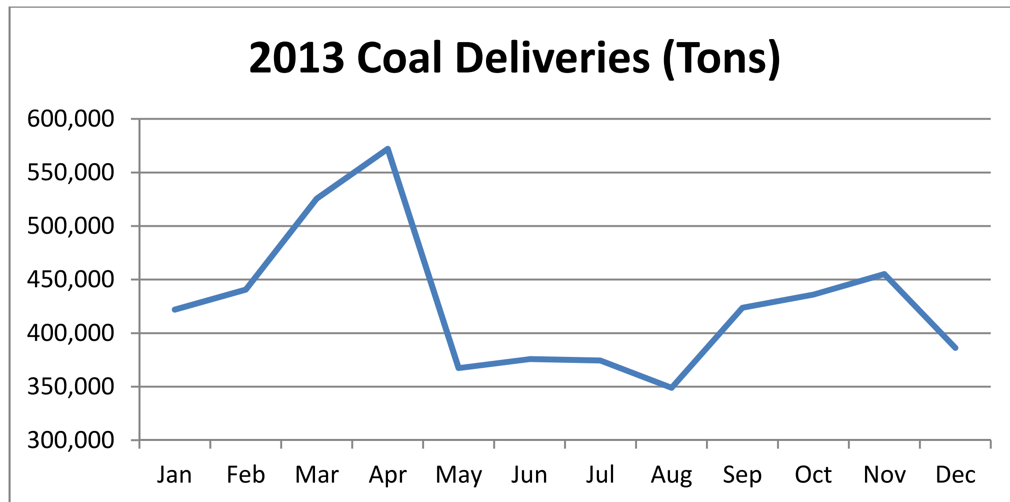
List sources of information:



[TRADE SECRET DATA EXCISED]

<u>2014 Response:</u>

[TRADE SECRET DATA EXCISED]



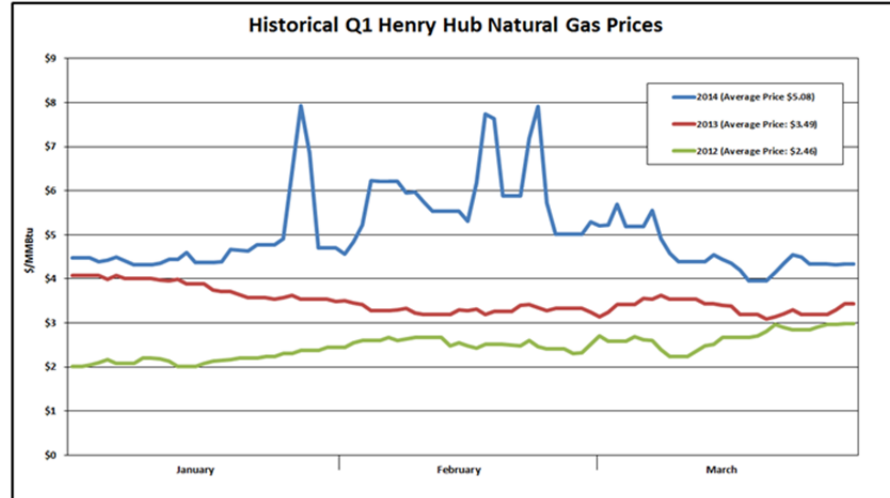
In addition, the first quarter of 2014 was marked by historically cold weather, record high natural gas and electric demand, and record high natural gas prices, which translated into abnormally high electricity prices. These market conditions resulted in MP producing more thermal generation than anticipated in October 2013, when the nomination was made.

For Minnesota Power, wholesale power prices averaged $56.31/MWh. This represents an increase of 80 percent compared to the same time period during 2013. Drivers of wholesale prices included natural gas prices, wind capacity, and loads within MISO.

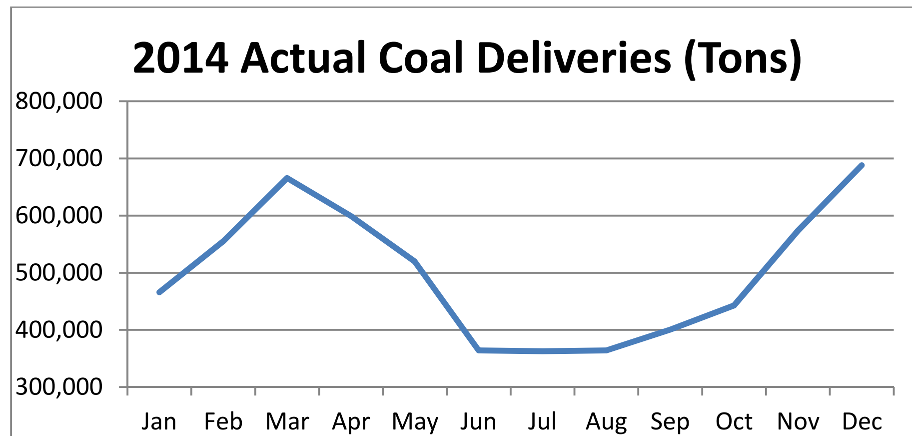
Response by: Kathy Benham
Title: Director - Fuel Strategy & Sourcing
Department: Strategy and Planning
Telephone: 218-313-4402

List sources of information:

Natural gas prices, as depicted in the graph below, increased 46 percent from first quarter 2013 to average $5.08 per MMBtu. There were four major cold events in the first quarter of 2014, and the U.S. daily natural gas demand spiked to record highs in January, coincident with an extreme cold weather event. On average, natural gas prices hadn't averaged this high since the first quarter of 2010 when they averaged $5.15 per MMBtu. Natural gas generators, often on the margin, drive electric market prices many hours of the day.



Minnesota Power recognized the need for additional coal immediately in 2014 and began requesting higher tonnages; although the railroad responded initially, deliveries quickly dropped and remained low until the last quarter of 2014, as shown in the chart below.



[TRADE SECRET DATA EXCISED]

Response by: Kathy Benham
Title: Director - Fuel Strategy & Sourcing
Department: Strategy and Planning
Telephone: 218-313-4402

List sources of information: