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January 10, 2020

VIA ELECTRONIC FILING

The Honorable Ann D. Begeman, Chairman
The Honorable Patrick J. Fuchs, Vice Chairman
The Honorable Martin Oberman, Commissioner
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

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January 10, 2020
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Re: Docket No. EP 756 – Market Dominance Streamlined Approach

Dear Board Members:

Enclosed please find Reply Comments of BNSF Railway Company and a Verified Statement of John H. Miller in response to the Board's Notice of Proposed Rulemaking issued by the Surface Transportation Board in the above-referenced proceeding on September 12, 2019.

Very truly yours,

A handwritten signature in blue ink that reads "Suzanne Wellen". The signature is fluid and cursive, with the first name "Suzanne" being more prominent.

Suzanne Wellen

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. EP 756

MARKET DOMINANCE STREAMLINED APPROACH

REPLY COMMENTS OF BNSF RAILWAY COMPANY

INTRODUCTION AND SUMMARY

BNSF Railway Company (“BNSF”) submits these reply comments pursuant to the Notice of Proposed Rulemaking issued by the Surface Transportation Board (“STB”) in this proceeding on September 12, 2019 (the “NPRM”). Attached to these reply comments is a Verified Statement of John H. Miller, Group Vice President, Industrial Products at BNSF (“Miller VS”). Mr. Miller provides further factual support and context for BNSF’s opening comments in this proceeding, filed on November 12, 2019, and addresses certain comments filed in this proceeding by shippers and their trade organizations.

In our opening comments, BNSF explained that, while we support the concept of streamlining market dominance assessments, any simplification of the STB’s procedures must be guided by two key principles. First, competition is pervasive in rail markets and derives from a number of sources. Mr. Miller expands on BNSF’s discussion of this issue, providing additional examples of modal competition in certain commodity markets, Miller VS at 2-5, of product and geographic competition, Miller VS at 5-11, and illustrating how external market conditions constrain BNSF’s rates, Miller VS at 11-14. Second, the market dominance inquiry is crucial to the STB’s rate regulatory regime. As a result, any simplification of market dominance

procedures must avoid improper regulatory interference in well-functioning transportation markets.

BNSF also provided specific comments regarding the STB's streamlining proposal set forth in the NPRM, which would allow shippers to make a prima facie market dominance showing based on simplified factual showings. Most importantly, BNSF argued that the STB should limit the streamlined inquiry to small shippers, which would significantly reduce the risks of oversimplification and the attendant risks of market distortions. Mr. Miller provides further support for this proposal, describing the market power of larger shippers and the variety of market-based tools that larger shippers have to avoid paying unreasonable rail rates. *See Miller VS* at 17. Additionally, BNSF urged the STB to: (1) consider in any streamlined market dominance assessment the significant product and geographic competition that railroads face, (2) not reduce the assumed distance of trucking competition below the proposed 500-highway-miles for any commodity, (3) include pipeline competition in the list of prima facie factors, and (4) allow railroads to also use an Administrative Law Judge to develop the record.

RESPONSES TO OPENING COMMENTS

A number of academic experts, railroads, shippers, and their respective trade associations filed opening comments in this proceeding. While BNSF will not reply in detail to each opening comment, we provide the following responses in order to highlight matters of particular importance to BNSF.

1. Academic experts properly recognized the importance of product and geographic competition in the market dominance analysis.

The academic authors of a recent report on rate regulation reform recommended that the STB remove existing restrictions on introducing evidence regarding product and geographic competition. *See Public Interest Comment* at 3-4 (filed Oct. 17, 2019) ("We continue to

recommend that the existing restrictions on types of evidence allowed in market dominance proceedings be removed in conjunction with adoption of deadlines to address the problem of excessive delays.”). Importantly, the authors also echoed BNSF’s recommendations that the STB add “absence of product and geographic competition” as one of the prima facie factors for a market dominance determination. *Id.* at 4. BNSF proposed in its opening comments that the STB could address its previously-stated concerns regarding complexity of product and geographic evidence by simply allowing the shipper to certify whether or not such indirect competition exists at the prima facie showing stage, and allowing the railroad to rebut that certification with evidence on reply.

As we stated in our opening comments, if the STB implements a streamlined market dominance process without considering the pervasive product and geographic competition that railroads such as BNSF face, the STB risks substantial interference in well-functioning transportation and commodities markets. Mr. Miller describes how BNSF’s agricultural products and cement businesses provide clear examples of geographic competition. *See Miller VS* at 6-10. For example, in setting BNSF’s transportation rates for an agricultural producer, BNSF “must account for the producer’s range of destination options and the diverse competitive forces involved in each movement.” *Id.* at 8. In describing product competition faced by BNSF, Mr. Miller provides the example of how the availability of abundant natural gas to generate electricity in competition with coal “serves as a fundamental constraint on rail rates for coal movements” and refers to the testimony provided by BNSF’s Jill Mulligan to the STB on this point in the Revenue Adequacy hearing held December 12-13, 2019. *Id.* at 10-11.

2. The STB should reject the efforts of shippers to loosen the STB's market dominance streamlining proposal.

Many shippers and their trade associations suggested changes to the STB's proposed market dominance inquiry procedures that would make the procedures easier to use and more likely to result in a finding of market dominance. For example, a number of shippers (including the American Fuel & Petrochemicals Manufacturers ("AFPM"), Indorama Ventures ("Indorama"), Industrial Minerals Association – North America, Millercoors, and Steel Manufacturers Association ("SMA")) request that the STB eliminate its proposed prima facie factor of "no practical build-out alternative." In addition, many shippers seek to water down the proposed prima facie factors related to truck competition (movement would exceed 500 highway miles and complainant has used truck for 10% or fewer of its movements subject to the rate at issue over a five-year period). The "Coalition Associations" (The American Chemistry Council, The Fertilizer Institute, The National Industrial Transportation League, the Chlorine Institute, and the Corn Refiners Association) go so far as to suggest that the STB allow shippers to satisfy the prima facie factors "on an a la carte basis that associates each factor with an alternative transportation mode." Coalition Associations at 7-8.

These result-oriented shipper proposals ignore the central role of the market dominance inquiry in the current regulatory scheme. Given the pervasive competition in rail markets, as described in BNSF's opening comments and further described in Mr. Miller's Verified Statement at 2-11, it would be a mistake to over-simplify a streamlined market dominance approach simply to make it easier for shippers to seek regulatory intervention. As the STB considers the scope and substance of any final rules resulting from the NPRM, BNSF urges the STB to maintain its focus on the importance of the market dominance inquiry to both the STB's statutory mandate and to the existing competitive balance in well-functioning markets. Over-simplification of the market

dominance inquiry would result in significant market distortions that the STB must seek to avoid. Instituting a “small shipper” screen for any streamlined market dominance inquiry and implementing the changes and principles suggested in BNSF’s comments and the comments of other railroads, including the Association of American Railroads, will help the STB avoid unintended interference in competitive and well-functioning markets.

3. The Board should reject efforts by shippers to lower the STB’s proposed 500-highway-mile threshold.

The shipper community appears to be particularly focused on the STB’s proposal to include, as one of the *prima facie* factors for a market dominance determination, a demonstration that a rail movement would exceed 500 highway miles between origin and destination. The STB proposed this factor to identify a distance beyond which trucking likely will not provide effective competition to a rail movement. A number of shippers ask the Board to reduce that 500-highway-mile threshold, either on overall basis or for specific commodities. For example, certain shippers requested that the STB shorten the threshold to 250 miles (including AFPM, the Coalition Associations, Indorama, and the SMA) or 200 miles (including Portland Cement, the National Grain and Feed Association, and Institute of Scrap Recycling Industries), while other shippers seek to eliminate the factor entirely for certain commodities (Olin Company for chlorine and other hazardous materials, Western Coal Traffic League for unit train coal shipments).

As BNSF explained in its opening comments, the STB should not consider any distance limit less than 500 miles for any commodity, because any lesser distance limit would capture rail movements subject to extensive truck competition. Mr. Miller provides further support for this position, describing specific examples of truck competition on BNSF rail movements of distances both below and significantly above the proposed 500-highway-mile threshold for a number of different commodities. *See* Miller VS at 14-16.

CONCLUSION

BNSF understands the STB's interest in improving effective access to rate reasonableness review. However, given the importance of the market dominance inquiry to the STB's rate regulation scheme and the pervasive competition that exists in rail transportation markets, the STB must be careful to not allow its streamlining efforts to result in regulatory intervention where competition exists.

Respectfully submitted,

A handwritten signature in blue ink, reading "Suzanne C. Wellen", is written over a horizontal line.

Jill K. Mulligan

Suzanne Wellen

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Dated: January 10, 2020

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. EP 756

MARKET DOMINANCE STREAMLINED APPROACH

VERIFIED STATEMENT OF JOHN H. MILLER

1. Introduction and Summary

I am John H. Miller, Group Vice President, Industrial Products at BNSF Railway Company ("BNSF"). I joined BNSF in March 2008 as Assistant Vice President, Agricultural Products. I worked in the Industrial Products Sales Group from November 2011 through January 2014 as Assistant Vice President and then as Vice President. I then worked in the Agricultural Products Sales Group as Group Vice President from February 2014 through August 2017. I assumed my current position as Group Vice President, Industrial Products in August 2017.

Our Industrial Products group works with customers who move a host of industrial commodities, including crude oil and refined petroleum products, cement and aggregates, and construction and forest products. BNSF's Agricultural Products group works with customers who move commodities like corn, wheat and other field crops, bulk foods like seeds and potato flakes, fertilizers, ethanol, and fresh foods like apples and potatoes.

Prior to joining BNSF, I spent 25 years working for various companies that shipped grain. From 1983 to 1997, I was employed by the Continental Grain Company ("CGC") and assumed roles with increasing responsibility until I became Vice President, North American Wheat for CGC. From 1997 to 2004, I was employed by Bartlett Grain Company, first as Executive Vice President, Merchandising, with responsibility for all company grain trading, and then as President of Bartlett Grain, LLC. From 2004 to March 2008, I was the Senior Group Manager at the Scoular Company, where I had responsibilities for the company's grain-in-a-box Non-Vessel Operating Common Carrier (NVOCC) group, which included rail options.

I understand that the Surface Transportation Board ("STB") is considering changes to its existing market dominance standards that would streamline the assessment of competition facing railroads in particular circumstances. BNSF submitted opening comments in this proceeding on

November 12, 2019. I am submitting this verified statement in support of BNSF's comments and to respond to certain opening comments submitted by others in this proceeding.¹ In this statement, I describe why the STB should proceed carefully in any simplification of the market dominance analysis given the complexity of transportation markets in which BNSF participates and the pervasive competition BNSF faces for its services, including extensive modal, product, and geographic competition.

Certain shippers seem to suggest in their opening comments that the STB could pursue significant simplification of the market dominance inquiry without worrying about the effect on rail markets. As noted in BNSF's opening comments, a streamlined approach must avoid improper regulatory interference in well-functioning transportation markets through overly simplistic assumptions and procedures. I further explain that movement distance and shipper size are important factors in assessing competitive pressure created by other transportation modes and I respond to a number of comments that seek to minimize and understate the importance and extent of truck competition. Finally, I explain that, in addition to barge competition, the existence of pipeline competition also exerts competitive pressure on BNSF's rates.

2. BNSF competes extensively with other transportation modes to expand our traffic.

A major focus of BNSF's commercial strategy is to strengthen and expand our business by offering rail rates that are competitive in the market. By far, the majority of BNSF's traffic is competitive traffic, and BNSF gains and retains this traffic by competing with transportation modes like trucks, barges and pipelines – competitive modes that restrain BNSF's pricing and require us to develop innovative service offerings to effectively compete.

As an example, in our opening comments, BNSF described our use of a unit train product in the cement market, which trucks have traditionally dominated. Of the 96 million tons of cement consumed in the U.S. in 2018, the Association of American Railroads' Market Share Report shows only 25% moved by rail. BNSF explained that our cement unit train service to

¹ On June 26, 2014, I provided a verified statement to the STB in support of BNSF's comments in Docket No. EP 665 (Sub-No. 1), *Rail Transportation of Grain, Rate Regulation Review*, highlighting that BNSF faces pervasive competition in the grain markets that constrain BNSF's rail pricing. The verified statement I submit today includes updated information about the agricultural markets BNSF serves, as well as current information about the industrial products markets we serve.

Sioux Falls market has provided a competitive sourcing option to locally-trucked cement. In addition, BNSF provides a unit train product for a movement of cement over 131 miles from Minnequa to Irondale, CO. Here, the customer made a significant investment in a storage facility for the cement. I discuss the cement market further below in the context of geographic competition.

BNSF has likewise successfully expanded our competitive business by offering unit train service to compete with trucks for transportation of aggregate in California – a new geographic market for BNSF. This is another commodity that has traditionally been transported by truck, given that aggregates used in highway, residential and non-residential construction are readily available within truck distance in almost all areas in the U.S. However, BNSF has used the economics of unit train rail service to provide shippers with a competitive option to truck in certain geographic markets. Because unit trains can move up to 13,000 tons of aggregates at one time, shippers can serve their markets with more tonnage and speed than the truck mode offers.

We also compete with barge. BNSF noted in our opening comments that our scrap steel unit train product provided a Kansas City shipper a competitive option to access markets in Arkansas that were being served with scrap from Houston, Texas via barge. The shipper benefited by accessing a new market and the receiver benefited with access to another source of scrap steel.

BNSF has also successfully used transload operations to expand its competitive business. Indeed, in many cases it is not possible to assess the competition that BNSF faces by looking only at alternatives to the rail portion of a particular movement, due to the extensive and increasing use of transload operations in movements involving multiple transportation modes.

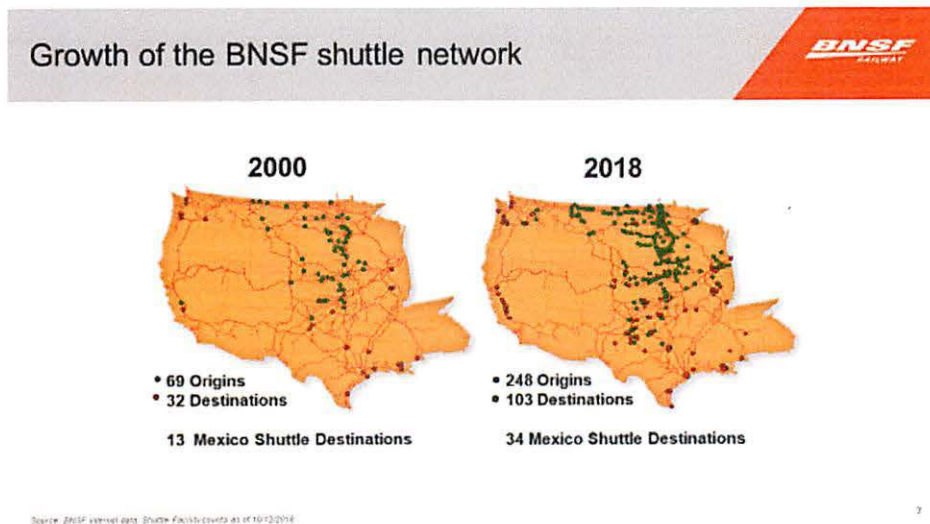
Take the example of bentonite clay. BNSF ships bentonite clay by rail from Wyoming to Midland, Texas, where oil and gas sector companies transload the clay into bags for furtherance by truck to oil and gas wells located in the Permian Basin of western Texas and southeastern New Mexico where it is often used in the drilling process. These rail-to-truck movements come under competitive pressure by clay originating in Mexico and moving entirely by truck to destinations in the Permian Basin.

BNSF has also moved plastics products by rail car that are then transloaded into trucks and moved an additional 100 to 2,000 miles for delivery in order to meet transit time or product availability demands.

3. Shippers often choose to site their facilities directly on BNSF lines to take advantage of BNSF's competitive service.

As BNSF noted in our opening comments, shippers often choose to locate new facilities or invest in expanding facilities located exclusively on BNSF lines – not because we have market power, but because we offer a highly competitive service. The expanding use of our grain shuttle service by BNSF's grain shippers provides a notable example of shippers' decisions to invest in facilities located on BNSF's lines. We have led the rail industry for over twenty years in offering efficient, low-cost rail transportation services for grain shipments. As illustrated in Figure 1 below, many grain shippers have moved production of their grain to build large, efficient grain elevators located on BNSF lines, so that they can take advantage of our shuttle service.²

Figure 1



Shippers of commodities such as crushed stone, construction sand, and gravel have also decided to locate new facilities on BNSF rail lines for the purpose of converting truck share to rail. As BNSF noted in its opening comments, just in the period of 2015-2018, shippers and

² BNSF presented figures similar to those used in this statement in live testimony to the STB on June 10, 2015 in Docket No. EP 665 (Sub-No. 1). BNSF has updated the Figures to reflect more current information.

receivers have invested nearly \$15 billion in 450 new or expanded facilities on BNSF. That included a large sheet steel producer electing in 2017 to locate, after an extensive review of site locations with various modal service profiles, at a BNSF solely-served location. That same producer now plans new investments to double the production at its facility.

This year, a BNSF scrap metals customer is opening a large facility at a rail location solely served by BNSF in order to compete head-to-head with barged scrap shipments into numerous steel mills around the country. Additionally, a significant number of aggregate shippers have spent and continue to invest tens of millions of dollars to locate facilities on BNSF lines in Texas and Oklahoma to compete with truck, vessel, and barge service. A similar pattern of investment in BNSF-served facilities occurs in the cement area, including new production sites and terminal operations.

4. BNSF faces extensive geographic and product competition.

My statement has until now focused on direct competition that BNSF faces from other modes of transportation to move a product between a particular origin and a particular destination. But this is not the only competitive pressure that BNSF faces. In fact, in many markets, BNSF faces very strong geographic and product competition. That is why BNSF suggested in its opening comments in this proceeding that the STB consider adding “absence of product and geographic competition” as an additional prima facie factor for the streamlined market dominance test. As a former grain shipper, I am confident that a knowledgeable shipper representative would be in a position to certify to an absence of product and geographic competition.

The best example of geographic competition that BNSF faces involves our movement of grains, where we are constrained by strong competition from the availability of different transportation providers, different domestic market destinations and international markets. A clear example of effective product competition involves the increasing demand for and use of natural gas to generate electricity, which constrains rates for rail transportation of coal. I briefly describe each of these competitive forces below.

A. Geographic Competition

As noted above, I have worked in the grain industry for much of my career. BNSF's agricultural products business clearly exhibits the prevalence and importance of competitive forces and the broad range and diversity of those competitive forces. Grain transportation has been a significant part of the business of BNSF and its predecessors. BNSF's rail lines traverse the fertile northern plains and the Corn Belt and we serve a vast number of grain elevators and a range of end users, including domestic grain processors, grain terminals and export facilities. We make our grain shipments in single cars, multiple car loads, unit trains that move back and forth between particular origins and destinations, and shuttle trains.

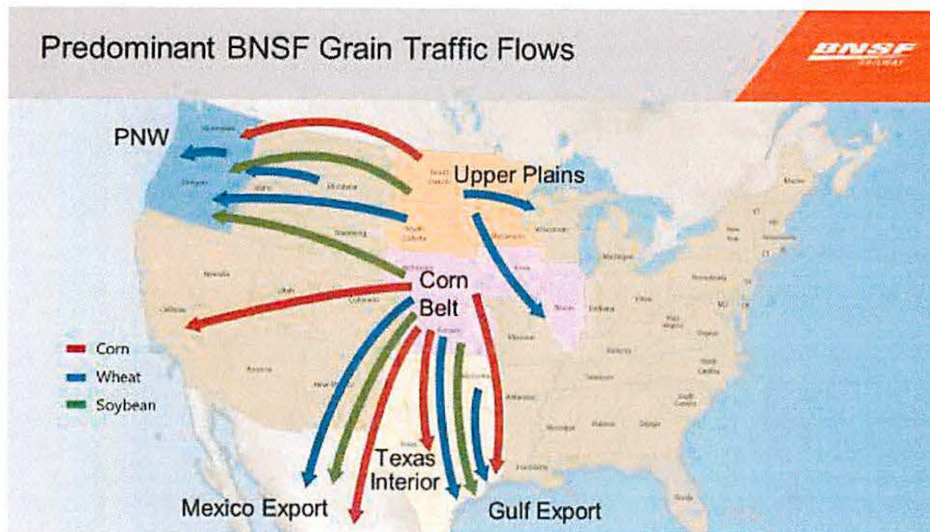
BNSF's shuttle train program illustrates the extent of our response to market forces and how we strategically and proactively seek ways to meet our grain shippers' needs. Shuttle trains are high-capacity trains particularly well suited to export grain markets. Historically, grain shipments were made in single-car lots. Beginning in 1996, BNSF established a shuttle train program that encouraged, through new tariffs and incentive payments, more efficient shipments in larger car lots and ultimately in shuttle trains that consist of 110 or more cars. As noted previously, BNSF's shuttle train program has been very attractive to grain producers, who have chosen to locate an increasing number of elevator facilities on BNSF's network to take advantage of the program. BNSF's shuttle train program has led to more efficient and lower-cost grain transportation and has given grain producers increasing access to export grain markets.

BNSF transports grain destined for both export and domestic markets. Our export markets, which primarily involve wheat, corn and soybeans, tend to involve longer-haul and higher-volume shipments than our domestic markets. Most of our shuttle trains are destined to export markets. BNSF transports its domestic grain shipments – principally wheat and corn – to a large number of widely-dispersed destinations, such as feedlots, ethanol plants and processors, flour mills, and high-fructose corn syrup processors. As a result, truck competition for these domestic grain shipments is pervasive and very strong. BNSF's opening comments discussed the importance of truck competition generally in grain markets, given that virtually all grain transportation begins with a truck that moves the grain from the producer's origin to an elevator or to the ultimate end user. I noted these facts in my verified statement to the STB submitted on

June 26, 2014, in Docket No. EP 665 (Sub-No. 1), *Rail Transportation of Grain, Rate Regulation Review*, and these circumstances and perspectives remain true today.

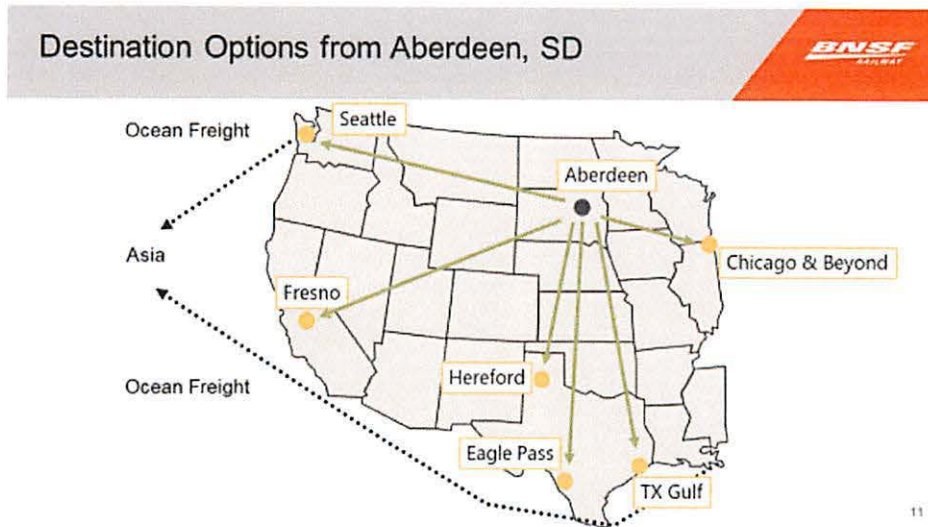
As a result of the extensive truck and barge competition offering a variety of domestic destinations and the range of export opportunities for grain, grain producers located near BNSF's lines have multiple options, as depicted on the map set out below in Figure 2.

Figure 2



More than half of our grain shipments move to export markets, including the Pacific Northwest ("PNW"), Mexico and the Gulf Coast, as shown in Figure 2. The wide range of destination options creates competitive pressure that constrains rates to market levels. If BNSF sets rates to a particular market destination too high, the producer can choose to move the product to different destinations. To illustrate, I set out in Figure 3 below an example of a grain producer in Aberdeen, SD.

Figure 3



This example shows six different destination options for a producer located in South Dakota. At each destination, prices for the product are set based on a range of market and competitive factors, including the transportation rates charged by different transportation suppliers. BNSF cannot demand above-market prices for any particular destination movement and expect to move the grain to that destination. We must account for the producer's range of destination options and the diverse competitive forces involved in each movement in setting its rates. And this reality is not limited to the South Dakota example. The same is true for shipments originating in Montana and other states – if BNSF rates are above-market, shipments will move via another carrier or mode to an alternate destination.

The strength of geographic competition created by international markets is also illustrated in Figure 4, which addresses competitive options for corn shippers.

Figure 4



Many corn producers in the Corn Belt are located near rivers with easy access to barges that can move the corn to the New Orleans export market. Because global grain markets can easily shift their purchases among export terminals or export regions, we must account for the competitive pressure created by those barges. This occurs even in areas where shippers may not have direct access to barges or where they choose to transport their grain to other non-barge served destinations. Thus, in the example depicted in Figure 4, corn would not move to the PNW if transportation rates made that corn too expensive relative to corn sold out of New Orleans and moved to New Orleans via barges. BNSF must constantly monitor global markets in setting rates to ensure that our shippers have viable outlets for their products. In particular, we are continuing to focus on export competition in the grain markets from non-U.S. sources and the impact of changes in international trade policies.

My discussion until now has focused on geographic competition in grain transportation markets. But it is important to keep in mind that geographic competition also is widespread in other commodity markets, as illustrated with the example of cement. For example, the Ash Grove Cement Company has a plant in Foreman, AR within a one-hour truck drive from Hope, AR, the receiving market. The Holcim cement plant in Ste. Genevieve, MO – more than six hours by truck from Hope, AR – competes with the closer Ash Grove production by transporting cement by rail to Hope, AR via BNSF and the Union Pacific Railroad. Holcim's state-of-the-art

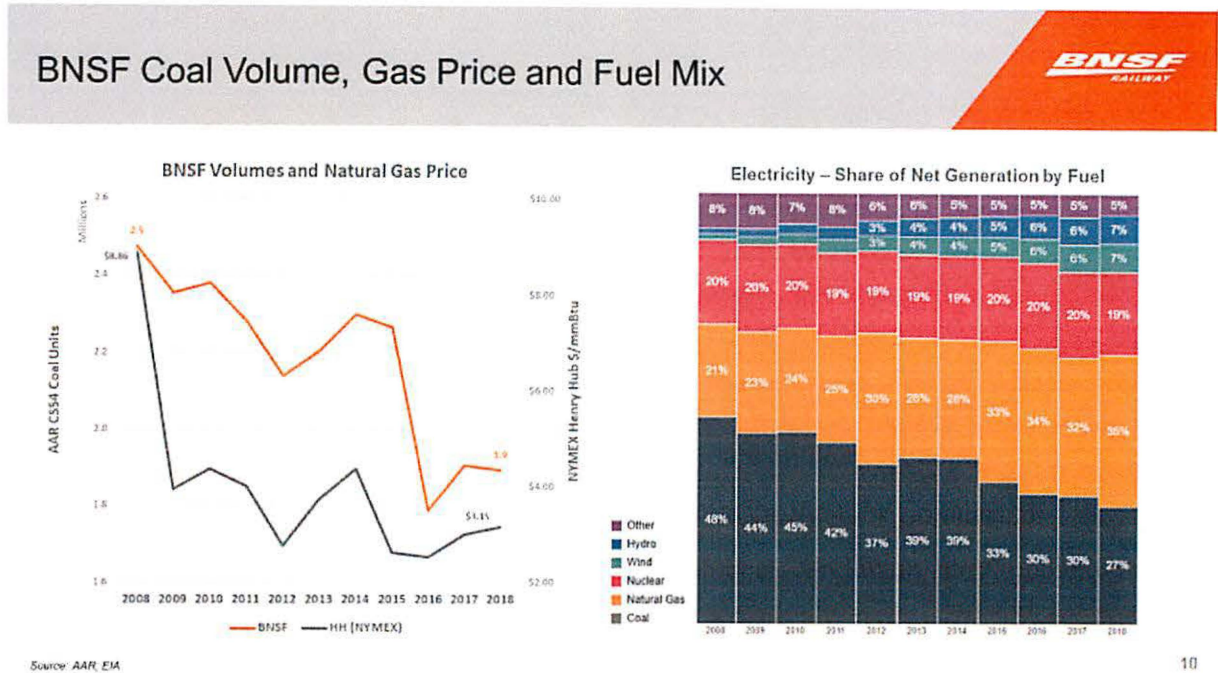
cement plant and the density provided with rail economics enables them to reach this market and provide a competitive sourcing option from a different geographic region.

B. Product Competition

A prominent example of product competition and its constraint on rail rates involves the availability of natural gas to generate electricity in competition with coal. Figure 5 below depicts the precipitous decline in natural gas prices over the last 10 years, along with the resulting significant loss in market share that coal generation has seen to gas plants. In order to retain coal volume, BNSF has even entered into deals with coal shippers that include a mechanism for coal rail rates to lower in response to falling gas prices. Put simply, abundant natural gas resources serve as a fundamental constraint on rail rates for coal movements.

My colleague Jill Mulligan recently testified before the STB in the Revenue Adequacy hearing held December 12-13, 2019, and explained Figure 5 as follows: "On the left side of this chart, you can see the precipitous decline in gas prices over the last 10 years and on the right, the resulting significant loss in market share that coal generation has seen to gas plants. . . . It is a punishing competitive environment. As long as the STB continues to ignore product and geographic competition, it is significantly handicapped in its understanding of the competitive markets BNSF participates in."

Figure 5



5. BNSF sets its rates based on market conditions.

BNSF recognizes that our success as a transportation provider depends on the success of our shippers in their markets. We therefore work extensively with our customers to understand their markets and to ensure that our pricing responds to market forces. We often adjust rates to account for changes in market conditions. For example, our sand shippers have recently faced a shrinking market in some areas, making it increasingly difficult for them to compete. We estimate currently that about 200 million tons of sand capacity exists for only 100 million tons of demand. Moreover, sand is increasingly available in areas close to where it is used, adding pricing pressure on our transportation rates. To meet this pressure and remain competitive, we adjusted rates that enabled customers to compete with new sources due to regional sand development in some geographic areas. As a result, our shipments – and their sales – increased.

In our agricultural business, we frequently adjust our rates and practices to accommodate changing market conditions. A recent example involves wheat shipments from North Central Texas to the Gulf of Mexico. In the late spring of 2019, a drought produced a spike in demand for wheat shipments to the Gulf. BNSF responded with changes to our shuttle program to ensure that our customers had access to the Gulf export markets.

Since BNSF relies heavily on market forces to set rates, the STB would introduce major distortions in the markets of our shippers if the STB were to intervene in competitive markets and artificially reduce transportation rates. Take the example of transportation rates for wheat to Gulf Coast destinations, discussed broadly above. Today, market forces determine where the wheat moves, whether to destinations such as the Gulf Coast, flour mills in the Eastern United States, California, or local nearby mills. Crop prices and other wider market characteristics, driven by international harvest supply and global consumption trends, are often more important than underlying rail rates. The STB should avoid sending false and inefficient market signals by interfering with market-based rail rates and changing the movement patterns of grain based on an overly narrow view of competition that exists in transportation markets.

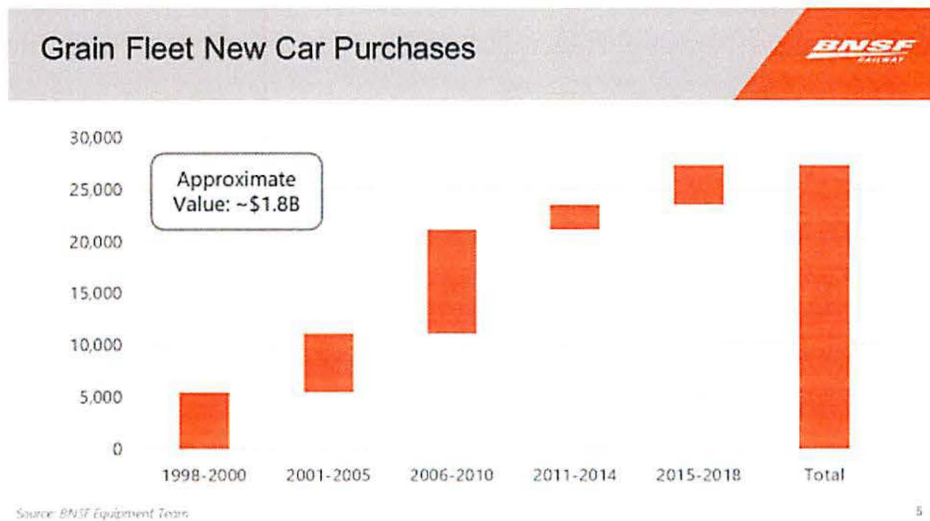
Another distortion that would result from artificially reducing rates below the level that would result from market forces involves BNSF's capital investments. We continue to make substantial investments to increase the competitiveness of our service offerings and to ensure that we have the resources to meet growth opportunities. BNSF invests each year to maintain and expand our linehaul and terminal capacity. Since 2000, we have made nearly \$65 billion in capital investments. Our 2018 and 2019 line expansion investments have focused on both our northern and southern transcontinental lines, as illustrated in Figure 6 below.

Figure 6



In the area of grain transportation alone, we have added over 25,000 new cars since 1998, as illustrated in Figure 7 below.

Figure 7



BNSF likewise invests in equipment supporting industrial product movements. For example, BNSF has 8,500 cars supporting steel; that represents over \$650,000,000 in replacement value for owned cars and about \$20,000,000 in annual rental costs. Most recently, BNSF added 150 coil cars to the fleet. At any given point a number of those cars go into storage because of market fluctuations, and in the last ten years, at various points as many as 2,500 cars have been stored.

We base these investment decisions on our assessment of the market. Any STB intervention in competitive rail markets would undermine our decision-making and distort our investment decisions. Ultimately, this would adversely impact all shippers that rely on efficient rail transportation service.

- 6. Distance and shipper size are important factors in assessing direct competitive pressure.**
 - A. BNSF's experience shows that the STB should not consider any distance limit less than 500 miles for any commodity.**

I understand that the STB has proposed to limit the use of any streamlined market dominance approach to movements that exceed 500 highway miles between the origin and destination. I agree with the premise underlying this approach that strong truck competition exists for such movements. As BNSF discussed in detail in our opening comments, the STB should not consider any distance limit less than 500 miles for any commodity. This is supported by the U.S. Department of Transportation (USDOT) Transportation Statistics Annual Report for 2018, which found that “[t]rucks...remain the primary mode for shipments moved less than 750 miles,” well above the STB’s proposed threshold.³

In addition to what is evidenced in the USDOT report, BNSF also sees strong truck competition for movements that significantly exceed 500 highway miles. For example, BNSF faces substantial competition from flatbed trucks serving steel and forest products markets. Flatbed trucks in these markets are able to minimize the cost of “empty positioning” miles; this allows flatbed trucks to compete with rail and other modes of transport well beyond 500 miles.

³ U.S. Department of Transportation, Bureau of Transportation Statistics, *Transportation Statistics Annual Report 2018* (Washington, DC: 2018). <https://doi.org/10.21949/1502596>

This is demonstrated in the structural steel beams market, where flatbed trucks move the product 1,050 miles—more than double the mileage limit proposed by the STB—from Indiana to Dallas, Texas. From there, flatbed trucks competitively move structural steel from Midlothian, Texas to Southern California. Trucks then can move steel coils from Southern California to pipe producers in the Pacific Northwest, and from there transport lumber to the Dallas–Fort Worth metroplex. Given the considerable concentration of suppliers providing finishing services for steel pipe in the Gulf, a large supply of trucks return empty in Houston. This enables trucks to compete for outbound loads of processed pipe to the Bakken in North Dakota for drilling. All of the above-mentioned distances are more than double the proposed 500-highway-mile threshold.

I also understand that the STB has asked whether the mileage threshold should vary by commodity group, using the example of comments submitted to the STB in 2016 by the National Grain & Feed Association (“NGFA”) stating that “trucking generally becomes cost-competitive to rail only for agricultural movements of 200 miles or less.” NGFA echoed this in their opening comment in this proceeding, along with several other shipper parties.⁴

As I explained above, because truck transportation is so prevalent in grain markets, it would not make any sense to assume that trucks compete with railroads only over shorter distances. There are many examples of truck competition for our agricultural business for movements well over 200 miles. I previously gave the example of BNSF’s efforts to increase shuttle train traffic this past spring from North Central Texas to the Gulf. That market, which involves movement distances of over 400 miles, is dominated by truck movements. We had to make special changes to our existing rate structure to compete with trucks for that business and to provide a rail market for our grain shippers for movements to the Gulf. In addition, varying the mileage threshold by commodity group would run counter to the STB’s simplification goal and would require the STB to conduct a detailed initial review and ongoing management to set and appropriately update each mileage threshold.

⁴ The Portland Cement Association and Institute of Scrap Recycling Industries request the STB to implement a 200-mile threshold. Indorama, American Fuel & Petrochemical Manufacturers, and Steel Manufacturers Association support a 250-mile threshold.

In its opening comments in this proceeding, filed on November 12, 2019, Portland Cement Association asserted that “[s]hipping cement by truck long distances becomes impracticable far below 500 miles” and that “[i]n most cases, even shipping cement by rail is generally not economically viable beyond 300 miles.” As discussed above, BNSF’s experience in the cement market tells a very different story. We compete with trucks and transport significant volumes of cement by rail across a number of mileage distances. Contrary to Portland Cement Association’s claim, almost 70% of BNSF’s cement movements are over 300 miles. BNSF is also aware of cement truck movements greater than 200 miles (e.g., from Rapid City, South Dakota to Minot, North Dakota at a distance of 393 miles). Moreover, BNSF does not face competition in the cement market solely from trucks. For example, BNSF competes with cement barge lanes from St. Louis, Missouri to Minneapolis, Minnesota at a distance of 675 miles and from St. Louis, Missouri to Houston, Texas at a distance of 1,437 miles.

B. BNSF’s experience supports the addition of a “small shipper” screen.

In BNSF’s opening comments, we suggested that the STB should only allow small shippers to use the streamlined approach proposed by the STB for the market dominance inquiry. Our experience shows that the size of a particular shipper, in terms of the number of carloads shipped per year, is an important factor in assessing market constraints on the rates we charge. Most of our revenues derive from a relatively small number of shippers. For example, our top 10 agricultural shippers accounted for 55% of our agricultural product movements in 2018.

Large shippers with many shipments on BNSF’s lines have multiple ways to exercise market power and constrain the rates we charge. Large shippers can more easily shift their transportation purchases among different origins or destinations to resist increases in transportation rates that are inconsistent with the market. In addition, larger shippers often have longer term commercial relationships with their transportation suppliers and they can therefore monitor pricing and price changes more closely than small shippers and respond to price changes in commercial discussions and negotiations.

In my experience, “small shippers” would include those moving fewer than 1,000 carloads a year on BNSF. Once a shipper’s volume exceeds 1,000 carloads, the shipper’s leverage with a rail carrier changes and it becomes more complicated to assess the shipper’s

competitive options. In my opinion, any market dominance inquiry involving a “large” shipper would be more complex and less easy to determine via the streamlined approach proposed by the STB. Furthermore, as compared to a small shipper, the implications to the broader transportation market are greater if the STB's application of the market dominance streamlined approach came to an incorrect conclusion with respect to a large shipper.

7. Build-out competition serves as a real constraint on BNSF's rates.

Certain shippers and their trade associations – including MillerCoors, the Steel Manufacturers Association, and the Coalition Associations – requested in opening comments for the STB to remove or further qualify the “no practical build-out alternative” in the list of factors proposed by the STB as necessary to make a prima facie showing of market dominance. The Coalition Associations argue that “build-outs are extremely costly, making them unlikely to provide effective competition except in very rare circumstances.” Coalition Associations Opening Comments at 17. In BNSF's experience, however, build-out competition often constrains our rates as shippers utilize the possibility of a build-out in rate negotiations.

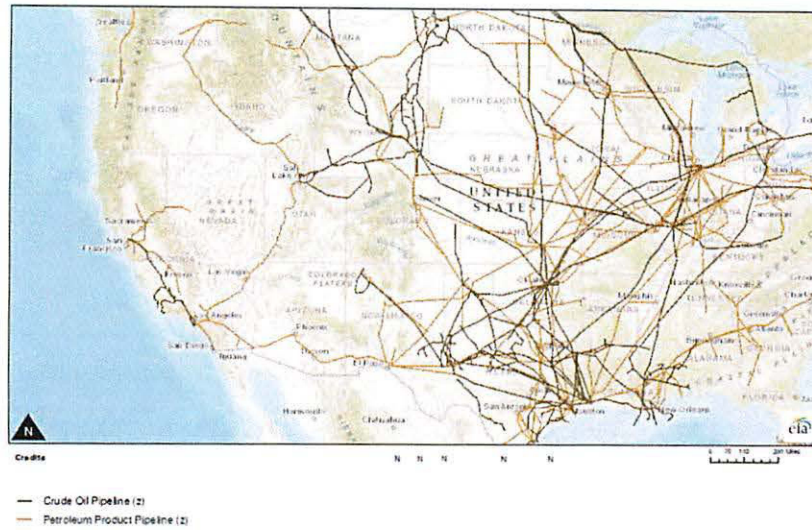
8. In addition to barge competition, the existence of pipeline competition also exerts competitive pressure on BNSF's rates.

I understand that the STB proposed “no barge competition” as one of the factors for a prima facie showing of market dominance. The STB should also add “no pipeline competition” and “no potential for pipeline build-out competition” to this list. As I discussed above, the existence of pipeline competition – like truck and barge competition – provides strong competitive constraints on BNSF's rates. Products such as crude oil, propane, and other refined petroleum products often move by pipeline or rail.

This is illustrated by BNSF's historical movement of unit trains of propane from the Marcellus Basin in Hanna, Ohio to Conway, Kansas. In the second quarter of 2019, the completion of the Mariner East 2 pipeline opened an outlet to export via the East Coast at Marcus Hook, Pennsylvania, and the BNSF unit trains have stopped.

The map I include below in Figure 8 from the U.S. Energy Mapping System shows crude oil and petroleum product pipelines throughout the Western U.S. You can access this map and apply additional layers (including rail lines) here: <https://www.eia.gov/state/maps.php>

Figure 8



9. Conclusion

BNSF strongly believes that the STB should proceed carefully in any simplification of the market dominance standard given the complexity of transportation markets in which BNSF participates and the pervasive competition BNSF faces for its services, including extensive modal (particularly from trucks), product, and geographic competition. Any streamlined approach must avoid improper regulatory interference in well-functioning markets.

VERIFICATION

I, John H. Miller, Group Vice President, Industrial Products at BNSF Railway Company, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement. Executed on January 10, 2020.



John H. Miller