Attachment 2

Part 8 of 9

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

Appendix B

The additional information below is included to assist those who may wish to submit comments pertinent to review under the Paperwork Reduction Act:

DESCRIPTION OF COLLECTION

Title: Rail Service Data Collection.

OMB Control Number: 2140-XXXX.

STB Form Number: None.

Type of Review: New collection.

Respondents: Class I railroads (on behalf of themselves and the Chicago Transportation Coordination Office ("CTCO")).

Number of Respondents: Seven.

Estimated Time per Response: The proposed rules seek three related responses, as indicated in the table below.

Table – Estimated Time per Response

Type of Responses	Estimated Time per Response
Weekly	3 hours
Quarterly	3 hours
On occasion	3 hours

Frequency: The frequencies of the three related collections sought under the proposed rules are set forth in the table below.

Table – Frequency of Responses

Type of Responses	Frequency of Responses
Weekly	52/year
Quarterly	4/year
On occasion	2/year

Total Burden Hours (annually including all respondents): The recurring burden hours are estimated to be no more than 1,182 hours per year, as derived in the table below. In addition, there are some one-time, start-up costs of approximately 2 hours for each respondent filing a quarterly report that must be added to the first year's total burden hours. To avoid inflating the estimated total annual hourly burden, the two-hour start-up burden has been divided by three and spread over the three-year approval period. Thus, the total annual burden hours for each of the three years are estimated at no more than 1,186.67 hours per year.

Table – Total Burden Hours (per Year)

Type of Responses	**Number of Respondents**	**Estimated Time per Response**	**Frequency of Responses**	**Total Yearly Burden Hours**
Weekly	7	3 hours	52/year	1,092 hours
Quarterly	7	3 hours	4/year	84 hours
On occasion	1	3 hours	2/year	6 hours
Total				**1,182 hours**

Total "Non-hour Burden" Cost: None identified. Reports will be submitted electronically to the Board.

Needs and Uses: The new information collections would allow the Board to better understand current service issues and potentially to identify and resolve possible future regional and national service disruptions more quickly. Transparency would also benefit rail shippers and stakeholders, by allowing them to better plan operations and make informed business decisions based on publicly-available real-time data, and their own analysis of performance trends over time.

Retention Period: Information in this report will be maintained in the Board's files for 10 years, after which it is transferred to the National Archives.

44159 SERVICE DATE – LATE RELEASE DECEMBER 30, 2014
EB

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 724

UNITED STATES RAIL SERVICE ISSUES

Digest:[1] The Board directs BNSF Railway Company to submit a detailed description of the contingency plans the carrier would use to help mitigate an acute coal inventory shortage at one or more generating stations in a region.

Decided: December 30, 2014

On October 22, 2014, the Western Coal Traffic League (WCTL) petitioned the Board to require BNSF Railway Company (BNSF) to submit to the Board a coal-specific service recovery plan, and for the Board to review, approve or revise, and enforce the recovery plan. In support of its petition, WCTL states that its electric utility members who are served by BNSF continue to experience severe service difficulties. In light of the concerns raised by WCTL's petition and the approach of winter weather conditions, the Board issued an order on October 24, 2014, directing BNSF to file a reply to the petition no later than November 3, 2014. Other interested persons were invited to comment on WCTL's petition by that date.

On October 28, 2014, BNSF submitted a letter to the Board, which identifies many recently completed and planned infrastructure projects which, according to BNSF, would benefit its coal franchise. The letter also details various BNSF operational and personnel initiatives to improve its transportation of coal. Additionally, BNSF outlines several of its public outreach and communications efforts, including its reporting to the Board, to provide transparency to its customers regarding the status of its network. BNSF contends that preparing and filing a coal service recovery plan, as envisioned by WCTL, would not contribute materially to its customers' perspective on its operations.[2] BNSF asks that, if the Board is inclined to take additional regulatory steps, BNSF be permitted to submit additional regulatory proposals that it believes would address systemic service challenges that, according to BNSF, would have the potential to have a far greater impact on coal service than the proposal by WCTL.[3]

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[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

[2] See BNSF Letter 2; BNSF Reply 8-10.

[3] BNSF Letter 5.

On November 3, 2014, BNSF filed its reply in opposition to WCTL's petition. BNSF reiterates several of the points set forth in its October letter, and also presents several legal arguments against WCTL's request. First, BNSF argues that the Board lacks authority to mandate service requirements pursuant to 49 U.S.C. § 11145(a)(1). Second, BNSF asserts that the Board cannot compel BNSF to take specific actions related to service absent a finding of an emergency under 49 U.S.C. § 11123. Third, BNSF contends that the Board cannot grant the relief requested by WCTL because the "vast majority" of BNSF's coal traffic moves under private contracts, which are not subject to STB jurisdiction. Finally, BNSF contends that the relief requested by WCTL would detract from its overall recovery efforts as other stakeholders would seek to obtain similar relief.

The Board also received comments from several energy companies, legislators, and other interested parties generally expressing support for WCTL's petition. Dairyland Power Cooperative cites inadequate service to its Alma, Wis. coal-fired power plant that forced it to curtail electric generation and seek alternative power sources.[4] Similarly, Minnesota Power states that it ceased operations at four electric generating units in an effort to preserve coal stockpiles.[5] Several other power companies also comment in support of WCTL's petition and note low coal inventory and reduced deliveries.[6] The American Public Power Association, Edison Electric Institute, National Association of Regulatory Utility Commissioners, and the National Rural Electric Cooperative Association jointly submitted comments and reiterate many of WCTL's points, citing low stockpiles and vulnerable rail service as a threat to their members.[7] Minnesota Governor Mark Dayton, U.S. Senator Amy Klobuchar, and U.S. Senator Al Franken also submitted comments expressing support for the WCTL petition.[8] From Wisconsin, U.S. Senator Tammy Baldwin and U.S. Representatives Ron Kind, Sean P. Duffy, Thomas E. Petri, Reid Ribble, and Paul Ryan also wrote to the Board expressing concern about coal service, requesting that, if delivery problems persist, the Board require all Class I carriers to submit publicly available coal service recovery plans and monitor carriers' progress through weekly public reporting.[9]

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[4] Dairyland Power Comment 1 (filed Nov. 3, 2014).

[5] ALLETE d/b/a Minnesota Power Comment 1 (filed Nov. 3, 2014).

[6] See Otter Tail Power Company Comment 1 (filed Nov. 3, 2014); and Ameren Missouri Comment 1 (filed Nov. 3, 2014); see also Consumers United for Rail Equity Comment 1 (filed Nov. 3, 2014) (citing similar concerns about low coal inventory and electric reliability).

[7] American Public Power Association et al. Comment 1 (filed Oct. 31, 2014).

[8] Comment from Governor Dayton (filed Nov. 3, 2014); Letter from U.S. Senators Klobuchar and Franken (filed Nov. 7, 2014).

[9] Letter from U.S. Senator Baldwin and U.S. Representatives Kind, Duffy, Petri, Ribble, and Ryan (filed Nov. 19, 2014).

DISCUSSION AND CONCLUSIONS

Rail service performance throughout the national system continues to be a priority for the Board. At the Board's September 4, 2014 hearing in Fargo, N.D., shippers from various commodity groups and regions explained the impact that less reliable rail service has had on their operations. These concerns included significant backlogs for farmers,[10] escalating costs,[11] inability to transport products to the marketplace in a timely manner,[12] and general concerns about the business impacts of rail congestion.[13] Coal shippers, in particular, expressed concerns about increased cycle times, being forced to implement coal conservation measures,[14] the inability to manage coal piles,[15] and the potential impacts of coal shortages on electricity grid reliability.[16] Many shippers also expressed concerns about a lack of regular communication with, and information sharing from, the railroads.[17]

During the Board's two rail service hearings, and in its recent filings, BNSF generally acknowledges that it has not met customer expectations with regard to its movement of coal.[18] It also notes that it has been working aggressively towards remedying ongoing service issues to meet customer demand.[19] To address these issues and improve its coal service, BNSF states that it has undertaken the following initiatives: increasing hiring, locomotive and car acquisitions, and capital investment in maintenance and capacity expansion;[20] investing in northern corridor infrastructure, including network capacity expansion;[21] adding two double-track projects to its infrastructure investment plan to support its coal route;[22] making network-wide investments, including terminal and capacity expansion projects that it states will result in a stronger railroad,

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[10] Sept. Hr'g Tr. 218, U.S. Rail Serv. Issues, EP 724 (Sept. 4, 2014).

[11] Id. at 219.

[12] Id. at 228.

[13] Id. at 229, 233.

[14] Id. at 127.

[15] Id. at 151.

[16] Sept. Hr'g Tr. 151.

[17] Id. at 219.

[18] BNSF Reply 2 ("BNSF readily acknowledges that current service has not met its customers' expectations or its own high standards in all parts of the network."); Sept. Hr'g Tr. 90; Apr. Hr'g Tr. 181, 190, U.S. Rail Serv. Issues, EP 724 (Apr. 10, 2014) (acknowledging customer concerns generally and about coal, and describing BNSF's response to increased coal demand).

[19] BNSF Reply 2.

[20] BNSF Letter 2.

[21] Id.

[22] Id. at 3.

improving service for all customers;[23] improving fluidity on the coal network through maintenance projects across the network;[24] preparing enhanced Winter Action Plans, including new resources for the 2014 winter season to better handle extreme weather;[25] and decongesting the network by strategically removing a small number of coal sets.[26]

With respect to this final point, WCTL expresses concern regarding an alleged near-term plan for BNSF to withdraw 60 coal-train sets from service. In response, BNSF states that it has no plan to withdraw 60 coal-train sets; rather it says that it identified an opportunity to reduce congestion on certain lanes by removing a total of fewer than 30 coal-train sets.[27] BNSF asserts that, by strategically removing a small number of coal-train sets, it is decongesting the system and improving overall velocity for its utility customers.[28] It states that the cuts are not across-the-board, but involve specific coal customers where BNSF has identified an operational and contractual opportunity for set reductions.[29]

WCTL's petition conveys the concern that exists among WCTL members with regard to coal rail service and the potential impacts of poor service, particularly going into the winter months. Although WCTL's petition does not specifically describe the extent of the coal supply shortage that its members have been experiencing,[30] relevant data regarding coal supply is prepared by U.S. energy regulatory agencies. The Board monitors developments at these agencies closely in order to assess the overall coal supply picture and augment the information we receive from rail carriers and shippers. Reports issued by the U.S. Energy Information Administration (EIA) indicate that, over the past year, approximately 75-80% of coal-fired plants nationwide maintained coal stockpiles in excess of 30 days, and a significant proportion of those plants maintained stockpiles in excess of 60 days.[31] EIA's most recent update shows that

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[23] Id.

[24] Id.

[25] Id. at 3.

[26] BNSF Letter 3-4.

[27] Id. at 4.

[28] Id.

[29] Id.

[30] For example, the petition does not include information regarding WCTL's members' current versus historical coal stockpile levels; historical, actual and projected burn rates; current versus historical cycle times and cycle time trends; a description of available mitigation; and the availability and costs of procuring replacement power from other sources. As noted earlier, however, two commenters, Dairyland Power and Minnesota Power, did cite specific decisions to curtail electric generation.

[31] See U.S. Energy Information Administration, Electric Power Sector Coal Stocks: October 2014 (Dec. 23, 2014), http://www.eia.gov/electricity/monthly/update/fossil_fuel_stocks.cfm (scroll down to "Capacity by days of burn" chart).

nationwide, 52.2% of coal-fired plants maintained stockpiles in excess of 60 days; 39.8% of plants maintained stockpiles between 30 and 60 days; and 8% of plants maintained stockpiles of less than 30 days.[32] Coal stockpiles in certain states, however, are lower than historical levels. At an open meeting of the Federal Energy Regulatory Commission (FERC) held on December 19, 2014, FERC staff noted that coal stockpiles in Iowa and Oklahoma are more than 40% lower than last year's level, and coal stockpiles in Minnesota, Wisconsin, Missouri, and Texas are between 25 and 40% below last year.[33] Representatives of a regional transmission organization and a utility also provided testimony at FERC's open meeting about specific coal reliability situations, most of which appeared to reflect some progress on stockpiles.[34]

The Board has been collecting specific service performance data from Class I railroads across all commodities. U.S. Rail Serv. Issues—Data Collection (October 8 Order), EP 724 (Sub-No. 3) (STB served Oct. 8, 2014). Several categories of data collected under the October 8 Order specifically provide insight into BNSF's coal service performance, including:

- System average train speed for coal unit trains (part of Item 1). BNSF's reports to date show system average train speed for coal unit trains around 17 to 19 m.p.h. This remains below recent historical levels (2009-mid 2013), which ranged from 20 to 24 m.p.h.[35]

- Weekly average dwell time at origin for coal unit trains (part of Item 4). BNSF's reports to date show weekly average dwell time at origin for coal unit trains around 4 to 5.5 hours.

- Average daily coal unit train loadings versus plan for the reporting week by coal production region (Item 10). BNSF's reports to date show that while its average train loadings per day in the Powder River Basin (PRB) did not meet its plan in

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[32] Id.

[33] Coal Delivery Issues for Electric Generation, Staff Overview (Dec. 18, 2014), slide 3, http://www.ferc.gov/media/headlines/2014/2014-4/A-3-presentation-staff.pdf.

[34] Midcontinent Independent System Operator, Inc., stated that "coal-pile drawdowns this year have not yet resulted in a significant issue from a reliability perspective on the system." FERC Open Meeting, Dec. 18, 2014 (video archive), at 00:74:15, available at http://ferc.capitolconnection.org/121814/fercarchive_flv.htm. ALLETE d/b/a Minnesota Power stated that "we enter January in much better shape than we were last year. The coal pile is full and with some certainty that it will stay full in February and March, we look good this year compared to where we've been at our biggest power plant." Id. at 00:85:35.

[35] See BNSF Weekly Reports in United States Rail Service Issues—Data Collection, Docket No. EP 724 (Sub-No. 3). See also Performance Measures Subcommittee Update, Rail Energy Transp. Advisory Committee, Oct. 2, 2014, slide 11 ("Historical Coal Train Speed"), available at http://www.stb.dot.gov/stb/rail/retac.html (select "Performance Measures" hyperlink adjacent to Oct. 2, 2014 Meeting Minutes).

reporting weeks 3 to 7, BNSF either met or exceeded its plan in weeks 1, 2, 8, 9, and 10.

With respect to BNSF and coal specifically, the totality of the information collected to date suggests that BNSF's coal service has struggled, although there has been some progress in recent weeks. It is critical that the Board continue to closely monitor BNSF's performance for indications of improving or deteriorating service. In addition to monitoring BNSF's coal service performance via the data we collect, we will continue to hold regular meetings with BNSF senior management so that we can receive first-hand information about the challenges and progress BNSF is experiencing with respect to all service issues, including coal.[36] Also, the Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC) will maintain its weekly calls with BNSF to discuss service issues, including the status of BNSF's coal service. OPAGAC will continue its outreach and regular communications with counterparts at the Department of Energy (DOE) and FERC in order to share information about the coal railroad supply chain as it relates to the reliability of energy production.

Moreover, we will direct BNSF to provide specific information with regard to its coal service contingency planning. BNSF's October 28 Letter and its November 3 Reply indicate that the carrier devotes particular attention to utility customers at or below a 10-day stockpile level "to ensure that the customer does not run out of coal."[37] However, BNSF does not provide more specific information. A key concern of the Board is the railroad's ability to promptly and effectively redeploy resources in the event that unanticipated circumstances cause one or more regionally significant generating stations to reach critical stockpile levels. So that the Board has a full understanding of how BNSF would mitigate any critical shortfalls of coal, BNSF is directed to provide to the Board its contingency plans for addressing any such shortfalls, including a detailed description of the steps it takes to identify coal-fired plants at critical levels and to remedy acute shortages in a timely fashion. BNSF's response should address equipment, infrastructure, and personnel resources used to respond to such situations. BNSF may also submit the regulatory proposals referenced in its October 28 Letter, which it stated would address systemic service challenges.

To ensure that the Board receives the full range of perspectives regarding coal service, we also invite utilities and other coal stakeholders to submit status reports in this docket. Together with the input received through the Board's continued coordination with FERC and DOE, its continued calls and meetings with BNSF,[38] and the coal service data collected pursuant to the October 8 Order, these reports will increase the Board's ability to monitor the status of coal service. If utilities and other coal stakeholders choose to submit such reports, we request that they address:

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[36] See, e.g., U.S. Rail Serv. Issues, EP 724, slip op. at 2 (STB served Aug. 18, 2014) ("At the Board's request, senior management representatives of BNSF and CP have met individually with Board Members on a number of occasions . . . .").

[37] BNSF Reply 10.

[38] OPAGAC holds regular, informal meetings with BNSF and the other Class I carriers.

- Information regarding regional, state, or plant-specific stockpiles. This information (as well as any other information included in these status reports) may be filed under seal if the submitting party chooses to do so. Questions about submitting a filing under seal, including how to request a protective order, may be directed to OPAGAC at (866) 254-1792 or rcpa@stb.dot.gov.

- Information regarding the status of coal by rail service received from railroads (including, but not limited to, BNSF).

The Board's access to all of the information described above from a combination of carriers, shippers, and energy regulatory agencies will assist the Board in evaluating whether further regulatory steps with regard to coal service are necessary, and if so, when. As the Board is not requiring the service recovery plan enforcement requested by WCTL, we need not reach a conclusion on BNSF's legal objections to that remedy. We do note, however, that BNSF has raised a significant concern with respect to the scope of the Board's authority over contract traffic under 49 U.S.C. § 10709. 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). Given that the vast majority of coal rail traffic nationwide moves under contract, § 10709 could have an impact on the scope of any prospective relief available under the Interstate Commerce Act. At the same time, however, a carrier entering contracts "remains subject to [its] common carrier obligation . . . with respect to [its non-contract] traffic" under § 10709(f). The national rail system carries both regulated and non-regulated traffic and the Board necessarily must look to the fluidity of that network.

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

<u>It is ordered</u>:

1. WCTL's petition is granted in part and denied in part, as discussed above.

2. BNSF shall submit no later than January 29, 2015 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.

3. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

BNSF RAILWAY

Stevan B. Bobb
Executive Vice President and
Chief Marketing Officer

BNSF Railway Company
P.O. Box 961051
Fort Worth, Texas 76161-0051
2650 Lou Menk Drive
Fort Worth, Texas 76131-2830
Tel: (817) 867-6400
Fax: (817) 352-7122
stevan.bobb@bnsf.com

January 29, 2015

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The Honorable Debra Miller, Chairman
The Honorable Ann Begeman, Vice Chairman
United States Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Dear Members of the Board:

I write in response to the Board's December 30, 2014 order in Ex Parte No. 724, *United States Rail Service Issues* relating to BNSF's contingency plans around addressing critical coal shortfalls experienced by BNSF shippers.

Overview

As we enter the first quarter of 2015, BNSF maintains our focus on providing consistent and reliable service to our coal customers and delivering as much coal as possible into the marketplace. We continue in our efforts to maximize velocity across our network, and we have seen improvements in key performance areas like network fluidity. The most effective way to address coal stockpile fluctuations is to improve velocity across our network to a level where we are no longer managing resources to respond to critical situations. While we have seen the recent improvements in network fluidity benefit our coal customers in terms of rising stockpiles, we also continue in the immediate term to work with our coal customers to identify critical stockpile situations and to implement appropriate responsive measures.

The Board's December 30, 2014 order in the above-captioned service proceeding directed BNSF to provide a detailed description of the contingency plans that BNSF would use to mitigate critical shortfalls of coal. In this letter, I describe in more detail the various elements of BNSF's "coal customer escalation process," an existing process that BNSF has utilized to address potential concerns arising from recent service issues in coal transportation. These efforts include a process for identifying customers experiencing critical stockpile levels and various tools that BNSF has available to address critical situations. Measures that BNSF would take in the future to deal with critical coal stockpile shortages would be an outgrowth of BNSF's existing process modified to account for the specific circumstances of individual shippers.

These contingency measures are extraordinary and costly, but they have also been effective in dealing with problems that have previously arisen. BNSF has demonstrated its ability to implement measures to effectively mitigate critical stockpile situations. As shown in Attachment A, as of January 23, 2015, BNSF has been able to add coal representing 440 days of coal burn to the coal stockpiles of customers identified as having critical stockpile shortages through the processes described here. As a result of the steady improvements that have been seen, BNSF does not believe it is necessary to consider more wide-ranging changes in regulation to address the present service situation.

BNSF RAILWAY

In describing BNSF's contingency planning, it is important to note at the outset that there is no one-size-fits-all, pre-prescribed formula of responsive measures for every critical stockpile situation. On the contrary, when a critical coal situation at a particular plant is identified, BNSF teams review the specific circumstances, including contributing factors, and determine which responsive actions will be most effective and appropriate to address the situation while maintaining overall network fluidity. As explained in more detail below, such actions may include heightened operational focus, equipment reallocation (including both trainsets and locomotives), increased crew coverage, rerouting, and/or gateway modifications.

It may be necessary or appropriate for BNSF to activate a subset (or even just one) of these counter-measures in response to a specific critical stockpile situation. As explained in more detail below, there are a number of factors that can contribute to diminishing stockpiles, including circumstances unrelated to railroad performance. These factors can greatly impact whether responsive countermeasures adopted by BNSF will be fully effective. Frequent communication with our customers is an absolute necessity to diagnose critical situations, and to understand the driving factors and appropriate countermeasures. Moreover, the effectiveness and appropriateness of countermeasures can change over time even for a particular customer. For that reason, it is of critical importance that BNSF have the flexibility to adjust service recovery efforts as network conditions and the circumstances of individual shippers evolve. Constant change is a core characteristic of our operating environment, but even in that context we have also seen short-term flux in the demand profile of our customers. Strict adherence to pre-formulated measures could seriously impair BNSF's ability to respond to the needs of individual shippers experiencing critical shortages and be detrimental to our overall network performance.

Finally, the measures I describe here have been designed to address the specific concerns that arose over the course of the last year for our coal shippers as a result of service difficulties on BNSF's network. This process for addressing critical stockpile shortfalls is not very different from the contingency measures railroads implement in response to temporary service disruptions like flooding or a major derailment. We expect that a return to consistent performance will also mean a return to normal operational and resource planning for consistent, ratable service that supports the annual demand of our utility customers.

<u>BNSF's Process for Identifying Coal Plants with Critical Stockpile Challenges</u>

As the Board knows, BNSF talks regularly with our customers and, with the onset of the service challenges in 2013, we built into those conversations a discussion about our customers' stockpile levels. The first step in managing an emerging critical situation is to identify situations where responsive action might be necessary. BNSF's current coal customer escalation process starts with the information our customers provide BNSF assessing the stockpile levels at the individual coal generating facilities we serve; these assessments specifically focus on "days of burn," which is an estimate of the number of days a stockpile of coal should last based on historic consumption patterns at the plant. Days of burn appears to be the key measure that utilities use in their own industry to provide forward-looking estimates of demand.

BNSF RAILWAY

January 29, 2015
The Honorable Debra Miller, Chairman
The Honorable Ann Begeman, Vice Chairman
United States Surface Transportation Board

It is important to remember that BNSF has no direct visibility into our customers' stockpile levels. We rely entirely on our customers to provide timely and accurate information about their respective stockpiles. While the days of burn information we receive from our customers is a necessary element in our coal customer escalation process, it is an imperfect reference point even for short-term management of critical supply situations. Some customers provide stockpile information to BNSF more regularly than others. It also appears that utilities may have different methodologies for judging days of burn, and BNSF is not in a position to reconcile those differences. In addition, while rare, some utilities may seek to use the stockpile information they provide as an opportunity to secure preferential treatment or as a backdoor way to influence rail service – not to address critical stockpile shortages related to railroad service, but to respond to the utility's changing short-term demand profile (e.g., managing the coal burn in response to the rise and fall of gas prices). These same challenges make reliance on days of burn information from our customers a necessary part of our contingency planning but unworkable as a long-term tool for planning service and capacity under normal operating conditions.

<u>BNSF's Process for Distributing Information about Critical Stockpile Situations</u>

The second element in BNSF's contingency planning for critical stockpile shortfalls is a process for making sure that the information about critical stockpile levels is distributed to BNSF personnel that can act to address the situation. As detailed above, BNSF relies on customers to provide information about the level of coal stockpiles at their generating stations. BNSF's contingency planning involves several measures for notifying relevant personnel that special action may need to be taken in particular cases.

- When we receive information indicating that a customer stockpile is at or below 20 days, we internally designate that customer as "critical." We also specifically flag customers within that "critical" group that are experiencing single digit stockpile levels (meaning below 10 days of burn). As network service improvements result in general stockpile increases, we have seen fewer instances of burn levels hitting less than 10 days; as a result, we can adjust our efforts to focus mitigation measures and accelerate recovery for facilities at or below 20 days.

- On a going forward basis, all critical coal customers are identified in our internal daily "critical customer" broadcast communication which goes out to key operating personnel in BNSF's Fort Worth headquarters and in the field. That customer list is incorporated into the many regional and division communications that are continually distributed to the field operating teams. These teams have key responsibilities in creating and modifying trip plans for the cars and trains moving across our system.

- When a coal customer does notify BNSF that it has less than 10 days' worth of coal in its stockpile, in addition to being included on the critical customer list, there is a separate report that is generated twice a day by service design personnel manning the Coal Desk (with responsibilities for coordinating coal moves across the network and managing trainset levels) that is circulated to the same Fort Worth and field operating teams discussed above. The report identifies the physical location of each train set moving coal to that utility, as well as the current disposition

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of each train, and it provides a snapshot of the arrival pipeline of trains for the next 3 days. These communications are also provided to company leaders in all functional areas.

- We also provide the Board's staff with updates on the customers who have plants on this critical list on our weekly service call with the Board's Office of Public Assistance, Governmental Affairs, and Compliance.

- A customer's plant will be included in the critical customer communications described above until it is no longer in critical status (i.e., its stockpile levels are above 20 days).

Operational Measures Available to Address Critical Stockpile Situations

Inclusion of a coal utility on the critical customer list and the additional reporting about utilities with less than 10 days' worth of coal in their stockpiles creates visibility and focus at multiple levels within the BNSF operations groups responsible for designing and implementing service plans. Once a critical customer situation is identified, a range of operating decisions that are tied directly to existing network conditions and the specific circumstances of the customer can be made to enhance deliveries of coal. It is not possible or practicable to prescribe a set of rules or procedures to be followed. In many cases, the measures necessary to improve service involve modest changes to train schedules or maintenance plans that are based on existing operating conditions. In addition to these particular operating adjustments that can be taken to address the circumstances of individual shippers with critical stockpile concerns, several types of short-term and longer-term measures are available to address critical stockpile situations, as discussed below.

- Trainsets

  - BNSF can also adjust the number of trainsets in service to maximize velocity and coal deliveries. In a prior submission to the Board, BNSF described a recent effort to strategically remove trainsets from service to decongest the system and improve velocity. Under appropriate circumstances, this strategy can be used to improve service on particular corridors or routes.

  - One important lever available to address critical stockpile needs is to adjust the number of unit trains in service to customers on the critical list in the short term to create additional throughput. Such increases, however, must be managed in the context of the overall network and the specific corridors crossed in the route of movement, as adding trainsets can sometimes result in reduced velocity. Similar to a highway where adding more cars leads to more congestion, an increased number of sets running on the key coal corridors can result in lower velocity and less overall coal being delivered if not properly managed.

  - Because of the direct connection between the number of coal trainsets in service and overall coal velocity, adding trainsets to serve a plant on the critical list usually works best when those trainsets are borrowed from service to another plant for the same customer, thereby increasing the overall number of loaded trainsets directed towards the critical plant without

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increasing the overall number of coal sets trying to move across the system. BNSF's Coal Desk is in constant communication with utility customers to ensure that we are getting optimal use out a customer's trainsets, and in many cases can adjust trip plans for trainsets within a customer's dedicated fleet in real time.

- Making use of a customer's existing fleet is often necessary because incremental trainsets may not be available from the customer or from the railroad. In some limited instances, sets can be leased for short periods from other utilities or third-party lessors.

- <u>Locomotives</u>
  - BNSF may be able to adjust the allocation of locomotive resources across the network in response to localized increases in the number of trains holding for power. Yard personnel can manage available locomotives to ensure that locomotives are available for delivery of coal to critical customers.
  - Such measures may involve moving locomotives supporting one business unit into another business unit on a temporary basis. This is most effective and least disruptive when extra locomotives can be secured from business units experiencing seasonal reductions in demand.
  - While purchases of new locomotives requires significant lead time, on some limited occasions, BNSF may have the opportunity to enter into short-term locomotive leases. In 2014, in addition to these short-term temporary leases, BNSF entered into long-term leases for approximately 100 locomotives, in addition to purchasing more than 500 new locomotives.

- <u>Route and Gateway Adjustments</u>
  - BNSF implemented temporary rerouting of traffic at various times in 2014 to avoid congested corridors or yards, maintenance and other service disruptions. Rerouting of significant traffic volumes must be carefully reviewed because of potential negative impacts to service for other business segments and overall network fluidity.
  - In a limited number of cases, BNSF has been able to work with connecting carriers to adjust operational interchanges in order to avoid congested facilities and interchange joint traffic using alternative facilities where it will increase throughput and allow for more consistent service planning.
  - In limited circumstances where a utility can receive tons by another mode (e.g., barge or truck) or can be served directly by another rail carrier using independent facilities, BNSF has accommodated such customer requests.
  - Gateway changes may require BNSF to loosen contractual restrictions. Moreover, the circumstances must be closely reviewed to determine that throughput can be improved without a negative impact to the overall network.

BNSF RAILWAY

January 29, 2015
The Honorable Debra Miller, Chairman
The Honorable Ann Begeman, Vice Chairman
United States Surface Transportation Board

- Maintenance Planning
  - There may be options for minimizing the immediate impact of maintenance windows on shipments to utilities experiencing critical stockpile shortfalls, and that is often done through the operational focus created by the critical customer list and rerouting described above. There are obvious drawbacks to more extreme measures such as delaying essential maintenance and expansion on key coal routes in order to minimize service disruptions.
- Crew Management
  - Personnel adjustments can also be made over the longer term to address service issues. In 2014, BNSF demonstrated its ability to hire into key operating positions on a large scale, hiring and training 3,649 Train, Yard and Engine new employees and 2,779 Engineering and Mechanical new employees throughout the calendar year.
  - In addition, BNSF has some ability to move crews and other operating personnel around the network to mitigate shortages in key terminals. Generally speaking, temporary relocations can be accomplished in less than a month under our current labor agreements, which is significantly quicker than the four to five months it can take to hire and train new employees.

Additional Longer-Term Measures to Address Service Problems

- Infrastructure: In addition to the operational measures described above, BNSF has implemented and continues to implement longer-term measures to address service difficulties in coal transportation. BNSF has detailed in other submissions the large capital investment being made to support the coal network and to improve coal service. A number of key projects have or will come online in 2014 and 2015 and we are seeing the operational benefits from those investments. Included in our $6 billion capital plan for 2015 are two multi-million dollar double track projects on the Ravenna sub that have been undertaken to address the need to move significant coal volumes in the short term. In general though, given the long timeline associated with most infrastructure projects there is limited ability to use infrastructure investments to alleviate short-term critical service situations. Thus, infrastructure investment is a much more long-term strategy for addressing coal service issues.
- Winter Preparedness: As detailed in other submissions to the Board, BNSF has implemented enhanced Winter Action Plans for each division, which include division-specific processes for identifying and responding to emergency conditions. BNSF has also added a number of resources to address service disruptions resulting from weather events, including equipment improvements, rapid response recovery teams (six of which are strategically positioned coal-critical across the Northern region), and increased numbers of maintenance of way employees.

BNSF RAILWAY

These are the primary measures that BNSF has identified to mitigate critical stockpile situations. These measures can be immensely costly to undertake and have the potential to be disruptive to the overall goals of improving network velocity for all our customers. As a result, BNSF reviews the circumstances around each situation to determine what measures are appropriate and will ultimately be most effective.

It is also necessary to look at the circumstances that contributed to the shortfall situation. In many cases, the contributing causes are predominantly railroad service disruptions like maintenance windows, congested facilities, equipment shortages or crew shortages. In those instances, BNSF has been able to significantly mitigate delivery shortfalls through one or more of the measures identified above. In some cases, weather is the primary cause and, while beyond the railroad's control, can be effectively mitigated through these measures as well. In a very few cases, diminishing stockpile situations have been exacerbated by conditions within the control of the individual utility, such as dispatch patterns resulting in demand beyond expected levels. Mitigation measures identified above may be less effective in addressing these types of shortfall situations, and BNSF may at some point in the future need to consider whether it is appropriate in these situations to undertake measures that could negatively impact our ability to provide reliable service to our entire customer base.

Conclusion

The vast majority of our customers have demonstrated great patience as we work to return to the service levels that they expect from us, cooperating with us to avoid critical stockpile issues when possible and to implement appropriate measures by both parties when critical situations do arise. As the Board noted in its December 31 decision, the vast majority of our customers have stockpiles well in excess of the 20-day measure that triggers our coal customer escalation process. According to the EIA data for October 2014 cited by the Board, only 8 percent of utilities nationwide maintained stockpiles of less than 30 days. That report also does not reflect the improvements we have seen in December and January. As our service continues to improve, we look forward to our full return to consistent, reliable performance for our coal customers and a return to our normal operational and resource planning processes.

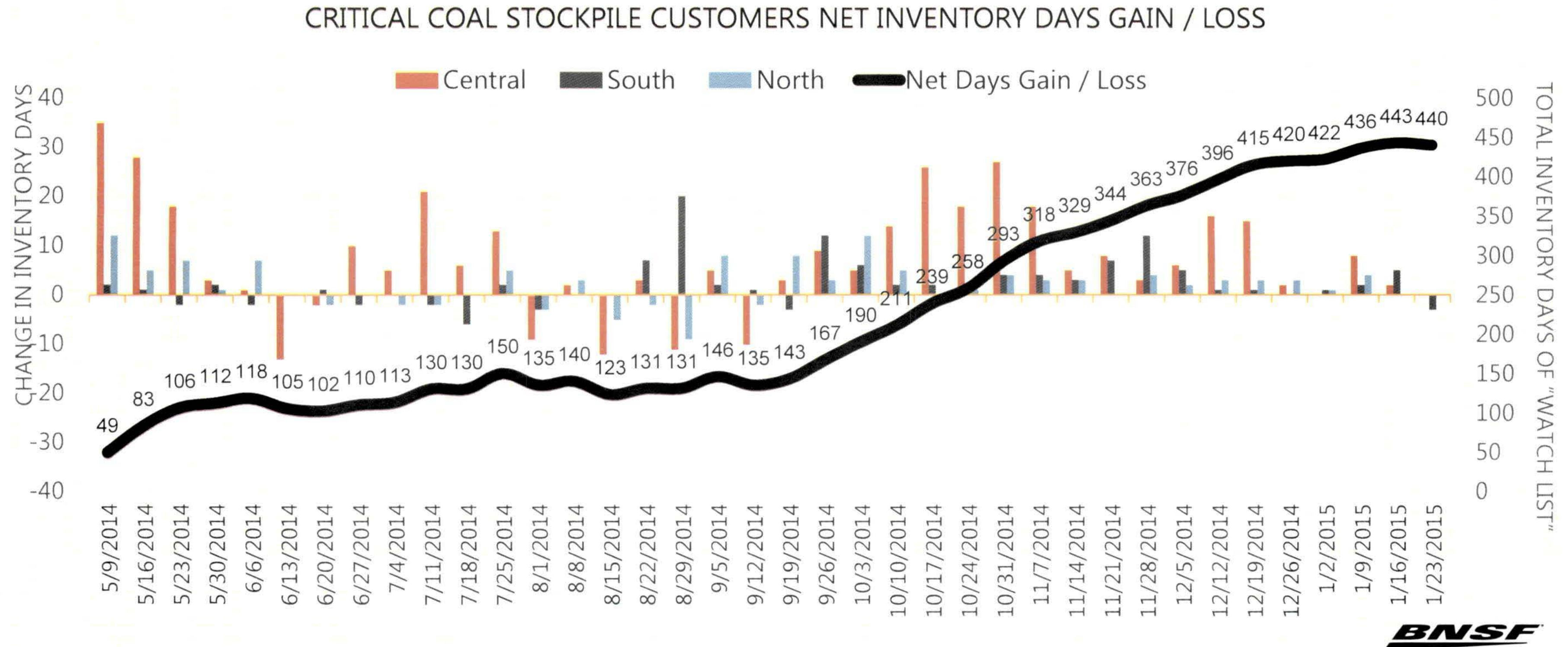
Sincerely,

Stevan B. Bobb

Stevan B. Bobb

ATTACHMENT A

Coal Stockpiles



Source: BNSF Internal Data, through Jan. 23, 2015. "Watch List" customers are defined as under 20 days of stockpile as self-reported.

**Excerpts from Warren Buffett's February 27, 2015
Letter to Shareholders of Berkshire Hathaway Inc.**

- Our bad news from 2014 comes from our group of five as well and is unrelated to earnings. During the year, BNSF disappointed many of its customers. These shippers depend on us, and service failures can badly hurt their businesses.

  BNSF is, by far, Berkshire's most important non-insurance subsidiary and, to improve its performance, we will spend $6 billion on plant and equipment in 2015. That sum is nearly 50% more than any other railroad has spent in a single year and is a truly extraordinary amount, whether compared to revenues, earnings or depreciation charges.

  Though weather, which was particularly severe last year, will always cause railroads a variety of operating problems, our responsibility is to do *whatever it takes* to restore our service to industry-leading levels. That can't be done overnight: The extensive work required to increase system capacity sometimes disrupts operations while it is underway. Recently, however, our outsized expenditures are beginning to show results. During the last three months, BNSF's performance metrics have materially improved from last year's figures.

...

The story at BNSF, however – as I noted earlier – was not good in 2014, a year in which the railroad disappointed many of its customers. This problem occurred despite the record capital expenditures that BNSF has made in recent years, with those having far exceeded the outlays made by Union Pacific, our principal competitor.

The two railroads are of roughly equal size measured by revenues, though we carry considerably more freight (measured either by carloads or ton-miles). But our service problems exceeded Union Pacific's last year, and we lost market share as a result. Moreover, U.P.'s earnings beat ours by a record amount. Clearly, we have a lot of work to do.

We are wasting no time: As I also mentioned earlier, we will spend $6 billion in 2015 on improving our railroad's operation. That will amount to about 26% of estimated revenues (a calculation that serves as the industry's yardstick). Outlays of this magnitude are largely unheard of among railroads. For us, this percentage compares to our average of 18% in 2009-2013 and to U.P.'s projection for the near future of 16-17%. Our huge investments will soon lead to a system with greater capacity and much better service. Improved profits should follow.

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

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[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:

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[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

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

Their Attorneys

Dated: March 2, 2015

BNSF RAILWAY

Roger Nober
Executive Vice President
Law & Corporate Affairs

BNSF Railway Company
Law Department
P.O. Box 961039
Fort Worth, TX 76161-0039

2650 Lou Menk Drive, MOB-2
Fort Worth, TX 76131-2830
(817) 352-1460
(817) 352-7111 fax
roger.nober@bnsf.com

March 25, 2014

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The Honorable Daniel R. Elliott
Chairman
The Honorable Ann D. Begeman,
Vice Chairman
United States Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

Re: Petition of the Western Coal Traffic League, Docket No. EP 723

Dear Chairman Elliott and Vice Chairman Begeman:

I write on behalf of BNSF Railway, Inc. (BNSF) in response to the March 24, 2014 petition of Western Coal Traffic League's (WCTL) to institute a proceeding to "address the adequacy" of BNSF's service to coal customers.

As you are well aware, BNSF has been experiencing significant service issues on its network as a result of increased traffic levels and the winter's severe weather. BNSF is committed to addressing and improving our service issues as well as providing transparency and information to all of our customers, including our coal customers in general and those that are a part of the WCTL in particular. But we do not believe that instituting the proceeding requested by a trade association that represents a small subset of BNSF shippers is warranted. We do not believe it will help BNSF shippers in general to receive improved service any faster and be informed about the progress of our service recovery in any greater detail.

<u>Background</u>
It is well known that BNSF's network has been strained by increases in traffic and the unusually severe weather we have all endured in the fall and winter of 2013-14. BNSF's traffic increases are not representative of the industry as a whole; BNSF has handled over fifty percent of the growth in all rail traffic for 2013. You are also aware that extensive media coverage has focused on the growth of crude oil shipments, and while crude by rail traffic on BNSF has grown significantly, our growth was across a number of commodity groups, including domestic intermodal, grain and most pertinent to this submission, coal. And as we have discussed, much of the growth in these commodities was compressed into a relatively short timeframe, further stressing capacity on our network.

And as all of us are aware, the winter of 2013-14 has been exceptionally severe and has further impacted BNSF's network velocity and performance. In particular, during the winter our northern region suffered from an extraordinary number of extremely cold days which have impacted almost every mechanical part of a railroad. Furthermore, this weather has also severely constrained operations at key BNSF terminals, most importantly Chicago, further impacting fluidity, particularly for eastern interchange traffic. The coming of spring has lessened, although not eliminated, the impact of weather on our operations and those of our interchange partners.

BNSF Recovery Plan

BNSF is taking aggressive short-term actions to address our service issue. The first is that we are over-resourcing our network -- we are hiring 5,000 employees, and adding over 500 locomotives and 5,000 freight cars to our active fleet in 2014. Most importantly, we have increased our capital spending from a record $4 billion in 2013 to another record $5 billion in 2014, comprised of $2.3 billion in replacement capital on our core network, $1.6 billion on equipment, $900 million on network expansion and efficiency, and $200 million on PTC deployment. As these resources come on line, service will gradually improve.

Importantly, BNSF has been committed to transparency about our service recovery with the Board, our customers and all of our stakeholders. BNSF's President & CEO Carl Ice met with both of you in February to respond to concerns you raised about our service and to review our service recovery plan. We have held weekly calls with the Board's Office of Rail Customer and Public Assistance. BNSF is submitting bi-weekly updates to the STB providing detailed metrics on our service recovery against our plan and the February benchmark.

And most importantly, BNSF has been open and transparent with our customers. BNSF employees at all levels of our business units – Coal, Agricultural Products, Consumer Products and Industrial Products – are constantly speaking and meeting with our customers and communicating about our service issues and providing recovery benchmarks to them. We have worked hard to minimize instances when a facility has shut down because of rail service issues, even though executing against this goal has stressed our network. Our senior executive and leadership teams are principally focused on operating safely, improving service and communicating with our customers. In sum, BNSF believes that we are doing everything possible to restore service on our network, but this recovery will be slow and uneven.

Western Coal Traffic League Petition

The WCTL, a trade association that represents a small number of BNSF coal customers in some matters, filed a petition yesterday asking the Board to institute an expedited proceeding to address BNSF's coal service issues. The WCTL asserts that this petition follows a letter dated March 14, 2012 from the President of the WCTL to the STB (a correspondence BNSF has never seen) raising "dire" concerns about BNSF coal service issues with the Board. As I will explain below, BNSF believes that the proceeding sought by the WCTL is unnecessary and would likely be counterproductive. Therefore BNSF urges you to reject this proposal.

First, the WCTL asks for the Board to institute a proceeding to "address BNSF's inability to meet the demands for coal transportation." [WCTL petition at 4]. BNSF has been forthright and transparent with its direct customers and stakeholders regarding our service issues; we don't believe that there is any additional service improvement that could be the result of such a proceeding. Instead, it would likely divert BNSF's and our customer's attention from addressing the underlying service issues to responding in a regulatory environment. Such a proceeding, advocated by a small subset of BNSF coal shippers, has the potential to skew service recovery towards the shippers who are members of the WCTL at the expense of shippers who are not. As regulators, we urge you not to artificially tilt the service recovery towards any subset of shippers at the expense of others.

Second, the WCTL asks the Board to hold a "public hearing [] to address involved issues." [WCTL Petition at 6] BNSF submits that such a public hearing is unnecessary. However, unfortunately the current situation is not the first time BNSF's coal shippers have faced service problems. As a result of coal dust caused capacity constraints in 2005, the Board created the Rail Energy Transportation Advisory Council (RETAC). BNSF is a member of RETAC, and we respectfully submit that if the Board feels a further Board-sponsored public discussion is necessary, that the Board convene a meeting of the RETAC to discuss the matter, where BNSF could present information that the Board members feel necessary.

Third and finally, the WCTL asks BNSF to provide the Board with a variety of weekly information regarding our coal service. [WCTL Petition at 7] As I discussed earlier, BNSF is already providing the Board with bi-weekly data regarding our service metrics and progress towards our service recovery. This is in addition to the service recovery information we are providing to our individual customers (as opposed to third party consultants or trade associations). As a result, BNSF's preference is to continue to communicate bilaterally with individual customers, where we can provide information that is more robust and meaningful to that customer. But if the Board feels that the rail stakeholder community as a whole would benefit from additional overall information regarding BNSF's coal service, we suggest that BNSF include appropriate additional data and a discussion of coal service progress as part of its bi-weekly submissions to the Board.

Conclusion

As discussed above, BNSF recognizes that a combination of factors has significantly impacted service on our network; impacts that have been felt by a wide range of BNSF's customers. BNSF's focus is on restoring our network's service to the levels expected by all of our customers; as the Board is aware will be a lengthy and uneven process, but one which BNSF is certain we will accomplish. We appreciate the concerns expressed by the BNSF coal customers who are members of the WCTL and have already spoken directly with most of them. We are committed to transparency to our customers and our stakeholders about the state of our network as our service recovers.

As I have discussed above, BNSF respectfully submits that no action by the Board is necessary to address the issues raised by the WCTL on behalf of our customers. But if the Board does feel that some regulatory action is necessary, then we respectfully submit the Board utilize the existing RETAC and regular BNSF service submissions to obtain any additional information and reject the proposal to institute a proceeding that will divert time, attention resources from our expeditious service recovery.

Sincerely,

Roger Nober
Executive Vice President Law & Corporate Affairs

cc: Bette Whalen
William L. Slover

minnesota power
AN ALLETE COMPANY
30 West Superior Street / Duluth, MN 55802

Allan S. Rudeck, Jr., P.E.
Vice President, MP Strategy and Planning
218-355-3480
arudeck@mnpower.com

March 4, 2015

Dave Christiansen
MnDOT
Transportation Building
395 John Ireland Boulevard
St. Paul, MN 55155-1899

Dear Dave:

On behalf of Minnesota Power ("MP") and its electric customers, particularly our large industrial energy consumers located on Minnesota's Iron Range, I am writing to ask for MnDOT's assistance in bringing effective and competitive rail infrastructure in both Itasca and St. Louis Counties.

Specifically we are asking for MnDOT to support funding for a two-phase project intended to create competitive rail optionality in Northeastern Minnesota. Phase one will address the immediate needs of businesses serving eastern Itasca County and the businesses of the greater Grand Rapids area, including Minnesota Power's Boswell Energy Station; Blandin Paper Company; the Cohasset Industrial Park; and Magnetation LLC. Phase two will expand competitive rail connections for currently captive shippers in St. Louis County, including Mesabi Nugget, United States Steel Corporation, ArcelorMittal USA–Minorca Mine, Cliffs Natural Resources and PolyMet Mining Corporation. Phase two also creates opportunities to leverage infrastructure in adjacent Lake and Cook Counties.

As you know, Minnesota's rail shippers have limited rail infrastructure and virtually no competitive access to more than one Class 1 railroad. Consolidation within the railroad industry over the past 25 years has led to less overall rail-to-rail competition. Back in 1980 when Congress enacted the Staggers Act, 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 also ushered in a new era of deregulation that allowed the railroads to price their services unilaterally and rationalize their systems. Staggers also led to a multitude of mergers that have resulted in the situation we have today: a rail industry dominated by four major carriers, two in the east and two in the west.

Even the dramatic numbers above do not indicate the true extent of the decrease in rail-to-rail competition. Many of the remaining "short-line" railroads have physical barriers or contractual obligations from the carrier from which the line was purchased or leased that prevent the free exchange of freight traffic.

In Northeastern Minnesota rail cost and service concerns are acute. Rail shippers including, Minnesota Power and our electric customers in the iron mining and forest and paper products industry have virtually no competitive access to more than a single Class 1 railroad. The enclosed freight railroad map clearly demonstrates this problem. In addition, as we've seen over the past 24 months, a lack of competitive rail options coupled with a generally ineffective rail regulatory system has led to a reduction in service quality. High costs for the captive rail shippers in Northeastern Minnesota are an impediment to economic development in the region.

We have described in the paragraphs below some of the reasons we believe support the needs of a more robust rail infrastructure in our region.

Railroad Competition Can Lead to Lower Energy Costs for Northern Minnesota Consumers:
Minnesota Power, the power generating subsidiary of ALLETE Corporation, Northern Minnesota's largest electric power producer, generates more than half its electricity from coal. MP obtains its low sulfur, low mercury coal used for electricity generation primarily from the Powder River Basin ("PRB") of Wyoming and Montana. While the majority of the PRB is served by two railroads, the Union Pacific Railroad Company ("UP") and the BNSF Railway Company ("BNSF"), MP's largest generating station, the Boswell Energy Center, is captive to a single railroad, meaning there is no effective rail competition.

Studies performed for the Surface Transportation Board ("STB"), the Federal agency tasked with the economic oversight of the railroad industry, found that rail competition at coal shipment destinations can have a significant impact on railroad pricing. Studies and testimonials from other utilities support the premise that railroad competition leads to lower transportation rates and subsequently lower delivered costs of fuel than currently available in today's captive shipper situation. Since MP's delivered costs of fuel are directly borne by its customers through the electric rate structure, a decline in delivered costs from competitive rail transportation rates would lead to lower energy costs for consumers than currently available in today's captive shipper environment. Conversely, increases in the delivered cost of coal are passed through to consumers in the form of higher electric costs. Effective rail competition also provides pricing stability and would protect ratepayers from volatility in delivered fuel costs.

Exports of Northern Minnesota Products Are Dependent Upon Rail Transportation:
The two largest commodity groups exported out of northern Minnesota are taconite, which accounts for over 60 percent of outbound tonnage; and lumber or wood products, accounting for over 10 percent.

All of these manufacturers, but especially the taconite producers, are highly dependent upon rail transportation for all or a portion of their movements. Rail transportation is especially conducive to the transport of bulk commodities such as taconite and coal because of the low value of the products (on a per unit basis) which requires shippers to transport large quantities for economic efficiency reasons. Keeping rail prices low through competitive market forces increases the marketability of Minnesota produced bulk commodities and helps to ensure their continued use in competitive global markets.

In closing, it is important to incorporate projects and policies within MnDOT's 2015 State rail plan that encourages competitive rail expansion in Northeastern Minnesota. Doing so will protect the affordability of our electric service as well as reduce future costs of inbound and outbound raw materials and finished goods of our region's internationally competitive and energy intensive natural resource based customers.

If you have any questions about our phase one and phase two action plans or would like further information, please feel free to contact me. I look forward to speaking with you.

Sincerely,

Allan S. Rudeck, Jr., P.E.
Vice President, MP Strategy and Planning

Encl.

C: Honorable Mark Dayton
Thomas Bakk – Senator, District 3
Dale Lueck – Representative, District 10B
Jason Metsa – Representative, District 6B
Rod Skoe – Senator, District 2
Commissioner Michael Rothman – DoC
Mark Phillips – IRRRB Commissioner
Margaret Hodnik – Minnesota Power
Tom Anzelc, Representative – District 5B
David Dill – Representative, District 3A
Carly Melin – Representative, District 6A
Tom Saxhaug – Senator, District 5
David Tomassoni – Senator District 6
Commissioner Katie Clark Sieben – MN DEED
Joe Radinovich – IRRRB Assistant Commissioner

DEPARTMENT OF JUSTICE

STATEMENT OF

STEVEN C. SUNSHINE
DEPUTY ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE
SUBCOMMITTEE ON RAILROADS
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
HOUSE OF REPRESENTATIVES

CONCERNING COMPETITIVE REVIEW OF RAILROAD MERGERS AFTER ICC SUNSET
ON
JANUARY 26, 1995

Madam Chairwoman and Members of the Subcommittee: I very much appreciate this opportunity to appear before you today to explain how the Department of Justice would review railroad mergers and acquisitions if the Interstate Commerce Commission's authority to review and approve those transactions is repealed. The Department of Justice believes that railroad mergers and acquisitions should be reviewed under the same legal standards that apply to virtually every other sector of our nation's economy. We believe that the antitrust approach would provide significant advantages, saving time and scarce federal resources and reducing burden and delay on the merging parties, while still protecting the public interest by preventing anticompetitive mergers.

For most of our economy, Congress has chosen to rely on market competition rather than government regulation to protect consumers and the public interest. Not only does competition best allocate scarce goods and services to those who value them most highly, it also forces firms to become as efficient as possible. Consumers benefit where competition is vibrant -- it provides the highest possible quality of goods and services at the lowest possible cost. The antitrust laws protect competition by prohibiting unreasonable restraints of trade, including mergers that threaten substantially to lessen competition.

A number of important industries have in recent years been largely freed from economic regulation, including trucking, airlines, and natural gas production. Building on earlier regulatory and legislative efforts, the

Staggers Rail Act of 1980 substantially deregulated the freight rail industry by placing more reliance on market forces. The Staggers Act is widely credited with revitalizing freight railroads, many of which were in precarious financial condition. The next logical step to deregulate further the rail industry would be to eliminate prior government review and approval of mergers under the "public interest" standard that is currently embodied in the Interstate Commerce Act.

Under the Interstate Commerce Act (ICA), rail carrier mergers must receive prior government approval under a broad "public interest" standard before they are permitted to occur. If a merger transaction involves two class I railroads, the ICC may not approve it unless and until the Commission determines that the transaction is, on balance, "consistent with the public interest."[(1)]

The ICA directs the Commission to consider competition, but only as one of five factors to balance in assessing the public interest: the effect of the proposed transaction on the adequacy of transportation to the public; the effect on the public interest of including, or failing to include, other rail carriers in the proposed transaction; the total fixed charges that would result from the proposed transaction; the interest of carrier employees affected by the proposed transaction; and whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.[(2)]

The ICA contemplates intervention in the process by competitors and other interested parties, and provides for lengthy time periods for the Commission to conduct evidentiary hearings and issue its determinations. It can take the Commission up to two to three years to render its decisions on mergers having significant competition issues. Even a rail merger that raises few competitive concerns can be under review at the ICC for a year or more. For example, the ICC recently completed its review of the proposal by the Union Pacific for authority to take control of the Chicago & North Western. Union Pacific filed its application on January 29, 1993; the ICC approved the transaction in December 1994. There was extensive participation by competitors -- competitors who were perhaps more concerned with their own private interests than with the merger's likely impact on rail customers.

A more dramatic example of the time that ICC proceedings can take was the Santa Fe's proposal to take control of the Southern Pacific, which the Department opposed at the Commission. Those railroads first notified the ICC about their proposed combination on November 22, 1983. The ICC's ultimate decision, which disapproved the transaction, was not made until almost 3 years later, on October 10, 1986. Then, close to 2 more years passed before the ICC ordered Santa Fe to divest the Southern Pacific stock, which the ICC had allowed Santa Fe to hold in a voting trust.

The ICA's public interest standard as applied in ICC railroad merger proceedings has led to the negotiation of many protective and other conditions that caused the merged carrier to make concessions to protesting parties, which often include its principal competitors. Such conditions can limit the potential efficiencies of a merger and protect competitors from the enhanced competition that could otherwise result from a procompetitive combination.

In contrast, merger enforcement under the antitrust laws protects competition, not competitors. Section 7 of the Clayton Act, 15 U.S.C. 18, the primary provision of the antitrust laws governing mergers and acquisitions, prohibits those transactions that threaten "substantially to lessen competition in any line of commerce in any section of the country." The central issue under the Clayton Act is whether the merger will result in increased prices to consumers or reduced services.

Merger decisions are made far more quickly under the antitrust laws than under the ICA. Under the premerger notification provisions of the Hart-Scott-Rodino ("HSR") Act,[(3)] routine mergers that raise no antitrust issues can be consummated upon the expiration of a 30-day waiting period (15 days for cash tender offers). When requested, the antitrust enforcement agencies will in appropriate cases agree to "early termination" of the waiting period in less than 30 days.

Where a merger does raise antitrust concerns, we are able to obtain all of the information we need to resolve those concerns expeditiously. If we need additional information from the parties to complete our investigation, we can issue a "second request" that will extend the waiting period an additional 20 days after the parties supply the requested information.[(4)] The Department seeks information from competitors, suppliers, customers, employees, and other knowledgeable parties in order to analyze the effects of the merger. In addition, we can seek documents, deposition testimony, and interrogatory answers from the parties and other persons pursuant to the Antitrust Civil Process Act.

When the Department determines that a proposed merger raises significant competitive issues, several steps are available to speed resolution of the matter. Most such matters are resolved in 6 months to a year. The parties can "fix-it-first" by restructuring the transaction, which avoids a legal challenge by the Department. If the investigation runs its course and the Department decides to challenge the transaction, the parties and the Department frequently negotiate a consent judgment that corrects the competitive problem but otherwise allows the remainder of the transaction to go forward.

If the Department concludes that a merger transaction as structured would violate the antitrust laws, and the parties do not wish to restructure it, the Department must go to court to prevent the transaction. The Department can seek a preliminary injunction, which prohibits the merger pending a full trial for a permanent injunction. Even if the case goes through a full trial, it will likely be resolved less than a year after the complaint is filed. substantially less time than it usually takes the ICC to reach a final decision on a merger under the ICA. However, only a small percentage of the mergers reviewed by the Department are challenged in court.

The analytical framework we use in merger investigations is set forth in the 1992 Horizontal Merger Guidelines, issued jointly by the Department of Justice and the Federal Trade Commission. These Merger Guidelines have been cited and relied on by the courts in merger cases. Under the Merger Guidelines, we assess the merger's likely harm to competition, and consider any efficiencies that may outweigh potential harmful effects.

Our competitive analysis takes into account the position of each of the merging firms in each economically meaningful "relevant market", the relevant market's concentration, the extent to which that concentration would be increased, the competitive conditions likely to exist in the market after the transaction, and the likely ability of the resulting firm to raise prices or lower services to the detriment of consumers. We define relevant markets carefully, through an evaluation of any effective substitutes customers have for the services provided by the merging firms.

For railroad mergers, the analysis begins with identification of the affected routes. For two railroads with largely parallel routes, the logical starting point for defining a market is the carriage of a particular commodity from one point (called an origin) to a second point (called a destination) by the merging railroads.

Once the affected routes are identified, the analysis generally focuses on an evaluation of the other rail, intermodal, product, and source competition options available to shippers. Intermodal competition is the ability of a shipper to substitute another mode of transportation, usually truck or water carriage, for the shipment of a particular commodity between a particular origin and destination. If truck or water service is available and is a close substitute for rail carriage for certain commodities, these competitive alternatives would prevent a rail carrier from raising its rates for these commodities. For other commodities, however, trucks may be at a significant disadvantage to rail where, for example, the distance the commodity is shipped is great, the volume of the commodity shipped is large, or the value of the commodity as compared to its weight is small.

Other forms of competition considered include product and source competition. "Product competition" is the ability of a shipper to substitute another commodity that allows use of a transportation system other than the merged rail carrier. "Source competition" is the ability of shippers in the region of the merging railroads to avoid high rail rates by shipping a commodity to another destination or by obtaining it from another source, again using other than the merged rail carrier.

If one or more of these forms of competition is available, its existence will be reflected in the Department's definition of the markets affected by the merger. If such competition is significant, it may defeat or limit the ability of the merged carrier to raise prices. The degree to which any of these methods of competition will be effective will vary according to the nature of the commodities, routes, and perhaps other factors, including differences in demand and/or supply elasticity for different commodities.

The antitrust laws do not prohibit efficient railroad mergers that can benefit shippers. The Merger Guidelines expressly recognize that mergers can enhance efficiency. When necessary to an evaluation of the net competitive effects of a merger, we consider the prospect that real efficiencies will be achieved that could not be realized absent the merger. Thus, the Department of Justice will challenge a merger only when its likely harm to competition is not outweighed by its likely efficiencies.

The Department has not opposed rail mergers that did not significantly threaten competition. Over the past 10 years, the Department opposed only one rail merger in its entirety -- the proposed consolidation of the Santa Fe and Southern Pacific Railroads -- a transaction the ICC ultimately disapproved. The Department raised no objection to the two rail mergers most recently approved by the ICC: Kansas City Southern's acquisition of Mid-South, and the Union Pacific's control of the Chicago & North Western.

In sum, our analysis of proposed railroad mergers using the Merger Guidelines is the same general analysis we use in reviewing mergers subject to the antitrust laws. That analysis is sophisticated, thorough, and flexible -- it involves far more than simply computing market shares or concentration figures. It takes into account all the dynamics of the markets with which we are dealing.

Subjecting railroad mergers and acquisitions to the antitrust laws would expedite both the investigation and resolution of such transactions.

Madam Chairwoman, this concludes my prepared remarks. I would be happy to respond to any questions that you or other members of the Subcommittee may have.

FOOTNOTES:

1. 49 U.S.C. 11344(c). If a merger transaction does not involve two class I railroads, the ICA requires approval unless the ICC finds there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States and the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs. Id. 11344(d).

2. 49 U.S.C. 11344(b)(1).

3. 15 U.S.C. 18a.

4. 15 U.S.C. 18(b)(1), (e).

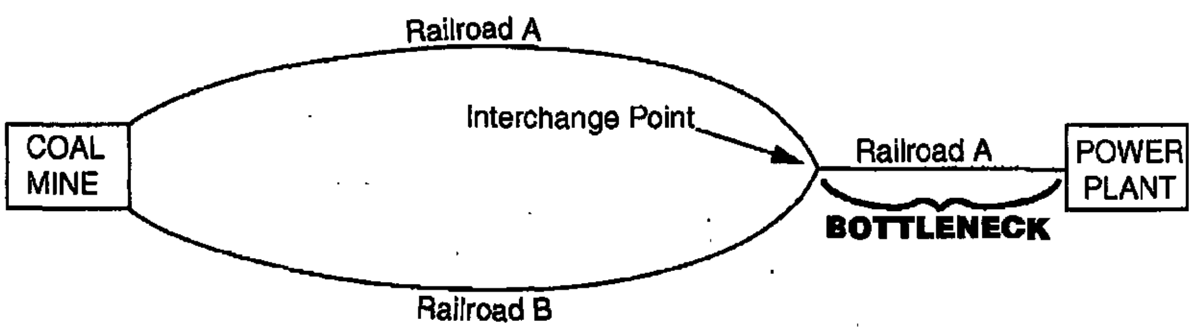
minnesota power / 30 west superior street / duluth, minnesota 55802 / telephone 218-722-2641

Railroad bottlenecks thwart competition

Minnesotans pay too much for electricity because of barriers to railroad competition.

Minnesotans pay millions of dollars a year more than they should for electricity because of barriers to railroad competition known as "bottlenecks." Bottlenecks block access to competing railroads and make it more expensive for electricity suppliers to ship coal from mines to power plants.

For example, the Burlington Northern Santa Fe (BNSF) railroad can haul coal from Wyoming or Montana mines to Minnesota Power's Boswell Energy Center near Grand Rapids, Minnesota. Minnesota Power could also use the Union Pacific to ship coal from Wyoming to Superior, Wisconsin, but BNSF owns the bottleneck between Superior and Boswell. Unfortunately, because federal law has yet to remove this barrier to competition, BNSF does not even have to quote a price for service over the bottleneck. In effect, ownership of an 80-mile bottleneck allows BNSF to block competition from UP over the much longer haul from Wyoming to Superior. In railroad policy lingo, MP is a "captive shipper" because the bottleneck makes the company dependent on a single railroad to deliver coal to Boswell.



Rail rates are lower where competition exists.

A study commissioned by the Western Coal Traffic League found that captive rail moves over 600 miles (MP's situation) pay, on average, 4.3 mills per revenue ton mile more than similar competitive moves, a premium of about 48 percent. This means Minnesota Power customers could be paying as much as $15 million per year in added fuel costs merely because the company is a captive rail shipper.

S. 621 would remove rail bottlenecks and unleash competition.

Minnesota Power strongly supports S. 621 which would remove bottlenecks and unleash competition. Unless Congress passes this important legislation, railroads will continue to wield monopoly power over captive shippers, coal transportation will be more expensive than it should be and consumers and businesses will pay more than they should for electricity.

Minnesota Power customers would see immediate savings.

Because of Minnesota's fuel adjustment clause, any savings Minnesota Power realizes from more competitive rail rates would flow directly to customers. While all kinds of customers benefit from lower electricity prices, the relief could be especially helpful to taconite producers struggling to cope with imported steel dumping and forest products companies engaged in fierce global competition.

March 24, 1999
Contact: Bill Libro (202) 293-6184 Cell: (202) 679-2839

ALWAYS AT YOUR SERVICE

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

James A. Roberts – vice president, corporate relations
218-723-3981
fax 218-723-3960
e-mail jroberts@mnpower.com

June 28, 1999

The Honorable Kay Bailey Hutchison
United States Senate
284 Russell Senate Office Building
Washington, DC 20510

Dear Senator Hutchison:

I wanted to take this opportunity to thank you for introducing S.747, the Surface Transportation Board Reauthorization and Improvement Act of 1999. Minnesota Power and our customers appreciate your willingness to play an active role in facilitating railroad competition. Minnesota Power's electric consumers depend on the railroads to assure that the electricity we produce is done so reliably and at the lowest possible cost. We feel that our product costs could be lower but for the fact that we are a captive shipper.

The United States has seen the railroad industry shrink from 63 Class I railroads in 1976 to 9 Class I railroads today. In fact, there are only 4 major Class I railroads – two in the east and two in the west. This concentration, coupled with the recent "bottleneck" decision by the courts, gives shipping customers like us little power over what has essentially become a monopoly situation.

Minnesota Power strongly supports S.621, which we believe interjects common sense and some needed competition into the railroad industry. However, we applaud your leadership in trying to find common ground between the railroads and their customers. Minnesota Power urges you to continue your active role in this debate. Transportation is a significant cost of many products. Your leadership is needed now to assure that the consumers of electricity, and the millions of other consumers across the United States, do not pay more for their products because of a lack of competition in rail service.

If you have any questions please do not hesitate to give me a call at (218) 723-3981, or Bill Libro of our Washington Office at (202) 638-7707.

Sincerely,

Jim Roberts

James A. Roberts

cc: Amy Henderson
bc: Ed Russell
Bob Edwards

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

James A. Roberts – vice president, corporate relations
218-723-3981
fax 218-723-3960
e-mail jroberts@mnpower.com

April 5, 1999

The Honorable Pat Roberts
United States Senate
SH-302 Senate Office Building
Washington, DC 20510

Dear Senator Roberts:

I wanted to take this opportunity to thank you for cosponsoring S.621, the Railroad Competition and Service Improvement Act of 1999. As a captive shipper, this bill is very important to Minnesota Power and many of our customers.

The United States has seen the railroad industry shrink from 63 Class I railroads in 1976 to nine Class I railroads today. In fact, there are only four major Class I railroads – two in the east and two in the west. This concentration, coupled with the recent 'bottleneck" court decision, gives shipping customers little power over what has essentially become a monopoly situation.

Minnesota Power applauds your leadership and looks forward to working with you and your staff on this important piece of legislation. If you have any questions please do not hesitate to call me at (218) 723-3981, or Bill Libro, Manager-Federal Government Affairs, at (202) 638-7707.

Sincerely,

Jim Roberts

James A. Roberts

cc: Keith Yehle

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

James A. Roberts – vice president, corporate relations
218-723-3981
fax 218-723-3960
e-mail jroberts@mnpower.com

April 5, 1999

The Honorable Conrad Burns
United States Senate
187 Dirksen Office Building
Washington, DC 20510

Dear Senator Burns:

I wanted to take this opportunity to thank you for cosponsoring S.621, the Railroad Competition and Service Improvement Act of 1999. As a captive shipper, this bill is very important to Minnesota Power and many of our customers.

The United States has seen the railroad industry shrink from 63 Class I railroads in 1976 to nine Class I railroads today. In fact, there are only four major Class I railroads – two in the east and two in the west. This concentration, coupled with the recent 'bottleneck" court decision, gives shipping customers little power over what has essentially become a monopoly situation.

Minnesota Power applauds your leadership and looks forward to working with you and your staff on this important piece of legislation. If you have any questions please do not hesitate to call me at (218) 723-3981, or Bill Libro, Manager-Federal Government Affairs, at (202) 638-7707.

Sincerely,

Jim Roberts

James A. Roberts

cc: Randall Popelka

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

James A. Roberts – vice president, corporate relations
218-723-3981
fax 218-723-3960
e-mail jroberts@mnpower.com

April 5, 1999

The Honorable Jay Rockefeller
United States Senate
531 Hart Senate Office Building
Washington, DC 20510

Dear Senator Rockefeller:

I wanted to take this opportunity to thank you for introducing S.621, the Railroad Competition and Service Improvement Act of 1999. As a captive shipper, this bill is very important to Minnesota Power and many of our customers.

As you pointed out in your Congressional Record comments, the United States has seen the railroad industry shrink from 63 Class I railroads in 1976 to nine Class I railroads today. In fact, there are only four major Class I railroads – two in the east and two in the west. This concentration, coupled with the recent 'bottleneck" court decision, gives shipping customers little power over what has essentially become a monopoly situation.

Minnesota Power applauds your leadership and looks forward to working with you and your staff on this important piece of legislation. If you have any questions please do not hesitate to call me at (218) 723-3981, or Bill Libro, Manager-Federal Government Affairs, at (202) 638-7707.

Sincerely,

Jim Roberts

James A. Roberts

cc: Kerry Ates

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

James A. Roberts – vice president, corporate relations
218-723-3981
fax 218-723-3980
e-mail jroberts@mnpower.com

April 5, 1999

The Honorable Paul Wellstone
United States Senate
SH-136 Hart Senate Office Building
Washington, DC 20510

Dear Senator Wellstone:

I wanted to take this opportunity to encourage you to support, and cosponsor, S.621, the Railroad Competition and Service Improvement Act of 1999. This important legislation, introduced by Senator Rockefeller on March 15, enjoys bipartisan support. As a captive user of the rail system, this bill is very important to Minnesota Power and many of our customers.

The United States has seen the railroad industry shrink from 63 Class I railroads in 1976 to nine Class I railroads today. In fact, there are only four major Class I railroads – two in the east and two in the west. This concentration coupled with the recent "bottleneck" court decision, gives shipping customers little power to negotiate with the railroads over the price of its transportation service. In many cases the situation is essentially that of monopoly status enjoyed by the railroad.

Minnesota Power applauds your leadership and looks forward to working with you and your staff on this important piece of legislation. If you have any questions please do not hesitate to call me at (218) 723-3981, or Bill Libro, Manager-Federal Government Affairs, at (202) 638-7707.

Sincerely,

Jim Roberts

James A. Roberts

cc: Kelly Ross

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

James A. Roberts – vice president, corporate relations
218-723-3981
fax 218-723-3960
e-mail jroberts@mnpower.com

April 5, 1999

The Honorable Russell Feingold
United States Senate
716 Hart Senate Office Building
Washington, DC 20510

Dear Senator Feingold:

I wanted to take this opportunity to encourage you to support, and cosponsor, S.621, the Railroad Competition and Service Improvement Act of 1999. This important legislation, introduced by Senator Rockefeller on March 15, enjoys bipartisan support. As a captive user of the rail system, this bill is very important to Minnesota Power and many of our customers.

The United States has seen the railroad industry shrink from 63 Class I railroads in 1976 to nine Class I railroads today. In fact, there are only four major Class I railroads – two in the east and two in the west. This concentration coupled with the recent "bottleneck" court decision, gives shipping customers little power to negotiate with the railroads over the price of its transportation service. In many cases the situation is essentially that of monopoly status enjoyed by the railroad.

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Sincerely,

Jim Roberts

James A. Roberts

cc: Mary Frances Repko

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

James A. Roberts – vice president, corporate relations
218-723-3981
fax 218-723-3960
e-mail jroberts@mnpower.com

April 5, 1999

The Honorable Herb Kohl
United States Senate
330 Hart Senate Office Building
Washington, DC 20510

Dear Senator Kohl:

I wanted to take this opportunity to encourage you to support, and cosponsor, S.621, the Railroad Competition and Service Improvement Act of 1999. This important legislation, introduced by Senator Rockefeller on March 15, enjoys bipartisan support. As a captive user of the rail system, this bill is very important to Minnesota Power and many of our customers.

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Sincerely,

Jim Roberts

James A. Roberts

cc: Mark Rokala

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

James A. Roberts – vice president, corporate relations
218-723-3981
fax 218-723-3960
e-mail jroberts@mnpower.com

April 5, 1999

The Honorable Tom Daschle
Senate Minority Leader
United States Senate
509 Hart Senate Office Building
Washington, DC 20510

Dear Senator Daschle:

I wanted to take this opportunity to encourage you to support, and cosponsor, S.621, the Railroad Competition and Service Improvement Act of 1999. This important legislation, introduced by Senator Rockefeller on March 15, enjoys bipartisan support. As a captive user of the rail system, this bill is very important to Minnesota Power and many of our customers.

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Sincerely,

Jim Roberts

James A. Roberts

cc: Eric Washburn
Peter Hanson

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

James A. Roberts – vice president, corporate relations
218-723-3981
fax 218-723-3960
e-mail jroberts@mnpower.com

April 5, 1999

The Honorable Tim Johnson
United States Senate
324 Hart Senate Office Building
Washington, DC 20510

Dear Senator Johnson:

I wanted to take this opportunity to encourage you to support, and cosponsor, S.621, the Railroad Competition and Service Improvement Act of 1999. This important legislation, introduced by Senator Rockefeller on March 15, enjoys bipartisan support. As a captive user of the rail system, this bill is very important to Minnesota Power and many of our customers.

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Sincerely,

Jim Roberts

James A. Roberts

cc: Sarah Dahlin

JIM RAMSTAD
THIRD DISTRICT, MINNESOTA

WAYS AND MEANS
COMMITTEE

TRADE SUBCOMMITTEE

HEALTH SUBCOMMITTEE

103 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-2871

DISTRICT OFFICE:
8120 PENN AVENUE SOUTH, #152
BLOOMINGTON, MN 55431
(612) 881-4600

Congress of the United States
House of Representatives
Washington, DC 20515–2303

October 6, 1999

→ WJ Cuber FYI. Jim

James A. Roberts
Minnesota Power
30 W Superior Street
Duluth, Minnesota 55802

Dear James:

Thank you for contacting me about H.R. 2784, the Railroad Organization and Service Improvement Act. It is always nice to hear from you.

My staff and I have met with NSP representatives on this issue, and I am certainly sympathetic to your plight and to that of all Minnesota consumers who pay higher prices due to the consolidation of railroad companies.

I am hopeful the Surface Transportation Board reauthorization bill will serve as a vehicle to fix this significant economic problem. While I am becoming pessimistic that it will be addressed this year, I have received assurances that it is a priority for the Transportation committee in 2000.

Rest assured I will keep your views in mind should this issue come to the House floor for a vote.

Thanks again for your letter, as I appreciate hearing from you. Please feel free to contact me anytime I can be helpful to you or your family.

Sincerely,

JIM RAMSTAD
Member of Congress

JR:mi

→ To: Bill Fibers

Committee on Transportation and Infrastructure

Congress of the United States

Bud Shuster
Chairman

Jack Schenendorf, Chief of Staff
Michael Strachn, Deputy Chief of Staff

House of Representatives
Washington, DC 20515

James L. Oberstar
Ranking Democratic Member

David Heymsfeld, Democratic Chief of Staff

October 14, 1999

Mr. James A. Roberts
Vice President
Minnesota Power
30 West Superior Street
Duluth, Minnesota 55802-2093

Dear Jim:

Thank you for your letter on H.R. 2784, Rep. Quinn's proposed Railroad Competition and Service Improvement Act of 1999. This bill is identical to S. 621, introduced by Senator Rockefeller, and is intended to change the statute under which the Surface Transportation Board (STB) operates so as to enhance railroad competition and improve service to shippers.

The Rockefeller-Quinn bill has four major provisions: (1) it overturns the Surface Transportation Board's "bottleneck" decision, which restricts competition on routes where two carriers could compete along part of the route; (2) it opens up more opportunities for competitive terminal access and reciprocal switching without having to meet the Board's burdensome "anticompetitive practices" standard; (3) it codifies the Board's sensible decision on product and geographic competition from last year, so that it cannot be overturned by the Board in the future; and (4) it eliminates the requirement for the Board to make annual determinations of revenue adequacy.

I think all of these provisions are a step in the right direction of achieving a more competitive railroad industry that provides better service to shippers and sets rates more equitably. However, there are several provisions that I think we need in an STB reauthorization bill that are not included in the Rockefeller-Quinn bill. First, and foremost, the bill does nothing to correct the Board's practice of abrogating collective bargaining agreements to reduce costs for merging railroads. Second, the bill does not address the problem that commuter railroads have encountered of being refused access to the freight rail network. Third, the bill does not correct the tendency of the Board to ignore legitimate safety and environmental concerns of towns and cities that are affected by the Board's decisions.

Mr. James A. Roberts
October 14, 1999
Page 2

While I am flexible on the question of exactly which provisions I could support in an STB reauthorization bill, I do not believe Congress can – or should – enact STB authorization without addressing the issues of abrogation of collective bargaining agreements, commuter railroad access to the freight rail network, and the concerns of cities about the preemption of their safety and environmental ordinances.

I am considering crafting my own version of a reauthorization bill to meet the needs of shippers, employees, railroads and communities – and look forward to working with you toward that objective.

With all best wishes.

Sincerely,

Jim

James L. Oberstar, M.C.
Ranking Democratic Member

JLO/jwmm

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

James A. Roberts – vice president, corporate relations
218-723-3981
fax 218-723-3960
e-mail jroberts@mnpower.com

May 30, 2000

The Honorable Earl Pomeroy
United States House of Representatives
1533 Longworth House Office Building
Washington, DC 20515

Dear Representative Pomeroy:

I wanted to take this opportunity to thank you for introducing HR 4514, the "Rail Merger Reform and Customer Protection Act". As a captive shipper, this bill is very important to Minnesota Power and the competitiveness of all our electric customers in the upper Midwest.

As you are well aware, the United States has seen the railroad industry shrink from 63 Class I railroads in 1976 to 9 Class I railroads today. In fact, there are only 4 major Class I railroads – two in the east and two in the west. This concentration, coupled with the court decision on the bottlenecks issue, gives shipping customers little power over what has essentially become a monopoly situation.

Both of Minnesota Power's major coal-fired plants are captive shippers for coal deliveries. Because of this, Minnesota Power estimates that our regional electric customers pay approximately $15 million more per year in electricity costs than they would otherwise.

Minnesota Power applauds your leadership and looks forward to working with you and your staff on this important piece of legislation. If you have any questions please do not hesitate to give me a call at (218) 723-3981, or Bill Libro of our Washington Office at (202) 638-7707.

Sincerely,

Jim Roberts

James A. Roberts

cc Michael Smart
Tracee Gross

ALLETE

bc: Ed Russell

JAMES A. ROBERTS
Vice President, Corporate Relations

January 18, 2001

The Honorable Jim Oberstar
United States House of Representatives
2366 Rayburn House Office Building
Washington, DC 20515

Dear Representative Oberstar:

I wanted to take this opportunity to thank you for introducing H.R. 141, the "Surface Transportation Board Reform Act of 2001". As a captive shipper, this bill is very important to Minnesota Power and the competitiveness – even livelihood – of our electric customers.

We are extremely pleased that you chose to introduce this important piece of legislation at the beginning of the 107th Congress. Both of Minnesota Power's major coal-fired plants, the Boswell Energy Center in Cohasset and the Laskin Energy Center in Hoyt Lakes, are captive shippers for coal deliveries. Because of this, Minnesota Power estimates that our electric customers pay approximately $15 million more per year in electricity costs than they would otherwise.

As you are well aware, the United States has seen the railroad industry shrink dramatically over the past 25 years. This reduction in the number of railroads, and the resulting size and market power of the few remaining companies, gives shipping customers like Minnesota Power little leverage over what has essentially become a monopoly service.

Minnesota Power applauds your leadership and looks forward to working with you and your staff on this important piece of legislation. If you have any questions please do not hesitate to give me a call at (218) 723-3981, or Bill Libro of our Washington Office at (202) 638-7707.

Sincerely,

Jim

James A. Roberts

cc Frank Mulvey
Bill Richard
Bob Edwards
Don Shippar

minnesota power / 30 west superior street / duluth, minnesota 55802-2093 / 218-723-3937 / www.mnpower.com

Robert D. Edwards
President and Chief Executive Officer
Fax 218-723-3960
E-mail bedwards@mnpower.com

June 1, 2001

The Honorable Jim Oberstar
2365 Rayburn House Office Building
Washington, DC 20515

Dear Jim,

On behalf of Minnesota Power (MP) and all our electric customers, I want to thank you for your active and continued involvement in the captive rail shipper issue. As you know, transportation costs make up the bulk of the cost of coal delivered to our power plants, and companies like Minnesota Power often have little bargaining power with their rail provider. Given that, I'm convinced that your involvement in our concerns, and the effects of rail rates on electric prices for our customers in Northern Minnesota, helped us secure rates from the Burlington Northern Santa Fe that are fair for both BNSF and our customers. The agreement worked out between the two companies is important, and will help us contain the cost of electricity well into the future.

We look forward to working with you on this and other issues to keep energy costs low and reliability high for your constituents that we serve.

Sincerely,

Bob Edwards

Robert D. Edwards

cc: Bill Richard
Aaron Peterson
Frank Mulvey

bcc: Don Shippar
Jim Roberts
Bill Libro
Dave McMillan
Eric Norberg
Eric Olson

HEARING ON RAILROAD SHIPPER ISSUES

(JULY 31, 2002)

STATEMENT OF MINNESOTA POWER BEFORE THE SUBCOMMITTEE ON SURFACE TRANSPORTATION AND MERCHANT MARINE OF THE SENATE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION

Mr. Chairman and Members of the Subcommittee:

Minnesota Power, a division of ALLETE, appreciates the opportunity to present its written views on railroad shipper issues to the Subcommittee. We ask that this statement be included in the Subcommittee's July 31, 2002 hearing record.

INTRODUCTION

Minnesota Power's interest in railroad shipper issues is two-fold. First, Minnesota Power transports significant volumes of coal, by rail, to its electric generating facilities. These facilities include the Boswell Energy Center located near Grand Rapids, Minnesota and the Laskin Energy Center located in Hoyt Lakes, Minnesota. Both of these plants are served by a single rail carrier. Secondly, several of Minnesota Power's large power customers are heavily dependant on rail service for transportation of both inbound and outbound products. In many instances our customers' facilities are solely served by a single rail carrier.

Minnesota Power serves more than 130,000 electric customers and 16 municipal systems across a 26,000 square mile service territory in northwestern Minnesota. A Minnesota Power subsidiary sells electricity to 14,000 customers, natural gas to 12,000 customers, and provides water services to 10,000 customers in northwestern Wisconsin.

Minnesota Power also has a unique customer base. A dozen large power customers (requiring at least 10 megawatts of generating capacity) purchase about one-half of the electricity Minnesota Power sells. Minnesota Power's large power customers include five taconite producers who mine and process the iron-bearing rock that underlies the Missabe Iron Range. More than 60 percent of the ore consumed by integrated steel facilities in the United States originates from Minnesota Power's five taconite customers. Taconite processing requires large quantities of electric power. Minnesota Power's large power customers also include four paper and pulp manufacturers.

STATEMENT OF POSITION

In 1980, Congress enacted the Staggers Rail Act. The Staggers Act was designed and intended to balance both shipper and carrier interests. Since the Staggers Act was enacted, the nation's railroads have aggressively implemented the various pricing and consolidation freedoms the Staggers Act accorded to them. These actions, aided first by the Interstate Commerce Commission ("ICC") and subsequently, upon the sunset of the ICC, by the Surface Transportation Board ("STB"), have resulted in an unprecedented concentration of market power in a very few rail carriers. Just prior to the enactment of the Staggers Act, there were 42 Class I railroads. Today, that number has shrunk dramatically and the industry is dominated by a few behemoths.

No shipper in the past fifteen years has been able to successfully prosecute a case under the competitive access provisions in the Staggers Act. While the railroads, with the ICC/STB's active support, have aggressively implemented the railroad pricing and consolidation provisions in the Staggers Act, the same can not be said for other provisions in the Staggers Act designed to offset carrier monopoly pricing power. These provisions were designed to open up captive rail facilities to competition. Similarly, the Board's controversial 1996 decision in the Bottleneck Case effectively prevents bottleneck rail shippers from obtaining the benefits of competition. Finally, the ICC/STB maximum rate process does not work for smaller shippers. These shippers simply cannot afford to file and prosecute their cases under current STB standards.

Minnesota Power urges Congress to take necessary remedial actions to correct the above-referenced imbalance in the administration of the Staggers Act. To that end, Minnesota Power supports H.R. 141, Surface Transportation Reform Act, S. 1103, Railroad Competition Act of 2001 and S. 2245, Railroad Competition, Arbitration and Service Act. While each of these bills differs in their details, they all are intended to increase captive rail shippers' competitive options and to ease captive rail shippers' litigation burdens. These are important changes in the law that would preserve and enhance the goals Congress sought to achieve in the Staggers Act. Most importantly, they would restore a fair balance of shipper and carrier interests.

* * *

In conclusion, Minnesota Power would like to thank the Subcommittee, once again, for the opportunity to submit our written views for the record in this important hearing. Congress has an opportunity, and an obligation, to address the concerns of rail shippers and the millions of consumers who are paying more than they should for products that are transported by rail. Minnesota Power would be happy to provide any additional or supplemental information that the Subcommittee may need.

minnesota power / 30 west superior street / duluth, minnesota 55802-2093 / 218-720-2518 / www.mnpower.com

Donald J. Shippar
President and Chief Operating Officer

May 1, 2003

The Honorable Mark Dayton
United States Senate
346 Russell Senate Office Building
Washington, DC 20510

Dear Senator Dayton:

I wanted to take this opportunity to thank you for cosponsoring S.919, the Railroad Competition Act of 2003. As a captive shipper, this bill is very important to Minnesota Power and the competitiveness of all our electric customers in the upper Midwest.

As you are well aware, the United States has seen the railroad industry shrink from over 60 Class I railroads in 1976 to 5 major Class I railroads serving the United States today. This market concentration, coupled with a regulatory process at the Surface Transportation Board that is at best cumbersome, gives shipping customers little leverage in negotiating rail contracts. In some cases where the customer is "captive" the situation resembles a monopoly more than a functioning market. Both of Minnesota Power's major coal-fired plants are captive shippers for coal deliveries. Our major customers that ship bulk commodities also directly suffer because of this lack of competition.

The United States needs a financially strong railroad industry. However, we must also have railroad pricing practices that are fair and consistent for all customers, not just those that are fortunate enough to be situated where rail-to-rail competition exists.

Minnesota Power applauds your leadership and looks forward to working with you and your staff on this important piece of legislation. If you have any questions please do not hesitate to give me a call or Bill Libro of our Washington Office at (202) 638-7707.

Sincerely,

Donald J. Shippar

minnesota power / 30 west superior street / duluth, minnesota 55802-2093 / 218-720-2518 / www.mnpower.com

Donald J. Shippar
President and Chief Operating Officer

May 1, 2003

The Honorable Conrad Burns
187 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Burns:

I wanted to take this opportunity to thank you for introducing S.919, the Railroad Competition Act of 2003. As a captive shipper and a significant consumer of low-sulfur Montana coal, this bill is very important to Minnesota Power and the competitiveness of all our electric customers in the upper Midwest.

As you are well aware, the United States has seen the railroad industry shrink from over 60 Class I railroads in 1976 to 5 major Class I railroads serving the United States today. This market concentration, coupled with a regulatory process at the Surface Transportation Board that is at best cumbersome, gives shipping customers little leverage in negotiating rail contracts. In some cases where the customer is "captive" the situation resembles a monopoly more than a functioning market. Both of Minnesota Power's major coal-fired plants are captive shippers for coal deliveries. Our major customers that ship bulk commodities also directly suffer because of this lack of competition.

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Sincerely,

Donald J. Shippar

minnesota power / 30 west superior street / duluth, minnesota 55802-2093 / 218-720-2518 / www.mnpower.com

Donald J. Shippar
President and Chief Operating Officer

May 1, 2003

The Honorable Max Baucus
United States Senate
511 Hart Senate Office Building
Washington, DC 20510

Dear Senator Baucus:

I wanted to take this opportunity to thank you for cosponsoring S.919, the Railroad Competition Act of 2003. As a captive shipper and a significant consumer of low-sulfur Montana coal, this bill is very important to Minnesota Power and the competitiveness of all our electric customers in the upper Midwest.

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Sincerely,

Donald J. Shippar

minnesota power / 30 west superior street / duluth, minnesota 55802-2093 / 218-720-2518 / www.mnpower.com

Donald J. Shippar
President and Chief Operating Officer

May 1, 2003

The Honorable Larry Craig
United States Senate
520 Hart Senate Office Building
Washington, DC 20510

Dear Senator Craig:

I wanted to take this opportunity to thank you for cosponsoring S.919, the Railroad Competition Act of 2003. As a captive shipper, this bill is very important to Minnesota Power and the competitiveness of all our electric customers in the upper Midwest.

As you are well aware, the United States has seen the railroad industry shrink from over 60 Class I railroads in 1976 to 5 major Class I railroads serving the United States today. This market concentration, coupled with a regulatory process at the Surface Transportation Board that is at best cumbersome, gives shipping customers little leverage in negotiating rail contracts. In some cases where the customer is "captive" the situation resembles a monopoly more than a functioning market. Both of Minnesota Power's major coal-fired plants are captive shippers for coal deliveries. Our major customers that ship bulk commodities also directly suffer because of this lack of competition.

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Sincerely,

Donald J. Shippar

minnesota power / 30 west superior street / duluth, minnesota 55802-2093 / 218-720-2518 / www.mnpower.com

Donald J. Shippar
President and Chief Operating Officer

May 1, 2003

The Honorable Norm Coleman
United States Senate
320 Hart Senate Office Building
Washington, DC 20510

Dear Senator Coleman:

I wanted to take this opportunity to thank you for cosponsoring S.919, the Railroad Competition Act of 2003. As a captive shipper, this bill is very important to Minnesota Power and the competitiveness of all our electric customers in the upper Midwest.

As you are well aware, the United States has seen the railroad industry shrink from over 60 Class I railroads in 1976 to 5 major Class I railroads serving the United States today. This market concentration, coupled with a regulatory process at the Surface Transportation Board that is at best cumbersome, gives shipping customers little leverage in negotiating rail contracts. In some cases where the customer is "captive" the situation resembles a monopoly more than a functioning market. Both of Minnesota Power's major coal-fired plants are captive shippers for coal deliveries. Our major customers that ship bulk commodities also directly suffer because of this lack of competition.

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Donald J. Shippar

Donald J. Shippar

minnesota power / 30 west superior street / duluth, minnesota 55802-2093 / 218-720-2518 / www.mnpower.com

Donald J. Shippar
President and Chief Operating Officer

May 1, 2003

The Honorable Bryon Dorgan
United States Senate
713 Hart Senate Office Building
Washington, DC 20510

Dear Senator Dorgan:

I wanted to take this opportunity to thank you for cosponsoring S.919, the Railroad Competition Act of 2003. As a captive shipper, this bill is very important to Minnesota Power and the competitiveness of all our electric customers in the upper Midwest.

As you are well aware, the United States has seen the railroad industry shrink from over 60 Class I railroads in 1976 to 5 major Class I railroads serving the United States today. This market concentration, coupled with a regulatory process at the Surface Transportation Board that is at best cumbersome, gives shipping customers little leverage in negotiating rail contracts. In some cases where the customer is "captive" the situation resembles a monopoly more than a functioning market. Both of Minnesota Power's major coal-fired plants are captive shippers for coal deliveries. Our major customers that ship bulk commodities also directly suffer because of this lack of competition.

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Sincerely,

Donald J. Shippar

minnesota power / 30 west superior street / duluth, minnesota 55802-2093 / 218-720-2518 / www.mnpower.com

Donald J. Shippar
President and Chief Operating Officer

May 1, 2003

The Honorable Tim Johnson
United States Senate
324 Hart Senate Office Building
Washington, DC 20510

Dear Senator Johnson:

I wanted to take this opportunity to thank you for cosponsoring S.919, the Railroad Competition Act of 2003. As a captive shipper, this bill is very important to Minnesota Power and the competitiveness of all our electric customers in the upper Midwest.

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Sincerely,

Donald J. Shippar

minnesota power / 30 west superior street / duluth, minnesota 55802-2093 / 218-720-2518 / www.mnpower.com

Donald J. Shippar
President and Chief Operating Officer

May 27, 2003

The Honorable James Oberstar
2165 Rayburn House Office Building
Washington, DC 20515

Dear Representative Oberstar:

I wanted to take this opportunity to personally thank you for introducing H.R. 2192, the STB Reform Act of 2003. The reforms this bill envisions are very important to Minnesota Power and the competitiveness of all our electric customers in Minnesota.

As you are well aware, the United States has seen the railroad industry shrink from over 60 Class I railroads in 1976 to 5 major Class I railroads serving the United States today. This market concentration, coupled with a costly and cumbersome regulatory process at the Surface Transportation Board gives shipping customers little leverage in negotiating rail contracts. In some cases where the customer is "captive" the situation resembles a monopoly more than a functioning market. Both of Minnesota Power's major coal-fired plants are captive shippers for coal deliveries. Our major customers that ship bulk commodities also directly suffer because of this lack of competition.

The United States needs a financially strong railroad industry. However, we must also have railroad pricing practices that are fair and consistent for all rail customers, not just those that are fortunate enough to be situated where rail-to-rail competition exists.

Minnesota Power applauds your continued leadership on this issue and looks forward to working with you and your staff on this important piece of legislation. If you have any questions please do not hesitate to give me a call or contact Bill Libro in our Washington Office at (202) 638-7707.

Sincerely,

Don Shippar

ONE HUNDRED EIGHTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6216
(202) 225–3951
http://www.house.gov/judiciary

July 15, 2004

The Honorable R. Hewitt Pate
Assistant Attorney General
Antitrust Division
Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

Dear Assistant Attorney General:

I write to request that the Department of Justice Antitrust Division provide the Committee with its assessment and views on issues involving the application of the antitrust laws in the railroad transportation industry, and, more generally, on railroad competition policy.

United States railroads currently enjoy limited antitrust immunity. It is not clear that this immunity from antitrust actions serves the public interest in this marketplace. Some of these antitrust exemptions were established over eight decades ago, when competitive conditions in this marketplace were fundamentally different.

For example:

- Railroads are generally exempt from Sherman Act antitrust actions for treble damages if common carrier rates "approved by the [government]" are involved. This exemption is based upon notions of inherent conflict between a pervasive regime of rate regulation and published rates – a regime which no longer exists in the largely deregulated environment in which railroads presently operate. *See* Keogh v. Chicago & Northwestern R. Co., 260 U.S. 156 (1922); Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986).

- Railroads are generally exempt from private antitrust actions "for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of Title 49." *See* 15 U.S.C. § 26 et. seq.

- Persons participating in approved or exempted railroad consolidation, merger, and acquisition of control are "exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the transaction . . .". *See* 49 U.S.C. § 11321(a).

To the extent that exemptions from the antitrust laws unfairly shield competitors from competition, these exemptions require scrutiny and reconsideration as conditions warrant. This scrutiny is especially justified given the highly concentrated nature of the railroad industry. After years of industry consolidation, only two major carriers in the West and two major carriers in the East remain in this marketplace. In addition, many individuals, communities, and regions are served by only one railroad carrier.

Additionally, railroad customers have raised a number of concerns toward a range of industry practices that have allegedly suppressed competition in this marketplace. These practices include refusals by railroads to establish common carrier rates on individual "bottleneck" rail segments and corresponding demands that service be provided only on full-through rail routes. This practice produces anticompetitive harm by preventing customers from enjoying the benefits of carrier competition on rail segments in which at least two carriers compete. Another troubling allegation concerns Class I railroads imposing "paper barriers" after spinning off lower density lines to short-line railroads and subsequently preventing these carriers from handling business in conjunction with other railroads that would otherwise be eligible to provide competitive service. Additionally, concerns have been expressed that both of the major western Class I railroads are now attempting to publicly price major portions of their bulk commodity services in a manner that could raise anticompetitive concerns.

I relay these concerns, not because I seek to substantiate them as indicators of anticompetitive conduct in this marketplace, but rather, because they indicate that additional investigation into industry competitive practices may be warranted. Additionally, these concerns may highlight the need to revisit existing law and regulatory policies to more forcefully promote effective intramodal competition in the transportation marketplace. They may also indicate that investigation by the Department of Justice into such practices may be appropriate.

Given the special expertise of the Antitrust Division and its authority to investigate issues of competitive conduct in the railroad transportation industry, the Committee would benefit from receiving the written views of the Division on this matter.

I thus request an assessment of those concerns raised above. I appreciate your willingness to provide the Committee with this information, and request that you respond to this request no later than August 27, 2004.

Sincerely,

F. JAMES SENSENBRENNER, JR.
Chairman

FJS/Jud.

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 27, 2004

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Sensenbrenner:

This responds to your letter of July 15, 2004, to the Department of Justice regarding the application of the antitrust laws in the railroad industry. You note that the various statutory antitrust exemptions for railroad industry activities were enacted many decades ago, and you question whether continuing this antitrust immunity serves the public interest. The Department appreciates having the benefit of your perspective on this important issue of competition policy.

The antitrust laws are the chief legal protector of the free-market principles on which the American economy is based. Experience has shown that competition among businesses, each attempting to be successful in selling its products and services, leads to better-quality products and services, lower prices, and higher levels of innovation. The antitrust laws ensure that businesses will not stifle this competition to the detriment of consumers. Accordingly, the Department has historically opposed efforts to create sector-specific exemptions to the antitrust laws. The Department believes such exemptions can be justified only in rare instances, when the fundamental free-market values underlying the antitrust laws are compellingly outweighed by a clearly paramount and clearly incompatible public policy objective.

In the first decades of the past century, for example, Congress enacted antitrust exemptions in industries in which it believed normal free-market competition to be unworkable. These industries included the railroad, airline, trucking, and telephone industries. In lieu of competition protected by the antitrust laws, Congress established comprehensive regulatory regimes that regulated prices, service offerings, and market entry as well as other aspects of these industries. These regulatory regimes often included statutory antitrust exemptions for conduct approved by the regulatory agency. And if the regulatory regime was sufficiently pervasive, the courts could hold that it had implicitly displaced private damages recovery under the antitrust laws. *See* Keogh v. Chicago Northwestern Railway, 260 U.S. 156 (1922); Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409 (1986).

In the last decades of the past century, policymakers began to reconsider whether competition was truly unworkable in these industries, and efforts were undertaken to replace market regulation with competition where possible. As these industries became deregulated, antitrust exemptions no longer made sense. In the case of airlines, for example, the antitrust exemption for mergers approved by the Civil Aeronautics Board was repealed and, after a transition period, merger enforcement in the airline industry reverted to the Department of Justice under the antitrust laws.

In 1995, when Congress abolished the Interstate Commerce Commission and created the Surface Transportation Board to retain some of the ICC's old regulatory authority, the Department urged Congress to turn over review of railroad mergers to the antitrust enforcement agencies, as it had done with airlines. *See* Statement of Steven C. Sunshine, Deputy Assistant Attorney General, Antitrust Division, Before the House Transportation Subcommittee on Railroads, January 26, 1995 (attached). Congress opted instead to leave that responsibility with the Surface Transportation Board, with an accompanying antitrust exemption, with the Justice Department limited to an advisory role before the Surface Transportation Board. *See* 49 U.S.C. § 11321(a).

Your letter also describes three specific practices in the railroad industry about which concerns have been raised about possible anticompetitive effects.

The first practice is the refusal by a railroad that controls one segment of a freight movement to quote rates separately for that "bottleneck" segment, instead quoting rates only for the entire freight movement. You note that this practice denies shippers the benefits of competition on segments of the move where an alternative carrier might compete for the business. Because of the Surface Transportation Board's involvement in approving these rates, and its acceptance of this practice, relief may not be available under the antitrust laws. If this practice were subject to the antitrust laws, it could be evaluated as a refusal to deal in possible violation of section 2 of the Sherman Act, or as a tying arrangement in possible violation of section 1 of the Sherman Act. Whether it would constitute an antitrust violation would depend on the particular facts.

The second industry practice you describe is "paper barriers." Paper barriers are created when Class I railroads spin off segments of their trackage to short-line or low-density carriers with contractual terms that prohibit the acquiring carriers from competing with the Class I railroads for business. Since these contractual terms are part of an underlying sale transaction that is reviewed and approved by the Surface Transportation Board, they may be exempted from the reach of the antitrust laws, depending on the scope of the approval language in each of the Board's relevant orders. If paper barriers were subject to the antitrust laws, they would be evaluated under section 1 of the Sherman Act. The Department would examine whether the restraint is ancillary to the sale of the trackage – i.e., whether the restraint is reasonably necessary to achieve the pro-competitive benefits of the sale.

The third industry practice you describe is the practice by both of the major western Class I railroads of publicly disclosing tentative prospective shipping rate offerings. Under the antitrust laws, the public disclosure of pricing information among competitors can, under some circumstances, facilitate collusion and result in increased prices, in violation of section 1 of the Sherman Act. *See, e.g.*, United States v. Airline Tariff Publishing Co., 1994 Trade Cas. (CCH) ¶ 70,687 (D.D.C. 1994). Publicly announcing prospective rates outside the confines of a rate approval proceeding at the Surface Transportation Board is likely to be subject to review under the antitrust laws. If you know of anyone who has information that you believe might be useful for evaluating this practice under the antitrust laws, please encourage them to contact the Antitrust Division.

Thank you for bringing your interest in these issues to our attention, and for soliciting our views as you consider these issues. If we can be of further assistance, please do not hesitate to contact us.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

Enclosure

APPENDIX A

THE WESTERN COAL TRAFFIC LEAGUE

1224 Seventeenth Street, N.W.
Washington, D.C. 20036-3003

(202) 659-1445

August 27, 2004

The Honorable Roger Nober
Chairman
Surface Transportation Board
1925 K Street, N.W., Suite 810
Washington, D.C. 20423-0001

Dear Mr. Chairman:

I write in connection with the letters you received from the railroads on the subject of Fall Peak Service Demand which you made public on August 6, 2004.

Therein, to varying degrees, the nation's major coal hauling railroads suggest that their current inability to enjoy rates of return equal to the cost of their capital will impair their capacity to make future capital investments. The replicant for BNSF is particularly outspoken in this connection and uses coal traffic as an example of a commodity whose transportation by the railroads requires huge capital investments which investments generate anemic returns.

It merits note that BNSF offers no support for its aspersions of coal traffic other than its vague complaint that the "value" received by railroads for coal transportation services has declined in recent years. You and I heard similar claims from various railroad spokesmen during the course of the Board's recent Site Visit to the Powder River Basin.

The purpose of this letter is to dispel the notion that coal traffic is, in some undefined manner, contributing to the railroads' inadequate revenues. At my direction, William Whitehurst, a prominent transportation economist, prepared the attached computations which demonstrate that for the last two years for which data is available from the Board (2001 and 2002) coal traffic earned returns for its rail transporters very appreciably greater than the capital costs of their invested capital. Specifically, for the years 2001 and 2002, the major coal haulers reaped revenues of $1.2 and $1.4 billion more than their full costs for transporting coal traffic which costs, as computed by your staff, include a return on investment at a rate equal to the cost of capital (14.1 percent and 13.7 percent).

As the attached data demonstrates, railroad claims that coal traffic is not paying its way are unsupported by the railroad cost and profit data prepared by the Board.

On behalf of the Western Coal Traffic League, I ask that you include my letter together with Mr. Whitehurst's attached computations in the record in Ex Parte No. 655, Powder River Basin Site Visit. I also want to use this opportunity to thank you on the League's behalf for including our delegation on your Site Visit.

Sincerely,

Mark W. Schwirtz

Mark W. Schwirtz
President

MWS:kfm
Enclosure
cc: Hon. Frank Mulvey
Hon. Doug Buttrey
Mr. Matt Rose
Mr. Richard Davidson

W. W. Whitehurst & Associates, Inc.

Comparison of Revenues to Fully-Allocated Costs (Including Cost of Capital)
for Coal Traffic (STCC 11)
Handled by the Four Major U.S. Class I Railroads

Line No.	Description (1)	Source or Computation (2)	BNSF + UP + NS + CSXT 2001 (3)	BNSF + UP + NS + CSXT 2002 (4)
1	Coal Traffic Revenues	Note 1	$ 7,799,615,922	$ 7,677,558,395
2	Railroad Cost of Capital	Note 2	14.1%	13.7%
3	Coal Traffic Fully-Allocated Costs (Incl Cost of Capital)	Note 3	$ 6,615,751,358	$ 6,276,324,957
4	**Coal Traffic Revenue to Fully-Allocated Costs (Incl Cost of Capital) Ratio**	L.1 / L.3	**1.18**	**1.22**
5	**Coal Traffic Revenues Over/(Under) Coal Traffic Fully-Allocated Costs (Incl Cost of Capital)**	L.1 - L.3	**$ 1,183,864,564**	**$ 1,401,233,438**

[1] Sum of Revenues for BNSF, UP, NS, and CSXT from STB Costed Waybill Sample for 2001 and 2002.

[2] URCS WT A4L205C1 for 2001 and 2002, derived from STB Ex Parte No. 558 (Sub-No. 5) decided 06/14/2002 for 2001 and STB Ex Parte No. 558 (Sub-No. 6) decided 06/11/2003 for 2002.

[3] Sum of Fully-Allocated Costs for BNSF, UP, NS, and CSXT, calculated by applying each RRs Constant Cost Markup Ratio from URCS WT D8L617C1 to its Coal Traffic Variable Costs for each year.

APPENDIX B

Surface Transportation Board
Washington, D.C. 20423-0001

Office of Economics, Environmental Analysis, and Administration

October 6, 2004

Mr. William W. Whitehurst, Jr.
W.W. Whitehurst & Associates, Inc.
Economic Consultants
12421 Happy Hollow Road
Cockeysville, MD 21030

Dear Mr. Whitehurst:

This letter refers to the Carload Waybill Sample data provided to you by the Board on December 2 and December 4, 2003. As a previous user of waybill data, you are aware of the STB's emphasis on protecting the confidentiality of this sensitive data. After examining your submission on behalf of the Western Coal Traffic League, it is clear that you used the railroads' "unmasked revenue" that we inadvertently sent in the December 2 package. This highly confidential revenue data is for internal Board use only, and not to be released to users of waybill data.

Waybill data is the property of the STB, and is released to users with certain conditions. One of the primary conditions is that access to waybill data is for a limited period of time. These conditions are outlined in 49 CFR 1244.9. We therefore request that all the waybill data provided to you on December 2 and December 4, 2003 as well as all reports generated from that data either be returned to the Board or destroyed. Further, we require that you provide a written certification that all the original data, copied data, and any reports derived from the data stating that these data have been returned or destroyed. Obviously, you are precluded from using this information for any further analyses.

We ask that you comply with this request by no later than October 22, 2004. Failure to do so could jeopardize your future ability to obtain waybill data.

Sincerely,

Leland L. Gardner
Director

W. W. WHITEHURST & ASSOCIATES, INC.
ECONOMIC CONSULTANTS

12421 HAPPY HOLLOW ROAD
COCKEYSVILLE, MARYLAND 21030

PHONE (410) 252 - 2422
FACSIMILE (410) 561 - 9215

October 12, 2004

Mr. Leland L. Gardner, Director
Office of Economics, Environmental Analysis,
and Administration
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Dear Mr. Gardner:

This letter responds to your letter to me of October 6, 2004, which I attach hereto for ease of reference. In that letter, you ask that I return or destroy certain data the Surface Transportation Board ("STB" or "Board") furnished to me on December 2 and 4, 2003, destroy any reports derived from this data, and cease its use in future analysis. You make these requests under the authority of 49 C.F.R. 1244.9 Procedures for the release of waybill data. Your invocation of C.F.R. 1244.9 suggests that you are misinformed regarding the data I received and the terms and conditions under which it was furnished.

As a professional transportation consultant, I have a need in the ordinary course of my practice for publicly usable information on the revenue/cost ratios of products moving in rail commerce. Mindful of the confidentiality constraints applicable to the Waybill Sample, I concluded that the analyses generated annually by the Board on rail revenue/cost ratios in Ex Parte No. 347 (Sub-No. 2), Rate Guidelines-Non Coal Proceedings were a promising source of the non-confidential information in which I was interested. Each year, as part of the STB Ex Parte No. 347 (Sub-No. 2) "Revenue Shortfall Allocation Method" ("RSAM") and "Average Revenue-to-Variable Cost>180" ("R/VC>180") computations, the STB costs the Waybill Sample using Uniform Railroad Costing System ("URCS") unit costs. I surmised that the information provided by these STB computations, aggregated at a sufficiently high level, might provide information that I was seeking on a basis that would not violate confidentiality restraints and hence be available to the public upon request.

In the summer of 2002, I approached the Board to inquire about the Ex Parte No. 347 (Sub-No. 2) analyses. My queries were directed to Mr. James A. Nash, the Board official charged with the authority to release data. Mr. Nash confirmed my supposition that some Ex Part No. 347 (Sub-No. 2) analytical results on rail revenue/cost ratios for numerous commodities are available as publicly usable information. For example, the STB makes available on a non-confidential basis data by railroad by two-digit STCC code that shows variable cost, average Revenue-to-Variable Cost ("R/VC") ratio, and percent of Commodity Revenue in each major R/VC cell (i.e. R/VC<100, 100<R/VC<180, and R/VC>180).

Specifically, on July 22, 2002, Mr. Nash and I discussed the fact that aggregated railroad variable cost and revenue data by major R/VC cell from the Ex Parte No. 347 (Sub-No. 2) analyses at a two-digit STCC level by railroad was sufficiently aggregated that there were no confidentiality concerns. At this aggregation level, there is no shipper-specific data, no origin or destination information, no physical volume information, and no route of movement information. Accordingly, the STB provided this information to me, without any restrictions on its use, and I have since used this information on various occasions in non-confidential presentations to my clients, prospective clients, and the Board. In the summer of 2002, the STB provided data in this format for year 2000, the year then most recently available. Subsequently, in conformance with this non-confidential authorization, the STB has provided to me data in this same format for calendar years subsequent to 2000 as it has become available. It is data in this format for calendar year 2002 that I received on December 2 and December 4, 2003.

Under the foregoing circumstances, I believe you will understand why I am offended by your contention that I am in possession of highly confidential information released to me under the strictures of 49 C.F.R. 1244.9 which you are attempting to apply and which you imply I have violated. Please advise me if I am somehow misinformed.

Very truly yours,

William W. Whitehurst Jr.

William W. Whitehurst, Jr.

Attachment

002

Surface Transportation Board
Washington, D.C. 20423-0001

Office of Economics, Environmental Analysis, and Administration

October 25, 2004

Mr. William W. Whitehurst, Jr.
W.W. Whitehurst & Associates, Inc.
Economic Consultants
12421 Happy Hollow Road
Cockeysville, MD 21030

Dear Mr. Whitehurst:

This letter is in response to your letter of October 12, 2004. Upon review of your comments, it is clear to us that the proper procedures for processing requests for waybill data were not followed, and we can therefore understand your belief that the data provided by the Board was non-confidential and available for public use.

Nevertheless, as we pointed out in our October 6 letter, we inadvertently released "unmasked revenue" which is confidential and not to be released outside of the Board. Moreover, our review indicates that the 2001 revenue we released was also "unmasked". It is the recovery of this confidential revenue information that is the basis for our request not to use the data for any further analyses and to either return the data or certify that the data have been destroyed and will not be used in the future.

Our procedures for processing requests for waybill data require that the request be in writing, specifically identifying the requestor, the year or years of data requested, what the data will be used for, and shall be directed to the Director's Office.

We hope this explanation clarifies our reasons for our request and identifies the required steps for obtaining publicly available information from the Board.

We appreciate your cooperation with respect to the disposition of the data as described in our letter.

Sincerely,

Leland L. Gardner
Director

W. W. WHITEHURST & ASSOCIATES, INC.
ECONOMIC CONSULTANTS

12421 HAPPY HOLLOW ROAD
COCKEYSVILLE, MARYLAND 21030

PHONE (410) 252 - 2422
FACSIMILE (410) 561 - 9215

November 11, 2004

Mr. Leland L. Gardner, Director
Office of Economics, Environmental Analysis,
and Administration
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Dear Mr. Gardner:

Thank you for your letter of October 25, 2004 regarding the confidentiality of Surface Transportation Board ("STB" or "Board") backup from decisions in STB Ex Parte No. 347 (Sub-No. 2) Rate Guidelines - Non-Coal Proceedings.

In your most recent letter you indicate that the unmasked revenue data I have received from the Board, from time-to-time, is confidential. While some unmasked revenue information from the waybill sample is clearly confidential, I question whether the information released to me with the approval of Mr. Nash fits into that category. For that reason, I request clarification. Pending receipt of this clarification, I have quarantined the unmasked revenue data for 2001 and 2002 provided to me and will not use it until I have received your explanation as to why it is confidential.

It is my understanding that only revenues associated with contract shipments may be masked. These revenues are encrypted, or masked, to safeguard the confidentiality of the contract rates. The revenues provided to me by the STB, in accordance with my discussions with Mr. Nash, from its Ex Parte No. 347 (Sub-No. 2) "Revenue Shortfall Allocation Method" ("RSAM") and "Average Revenue-to-Variable Cost>180" ("R/VC>180") computations are aggregated by railroad at the two-digit STCC code level. In my opinion, when "unmasked" revenues are provided at this level of aggregation and are combined with other tariff revenues, the confidentiality of contract rates is well protected, for the following reasons:

1.- There is no identification of contract shipment waybills (contract shipment flags). In fact, there is no waybill identification at all.

2.- All revenues for the given two-digit STCC are summed together and cannot be separately identified. For each individual railroad, at the two-digit STCC level, the unmasked revenues will contain a combination of contract rates and rates for movements that are not under contract, and hence are not "masked". Even if all movements of the commodities within the scope of a two-digit STCC are at contract rates, these individual contract rates are aggregated together with no identifying characteristics of the separate rates making up the total. Further, even the number of waybills that contributed to the aggregated revenue amount is not revealed.

3.- For traffic movements that involve more than one railroad, the revenues associated with each participating railroad are estimated by the STB using its revenue allocation algorithm (which may not be the same as the actual revenue divisions). Therefore, for any one railroad revenues for a given two-digit STCC will include some combination of single-carrier revenues plus an apportioned share of multi-carrier revenues.

4.- Other potential contract movement identifiers that might disclose contract shipment information may include: shipment origin, shipment destination, route of movement, number of carriers, length of haul, physical volume (cars, car-miles, tons, ton-miles, etc.), car ownership, size of shipment, etc. NONE of this information is present in the Ex Parte No. 347 (Sub-No. 2) revenue data furnished to me.

5.- The other Ex Parte No. 347 (Sub-No. 2) data component furnished to me is variable costs. NONE of the contract movement identifiers listed immediately above is contained in these Ex Parte No. 347 (Sub-No. 2) variable cost data. The variable costs are the outputs generated by applying Uniform Railroad Costing System ("URCS") unit costs to individual movement characteristics and then aggregating these variable costs at the two-digit STCC level. Given that there are approximately eight major URCS unit cost categories (some of which contain DLR and ROI components as well as an OPR component), reverse engineering movement characteristics of a single contract waybill from the variable costs would be a daunting project. (For example, do the variable costs reflect a large shipment moving a short distance or a small shipment moving a long distance.) Aggregation at the two-digit STCC level converts such an effort from highly improbable to impossible.

6.- Revenues are compared to variable costs by railroad only at the aggregated two-digit STCC level. Thus, there is no linkage of revenues to variable costs for individual waybills.

I would appreciate your considered evaluation of these points and response. If I am missing some aspect of contract rate confidentiality that would be revealed by furnishing unmasked revenues by railroad at the two-digit STCC level, please inform me of what it is.

Also, if aggregating unmasked revenues by railroad at the two-digit STCC level is not a sufficiently high level to safeguard the confidentiality of rates contained in confidential transportation contracts, at what level of aggregation do unmasked revenues achieve safeguarding of confidentiality of contract rates?

As I stated in my earlier response, I am seeking publicly usable information that can be provided by the STB without confidentiality constraints.

Very truly yours,

William W. Whitehurst Jr

William W. Whitehurst, Jr.

Attachment

cc: Mr. Mark W. Schwirtz
President
The Western Coal Traffic League

Surface Transportation Board
Washington, D.C. 20423-0001

NOV 23 2004

Office of Economics, Environmental Analysis, and Administration

Mr. William W. Whitehurst, Jr.
W.W. Whitehurst & Associates, Inc.
Economic Consultants
12421 Happy Hollow Road
Cockeysville, MD 21030

Dear Mr. Whitehurst:

This letter is in response to your letter dated November 11, 2004, requesting clarification as to our position that the information released to you for the years 2001 and 2002 should be treated as confidential. Notwithstanding any verbal agreement or understanding you may have concluded from discussions with James Nash, the data provided to you by Mr. Nash was developed using unmasked revenues which are always confidential and not made available to the public under any circumstances.

I believe this clarification is sufficient and brings this matter to a close. Please return the data as previously requested, or certify that you have destroyed the data and will not use it in the future.

We ask that you act on this request by no later than December 15, 2004. Your compliance is essential and will facilitate the handling of any future requests for STB data.

Sincerely,

Leland L. Gardner
Director

Received
NOV 24 2004
W. W. Whitehurst
& Associates, Inc.

THE WESTERN COAL TRAFFIC LEAGUE

1224 Seventeenth Street, N.W.
Washington, D.C. 20036

(202) 659-1445

December 8, 2004

The Honorable Roger Nober
Chairman
Surface Transportation Board
1925 K Street, N.W., Suite 810
Washington, D.C. 20423-0001

Dear Roger:

I write to bring to your attention my concern over recent actions by your staff which seek to suppress certain information in my letter to you on behalf of the Western Coal Traffic League (WCTL) in Ex Parte No. 655, Powder River Basin Site Visit, which letter I attach hereto for ease of reference as Appendix A.

In my letter, I pointed out, on the basis of data compiled by the Board, that coal traffic is extremely profitable to the nation's major railroads. While the railroads have mustered little to refute this economic reality, your staff appears to have come to their aid by ordering the destruction of the Board-generated data which I presented in my letter and which demonstrates the indisputable profitability of railroad coal traffic (see correspondence attached as Appendix B).

As I read it, your staff initially sought to squelch WCTL's presentation contending that it was based upon data improperly obtained by WCTL's economist, William Whitehurst (Appendix B, letter from Gardner to Whitehurst, 10/6/04). When it became obvious that the staff's contentions about how our data was obtained were meritless (Appendix B, letter from Whitehurst to Gardner 10/12/04) your staff, nonetheless, renewed its demand that our data be voided on the grounds that it is "confidential" (Appendix B, letter from Gardner to Whitehurst 11/23/04).

The Honorable Roger Nober
December 8, 2004
Page 2

I fail to grasp why the railroad revenue and cost data contained in my letter is confidential. As the correspondence discloses, it was initially made available by the Board because it was <u>not</u> confidential. When your staff reversed course and claimed that it was confidential, it offered no support for its changed position nor did it even acknowledge the six separate reasons which our economist offered to demonstrate the non-confidential nature of the data.

The unsupported position of your staff that unmasked railroad revenue data is "always confidential" fails to respond to Mr. Whitehurst's reasoned position to the contrary and, more importantly, undercuts WCTL's position in this proceeding on the highly profitable nature of its coal transportation business which is a subject of particular importance to our members. Roger, I am hopeful that you will personally investigate this matter. This episode illustrates why shippers feel so overwhelmed by what we believe are the influences of the railroads at the STB.

Sincerely,

Mark W. Schwirtz

Mark W. Schwirtz
President

MWS:kfm
Enclosures
cc: Mr. Paul Freund
Mr. David Laffere
Mr. Randall Rahm

EL-3 Resolution Urging Legal and Regulatory Reform to Improve Railroad Shipper Rates and Quality of Service

WHEREAS, The Staggers Rail Act of 1980 provided for the deregulation of competitive rail traffic and directed the Interstate Commerce Commission (now superseded by the Surface Transportation Board under the Department of Transportation) to continue to maintain reasonable rates where there is an absence of effective competition for rail traffic within the Board's jurisdiction; *and*

WHEREAS, Today, 25 years after passage of the Staggers Rail Act, over half of the electric energy in the United States is generated using coal, the majority of which is transported to electric utilities under non-competitive conditions, by no more than two railroad companies serving any coal region, which charge unjustifiably high monopoly prices for unreliable service, even though they are presumably subject to regulatory supervision by the Surface Transportation Board; *and*

WHEREAS, This body, the National Association of Regulatory Utility Commissioners (NARUC), passed a resolution in March of 1984, almost 22 years ago, voicing similar concerns about the lack of appropriate regulatory standards and alternatively the lack of competitive market conditions within the rail industry; *and*

WHEREAS, Today, 20 years after the last NARUC resolution on this issue, the railroad industry has consolidated to such a great extent that there are only 4 Class I railroads providing over 90% of the nation's rail transportation; *and*

WHEREAS, Today, in 2006, the nation is experiencing record high prices for natural gas, which has dramatically increased the cost of both natural gas and electricity service to the millions of business and residential customers in this country; *and*

WHEREAS, The cost of producing electricity with a gas-fired plant is several times higher than the cost of producing electricity with a coal-fired plant; *and*

WHEREAS, This economic statistic means that existing coal-fired electric generation should be used as much as possible in lieu of gas-fired generation in order to produce electricity more economically and to avoid upward pressure on natural gas prices; *and*

WHEREAS, Coal plants in the United States are dependent on reliable rail delivery and sufficient capacity to carry coal supplies coming out of the Powder River Basin in Montana and Wyoming, the Illinois Basin and the Appalachian region, yet only two railroad companies are available to ship coal out of any of these regions; *and*

WHEREAS, The 4 Class I railroads have had significant reliability and capacity problems and have reduced their coal deliveries to firm contract customers in numerous States by 10 - 25%, thereby dramatically reducing the amount of coal inventory available for current and future electricity production; *and*

WHEREAS, These reduced coal shipments have resulted in a substantially diminished ability of many electric utilities to rely on lower-cost electricity production from their existing coal plants, thereby necessitating the substitution of much higher priced gas-fired production or market purchases of gas-fired generation to make up the difference; *and*

WHEREAS, These higher costs of substitute gas-fired electricity have resulted in significant rate increases to customers of rural electric cooperatives, public power authorities, and investor-owned utilities all across the country, totaling billions of dollars, and have placed upwards pressure on natural gas market prices; *and*

WHEREAS, These billions of dollars in higher energy bills have contributed to a higher manufactured product cost for many industries, lower net business earnings, less disposable household income, and diminished economic productivity across the country; *and*

WHEREAS, This problem could be alleviated through legislative and regulatory reform at the federal level that would ensure more reliable rail service, more railroad capacity, more rail carrier options for shippers, and more equitable rates for affected rail shippers; *now therefore be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners (NARUC), convened in its February 2006 Winter Meetings in Washington, D.C., urges Congress to immediately address and resolve these issues by enacting legislation which would empower the Surface Transportation Board to develop and enforce quality of service standards and implement a more equitable rate-setting process, and to interpret the existing deregulation law to promote competition as well as to ensure reasonable rates in a competitive market, and to also remove the railroad industry's exemption from the federal antitrust laws; *and be it further*

RESOLVED, That NARUC urges the development of specific federal legislation that would create mandatory reliability standards for the nation's railroad system, enforced by the Surface Transportation Board, along with rate reform to ensure just and reasonable rates, particularly in the absence of true competition, since this nation is no less dependent on a reliable and reasonably-priced rail system than we are on a reliable and reasonably-priced electric transmission system; *and be it further*

RESOLVED, That NARUC calls upon the members of the Surface Transportation Board to exercise their existing regulatory authority to protect rail customers and consumers in this country, and to support Congressional efforts to pass the additional legislation necessary to ensure reliable rail service at just and reasonable rates, and enhance additional competition within the rail industry.

Sponsored by the Committee on Electricity
Adopted by the NARUC Board of Directors February, 2006

minnesota power
AN ALLETE COMPANY

David J. McMillan, Executive Vice President
Fax 218-720-2508 / Cell 218-590-4287 / E-mail dmcmillan@allete.com

Sample - Similar letter sent to Sen. Klobuchar

February 20, 2007

The Honorable Norm Coleman
United States Senate
Washington, DC 20510

Dear Senator Coleman:

Thank you for taking time out of your busy schedule on Thursday, February 15th to meet with me and Bill Libro of our Washington office. As you know our large electric power customers, all in internationally competitive markets, are the backbone of the economy in northeastern Minnesota. Minnesota Power has an ongoing commitment to provide reliable and economical energy to these customers.

Your ongoing work on the captive rail issue and past help on issues like Minnesota's inclusion in the Environmental Protections Agency's Clean Air Interstate Rule are, I believe, examples of your strong commitment to both the State of Minnesota and Minnesota Power. We appreciate the past help and look forward to working with you in the future.

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

Sincerely,

David J. McMillan

c: Tony Eberhard
Jordan Talge

United States Senate

WASHINGTON, DC 20510

March 2, 2007

Dear Colleague,

We are writing to urge you to cosponsor the Railroad Antitrust Enforcement Act of 2007. This bill eliminates one of the broadest remaining antitrust exemptions – one that is antiquated, has no public policy justification, and is protecting anticompetitive conduct by the railroad industry.

The lack of competition resulting from the antitrust exemption has allowed freight railroads to reap record profits – while providing unreliable service and charging exorbitant fees. Utilities, paper mills and agricultural groups have been subject to declining service, unreliable rail shipments and unreasonably high rates. In August 2006, the state Attorneys General of seventeen states sent a join letter to the House and Senate Judiciary Committees asking Congress to remove the railroad antitrust exemption.

That is why we plan to introduce the Railroad Antitrust Enforcement Act. The legislation will repeal the railroad antitrust exemptions in the antitrust and transportation statutes, so that antitrust law fully covers railroads as other industries. It will permit the Justice Department and FTC to review mergers under the antitrust law and it will eliminate the antitrust exemptions for mergers, acquisitions, collective ratemaking and coordination among railroads. The bill will also allow state Attorneys General and other private parties to sue for treble damages and to sue for court orders to halt anti-competitive conduct, both of which are not currently allowable under federal law.

This legislation is a first and fundamental step toward ensuring competition in the consolidated railroad industry. For more information, or if you would like to cosponsor, please contact Molly Harris with Senator Kohl (4-1883) or Jordan Talge with Senator Coleman (4-7589).

Sincerely,

Herb Kohl

Herb Kohl
United States Senator

Norm Coleman

Norm Coleman
United States Senator