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APR 12 2011

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ENTERED
Office of Proceedings

APR 13 2011

Part of
Public Record

Re: STB Ex Parte No. 705, *Competition in the Railroad Industry*

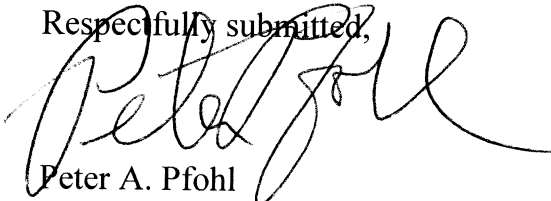
Dear Ms. Brown:

Enclosed for filing please in the above-referenced proceeding, please find an executed original and ten (10) copies of the Comments of the Western Coal Traffic League.

Also enclosed are three copies of a compact disc containing the filing.

Please date stamp the extra copy of this cover letter and the enclosed duplicate filing and return it to our messenger. Thank you for your attention to this matter.

Respectfully submitted,



Peter A. Pfohl
An Attorney for
Western Coal Traffic League

Enclosures

229258

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

APR 12 2011

RECEIVED

COMPETITION IN THE
RAILROAD INDUSTRY

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STB Ex Parte No. 705

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APR 13 2011

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Public Record**

COMMENTS OF THE WESTERN COAL TRAFFIC LEAGUE

WESTERN COAL TRAFFIC LEAGUE

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

COMPETITION IN THE
RAILROAD INDUSTRY

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STB Ex Parte No. 705

COMMENTS OF THE WESTERN COAL TRAFFIC LEAGUE

PREFACE

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

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

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**EX PARTE NO. 705
COMPETITION IN THE RAILROAD INDUSTRY**

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

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

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

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

ABOUT WCTL

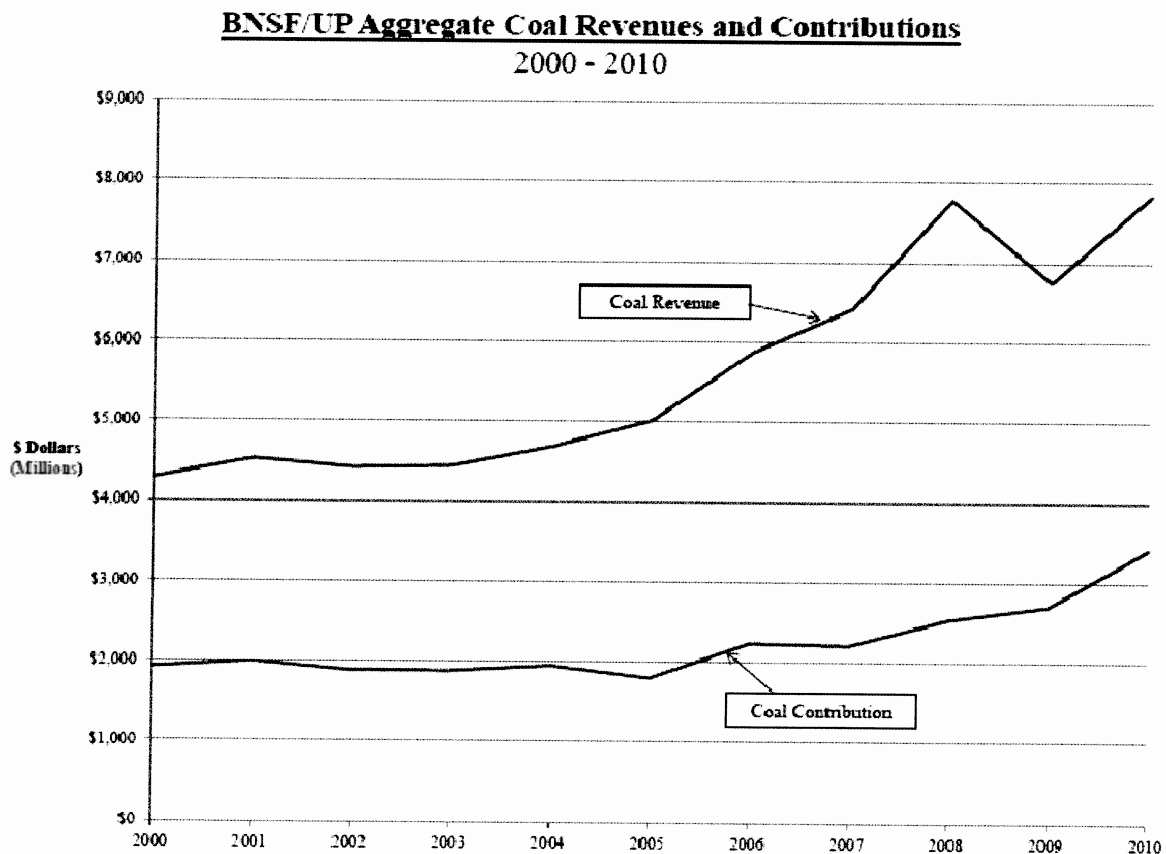
WCTL is a voluntary association whose membership is composed exclusively of organizations which purchase and transport coal from origins west of the Mississippi River. WCTL members collectively consume more than 170 million tons of western coal annually nearly all of which is moved by rail. Our members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

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

THE TRANSPORTATION OF COAL BY RAIL IN THE WEST

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

Chart I



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

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

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

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

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

RAILROAD COMPETITION IN THE WEST–1974-1984

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

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

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

Chart II

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

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

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

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

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

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

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

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

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

RAILROAD COMPETITION IN THE WEST 1984 - 2004

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

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

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

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

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

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

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

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

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

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

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

intended to increase consumer prices.” (UP/SP Merger, Fin. Docket No. 32760, V.S. of George Borts, p. 4)

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“The conditions in this market are conducive to market sharing and tacit acceptance of rate increases by the carriers.” (UP/SP Merger, Fin. Docket No. 32760, V.S. of George Borts, p. 21).

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

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

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

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

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

take place here, can also facilitate tacit collusion. Nevertheless, other important factors indicate that these carriers [BNSF and UP] are more likely to compete than tacitly collude. One significant factor here is the heterogeneity of rail service, which would make it very difficult to maintain a tacitly agreed rate level.

Another factor making tacit collusion unlikely is the secrecy about rail price and service offerings that now characterizes the rail industry. Contracts between railroads and shippers for major movements are now the rule, and railroads are no longer required to file public tariffs for the remainder of their traffic. Contracts often incorporate detailed specifications for a wide variety of service aspects. Confidentiality clauses in those contracts effectively deter collusive action because information about these competitive actions is shielded from competitors.

The significant economies of density and of scope exhibited by railroads also make tacit collusion less likely.... Given all these factors, we do not think that tacit collusion is a likely outcome for this traffic. (UP/SP Merger, 1 S.T.B. 233, 570) (emphasis supplied).

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

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

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

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

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

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

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

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

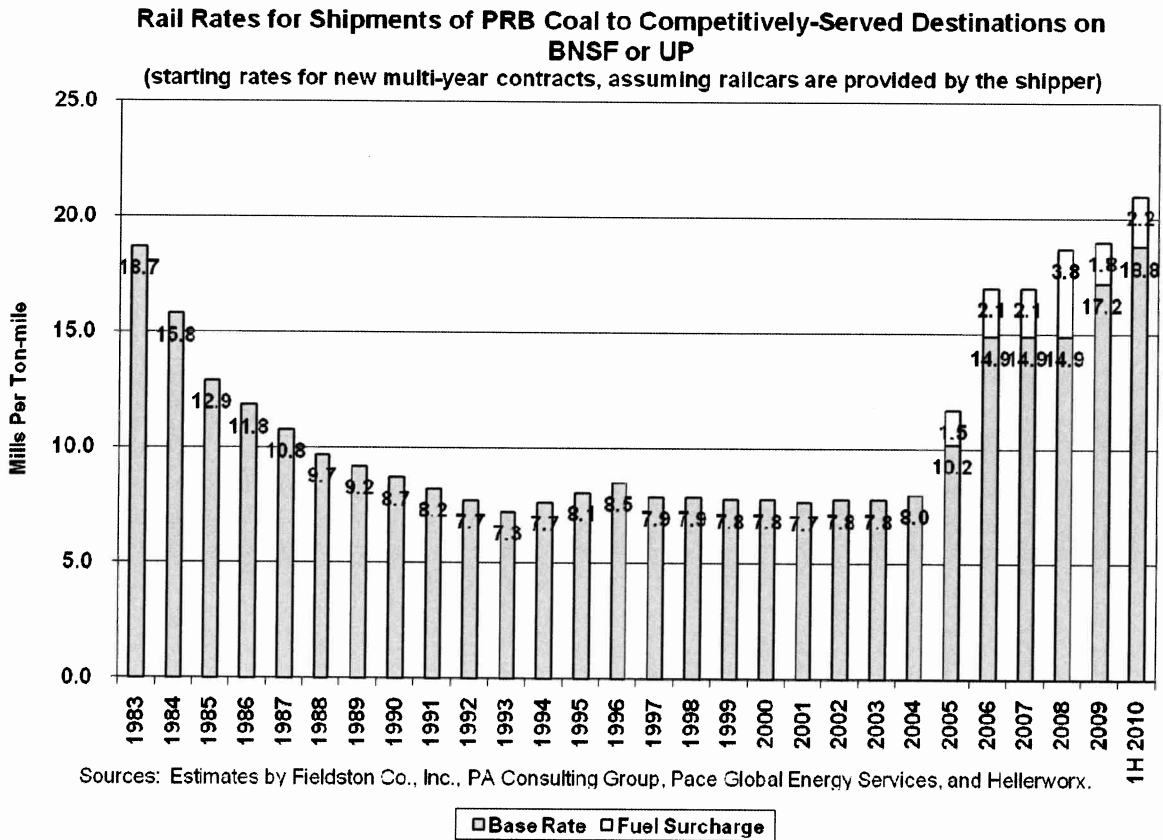
UP was still so offering, and as a consequence in 2003, after BNSF's promulgation of No. 90068, UP quickly captured the contract business of our member, OPPD, a former BN customer. Thereafter, BNSF itself immediately resumed contracting for coal traffic and secured new contracts with other former UP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

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

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

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

Chart III

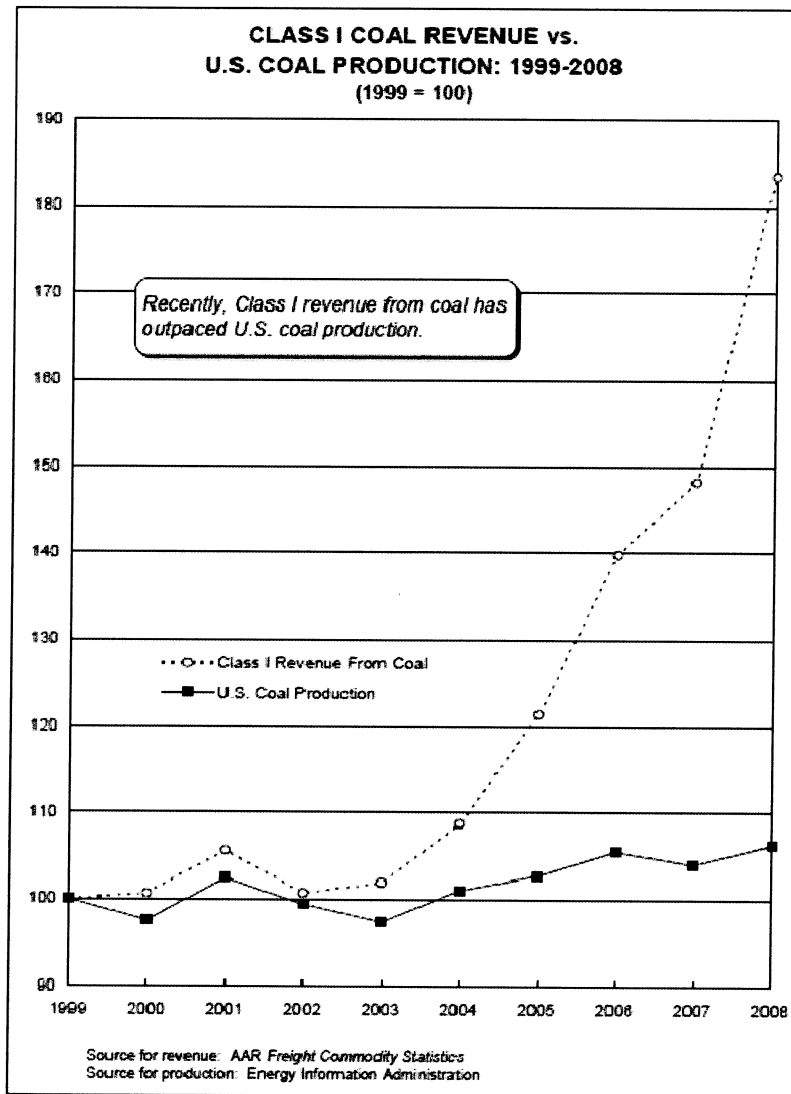


(Source: American Coal Council’s Implementing Fuel Flexibility Strategies Conference, July 20-21, 2010, Chicago, Presentation of Jamie Heller, “The Market for Fuel & Transportation.”)

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

Chart IV

The Rail Transportation of Coal - Volume 11



Association of American Railroads

Page 39

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

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

Chart V

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

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

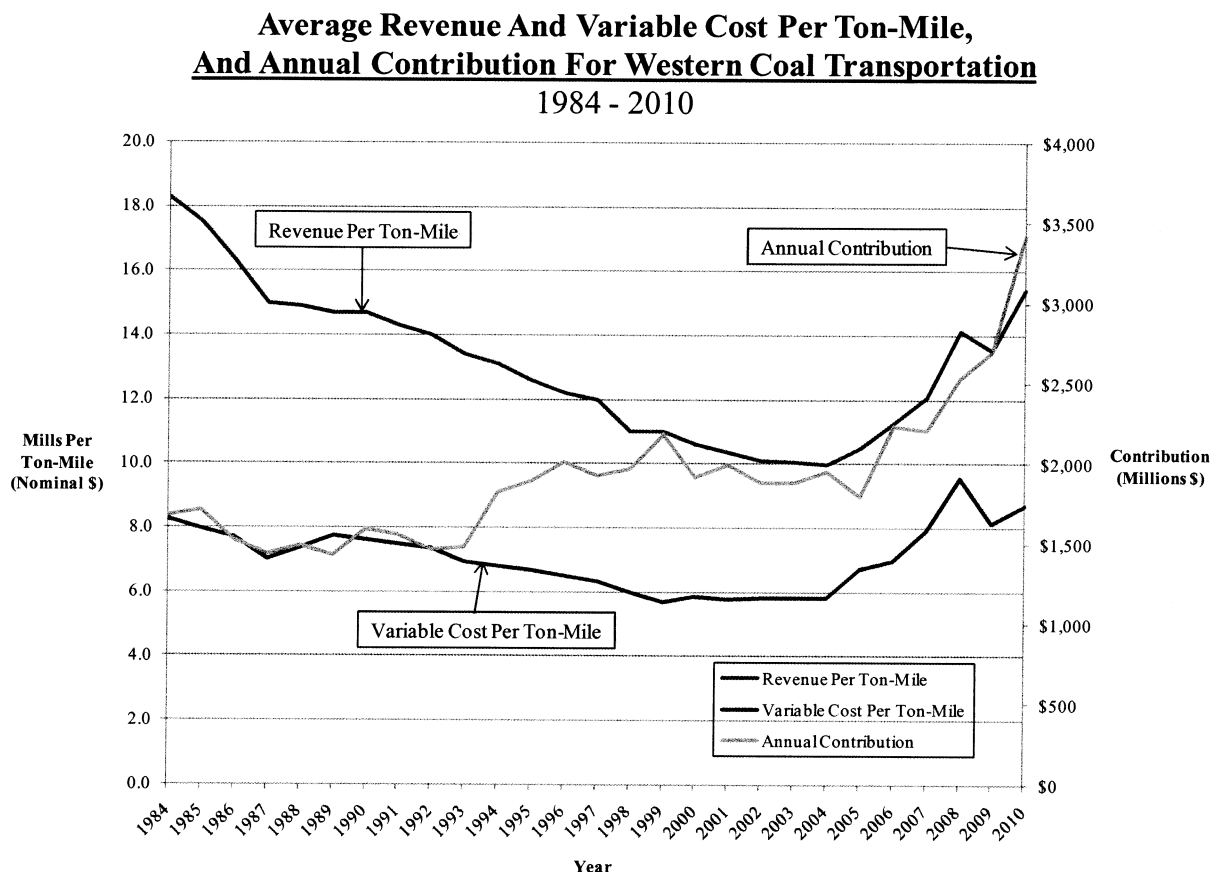
In recent STB hearings, Professor Willig has argued that the enormous increases in rail prices which began in 2004 were offset by increasing costs:

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

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

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

Chart VI

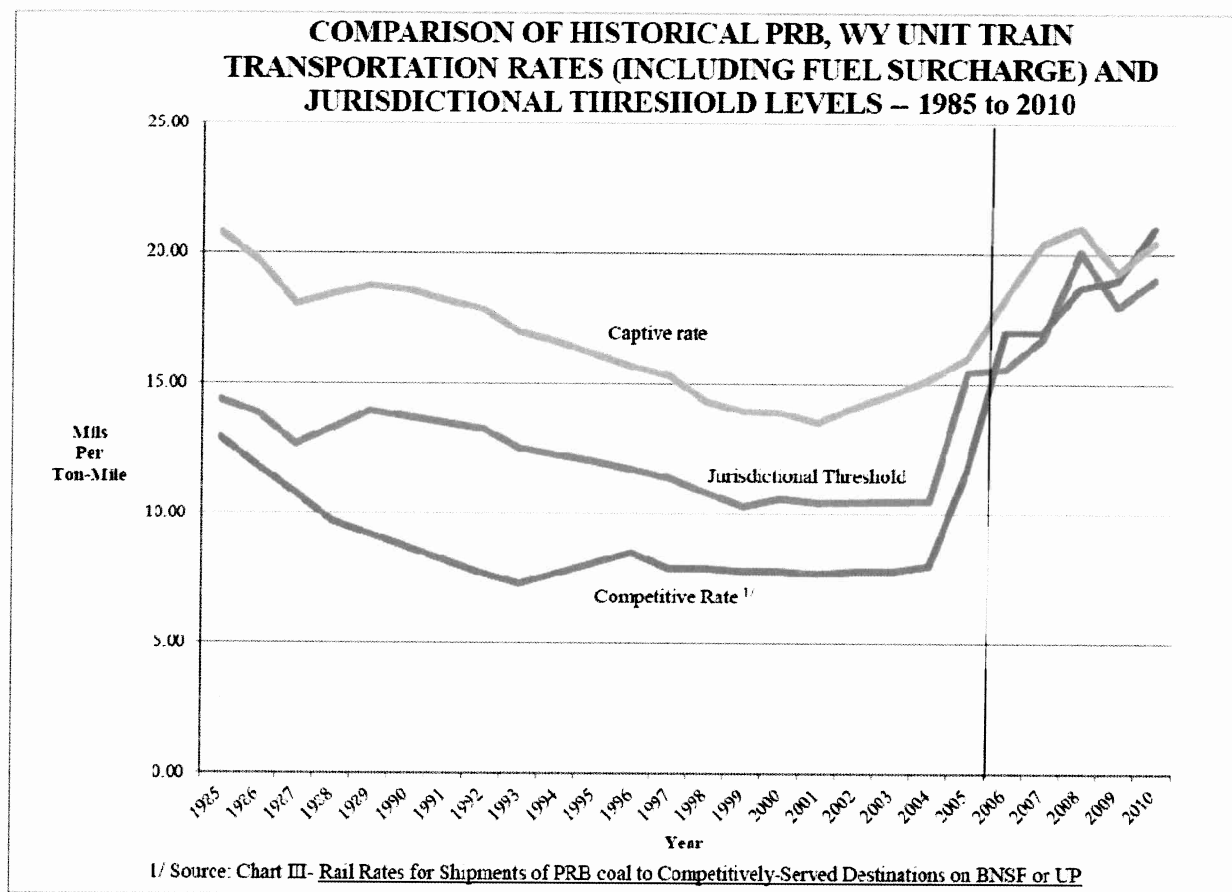


(Source: L. E. Peabody & Associates, Inc.)

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

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

Chart VII



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

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

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

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

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

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

MARKET DOMINANCE REVISION

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

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

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

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

CONCLUSION

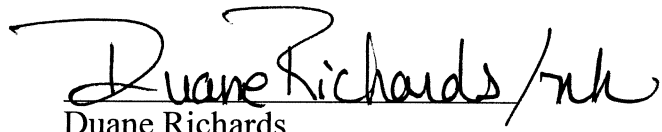
While, in some quarters, coal is in disfavor today, coal is nonetheless the bedrock of our nation’s energy supply and coal will so remain for the foreseeable future,

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

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

VERIFICATION

I, Duane Richards, verify that I have read the foregoing Statement, know the contents thereof, and that the same are true as stated to the best of my knowledge, information and belief. Further, I certify that I am qualified and authorized to file this statement.


Duane Richards

Executed on April th 11, 2011

Exhibit 1

WCTL Membership

Ameren Energy Fuels & Services

Arizona Electric Power Cooperative

Central Louisiana Electric Company

City of Austin, Texas

CPS Energy

Entergy Services, Inc.

Fayette Power Project

Kansas City Power & Light

MidAmerican Energy Company

Minnesota Power

Nebraska Public Power District

Omaha Public Power District

Texas Municipal Power Agency

Western Farmers Electric Cooperative

Western Fuels Association, Inc.

Wisconsin Public Service Corp.

Xcel Energy, Inc.

Exhibit 2

Representative Line Construction Projects

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

Exhibit 3



Energy

Circular 111 Overview

Simplified SPRB Coal Pricing

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

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

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

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

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

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

VERIFIED STATEMENT

Frederick R. Warren-Boulton

Kenneth C. Baseman

I. Qualifications

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

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

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

II. Assignment

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

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

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

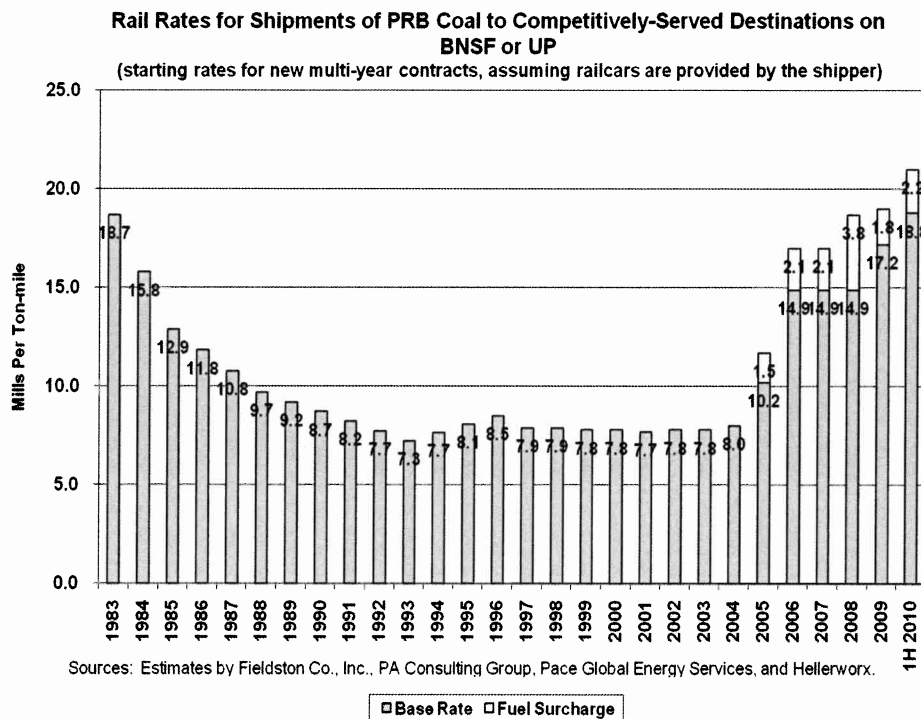
individual customers are large enough (or their orders are not “lumpy” enough) to trigger “cheating” just to get their business,¹ and where the railroads’ behavior on one aspect of a transaction (e.g. contract length) can significantly change the extent to which other characteristics of transactions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

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

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

Figure 1

PRB Rate Increases Affect PRB Reach



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

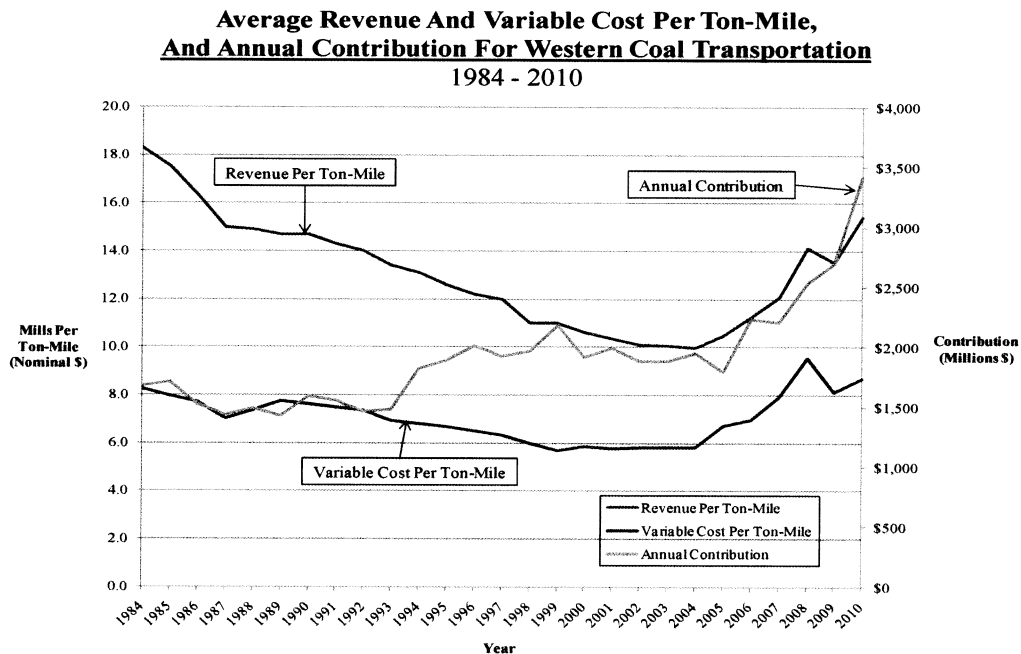
As Figure 1 shows, prices remained roughly stable between the early 1990s and 2004, even though the volume of shipments increased by 80% between 1990 and 2005 and by 50% between 1995 and 2005.³ Pre-2004 price levels were thus clearly sufficient to sustain the investment necessary for dramatic output increases.

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

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

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

Figure 2



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

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

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

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

There is strong evidence that in about 2004 BNSF and UP successfully colluded to raise prices. Mr. Richards provides a lengthy and very interesting summary of this history. From an economics perspective, the most interesting features of that history are⁷:

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

⁵ For example, see D.K. Osborne, "Cartel Problems," *American Economic Review*, 66:835-44 (1976)

⁶ Richards Statement at pp. 11-12.

⁷ Richards Statement at p. 13-21.

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

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

⁸ Richards Statement at p 18.

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

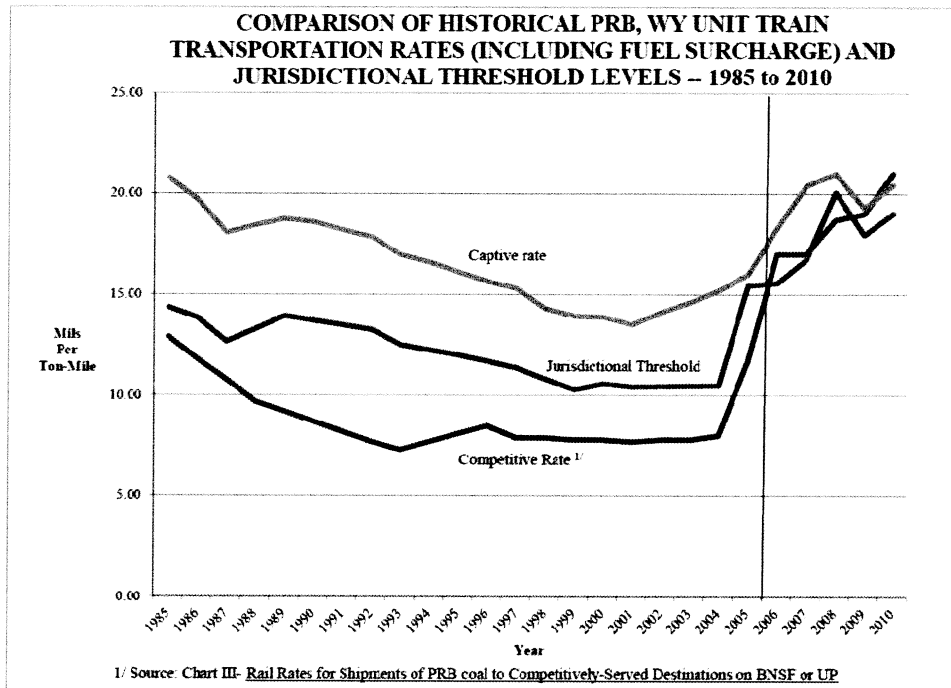
Mr. Richards also points out that, based on figures from a leading consultant, duopoly rates for so-called competitive shippers before 2004 were well below the STB’s 180% of variable cost threshold for market dominance, and were typically about one-half the level of captive rates, but, as shown in Figure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

⁹ FACTSET callstreet, March 11, 2009, analysts’ call with Matthew Rose, pp. 9-10.

¹⁰ Richards Statement, pp. 20-21.

¹¹ Figure 3 is taken from research by L.E. Peabody and the information shown in figure 2. Figure 3 also appears in the accompanying statement of Duane Richards.

Figure 3



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

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

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

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

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

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

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

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

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

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

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

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

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

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

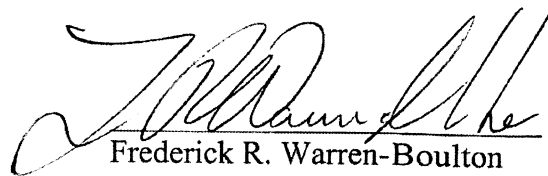
The history of “bottleneck” access in the PRB also does not provide much hope for such measures. The STB’s “Bottleneck” decision in 1996 established that, if a customer could get a “contract first” on the upstream “competitive” market segment, then the customer could then seek to obtain a regulated bottleneck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

V. Conclusion

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

VERIFICATION

I, Frederick R. Warren-Boulton, verify that I have read the foregoing Statement, know the contents thereof, and that the same are true as stated to the best of my knowledge, information and belief. Further, I certify that I am qualified and authorized to file this statement.

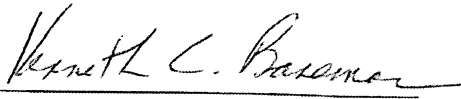


Frederick R. Warren-Boulton

Executed on April 11, 2011

VERIFICATION

I, Kenneth C. Baseman, verify that I have read the foregoing Statement, know the contents thereof, and that the same are true as stated to the best of my knowledge, information and belief. Further, I certify that I am qualified and authorized to file this statement.


Kenneth C. Baseman

Executed on April 11, 2011

EXHIBIT A



Microeconomic Consulting & Research Associates, Inc.

FREDERICK R. WARREN-BOULTON, Ph.D.

PRINCIPAL

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CURRICULUM VITAE

Education

- 1975 Ph.D., Economics, Princeton University
- 1969 M.A., Economics, Princeton University
- 1969 M.P.A., (Master of Public Affairs) Woodrow Wilson School of Public & International Affairs, Princeton University
- 1967 B.A., Economics, Yale University, *cum laude* with High Honors in Economics

Experience

Principal, MiCRA: Microeconomic Consulting and Research Associates, Inc.,
Washington, D.C.; August 1991 - present.

Visiting Lecturer of Public and International Affairs, Woodrow Wilson School of Public and International Affairs, Princeton University, Princeton, NJ; Spring Semester, 1991.

Resident Scholar, American Enterprise Institute for Public Policy Research, Washington, D.C.; May 1989 - April 1990, Adjunct Scholar from May 1990.

Senior Vice President, ICF Consulting Associates, Inc., Washington, D.C.; November 1989 - August 1991.

Research Associate Professor of Psychology, The American University, Washington, D.C.; September 1983 - 1990.

Deputy Assistant Attorney General for Economic Analysis, Antitrust Division, U.S. Department of Justice, Washington, D.C.; October 1985 - May 1989.

Director, Economic Policy Office, Antitrust Division, U.S. Department of Justice, Washington, D.C.; September 1983 - September 1985.

Research Associate, Center for the Study of American Business, Washington University in St. Louis; July 1978 - June 1985.

Associate Professor, Department of Economics, Washington University in St. Louis; July 1978 - June 1985. Chairman, Graduate Committee, 1978 - 1980. Chairman, Undergraduate Committee, 1980 - 1983.

Assistant Professor, Department of Economics, Washington University in St. Louis; September 1972 - June 1978.

Assistant in Instruction, Woodrow Wilson School of Public and International Affairs, Princeton University, Princeton, N.J.; 1969 - 1971.

Research Consultant, Ford Foundation, Kingston, Jamaica, W.I.; Summer 1969.

Fields Taught

Graduate: Industrial Organization, Economic Development and Planning, Microeconomic Theory, International Trade, International Finance, Economic Theories of Behavior, Applied Microeconomics.

Undergraduate: Government and Business, Industrial Organization, International Trade, International Finance, Economic Development, Intermediate Microeconomic Theory, Intermediate Macroeconomic Theory, Introductory Microeconomic Theory, Introductory Macroeconomic Theory.

Grants

National Science Foundation. Grant title: "Income Maximizing in Choice and Rate Effects," 1988 - 1991.

National Science Foundation. Grant title: "Application of Economic Theory to Operant Schedule Effects," 1985 - 1987.

National Science Foundation. Grant title: "Income and Choice," 1983 - 1985.

Professional Activities

Referee, *American Economic Review*, *The Bell Journal of Economics/Rand Journal*, *Economic Inquiry*, *Industrial Organization Review*, *Journal of Industrial*

Economics, Journal of Law and Economics, Journal of Political Economy, Quarterly Journal of Economics, Southern Economic Journal.

Member, Editorial Boards, *International Journal of the Economics of Business, Journal of Forensic Economics.*

Member, American Bar Association, American Economic Association, Southern Economic Association, Western Economic Association.

Languages

French, German

Publications

“From Structure to Effects: the Economics of Merger Control,” *Global Competition Review*, June 2008 with R.S. Khemani and R. Duplantis.

“On Loss Aversion in Capuchin Monkeys,” *Journal of the Experimental Analysis of Behavior*, 89 (March 2008) with A. Silberberg, P. Roma, M. Huntsberry, T. Sakagami, A. Ruggiero and S. Suomi.

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“Unilateral Price Effects: Staples and Office Depot,” in *The M&A Lawyer*, June 1998, Vol. 2, No. 3, with Serdar Dalkir. Available in revised form as “How Do You Know an Office Superstore? Staples and Office Depot,” on <http://www.antitrust.org/cases/>.

- “Resale Price Maintenance Reexamined: Monsanto v. Spray-Rite (1984),” in *The Antitrust Revolution: Economics, Competition and Policy*, John E. Kwoka and Lawrence J. White, eds.; Oxford University Press, third edition, 1999.
- “Exclusionary Behavior in the Market for Operating System Software: the Case of Microsoft,” in *Opening Networks to Competition: the Regulation and Pricing of Access*, David Gabel and David F. Weiman, eds.; Kluwer Academic Publishers, 1998, with Kenneth C. Baseman and Glenn A. Woroch.
- “Riding the Wave: Exclusionary Practices in Markets for Microprocessors Used in IBM-Compatible Personal Computers,” Conference and Festschrift in Honor of Merton J. Peck, Yale University, September 30, 1994, and *International Journal of the Economics of Business* 2-2 (July 1995), pp. 241-262, with Robert W. Wilson.
- “The Economics of Intellectual Property Protection for Software: The Proper Role for Copyright,” American Council on Interoperable Systems, Washington, D.C., June 1994, and *StandardView : ACM Perspectives on Standardization* 3-2 (June 1995), pp.68-78, with Kenneth C. Baseman and Glenn A. Woroch.
- “Microsoft Plays Hardball: Use of Nonlinear Pricing and Technical Incompatibility to Exclude Rivals in the Market for Operating Software,” *The Antitrust Bulletin* 40-2 (Summer 1995), pp.265-315, with Kenneth C. Baseman and Glenn F. Woroch.
- “Copyright Protection of Software Can Make Economic Sense,” *The Computer Lawyer*, 12 (February 1995), pp. 10, 18-28, with Kenneth C. Baseman and Glenn A. Woroch.
- “Exclusionary Practices in High-Technology Industries,” *The St. Louis Bar Journal*, 16 (Summer 1994), pp. 28-34.
- “Monsanto v. Spray-Rite: Resale Price Maintenance Reexamined,” in *The Antitrust Revolution: The Role of Economics*, John E. Kwoka and Lawrence J. White, eds.; Scott, Foresman and Company, Glenview, Illinois, second edition, 1994.
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State of Missouri, Office of the Public Counsel: Expert witness on electric utility rate structures, 1978.

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Education

- 1975 Ph.D. Candidate, Economics, Stanford University (M.A. plus two years additional course and seminar work required for admission to Ph.D. candidacy.)
- 1975 M.A., Economics, Stanford University
- 1971 B.A., Economics, *magna cum laude*, Carleton College

Experience

Mr. Baseman is a Principal of Microeconomic Consulting and Research Associates, Inc., (MicRA). He was a founder of the firm in 1991.

Prior to joining MicRA, Mr. Baseman was a vice president of ICF Consulting Associates and previously employed by the Antitrust Division of the U.S. Justice Department (1975-1981, 1983-

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1985) and by Economists, Inc. (1981-1983). In these positions, he developed expertise in a wide variety of industries, including: newspapers; telecommunications; computer software; cable television; crude oil markets; tires; numerous chemicals; cement; electric utilities; air conditioning; elevators; jet engines; and various aspects of the television industry, including program production, contractual licensing arrangements, music licensing, TV set manufacturing and R&D joint ventures.

As a private consultant, his work has been primarily focused on providing economic analysis for antitrust or regulatory issues. Mr. Baseman has special expertise in newspapers; he has been an expert witness or consultant on many of the most important antitrust cases or investigations. He has also played a major role in the development of the antitrust economics of exclusionary practices. He testified for LePages' in its successful and path-breaking lawsuit against 3M for exclusionary pricing. He also provided influential economic analysis in several other exclusionary practices cases, including the Microsoft cases, PMBR vs. BAR/BRI, and the FTC's investigation of Brunswick's market share discounts for stern drive marine engines.

Mr. Baseman has headed or (where indicated) shared lead responsibility for the following projects:

General Antitrust

- Preparation of an expert report, deposition testimony and trial testimony on behalf of LePage's regarding 3M's exclusionary practices in the home and office tape business. (LePage's vs. 3M).
- Expert report and deposition testimony on behalf of BoDeans in BoDeans vs. Norse Dairy Systems. BoDeans challenged Norse Dairy Systems exclusive contracts and its tie between equipment and consumables (cones and wafers).
- Expert report and deposition testimony on damages from the price-fixing of MCAA (monochloroacetic acid) on behalf of Hercules, Inc., a customer.
- Preparation of analysis presented to the FTC regarding the implications of Buzzi Inicem's (River Cement) acquisition of Dyckerhoff (Lone Star Cement) on competition in the U.S. Cement industry.
- Preparation (with Frederick Warren-Boulton) of analysis presented to DOJ regarding the effects of long term exclusive contracts for national radio advertising representation.
- Preparation and presentation to DOJ of analysis regarding Motorola's acquisition of Vertex.
- Preparation and presentation to the FTC of economic analysis regarding LaFarge's acquisition of Blue Circle's cement assets in the United States.

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- Preparation (along with Bruce Snapp and Frederick Warren-Boulton) of analysis presented to the German Cartel office on overcharges due to the German Cement cartel.
- Preparation of an expert report and deposition testimony regarding Softspikes' exclusionary behavior in the non-metal golf cleat business, and the damages suffered by Greenskeeper, a competitor.
- Expert reports and deposition testimony on market definition and market power in Z-Rock vs. Triathlon, an antitrust case involving the Spokane, Washington radio market.
- Preparation of a report (co-authored with Robert Willig and Hal Van Gieson) submitted to the FTC on the effects of Barnes & Noble's proposed acquisition of Ingram.
- Preparation of economic analysis regarding Outdoor Systems' acquisition of Gannett's Houston area billboard business.
- Preparation and presentation to DOJ's Antitrust Division of economic analysis regarding Outdoor Systems' acquisition of 3M's billboard business.
- Expert Declaration, expert report, and deposition testimony on behalf of Morris Communications in its antitrust lawsuit against the PGA Tour over the Tour's policies for press credentials.
- Preparation and presentation of economic analysis to the Antitrust Division about Michelin's acquisition of Uniroyal Goodrich.
- Preparation of a report, co-authored with Frederick Warren-Boulton, on the competitive effects of Microsoft's licensing practices for operating systems and complementary software.
- Preparation and presentation of "disruptive buyer" analysis to the FTC on behalf of Brunswick regarding Brunswick's partial equity interest in and supply contract with Tracker.
- Preparation of a report (co-authored with Steve Silberman) submitted to the FTC on the economic effects of Platinum's acquisition of Memco in the security software business.
- Economic testimony on behalf of Trane on market power, market definition, and vertical restraint issues in Tarrant v. Trane.
- Preparation and presentation of economic analysis to the FTC on St. Gobain's acquisition of Carborundum.
- Affidavit and deposition testimony on both liability and damages on behalf of PMBR in its

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antitrust litigation with BAR/BRI.

- Preparation and presentation of economic analysis to the FTC on First Data Corporation's proposed acquisition of Western Union.
- Preparation and presentation of economic analysis to the FTC on Illinois Tools Works' acquisition of Cyklop.
- Preparation of economic analysis submitted to the FTC on Brunswick's licensing and acquisition agreement with Perry-Austen.
- Preparation and presentation of economic analysis to the FTC concerning Witco's acquisition of DeSoto.
- Presentation of economic analysis and deposition testimony to the FTC involving a merger in the chemicals industry (Henkel Corp. acquisition of Parker Chemical).

Newspapers

- Expert report for DOJ's Antitrust Division for its challenge to the restructuring of the JOA in Charleston, West Virginia.
- Analysis presented on behalf of the Seattle Times to DOJ regarding its investigation of whether the Times was attempting to monopolize daily newspapers in Seattle.
- Expert reports and deposition testimony on behalf of the Washington Post, the Gazette newspapers and the Washington Suburban Press Network in the case filed against them by owners of the Montgomery and Prince George's Sentinel and St. Mary's Today.
- Deposition and trial testimony on behalf of the Antitrust Division in its lawsuit challenging the acquisition of the Northwest Arkansas Times by the owners of the Morning News of Northwest Arkansas.
- Preparation and presentation to the Antitrust Division of economic analysis concerning the acquisition of Community Publishers by the Arkansas Democrat-Gazette.
- Expert report and deposition testimony on behalf of a private challenge to Hearst's joint venture with and equity interest in Media News Group.
- Economic analysis of the acquisition of weekly or community newspapers by daily newspapers:

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- Gannett's acquisition of Hometown Communications, owner of community newspaper chains in the Detroit, Cincinnati and Lansing areas. Gannett owns the Lansing State Journal, and is partial owner of JOAs in Detroit and Cincinnati.
- Baltimore Sun and Patuxent Publishing.
- Bergen Record and North Jersey Newspapers.
- Milwaukee Journal-Sentinel and Community Newspapers Inc.
- St. Louis Post-Dispatch and Suburban Weeklies.
- Kansas City Star, and Olathe Daily News and affiliated weekly newspapers.
- Expert Report on behalf of the Milwaukee Journal Sentinel in the antitrust litigation filed against it by the owners of the Waukesha Freeman.
- Preparation of an affidavit filed on behalf of McClatchy Newspapers on the absence of any competitive effect of the purchase by McClatchy of the Raleigh News & Observer.
- Economic testimony on behalf of the Antitrust Division in hearings on the proposed newspaper joint operating agreement in Detroit.

Telecommunications and FCC Issues

- Written report (co-authored with Michael Pelcovits) filed *ex parte* at the FCC on the limitations of VOIP as a vehicle for competition in local telephony.
- Affidavit testimony for MCI on the "public interest" issues regarding entry by the Bell Operating Companies into long distance service in Michigan, New York, New Jersey, Maryland, Ohio, Wisconsin, Georgia and South Carolina. The Michigan and South Carolina affidavits were co-authored with Frederick Warren-Boulton for submission to the FCC.
- Direct and cross examination testimony for MCI on the "public interest" issues regarding entry by the Bell Operating Companies into long distance service in Ohio, Wisconsin, and Georgia.
- Affidavit testimony (co-authored with Frederick Warren-Boulton) for MCI to the FCC on the "public interest" issues regarding entry by the Bell Operating Companies into long distance service in Michigan and South Carolina.

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- Affidavit testimony (co-authored with A. Daniel Kelley) on the economic effects of Southwestern Bell's acquisition of Ameritech, and Bell Atlantic's proposed acquisition of GTE.

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- Preparation of a report submitted to the FCC, co-authored with Frederick Warren-Boulton and Susan Woodward, on appropriate principles of depreciation and capital recovery under the 1996 Telecommunications Act.
- Analysis for MCI and AT&T of various interconnection pricing and costing issues under the 1996 Telecommunications Act.
- Preparation of a report submitted to the FCC, co-authored with Harold Van Gieson, on appropriate depreciation for local exchange carriers.
- Preparation of a report submitted to the FCC on appropriate bidding restrictions to prevent anticompetitive pre-emption in spectrum auctions.
- Preparation of an affidavit for MCI on the effects of expanded interconnection between local telephone companies and competing providers of access.
- Preparation of several reports for MCI, some of which were co-authored with Stephen Silberman, on the effects of price cap regulation, especially as applied to the local exchange carriers. Presentation of the analysis to the FCC staff.
- Preparation of a report for the National Cable Television Association on integration by local telephone companies into video programming markets.
- Preparation of a report for MCI, co-authored with Stephen Silberman, on the economics of line-of-business restrictions.

Other Regulation

- Testimony filed at the FERC on behalf of wholesale customers in litigation against Maine Public Service's proposed tariff for transmission and ancillary service.
- Preparation of an affidavit, co-authored with Robert J. Reynolds, on the market power issues in an FERC abandonment proceeding in the natural gas pipeline industry.
- Preparation of a report, co-authored with John Woodbury, Frederick Warren-Boulton and Daniel Sherman, for the National Cable Television Association on the effects on consumers of cable deregulation.
- The preparation of testimony to be presented by Mr. Baseman, on behalf of the U.S. Justice Department, in an electric utility monopolization case (U.S. v. Kentucky Utilities).

Publications

- “Exclusionary Behavior in the Market for Operating System Software: the Case of Microsoft,” in *Opening Networks to Competition: the Regulation and Pricing of Access*, David Gabel and David Weiman, eds.; Kluwer Press, 1996, with Frederick R. Warren-Boulton and Glenn Woroch.
- “Microsoft Plays Hardball: Use of Exclusionary Pricing and Technical Incompatibility to Maintain Monopoly Power in Markets for Operating Software,” co-authored with Frederick R. Warren-Boulton and Glenn A. Woroch, Antitrust Bulletin, Summer 1995.
- “The Economics of Intellectual Property Protection for Software: The Proper Role for Copyright,” co-authored with Frederick R. Warren-Boulton and Glenn A. Woroch, Standard View, June 1995.
- “Copyright Protection of Software Can Make Economic Sense,” co-authored with Frederick R. Warren-Boulton and Glenn A. Woroch, The Computer Lawyer, February 1995.
- “The Detroit Newspaper Joint Operating Agreement,” in Kwoka and White, eds., *The Antitrust Revolution*, Harper Collins (1993).
- “Sustainability and the Entry Process,” *American Economic Review* (May 1981) pp. 272-277.
- “Open Entry and Cross-Subsidization in Regulated Markets,” in Gary Fromm, ed., *Economics of Public Regulation*, National Bureau of Economic Research and M.I.T. Press, Cambridge, Massachusetts, 1981.

Other Papers

- “Depreciation Policy in the Telecommunications Industry: Implications for Cost Recovery by the Local Exchange Carriers,” co-authored with Harold Van Gieson, December 1995.
- “Microsoft Plays Hardball: Use of Exclusionary Pricing and Technical Incompatibility to Maintain Monopoly Power in Markets for Operating Software,” co-authored with Frederick R. Warren-Boulton and Glenn A. Woroch, presented at Columbia University Institute for Tele-Information on Sustaining Competition in Network Industries through Regulating and Pricing Areas, November 1993.
- “The Economics of Intellectual Property Protection for Software: The Proper Role for Copyright,” co-authored with Frederick R. Warren-Boulton and Glenn A. Woroch, presented at American Committee for Interoperable Systems, June 1994.

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“The Effect of Deregulation on Cable Subscribers,” co-authored with John Woodbury, October 1990, presented at American Enterprise Institute conference, Policy Approaches to Deregulation of Network Industries.

“The Economics of Bell Operating Company Diversification in the Post-Divestiture Telecommunications Industry,” co-authored with Stephen Silberman, with the assistance of Roger Noll, ICF, Inc., September 1986.

“A Framework for Economic Analysis of Electronic Media Concentration Issues,” co-authored with Bruce Owen, Economists, Inc., December 1982.

Other Professional Experience

Journal referee: *International Economic Review*, *Journal of Industrial Economics*, and *International Journal of Industrial Organization*.

Trial Testimony

Testified on market definition; market power and exclusionary practices in LePage’s v. Minnesota Mining and Manufacturing, (September 1999).

Direct and cross examination testimony for MCI on the “public interest” issues regarding entry by the Bell Operating Companies into long distance service in Ohio, Wisconsin, and Georgia, (1996-97).

Testified on market definition and competitive effects of joint ownership of two competing daily newspapers in U.S. vs. Nat. L.C. and D. R. Partners, (May 1995).

Testified on market power, market definition and vertical restraint issues in Tarrant v. Trane, (November 1993).

Expert witness for the Antitrust Division on the Detroit Newspaper Joint Operating Agreement (August 1987). Testified that the Detroit *Free Press* was not a failing newspaper when it agreed to joint operations.

Deposition Testimony

- Bo Deans Cone Company, L.L.C., et. al. v. Norse Dairy Systems, et. al. (August 2009)
- Reilly vs. Medianews Group, et. al., (March 2007)
- Hercules vs. Atofina, et. al., (December 2005)
- Berlyn, Inc., et al. v. the Gazette Newspaper, Washington Post, and the Suburban Press Network (April 2002).
- Morris Communications v. PGA Tour, (January 2002).
- Z-Rock Communications et al. v. Triathlon Broadcasting et al., (December 2001).
- LePages's v. 3M (Minnesota Mining and Manufacturing Company), (December 1998)
- Green Keepers v. Softspikes, (April 1999).
- U.S. vs Nat, L.C. and D. R. Partners, (April 1995).
- PMBR v. Harcourt Brace Jovanovich, et al., (February 1994).
- Deposed in Detroit JOA proceeding, (July 1987).
- Deposed by the FTC concerning Henkel's acquisition of Parker Chemical, (January 1986).
- U.S. v. Kentucky Utilities, (July 1985).

Expert Affidavits & Declarations

- Rocket Holding, Inc. v. McNeilus Truck and Manufacturing, (February 1993).
- PMBR v. Harcourt Brace Jovanovich, et al., (February 1994).
- AD/SAT v. McClatchy Newspapers, (July 1995).
- Morris Communications v. PGA Tour, (Oct. 2000).
- Jason Tesauro and Elizabeth Eley v. The Quigley Corporation (Feb. 2003).

Expert Statements Submitted to Regulatory Agencies

- Affidavit testimony for MCI on the “public interest” issues regarding entry by the Bell Operating Companies into long distance service in state regulatory hearings in New York, New Jersey, Maryland, Ohio, Wisconsin, Georgia and South Carolina, (1996-97).
- Affidavit testimony (co-authored with Frederick Warren-Boulton) for MCI to the FCC on the “public interest” issues regarding entry by the Bell Operating Companies into long distance service in Michigan and South Carolina, (1997).
- “The Economics of Bidding for Scarce Resources: The Lessons of Monopoly Preemption as Applied to FCC Auctions of LMDS Licenses,” August 1996, submitted on behalf of WebCel in FCC Docket No. 96-98.
- “Depreciation and Capital Recovery Issues, A Response to Professor Hausman,” co-authored with Frederick Warren-Boulton and Susan Woodward, July 1996, submitted on behalf of MCI in FCC Docket No. 96-98.
- Testimony in FERC Docket ER95-836-000 on behalf of wholesale customers, who were objecting to certain aspects of Maine Public Service’s transmission and ancillary service tariff, (August 1995).
- A comment on the relationship between advertising and sales, January 1995, submitted on behalf of MCI in FCC Docket No. 92-77, concerning proposals for implementing billed party preference in the selection of long distance carriers.
- Affidavit, co-authored with Robert J. Reynolds, concerning an FERC abandonment proceeding, October 1991, submitted on behalf of Sun Refining and Marketing Company in FERC Docket No. CP91-2819-000.
- Affidavit concerning Expanded Interconnection with Local Telephone Company Facilities, September 1991, submitted on behalf of MCI in Federal Communications Commission Docket No. CC 91-41, ENF-87-14.
- “The Economic Effects of Cable Deregulation,” co-authored with John Woodbury, Frederick Warren-Boulton and Daniel Sherman, May 1990, submitted on behalf of the National Cable Television Association in Federal Communications Commission MM Docket No. 90-4.
- “The Economics of Local Telephone Company Integration into the Retailing of Video Programming,” December 1988, submitted on behalf of the National Cable Television Association in the Federal Communications Commission Docket No. CC 87-266.

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- “The Choice of Productivity Offsets for Rate Cap Regulation,” July 1988, submitted on behalf of MCI in Federal Communications Commission Docket No. CC 87-313.
- “An Analysis of the Utility of Price Cap Regulation as Applied to the Local Exchange Carriers,” co-authored with Stephen Silberman, December 1987, submitted on behalf of MCI in Federal Communications Commission Docket No. CC 87-313.
- “The Economics of Line of Business Restrictions and Structural Separations,” co-authored with Stephen Silberman, January 1986, submitted on behalf of MCI in Federal Communications Commission Docket No. CC 85-229.

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

COMPETITION IN THE
RAILROAD INDUSTRY

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STB Ex Parte No. 705

LEGAL ARGUMENT

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

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

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

and access since the enactment of the Staggers Act in 1980² (“Staggers Act”), appreciates the opportunity to file these comments.

I.

SUMMARY

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

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

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

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

- The ICC and STB’s revenue adequacy rules have produced a flawed financial portrait of rail carriers like BNSF and UP, and the other remaining mega-carriers, who today are the financial titans of Wall Street;
- Over the past 30 years, all captive shipper attempts to improve their competitive plight (besides construction of rail lines) have been denied, and the Staggers Act competitive access provisions have been administratively gutted, based in large part on an acceptance of rail carrier arguments that access-produced competition would unduly undermine railroad “revenue adequacy”;
- Today’s western coal transportation market is a mature duopoly, with UP and BNSF tacitly satisfied with equal market shares, and unwilling to aggressively compete for individual customers’ business; and
- ICC/STB decisions on competitive access, combined with the market developments resulting from massive industry consolidation, have emboldened the railroads today to extract significant rate increases from western coal customers – even from shippers with theoretical access to “competition” from two carriers and who have no effective remedy available to protect themselves against market abuse by dominant rail carriers.

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

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

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

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

II.

DISCUSSION

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

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

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

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

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

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

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

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

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

[T]he existence of an additional rail carrier is likely to result in more efficient and responsive service than that currently available. . . .

Our decision . . . is supported by the recently enacted Rail Transportation Policy Statement, 49 U.S.C. 10101a, which

was added by the Staggers Act. Its first directive is to “allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail.” (Section 10101a(1).) The policy statement also instructs us to reduce regulatory barriers to entry into the industry (section 10101a(7)) and to prohibit predatory pricing and practices and to avoid undue concentration of market power (section 10101a(13)). Approving CNW’s application and thus allowing another carrier to serve the basin furthers all of these goals.

Our decision . . . also furthers our national energy policy. . . . The public interest requires that these coal resources be made available to consumers under the most favorable terms possible. Ensuring competition for the transportation of coal is the best means to guarantee that result.

Id. at 927.

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

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

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

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

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

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

of the cornerstones of the Staggers Rail Act of 1980 was the emphasis on increased railroad competition. Finally, BN has received handsome returns while it was the only railroad serving the PRB.

BN's . . . right to entrepreneurial awards [argument] is without merit. BN has not provided any financial analysis or other specific evidence demonstrating that increased rail competition would inhibit BN from recovering and earning an adequate return on its coal-related investment.

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

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

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

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

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

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

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

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

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

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

[T]he rail transportation policy (RTP) found at 49 U.S.C. 10101a states that, in regulating the railroad industry, it is the policy of the United States Government “to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail; . . . and to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers . . . to meet the needs of the public”

* * *

We recognize that carriers in competitive markets are less able to price differentially than carriers in monopoly situations, and that differential pricing is one way in which carriers can move toward revenue adequacy. But, while it was aware of the potential conflict between revenue adequacy and competition, Congress determined that the public would benefit from increased competition. Staggers Act Conference Report at 114. Indeed, while it clearly sought to promote railroad earnings, Congress concluded that the best “way to attain revenue adequacy [was] by means of the interaction of competitive forces.” *American Short Line R.R. Ass’n v. United States*, 751 F.2d 107, 113 (2d Cir. 1984).

Thus, we do not believe that we should administer the Congressional policy directing us to promote revenue adequacy at the expense of the clearly articulated policy, in the RTP . . . that we advance competition.

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

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

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

[I]n expressing the broad goals of the Staggers Act, Congress directed us to encourage efficient operations. Staggers Act Conference Report at 80. Actions that we take to facilitate efficient and competitive rail operations are consistent with, not at odds with, the [national Rail Transportation Policy].

Additionally, compensation based on potential lost future earnings is not warranted because the right to construct a rail line that crosses another carrier's line does not deprive the incumbent carrier of the ability to earn future revenues on its line. Contrary to BN's assumption, BN, as the incumbent railroad, will not automatically lose its traffic base once the new line is in place. Nothing prevents BN from competing for all or some of OPPD's future coal traffic. . . . As the ICC stated in *CNW Crossing*, "BN has every opportunity to haul all other coal traffic for which it may compete . . . by charging better prices or offering better service."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Addressing The Competitive Market Structural Flaws

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

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

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

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

See Richards V.S. at 4-21.

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

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

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

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

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

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

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

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

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

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

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

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

a. Market Dominance Test Clarification

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

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

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

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

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

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

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

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

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

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

Id. (emphasis added).

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

b. Access Remedies

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

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

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

Some of the shippers have expressed their concern that the Board has not afforded them meaningful relief. I disagree. The Board has given the shippers the opportunity to obtain significant relief

[T]he railroads' rate and route initiative is not absolute and must be balanced against the statutory objective of promoting competition. Businesses are resourceful, and they will compete if given the opportunity to do so. Our decisions are significant because they encourage railroads to compete for bottleneck traffic in response to the needs of the shippers.

I recognize that the relief that these decisions provide is not self-executing. . . . Moreover, shippers, to secure separate bottleneck-segment rate review, will have to enter into contracts with non-bottleneck railroads. However, if history is any guide, and if shippers are diligent in negotiating, *railroads will seek out contracts to capture new business. Initiative can produce positive results.*

. . . I believe that the Board has addressed [bottleneck issues] in a fair and evenhanded manner. If shippers and competing railroads pursue the competitive avenues afforded them in these decisions, they will find that our decisions have provided real opportunities.

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

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

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

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

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

reversing the *Bottleneck* decision,⁸ and by repealing the competitive access rules and reinstating the pro-access principles embodied in the initial post-Staggers Act access decisions described in Section II.A. above.⁹ In revisiting these rules/decisions, the STB needs to return to the guiding principles of its *CNW Access* decision that “a railroad does not have a right to traffic,” that “[a] railroad is an instrumentality of commerce that must earn and retain its traffic by providing efficient, effective, and competitive service,” and that the best way to promote effective and efficient rail service and further railroad financial health, is to promote competition. *Id.*, 1985 ICC LEXIS 9 at *42-*43.¹⁰

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

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

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

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

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

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

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

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

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

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

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

Hathaway’s shareholders:

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

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

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

abandonment or sale of non-essential facilities¹¹ – which the railroads profess has been a resounding success in promoting their ability to profitably and efficiently serve their customers. With this significant rationalization of their systems, the railroads are no longer retaining unprofitable assets that have the potential to drain their resources.

Railroads frequently point out to the Board and Congress that their revenue per ton-mile has been falling over time – intimating that they are losing ground financially. But as the attached *Exhibit 7* shows, the western railroads' variable costs per ton-mile for coal¹² have remained consistently and substantially below revenues per ton-mile, with the differential between revenues and variable costs remaining relatively stable over time, allowing the railroads to become more financially secure, and leading to annual western coal contributions approaching \$3.5 billion.¹³

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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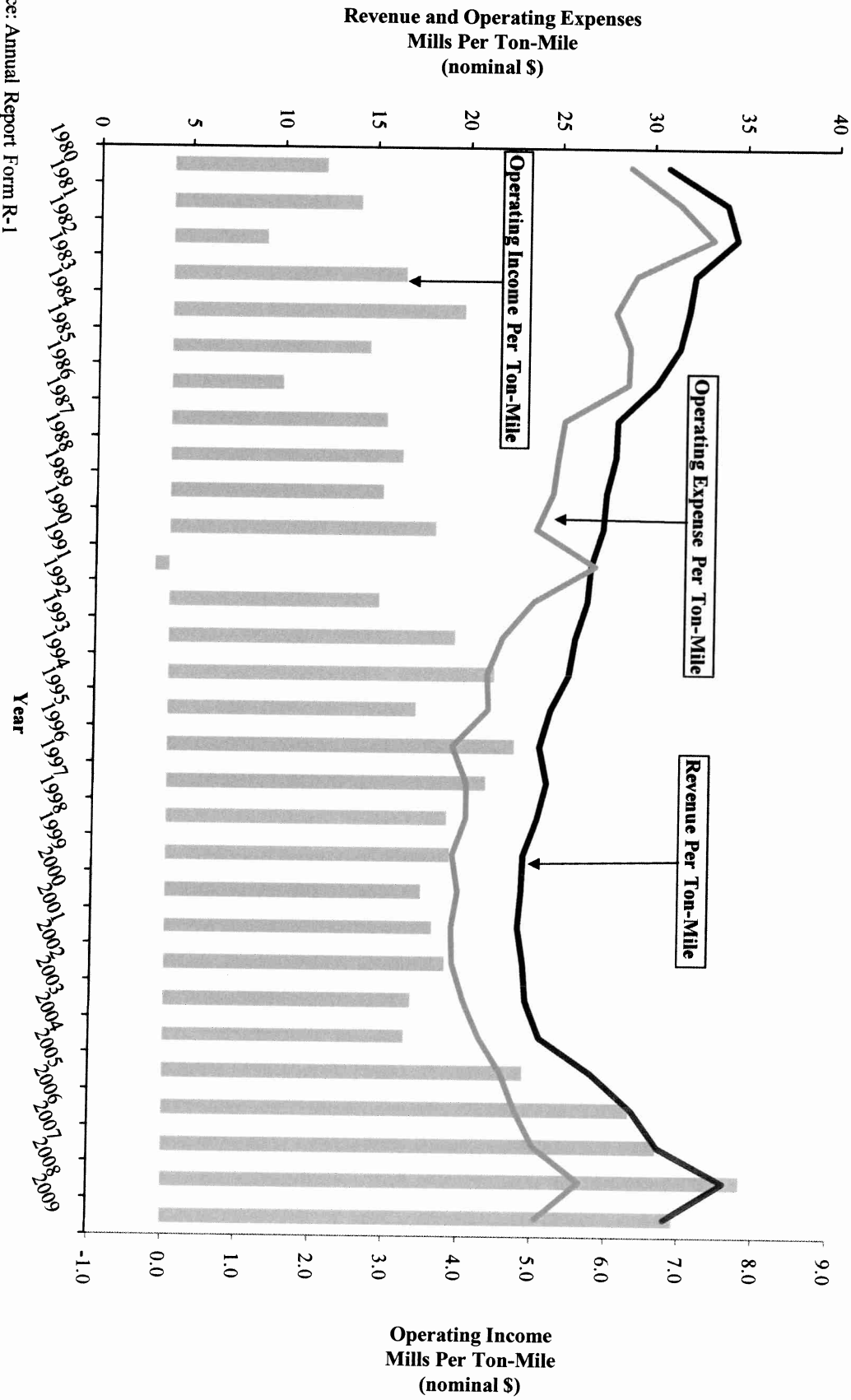
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Dated: April 12, 2011

Its Attorneys

EXHIBIT 1

Class I Railroad Revenue, Operating Expense and Operating Income Per Ton-Mile
(1980 to 2009)



Source: Annual Report Form R-1

EXHIBIT 2

IN THE
United States Court of Appeals
FOR THE EIGHTH CIRCUIT

RECEIVED

Consolidated Docket Nos. 97-1081, 97-1284, 97-1331,
97-1332, 97-1333, 97-1335, 97-1583, 97-2204, 97-2206,
97-2260, 97-2303, 97-2328, 97-2462, 97-2464

JUN 18 1997
U. S. COURT OF APPEALS
EIGHTH CIRCUIT

MIDAMERICAN ENERGY COMPANY, ET AL., *Petitioners*,

v.

SURFACE TRANSPORTATION BOARD
and UNITED STATES OF AMERICA, *Respondents*.

**Petitions For Review Of Orders
Of The Surface Transportation Board**

**JOINT BRIEF OF PETITIONERS
WESTERN COAL TRAFFIC LEAGUE AND
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE**

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SUMMARY AND REQUEST
FOR ORAL ARGUMENT

In the proceedings below, the Surface Transportation Board ("STB" or "Board") dismissed three complaints brought by rail shippers. Each complaint sought the prescription of a maximum reasonable rate over a rail "bottleneck line." The STB dismissed the three complaints in a single decision ("Decision"), subsequently clarified, now on review before this Court.

The STB's Decision must be set aside. The Decision is predicated upon three erroneous legal principles and produces a result that is totally inconsistent with Congressional intent. The Decision also means that the three involved shippers, as well as other similarly situated shippers, will pay higher transportation charges than Congress intended. These higher rates are not only unfair to rail shippers, they will produce higher electricity charges where, as was the case below, the complainants are electric utility rail shippers seeking to lower their delivered fuel costs -- costs ultimately paid by their customers as part of the customer's monthly electric bills.

Oral argument should assist the Court in deciding this case. In light of the substantial number of parties, the substantial number of briefs, and the importance of this case, we request that the Court allocate to rail shippers, and shipper organizations, a total of sixty (60) minutes of argument time.

CORPORATE DISCLOSURE STATEMENT

The Western Coal Traffic League ("WCTL") is an unincorporated trade association. WCTL has no parent, subsidiary or affiliate corporations, and does not issue shares of stock to the public. The National Industrial Transportation League ("NITL") is a not-for-profit trade association. NITL has no parent, subsidiary or affiliate corporations, and does not issue shares of stock to the public.

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PRELIMINARY STATEMENT

WCTL and NITL petition for review of the final Decision served by the STB on December 31, 1996 in STB Case Nos. 41242, Central Power & Light Co. v. Southern Pac. Transp. Co. ("CPL Case"); 41295, Pennsylvania Power & Light Co. v. Consolidated Rail Corp. ("PPL Case"); and 41626, MidAmerican Energy Co. v. Union Pac. R.R. ("MidAmerican Case") (hereinafter collectively referred to as the "Bottleneck Cases"). WCTL and NITL also petition for review of the final decision ("Clarification Decision") served by the STB on April 30, 1997 in the Bottleneck Cases.¹

The CPL Case, PPL Case and MidAmerican Case were each instituted before the Interstate Commerce Commission ("ICC"). In each case, the shipper asked the ICC to prescribe a maximum reasonable rail rate. The ICC's jurisdiction to hear these cases arose generally under Subtitle IV of Title 49 (establishing the ICC and setting forth the agency's regulatory powers), and specifically under former 49 U.S.C. § 10704(a)(1) (ICC may prescribe maximum rail rates in specified situations).

During the pendency of the three cases, the ICC was abolished and replaced by the STB, a newly-created agency within the Department of Transportation. See ICC Termination Act of

¹ WCTL and NITL have also intervened as petitioners in other cases, now consolidated, filed by rail shippers seeking review of the Decision and the Clarification Decision, and have intervened as respondents in other cases, now consolidated, filed by the Association of American Railroads and individual railroads seeking review of the Decision and the Clarification Decision.

1995 ("Termination Act"), Pub. L. No. 104-88, § 101, 109 Stat. 803, 804 (1995) (abolishing ICC); id. § 201, 109 Stat. at 932-93 (creating STB). The Termination Act also made substantial amendments to Subtitle IV of Title 49, including the elimination of many regulatory functions previously exercised by the ICC. Id. § 102(a), 109 Stat. at 804-932; H.R. Rep. No. 104-422, at 165 (1995).

At the time the ICC was abolished (January 1, 1996), there were numerous cases pending at the ICC. The Termination Act directed the STB to adjudicate pending ICC cases so long as the pending case involved a retained regulatory function. Id. § 204(b), 109 Stat. at 941. Among the regulatory functions retained in the Termination Act is the power to set maximum reasonable rail rates. Id. § 102(a), 109 Stat. at 810-811 (amending 49 U.S.C. § 10704(a)(1)). Accordingly, the Board's jurisdiction arises pursuant to the above-cited provisions of the Termination Act.²

² The Termination Act further provides that ICC cases pending at the time the Board was created, involving retained functions, shall be decided and "appeals shall be taken therefrom . . . as if this Act had not been enacted." Id. § 204(b)(1), 109 Stat. at 941. Accordingly, this case is to be adjudicated under pre-Termination Act law and references hereinafter to Title 49 shall be to the provisions in former Title 49 in effect immediately prior to the termination of the ICC on January 1, 1996, except as otherwise noted. See H.R. Rep. No. 104-22 at 236 ("Pending cases [at the ICC] are to be decided [by the STB] under the statute prior to the enactment of [Termination Act]."); Wisconsin Cent. Ltd. v. STB, 112 F.3d 881 (7th Cir. 1997) (pre-Termination Act law governs cases initiated prior to the Termination Act).

This Court has jurisdiction to review the Decision pursuant to 28 U.S.C. §§ 2321, 2342(5). WCTL and NITL's petitions for judicial review were also timely filed. 28 U.S.C. § 2344 provides petitions seeking judicial review of STB final decisions must be filed within 60 days after the STB's entry of a final order. The Decision was entered on December 31, 1996. WCTL and NITL filed separate petitions seeking judicial review of the Decision on February 26, 1997 and January 9, 1997, respectively. The Clarification Decision was entered on April 30, 1997. WCTL and NITL filed separate petitions seeking judicial review of the Clarification Decision on May 16, 1997 and May 30, 1997, respectively.

**STATEMENT OF THE
ISSUES PRESENTED FOR REVIEW**

(1) Whether the "Governing Principles" adopted in Parts I and II of the Decision that preclude a shipper from obtaining a maximum rate prescription over a bottleneck line segment are arbitrary, capricious and otherwise unlawful?

Most Apposite Cases: San Antonio, Texas v. Burlington N., Inc., 355 I.C.C. 405 (1976) ("San Antonio"), aff'd sub nom. Burlington N., Inc. v. United States, 555 F.2d 637 (8th Cir. 1977); American Trucking Ass'ns v. Atchison, Topeka & Santa Fe Ry., 387 U.S. 397 (1967); Routing Restrictions Over Seatrain Lines, Inc., 296 I.C.C. 767 (1955) ("Routing Restrictions");

Atchison, Topeka & Santa Fe Ry. v. United States, 279 U.S. 768 (1929) ("Santa Fe").

Most Apposite Statutory Provisions: Former 49 U.S.C. §§ 10704(a)(1), 10742, 10762, 11101(a).

(2) Whether the STB erred in Part III of its Decision in dismissing the CPL Case and the MidAmerican Case?

Most Apposite Cases: See cases cited under Issue 1 and Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983).

Most Apposite Statutory Provisions: 5 U.S.C. § 706(2)(A), (E).

(3) Whether the STB's disposition of the Bottleneck Cases comports with the Rail Transportation Policy?

Most Apposite Cases: Omaha Pub. Power Dist. -- Petition Under 49 U.S.C. 10901(d), Finance Docket No. 32630 (Sub-No. 1) (Decision served Aug. 1, 1996) (unprinted).

Most Apposite Statutory Provisions: Former 49 U.S.C. § 10101a.

STATEMENT OF THE CASE

WCTL/NITL agree with the statements of the case presented by Petitioners Central Power & Light Company ("CPL") and MidAmerican Energy Company ("MidAmerican"), as supplemented herein.

A. Identification Of Interest

WCTL and NITL are both shipper organizations. WCTL is a voluntary association consisting primarily of electric utilities that purchase coal from mines located west of the Mississippi River, and who pay for the transportation of that coal by various railroads from the mines to their generating stations. WCTL members ship in excess of 93 million tons of coal per year, and their delivered coal costs (the cost of coal plus the cost of transportation) exceed \$2 billion annually. These costs are ultimately paid by WCTL members' customers as part of their monthly electric bills.

NITL is a nationwide association of shippers engaged in all types and sizes of commercial and industrial enterprises. NITL members are substantial users of rail transportation. Founded in 1907, NITL is the oldest, largest and most broad-based shippers' organization in the nation. Its members include industrial corporations, manufacturers, retailers, shippers' associations, boards of trade, chambers of commerce, port authorities and others concerned with the purchase of freight transportation.

WCTL and NITL actively participated in the proceedings below in support of the three shipper complainants, CPL, MidAmerican³ and Pennsylvania Power & Light Company ("PPL").

B. The Monopoly Problem Common To All Three Bottleneck Cases

The three utility coal shippers that initiated the proceedings below faced a common problem: each could originate its coal shipments using two or more rail carriers, but each could receive service at destination by only one rail carrier. This transportation circumstance (multiple origin carriers, but only a single destination carrier) is frequently referred to as a "bottleneck" situation. Hereinafter, the term "bottleneck" will denote the destination carrier; the term "bottleneck line" will denote that portion of the origin-to-destination routing for which no alternative rail route is available; and the term "bottleneck shipper" will denote a shipper served by a bottleneck carrier over a bottleneck line.⁴

The specific bottlenecks involved in the proceedings below can be simply illustrated as follows:

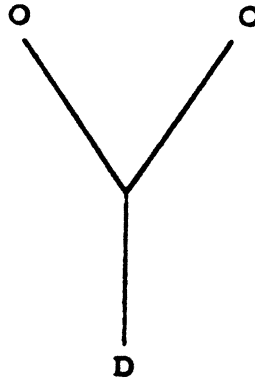
³ CPL and MidAmerican are WCTL members.

⁴ This terminology conforms to the terminology used in the Decision.

CPL
Bottleneck



PPL
Bottleneck



MidAmerican
Bottleneck



Where: O = Origin; D = Destination; Colored Lines = Separate Rail Carriers

The ICC/STB has long recognized, in numerous contexts, that a bottleneck rail carrier can utilize its destination monopoly to control the level of origin-to-destination rates; that such carriers do, in fact, frequently exercise this monopoly control to maximize their own revenues; and, as a consequence, origin-to-destination rates paid by rail shippers forced to employ bottleneck rail service are usually at supra-competitive levels. Findings to this effect have been made in ICC merger cases,⁵ maximum rate cases⁶ and rail construction cases.⁷

⁵ See, e.g., Burlington N., Inc. -- Control and Merger -- Santa Fe Pacific Corp., Finance Docket No. 32549, slip op. at 74 (Decision served Aug. 23, 1995) (unprinted) aff'd sub nom. Western Resources, Inc. v. STB, 109 F.3d 782 (D.C. Cir. 1997); Chicago, Milwaukee, St. Paul & Pac. R.R. -- Reorg. -- Acquisition by Grand Trunk Corp., 2 I.C.C.2d 427, 455 (1984); Union Pac. Corp. -- Control -- Missouri Pac. R.R., 366 I.C.C. 462, 538 (1982).

CPL, MidAmerican and PPL each devised a creative rate reduction strategy to lessen their bottleneck carriers' monopoly pricing control over each shipper's origin-to-destination rates. These shippers' strategy consisted in each case of two interrelated steps. First, each shipper asked the STB to prescribe a maximum reasonable rate over the involved bottleneck line segments. (J.A. 1, 470, 1637). With that prescription in hand, each shipper intended to have the origin carriers compete for the non-bottleneck rail transportation and to sign a contract with the low railroad bidder. (J.A. 1353, 1461, 1639). Thus, the origin-to-destination price ultimately obtained would equal the contract price (set by competition) plus the prescription price (set by the STB). Some background on contracts and rate prescriptions may assist the Court in understanding this marketplace/regulatory strategy.

⁶ See, e.g., Metropolitan Edison Co. v. Conrail, 5 I.C.C.2d 385, 413 (1989); Amstar Corp. v. Alabama Great Southern R.R., Docket No. 38239S, slip. op at 4 (Decision served Dec. 2, 1987) (unprinted); Allied Chem. Corp. v. Ann Arbor R.R., 1 I.C.C.2d 492, 497-98 (1985).

⁷ See, e.g., Omaha Pub. Power Dist. -- Petition Under 49 U.S.C. § 10901(d), Finance Docket No. 32630 (Sub-No. 1), slip op. at 4 (Decision served Aug. 1, 1996) (unprinted); Chicago and North Western Ry. -- Constr. and Operation Exemption -- City of Superior, WI -- Petition for Issuance of An Order Pursuant to 49 U.S.C. 10901(d), Finance Docket No. 32433 (Sub-No. 1), slip op. at 4-5 (Decision served Aug. 11, 1995) (unprinted); WFEC R.R. -- Constr. and Operation Exemption -- Choctaw and McCurtain Counties, Okla., Finance Docket No. 32607, slip op. at 6 (Decision served Sept. 1, 1995) (unprinted); Burlington N. R.R. -- Constr. and Operation Exemption -- Macon and Randolph Counties, Mo., 9 I.C.C.2d 1161, 1166-69 (1993), aff'd sub nom. Missouri Mining, Inc. v. ICC, 33 F.3d 980 (8th Cir. 1994).

Traditionally, most rail carriers provided common carrier rail service to their customers. Rates for this service were set forth in public tariffs. All such tariff rates had to be "reasonable" and, if the ICC concluded an existing rate was unreasonable, it would prescribe a maximum reasonable rate. Congress dramatically changed the traditional railroad regulatory landscape in the 1976 4-R Act⁸ and the 1980 Staggers Act.⁹ The overriding goal of both statutes was to improve the financial health of the rail industry by removing numerous regulatory shackles Congress had previously imposed on the railroad industry, while, at the same time, retaining regulatory protections necessary to protect the shipping public from monopoly pricing and service abuses. See Coal Exporters Ass'n v. United States, 745 F.2d 76, 80-82 (D.C. Cir. 1984); American Trucking Ass'n v. ICC, 656 F.2d 1115, 1118-19 (5th Cir. 1981).

In the rail rate area, Congress took the position that its policy objectives could best be advanced by permitting rail carriers to compete for business, without any ICC maximum rate oversight, except in those instances where a rail carrier or carriers exerted "market dominance" over a particular movement, in which case ICC maximum rate jurisdiction was retained.¹⁰

⁸ Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 96 Stat. 31 (1976) ("4-R Act").

⁹ Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980) ("Staggers Act").

¹⁰ Congress defined "market dominance" as "an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies." Former

Congress believed that allowing competition to work where it existed would inure to the benefit of both railroads and their customers, while limited regulation would serve to protect "captive" rail shippers from monopoly pricing abuses. See Western Coal Traffic League v. United States, 694 F.2d 378, 384-385 (5th Cir. 1982), and on reh'g en banc, 719 F.2d 772, 774 (5th Cir. 1983).

Congress also authorized a new means of rail service that was designed and intended to facilitate rail competition: rail contract service. Rail contract service arises when a railroad and shipper enter into a transportation contract. Such contracts establish rates and other service terms. In the Staggers Act, Congress expressly approved and encouraged the use of rail contracts and, to promote their use, provided that approved contract service would be exempt from ICC regulation. See Water Transport Ass'n v. ICC, 722 F.2d 1025, 1027 (2nd Cir. 1983); National Grain and Feed Ass'n v. United States, 5 F.3d 306, 309 (8th Cir. 1993). Today, a large majority of coal traffic and substantial amount of other rail traffic moves in contract service.

CPL, MidAmerican and PPL maintained in the proceedings below that their rate reduction strategy fully complied with Congressional intent to permit competition to set prices in competitive origin markets (with competition-set rates being incorporated into transportation contracts), while leaving regulation to

49 U.S.C. § 10709(a).

set rates in the non-competitive rail bottleneck line markets. (J.A. 1465-87, 1642-59, 2233-34). WCTL, NITL and other shippers filed extensive comments supporting CPL, MidAmerican and PPL. (J.A. 1601-28, 1811-62, 2336-51, 2465-2612).

C. The STB's Disposition
Of The Bottleneck Cases

To perfect their rate reduction strategy, CPL, MidAmerican and PPL each filed complaints asking the STB to prescribe maximum reasonable rates over their bottleneck lines. (J.A. 1, 470, 1637). The defendant carriers filed motions to dismiss, arguing that the STB lacked jurisdiction to hear the complaints. (J.A. 346, 477, 1641). These motions were briefed by the parties. Following briefing, the STB instituted a proceeding asking the public to comment on "generic" issues raised in the Bottleneck Cases. (J.A. 700). The Board proceeded to accept public comments and reply comments on the "generic" issues and conducted an oral argument. The Board's Decision followed. (J.A. 2989). That Decision contains a discussion of "Governing Principles." (Decision at 4-14; J.A. 2992-3001). Those principles are then cited as the basis for dismissing each complaint.¹¹ (Decision at 14-17; J.A. 3002-05). Three asserted principles appear to form the basis for the Board's dismissal

¹¹ PPL's complaint action also included a challenge to origin-to-destination rates. That portion of its complaint action was not dismissed. (Decision at 18, J.A. 3006). Reference hereinafter to the PPL complaint is to its bottleneck rate complaint.

orders. For ease of reference, WCTL/NITL have given names to these three principles: the Class Rate Principle, the One Route/One Rate Principle and the Great Northern Principle.

1. The Class Rate Principle.

The STB can prescribe a maximum reasonable rate only in those instances where it first finds that an existing rail rate applicable to the movement in question exceeds a maximum reasonable level. See former 49 U.S.C. § 10704(a)(1). To comply with former § 10704(a)(1), CPL, MidAmerican and PPL filed complaints alleging that an existing "class rate" applicable over the involved bottleneck line segments exceeded a maximum reasonable level. (J.A. 4-5, 472-73, 1637).¹² Each shipper then requested that the STB prescribe a maximum reasonable rate applicable to their "unit train" coal movements. (J.A. 5, 473-74, 2416).

A "class rate" is a rate calculated under a complex set of tariff provisions that are intended to produce a rate to transport any commodity between any two points on a rail carrier's system. See Railroad Comm'n v. Aransas Harbor Terminal Ry., 48 I.C.C. 312, 369 (1918); D. Philip Locklin, Economics of Transportation at 171-77 (7th ed. 1972). "Unit train" service refers to service in trains, usually consisting of carrier-supplied power and shipper-supplied cars, that shuttle, as a single unit, in regular cycles between the same origin and the

¹² The class rates challenged were "local rates" that applied to service between two points on the bottleneck carriers' lines. (Decision at 14-17; J.A. 3002-05).

same destination. See Increased Freight Rates and Charges, 1972, 341 I.C.C. 290, 373 (1972); Investigation of Railroad Freight Rate Structure -- Coal, 345 I.C.C. 493, 514 (1976).

The STB's Class Rate Principle holds that shippers cannot perfect STB maximum rate jurisdiction to prescribe a maximum reasonable unit train rate by first challenging a class rate unless the class rate is "actually moving the traffic or intended to move the traffic." (Decision at 6 n.10; J.A. 2994). As stated by the Board:

A challenge to single-car [class] rate would be essentially irrelevant to the unit-train service regularly involved in movements from coal mines to utility plants. Therefore, we do not intend to entertain challenges to single-car rates unless they are the rates actually moving the traffic or intended to move the traffic.

Id. The STB appears to conclude that in none of the Bottleneck Cases did the involved bottleneck carriers "intend[]" for the class rate to apply to the shippers' unit train shipments, nor were the class rates "actually" used by the involved carriers to invoice the shippers for transportation services provided. (Decision at 15-17; J.A. 3003-05). Therefore, the Class Rate Principle was not satisfied.

2. The One Route/One Rate Principle.

Having concluded that the three bottleneck shippers could not perfect STB jurisdiction to prescribe a maximum unit train rate over a bottleneck line segment by first challenging an existing class rate, the STB next addressed the issue of whether

the shippers had the legal right to require the bottleneck carriers to publish a "local" unit train tariff rate, applicable only over the involved bottleneck line segments, which rate could then be the subject of a maximum rate complaint.

The STB held, in each case, that the involved bottleneck carriers were under no obligation to publish a local unit train tariff rate applicable only over the involved bottleneck line segments. (Decision at 14-17; J.A. 3002-05). According to the STB, the statutory common carrier obligation (former 49 U.S.C. § 11101(a)), requires bottleneck carriers, in response to shipper requests, to offer, or participate in offering, at least one origin-to-destination route and rate. (Decision at 4-6; Clarification Decision at 8-10; J.A. 2992-94, 3159-61). Once such a route, and rate, has been established, however, the STB rules that a bottleneck carrier has no common carrier duty to voluntarily provide any additional routes, or rates, on shipper request. Id. We will hereinafter refer to this STB holding as the One Route/One Rate Principle.

The STB appears to conclude that in each of the three cases, the bottleneck carrier, either by itself (where it served the involved origin) or in conjunction with a second carrier (where the bottleneck carrier did not serve the involved origin), had established one route and published one rate to apply from the involved origins to the involved destinations. (Decision at 14-17; J.A. 3002-05).

3. The Great Northern Principle.

Finally, the STB holds that in those instances where a bottleneck carrier voluntarily publishes a "proportional" common carrier unit train rate that applies over a bottleneck line segment, a shipper cannot file a complaint asking the STB to prescribe a maximum reasonable proportional rate to apply over the bottleneck line segment. (Decision at 11-14; J.A. 2999-3002). The STB claims this result is compelled by the Supreme Court's 1935 decision in Great N. Ry. v. Sullivan, 294 U.S. 458 (1935). We shall refer to this holding as the STB's asserted Great Northern Principle.

The Great Northern Principle was created to dispose of an issue existing in only one of the three Bottleneck cases -- the PPL Case. In PPL, the Board ordered Conrail to publish, inter alia, unit train rates to apply from origins served by Norfolk Southern Corporation ("NS"). Conrail proceeded to publish a "proportional" rate from its point of connection with NS. (Decision at 16; J.A. 3004). A "proportional rate" is a form of rate used when two or more carriers have entered into an agreement (called a through route agreement) to provide common carrier origin-to-destination service, but wish to publish carrier-specific rates to apply over the route. These carrier-specific rates are called "proportional rates." (Decision at 2 n.3; J.A. 2990). Thus, in PPL, the origin-to-destination rate consisted of the combination of the NS proportional rate and the Conrail proportional rate.

The STB, applying its Great Northern Principle, held that PPL could not challenge the maximum reasonableness of the Conrail proportional rate, by itself. Instead, the STB ruled that PPL's only maximum rate case option was to challenge the maximum reasonableness of the combined Conrail/NS proportional rates and to seek a maximum prescription of an origin-to-destination Conrail/NS rate.¹³ (Decision at 16-17; J.A. 3004-05).

D. The Impact Of The STB's Decision
On Captive Rail Shippers

The Board's Decision, as subsequently clarified, sets forth a regulatory maze that WCTL/NITL submit, for all practical purposes, strips away captive shippers' ability to benefit from available competition over non-bottleneck line segments and to limit a bottleneck carrier's pricing monopoly only to bottleneck line segments.

The Board clearly will not permit shippers to employ the simple approach utilized by CPL, PPL and MidAmerican, where each shipper challenged an existing bottleneck line class rate. The Board offers up a convoluted set of alternative procedures which involve the filing of multiple complaints, and which may or may not ultimately lead to the STB's prescription of a maximum reasonable bottleneck line rate in those instances where a shipper has first entered into a rail transportation contract with an origin carrier.

¹³ The STB also found that MidAmerican's complaint was not ripe for review. (Decision at 17; J.A. 3115).

The Board's "contract first" relief is illusory in light of the collective rail industry position adamantly opposing any form of bottleneck rate relief. (J.A. 836-42). The industry concedes that such relief will force bottleneck carriers to compete for business, and will reduce bottleneck carriers' monopoly profit-taking. However, after the Decision, the industry now knows that bottleneck rate prescriptions will be forthcoming, if at all, only in those instances where one of their own first enters into an origin transportation contract. Given the stridency of the rail industry's "no bottleneck relief" rhetoric, industry members appear predisposed to seldom (if ever) break ranks with their industry brethren by entering into origin transportation contracts that form the necessary predicate for relief the industry so adamantly opposes. Evidence to this effect is already in the record. (J.A. 3010-15, 3146-49).

SUMMARY OF ARGUMENT

The STB's three governing principles appear to have been crafted with one purpose in mind -- to provide a legal justification for the Board's policy decision to dismiss the Bottleneck Cases. Each of the three principles is legally erroneous and, viewed as a whole, the three principles impose unlawful and unwarranted restrictions on a shipper's ability to curb the monopoly pricing powers of bottleneck rail carriers.

The Class Rate Principle is wrong because it constitutes an unexplained departure from San Antonio, and numerous

other agency precedents, that permit a shipper to file a maximum rate case against an existing applicable rate between two points on a rail carrier's line. The One Route/One Rate Principle is wrong because it abrogates a rail carrier's common carrier service obligation to provide service and rates that are responsive to reasonable shipper requests. The Great Northern Principle is wrong because Great Northern, properly read, does not bar complaints challenging the maximum reasonableness of proportional or local rates.

The STB's policy choice that gave rise to these three principles is also wrong. The STB's decision appears to be driven by a policy that promotes a monopoly bottleneck carrier's profits. That policy choice turns Congressional intent upside down. Congress, in the 4-R Act, the Staggers Act and the Termination Act, directed the STB to promote and encourage rail competition, not monopoly profit maximization.

Not only are the STB's three principles, as well as the policy goal that underlies them wrong, motions to dismiss rate complaints are disfavored in STB practice and, rarely granted. CPL, MidAmerican, and PPL deserved a better fate than to have their cases swept into a nebulous generic proceeding and then to have their cases summarily dismissed through arbitrary application of erroneous principles.

The errors committed by the STB injure not only the complainants in the proceedings below, but also injure other similarly situated captive shippers. The end result for the com-

plainants and other captive shippers will be higher transportation rates.

ARGUMENT

I.

THE STB'S CLASS RATE PRINCIPLE IS WRONG

The STB's Class Rate Principle holds that class rates applicable between two points on a rail carrier's line can be challenged only if the rate is "actually moving" or "intended to move" the shipper's traffic. (Decision at 6 n.10; J.A. 2994). This Principle was pulled out of thin air by the STB.¹⁴

The ICC's landmark San Antonio decision, affirmed by this Court, established that unit train coal shippers could perfect ICC jurisdiction to prescribe maximum reasonable rates by challenging a class rate that was not "actually moving" or "intended to move" unit train coal traffic. In San Antonio, a coal shipper filed a complaint alleging that a \$30.00 per ton

¹⁴ The Administrative Procedure Act ("APA") establishes the governing standard of review. Where, as here, a court reviews a decision in an agency adjudication, the agency's decision must be set aside when it is "arbitrary, capricious, an abuse of discretion . . . otherwise [unlawful] . . . [or] unsupported by substantial evidence. . . ." 5 U.S.C. § 706 (2)(A), (E). See Wisconsin Cent. Ltd. v. STB, 112 F.3d at 894-96. The STB's statutory construction is also subject to review under the standards set forth in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984). Under Chevron, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear. . . ." MCI Telecomm. v. American Tel. and Tel. Co., 512 U.S. 218, 220 (1994).

class rate applicable to its future coal traffic was unreasonably high, and asked the STB to prescribe a maximum reasonable unit coal train rate. Id. 355 I.C.C. at 413. The \$30.00 per ton class rate was not "actually moving" the shipper's unit train deliveries as those deliveries had not yet started, id. at 406, and the defendant carriers conceded they had no intention of applying the \$30.00 per ton class rate charge to the shipper's traffic when that traffic did commence moving. Id. at 413. The ICC did not, however, dismiss the shipper's complaint. Instead, the ICC correctly held that the \$30.00 per ton tariff rate did set the effective rate for the shipper's anticipated coal shipments, found the \$30.00 rate unreasonably high, and prescribed a maximum unit train rate of \$10.93 per ton. Id. 355 I.C.C. at 418.

The San Antonio holding fully comported with prior ICC precedent. The ICC ruled on numerous occasions that it had the statutory jurisdiction to adjudicate the reasonableness of tariff rates that were not "actually moving" traffic at the time the complaint was filed. Northeast Ky. Coal Bureau v. Chesapeake & Ohio Ry., 201 I.C.C. 165 (1934) (ordering the prescription of a proportional rate for coal traffic which was "entirely prospective"), aff'd, 206 I.C.C. 445, injunction denied sub nom. Chesapeake & Ohio Ry. v. United States, 11 F. Supp. 588 (S.D. W. Va. 1935), aff'd, 296 U.S. 187 (1935); Southern Agric. Chem. Corp. v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., 109 I.C.C. 227, 229 (1926) (stating that a complainant has the right to have

the reasonableness of the rate in issue decided, even though there is no existing movement thereunder); Lum v. Great N. Ry., 21 I.C.C. 558 (1911) (complaint action filed to obtain rate prescription from areas not yet in commercial development).

The ICC also consistently held that the written terms of a tariff, not the subjective intent of its drafters, governed the tariff's application to particular movements. See Metropolitan Metals, Inc. v. Pennsylvania R.R., 314 I.C.C. 737, 738 (1961) (tariff publisher's subjective intent not controlling where tariff terms are "clearly worded"); Safeway Stores, Inc. v. Atchison, Topeka & Santa Fe Ry., 297 I.C.C. 691, 695 (1956) (same); I.M. Dach Underwear Co. v. Central of Ga. Ry., 287 I.C.C. 797, 799 (1953) (same).

The Termination Act requires the Board to adhere to ICC precedents, unless and until such precedents are "revoked in accordance with law by the Board" Id. 204(a), 109 Stat. at 941. The law, in turn, prohibits an administrative agency from departing from its past precedents without first providing a correct, reasoned basis for its departure. See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. at 42 (1983); Brock v. Dun-Par Engineered Form Co., 843 F.2d 1135, 1137-38 (8th Cir. 1988); Consolidated Rail Corp. v. STB, 93 F.3d 793, 799 (D.C. Cir. 1996).

WCTL and other shippers emphasized the importance of the San Antonio decision in their comments filed with the Board. (J.A. 1831-32). The Board, however, does not even cite the San

Antonio decision, much less attempt to explain the Class Rate Principle's radical departure from San Antonio. For these reasons, the Class Rate Principle should be set aside.

II.

THE ONE ROUTE/ONE RATE PRINCIPLE IS WRONG

The STB's Class Rate Principle finds, in effect, that CPL, MidAmerican and PPL challenged the wrong rate -- a class rate. The STB then asks itself whether the three shippers could have obtained a proper rate to challenge, a rate the STB usually refers to as a "local unit-train rate" applicable only over a bottleneck line segment. (Decision at 15-17; J.A. 3003-05). The STB goes on to conclude, employing its One Route/One Rate Principle, that none of the defendant carriers had a statutory duty to publish a "local unit train rate." Id. That Principle, as discussed, supra, provides that a bottleneck carrier need not voluntarily publish a local unit train rate so long as it has in place an origin-to-destination route and rate.

A. The One Route/One Rate Principle Erroneously Abrogates The Statutory Common Carrier Obligation

Former Title 49 provided that rail carriers providing regulated service "shall provide for the transportation or service upon reasonable request." Former 49 U.S.C. § 11101(a). Former Title 49 further required that carriers "shall publish"

rates applicable to requested service. Former 49 U.S.C. § 10762. Former 49 U.S.C. §§ 11101(a) and 10762 codified the common law common carrier obligation. See American Trucking Ass'ns, 387 U.S. at 406-407.

The common law common carrier obligation is a strict one that has been "rigorously construed" in favor of rail service by the federal courts and the ICC. See B.J. Alan Co. v. United Parcel Serv., Inc., 5 I.C.C.2d 700, 711 (1989), aff'd sub nom. B.J. Alan Co. v. ICC, 897 F.2d 561 (D.C. Cir. 1990). Accord United States Energy Research and Dev. Admin. v. Akron, Canton & Youngstown R.R., 359 I.C.C. 639 (1978) (requiring carriers to transport spent nuclear fuels), aff'd sub nom. Akron, Canton & Youngstown R.R. v. ICC, 611 F.2d 1162 (6th Cir. 1979), cert. denied, 449 U.S. 830 (1980); Classification Ratings of Chemicals, Conrail, 3 I.C.C.2d 331 (1986) (requiring carriers to haul hazardous chemicals). As the Supreme Court has observed, the common carrier obligation "is comprehensive and exceptions are not to be implied." American Trucking Ass'ns, 387 U.S. at 407.

The common carrier obligation requires a carrier "to carry all goods offered for transportation." Id. at 406; Michigan Pub. Util. Comm'n v. Duke, 266 U.S. 570, 577 (1925) (common carrier is required to "serve all, up to the capacity of his facilities, without discrimination and for reasonable pay.") Pennsylvania R.R. v. Puritan Coal Mining Co., 237 U.S. 121, 133 (1915) (same). The common carrier obligation also requires that common carriers accept goods for transportation at all reasonable

locations, including reasonable points of interchange when the traffic has originated on the lines of a second carrier. As the ICC has explained:

We think that a common carrier is bound to accept a car for transportation whenever such a car is offered at places where it can reasonably receive it. To determine whether or not it will transport the car, the carrier can not lawfully inquire into the ownership and origin of the contents, nor into the route over which it has been moved in order to reach its rails. It can only ask that it be given reasonable compensation for the service it performs.

St. Louis, Springfield & Peoria R.R. v. Peoria & Pekin Union Ry.,
26 I.C.C. 226, 237 (1913).

The One Route/One Rate Principle erroneously abrogates the statutory common carrier obligation. The text of former Title 49 provides that carriers "shall" provide common carrier service and rates. The text does not contain a corresponding provision that carriers "shall not" be required to provide service where they have in place one origin-to-destination routing. The STB's attempt to read in such an "implied" service limitation is directly in conflict with the Supreme Court's admonition that "exceptions [to the common carrier obligation] are not to be implied,"¹⁵ and overturns longstanding precedent requiring carriers to "carry all goods"¹⁶ that are "offered at places where [the carrier] can reasonably receive it." St. Louis, Springfield & Peoria R.R., 26 I.C.C. at 237.

¹⁵ American Trucking Ass'ns, 387 U.S. at 407.

¹⁶ Id. at 406.

Congress has made many changes in railroad regulatory law in the last two decades. However, as this Court observed in 1993, while many changes have been made, Congress has chosen not to reduce the common carrier duties regulated carriers owe to the shipping public:

Congress passed the Staggers Rail Act upon a finding that most transportation in the United States today is competitive, that the nation's railroads have deteriorated under the burden of unnecessary and inefficient government regulation, and that rail tariffs should be more responsive to market forces. Although Congress specifically set as one goal of the Act "to assist the rail system to remain viable in the private sector of the economy," Staggers Rail Act, 94 Stat. 1895, 1897, it also preserved the statutory common carrier obligations of rail companies to all shippers.

National Grain and Feed Ass'n v. United States, 5 F.3d at 309.¹⁷ The One Route/One Rate Principle's assault on the common carrier obligation must be set aside.

B. Through Route Law Does Not Support
The One Route/One Rate Principle

The STB looks to the law of through routes to justify the One Route/One Rate Principle. A "through route" is an agreement "between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another." St. Louis Southwestern Ry.

¹⁷ Since 1993, Congress has enacted the Termination Act. That Act expressly "retains the existing legal duty of a rail carrier to provide transportation upon reasonable requests -- the 'common carrier obligation'." H.R. Rep. No. 104-422 at 183 (1995). See new 49 U.S.C. §§ 11101(a), (b).

v. United States, 245 U.S. 136, 139 n.4 (1917). The STB appears to conclude that through route law defines the contours of a carrier's common carrier obligations.¹⁸ The STB's conclusion is predicated upon a fundamental misunderstanding of the law of through routes.

At common law, rail carriers were permitted, but not required, to enter into through route arrangements. See Atchison, Topeka & Santa Fe Ry. v. Denver & New Orleans R.R., 110 U.S. 667, 680 (1884). The common law also provided that in the event a common carrier chose to enter into through route agreements, the carrier could select the through routings over which it would provide service. As explained by the Supreme Court:

At common law, a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts to go beyond, he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purposes of the contract, and if

¹⁸ This conclusion thus forms the predicate for the STB's arcane One Route/One Rate Principle jurisprudence. According to the STB, when the bottleneck carrier does not serve an origin, the common carrier obligation requires the bottleneck carrier and an origin carrier to enter into a through route agreement establishing a single route and rate, except in those instances when a shipper has first entered into a transportation contract with an origin carrier. (Decision at 5; Clarification Decision at 3-4; J.A. 2993, 3154-55). However, when the bottleneck carrier serves both the origin and destination, the STB holds a bottleneck carrier's common carrier obligation is satisfied when the bottleneck carrier offers a single-line route and rate from origin to destination. In this instance, the common carrier obligation does not require the bottleneck carrier to enter into a through route agreement with a second origin carrier since, according to the STB, through route law attempts to preserve the origin carrier's "long haul" rights. (Decision at 8; Clarification Decision at 4; J.A. 2996-55).

he holds himself out as a carrier beyond the line, so that he may be required to carry in that way for all alike, he may, nevertheless, confine himself in carrying to the particular route he chooses to use. He puts himself in no worse position, by extending his route with the help of others, than he would occupy if the means of transportation employed were all his own. He certainly may select his own agencies and his own associates for doing his own work.

Id. The absence of a through route agreement did not mean, however, that a carrier could prohibit a shipper from transporting its goods via two or more carriers over routings of a shipper's choice. It simply meant that the shipper had to make its own common carrier transportation arrangements with each individual carrier. Making such arrangements could prove quite burdensome, however, since the shipper would have to make separate arrangements with each carrier along its selected route of movement, including separate billing arrangements, separate interchange arrangements, and separate liability arrangements for cargo loss and damage.

The nation's first interstate rail regulation act, the Act to Regulate Commerce of February 4, 1907, ch. 104, 24 Stat. 324, commonly known as the "Interstate Commerce Act," required common carriers to establish reasonable facilities for the interchange of rail traffic between their lines, (id., § 3, 24 Stat. at 380, codified as amended at former 49 U.S.C. § 10742), but that Act, like the common law, imposed no mandatory through route obligations on rail carriers. See Southern Pac. Co. v. ICC, 200 U.S. 536, 554 (1906). However, in the Act of June 30,

1906, ch. 3591, 34 Stat. 584, commonly known as the "Hepburn Act," Congress amended the Interstate Commerce Act by adding a provision granting the ICC the power to order carriers to enter into through route agreements. Hepburn Act, § 4, 34 Stat. at 589, codified as amended at former 49 U.S.C. § 10705; See Thompson v. United States, 343 U.S. 549, 554 (1952).

Both before and after the Hepburn Act was passed, shippers generally preferred to transport goods from origin-to-destination via carrier through route agreements. Such agreements provided "one stop shopping" enabling a shipper to obtain origin-to-destination service and rates by making arrangements only with the originating carrier. Moreover, rates on through routes were usually the lowest available between origins and destinations. See Santa Fe, 279 U.S. at 771 n.1.

Because through route service was generally preferred by shippers, most of the post-1906 case law involves actions by shippers seeking through route service or claiming that such service existed for their movements. Though through route service was preferred by shippers, the ICC on occasion dealt with the question of whether shippers retained their common law rights to make their own arrangements with connecting carriers to move their goods from origin-to-destination.

In its 1953 Routing Restrictions case, the ICC addressed a shipper's options in moving freight between origin and destination where the carriers refused to enter into through route agreements. In Routing Restrictions, the ICC observed that

where a carrier refuses to establish a through route voluntarily, a shipper may, at its option, petition the ICC for "a determination and an order requiring the establishment of additional routes." Id., 296 I.C.C. at 774. However, the ICC further held that a shipper was not required to seek a through route prescription as it had a second option -- making its own transportation arrangements with each carrier:

On the other hand, a carrier may not, except under extraordinary conditions, lawfully refuse to transport a shipment from or to any point on its lines which it holds itself out to serve, including an established interchange with a connecting line. Thus, a shipper may secure transportation over any route he selects, although he may be required to use local billing to and from the junctions of the different lines composing the route he selects, and to pay the charges applicable over that route. . . .

Id. at 774-75.

The ICC observed that a shipper's use of non-through route arrangements to move its goods over the lines of two or more carriers might be viewed as "an almost untenable paradox" but that such a result was clearly permissible under the "through shipment" doctrine:

The conclusion that through shipments may be transported over the lines of two or more carriers which are not a through route might appear to present an almost untenable paradox, but by this conclusion past decisions of the Commission and the courts can be reconciled. In Baer Bros. Mercantile Co. v. Denver & R.G.R. Co., 233 U.S. 479 (1933), the Supreme Court, when faced with a similar situation, concluded that "while there was no through rate and no through route, there was in fact a through shipment * * *."

Id. at 775.

In 1970, the ICC addressed a related issue: whether a shipper had to utilize through route service when it was offered. The ICC held that a shipper always retained its rights under § 11101(a) to "make its own arrangements" with carriers and could not be forced to utilize through route service:

[A] rail carrier may not deny a shipper use of its services, held out to the public, merely because the shipper does not desire to avail itself of so-called through route arrangements. . . . [S]hould a shipper desire, in effect, to make its own arrangements for combining local services . . . the duty of a rail carrier pursuant to Section 1(4) [now codified at 49 U.S.C. § 11101] is not diminished.

P.B. Mutrie Motor Transp., Inc., Extension -- Ex-Rail, 111 M.C.C. 251, 269-70 (1970).

Historically, shippers have preferred through route service. However, the law has never mandated through route service as the exclusive means for a shipper to obtain origin-to-destination service, nor has through route law defined the parameters of a carrier's common carrier service obligations. The law, from the common law, until the STB's Decision, has always permitted shippers to make their own transportation arrangements with connecting railroads, and has always imposed upon carriers the duty to transport goods under these arrangements. Indeed, with the advent of rail contracting, as well as the practice of large shippers supplying their own cars to haul their traffic, making their own arrangements with connecting carriers frequently provides shippers -- and particularly bottle-

neck shippers -- with the most flexibility and the best rail prices.

The law for the last 100+ years has been clear: if they choose to do so, shippers can make their own arrangements with rail carriers for purposes of providing origin-to-destination service, and rail carriers are required to transport goods tendered under these arrangements. The One Route/One Rate Principle constitutes an unwarranted and unexplained departure from governing law.

C. The Other Authority Cited By The STB Does Not Support The One Route/One Rate Principle

The STB cites numerous cases involving the establishment of through routes, and the pricing structure on such routes, as mandating the agency's adoption of the One Route/One Rate Principle. See, e.g., United States v. Illinois Centr. R.R., 263 U.S. 515, 522 (1924) (carriers may choose the form of pricing when providing through route service); Metropolitan Edison Co. v. Conrail, 5 I.C.C.2d 385, 409 (1989) (same); Intramodal Rail Competition, 1 I.C.C.2d 822 (1985) (establishing STB's "competitive access rules"),¹⁹ aff'd sub nom. Baltimore Gas & Elec. Co.

¹⁹ The STB refers to its rules codified at 49 C.F.R. Part 1144 as its "competitive access rules." (Decision at 7; J.A. 3105). These rules set forth regulations governing through route matters, including the prescription of new through routes under former 49 U.S.C. § 10705. See 49 C.F.R. § 1144.5 (1994). Prior to the issuance of the Decision, the ICC/STB had never required shippers to seek relief under former 49 U.S.C. § 10705's competitive access rules as a prerequisite to obtaining maximum rate relief under former 49 U.S.C. § 10704(a). See Iowa Power & Light Co. v. Burlington N. R.R., Docket No. 40224, slip. op. at 3

v. United States, 817 F.2d 108 (D.C. Cir. 1987). (Decision at 5; J.A. 3103). These cases, however, do not mandate that shippers utilize through route service to transport their goods from origin-to-destination.

Similarly, former 49 U.S.C. § 10701a(a), cited by the STB,²⁰ does not compel a shipper to utilize through route service against its will. This provision states that a rail carrier "may establish any rate for transportation or other service provided by the carrier." Id. Former 49 U.S.C. § 10701a must be read together with former 49 U.S.C. § 11101(a) (carrier to provide service on reasonable request). Thus, where a shipper requests that a carrier provide specified service, it must publish a rate which is responsive to a shipper's service request. See Increased Rates on Coal, BN, Mont. to Superior, Wis., Docket No. 37135 (Decision served Jan. 4, 1980) (unprinted) (carrier does not fulfill common carrier obligation where rate provided does not correspond to service requested). Accordingly, if a shipper does not request that a carrier provide through route service, a carrier cannot comply with former § 10701a by providing a through service rate since such a rate is not responsive to the shipper's service request.

The STB next cites the policy of "efficiency" in support of its One Route/One Rate Principle. This policy, as

(Decision served Feb. 16, 1990) (unprinted) (rejecting carrier request that shipper complaint seeking maximum rate relief be initially determined under the competitive access rules).

²⁰ See Decision at 5; J.A. 3103.

conceived by the STB, provides that between any origin and any destination, there is one preferred, efficient rail routing. The STB assumes that the bottleneck carrier will select this routing, and by requiring a bottleneck carrier to participate in a second less efficient routing, efficiency will not be promoted. The STB claims that the regulatory reforms set forth in the 4-R Act and the Staggers Act, and the case law construing those Acts, support its efficiency findings. (Decision at 5-8; J.A. 3106).

The STB's efficiency arguments are wrong. Left to its own devices, a bottleneck carrier will select a routing that maximizes its revenues. (J.A. 2575). This may or may not be the most "efficient" route in terms of mileage, service costs, and other factors. In addition, fundamental economic principles teach that competition -- not monopoly -- will ultimately produce the most efficient operations. (J.A. 2585-87, 2935-40). Furthermore, reducing a monopoly bottleneck's power over rail routings by allowing a shipper to craft competitive origin routings is conducive to increased rail efficiency. Id. Such a result, as discussed infra, also correctly comports with the Congressional intent in the 4-R Act and the Staggers Act to promote, whenever possible, competition between rail carriers.²¹

Finally, the STB erroneously claims that allowing shippers like CPL and MidAmerican the right to route their own trains

²¹ The Joint Appendix references in this paragraph are to the Verified Statements submitted in the proceedings below by two of the nation's leading transportation economists: Dr. George H. Borts of Brown University and Dr. Alfred E. Kahn of Cornell University.

would lead to a chaotic system of "open routing." (Decision at 6, J.A. 3104). In the proceedings below, CPL, MidAmerican, and PPL were not advocating "open routing." Instead, those shippers sought only to obtain one routing and/or rate offering in addition to the monopoly routing and rates offered by the bottleneck carrier. The purpose of this second routing or rate was to maximize competition for service over the non-bottleneck route.

Moreover, shippers could not advocate "open routing" even if they so desired. Former 49 U.S.C. § 10742 limits shippers' routing flexibility, as shippers can request interline movements only via "reasonable" interchanges. Id.²² If a shipper requests a route via an interchange that a carrier believes is for some reason unreasonable, it can negotiate with the shipper or, should negotiations fail, either the shipper or the carrier can ask the STB to resolve the issue under § 10742.²³

²² WCTL presented substantial evidence that the bottleneck interchanges at issue in the proceedings below were reasonable ones. See J.A. 2603-11.

²³ Of course, carriers cannot claim relief from their interchange duties under § 10742 on grounds that they are refusing to interchange traffic to "freez[e] out" a competitor. 17 Cong. Rec. S3470, 3472 (1886) (statement of Sen. Cullom concerning the initial version of what was former section 10742).

III.

THE STB'S GREAT NORTHERN
PRINCIPLE IS WRONG

The STB's Great Northern Principle holds that shippers cannot challenge the maximum reasonableness of a proportional rate, by itself, where the origin-to-destination rate includes a proportional rate.²⁴ According to the STB, this result is mandated by the Supreme Court's 1935 decision in Great Northern. The STB misreads Great Northern.

A. Great Northern Does Not Bar Proportional
Rate Prescriptions.

The STB's construction of Great Northern is wrong because it conflicts with both the Supreme Court's 1929 decision in Santa Fe, a decision cited with approval in Great Northern, as well as with the ICC/STB's own post-Great Northern precedents.

In Santa Fe, a rail carrier challenged the maximum reasonableness of a proportional rate published by another rail carrier. The Supreme Court (Brandeis, J.) upheld an ICC order finding that the proportional rate at issue was unreasonable even though there was no showing that the involved origin-to-destination rate was unreasonable. Justice Brandeis considered and rejected the contention that the ICC lacked jurisdiction to

²⁴ As discussed, supra, a proportional rate is a form of pricing used when two or more carriers have entered into an through route agreement. Proportional rate pricing involves a tariff publication, or publications, where one or more participants in a through route publish a rate applicable only over that participant's lines. (Decision at 2 n.3; J.A. 3100).

consider the maximum reasonableness of a proportional rate, holding that "[t]he Commission's power to declare rates unreasonable applies alike to all rates":

The Commission's power to declare rates unreasonable applies alike to all rates, be they joint, local, or proportional. The Commission may, and in controversies involving through rates often does, deal with one factor only of the combination of rates which make up the through rate, and that factor may be a proportional rate.

Id. 279 U.S. at 776 (emphasis added).

In 1935, the Supreme Court held in Great Northern that a shipper could not obtain a reparation order on traffic priced using two separately published proportional rates, without first demonstrating that the combined rate was unreasonable. A reparation order refers to an order directing one or more carriers to pay damages to a shipper equal to the difference between the tariff rates paid in the past, and the maximum reasonable rates the carrier or carriers could lawfully charge during the same time period.

In Great Northern, the Court cited with approval its earlier Santa Fe decision, which the Court construed as permitting a shipper to challenge the reasonableness of a proportional rate alone, so long as reparations were not sought:

[The ICC] may determine whether a proportional constituting a part of a combination rate violates section 1 without passing upon the validity of the rate as a whole. Atchison, T. & S.F. Ry. v. United States, 279 U.S. 768, 776, 49 S.Ct. 494, 73 L. Ed. 947. But the commission may not order or permit payment of damages by way of reparation without finding

that the amount of the charge was unjust and unreasonable.

294 U.S. at 462-63.

The STB provides a bizarre rationale for not adhering to Santa Fe. According to the STB, Santa Fe holds that while carriers can institute cases challenging the maximum reasonableness of a proportional rate, shippers cannot. This reading of Santa Fe is wrong. At the time the Santa Fe was decided (1929) and under the governing law below, Title 49 provided that any "person" can file an action challenging the maximum reasonableness of a freight rate. See 49 U.S.C. § 13(1) (repealed); former 49 U.S.C. § 11701(b). Nothing in Title 49 (either then or now) supports the STB's arbitrary distinction that rail carriers can challenge the reasonableness of proportional rates, but that shippers cannot. Similarly, nothing in the Santa Fe or Great Northern decisions even remotely suggests that the Supreme Court intended to limit the ICC's jurisdiction to hear maximum proportional rate cases solely to those cases instituted by railroads. Rather, as Justice Brandeis held, the ICC has jurisdiction to adjudicate "controversies" involving the maximum reasonableness of proportional rates. Santa Fe, 279 U.S. at 776.

The STB's Great Northern Principle also constitutes an explained departure from prior ICC precedents involving prescription of maximum reasonable proportional rates. Following the 1935 Great Northern decision, the ICC held on numerous occasions that it could separately examine the reasonableness of a proportional rate component of an origin-to-destination rate. See L.T.

Barringer & Co. v. United States, 319 U.S. 1, 11 (1943); accord Coast Transp. Co., Inc. v. Aberdeen & Rockfish R.R., 268 I.C.C. 439, 446 (1947) ("The contention that proportional rates may not be separately considered finds little support in the decisions of the Supreme Court or in our decisions."); see generally Charles W. Berry, A Study of Proportional Rates, 10 I.C.C. Pract. J. 545, 566 (1943) ("There seems to be no doubt but the overwhelming weight of authority now is to the effect that the Commission has jurisdiction to consider the lawfulness of a separately established rate on its own merits and without regard to the through charges.").²⁵

The Great Northern Principle should be set aside. Like the STB's other principles, it misreads governing law and, in adopting it, the STB simply ignores its own prior precedents establishing the correct law.

B. Great Northern Does Not Bar Local Rate Prescriptions.

CP&L, MidAmerican and PPL each challenged a "local" class rate and each asked the STB to prescribe to a local unit train rate. A "local" rate is a rate applicable over the lines of a single carrier. Cost Ratio For Recyclables -- 1993 Determination, Ex Parte No. 394 (Sub-No. 1), 1993 ICC LEXIS 280 at *5

²⁵ The D.C. Circuit recently cited the Decision's Class Rate Principle, with approval. See Western Resources, Inc. v. STB, 109 F.3d 782, 784 (D.C. Cir. 1997). The D.C. Circuit undertook no detailed review of the Class Rate Principle and erred in its citation.

(Decision served December 16, 1993). Local rate pricing can occur when traffic originates and terminates on a single carrier's line, or can also apply as the measure of pricing on through route movements (where the involved carriers have not published proportional or joint rates over the route),²⁶ or on non-through route movements. Routing Restrictions, 296 I.C.C. at 774-75. As the ICC observed in 1993:

A local rate, by definition, moves only over the lines of one carrier. And a combination of locals may move over the lines of more than one carrier, but each carrier acts independently of the other carriers, and as far as the shipper is concerned, each leg of the service essentially stands on its own.

Cost Ratio For Recyclables -- 1993 Determination, Ex Parte No. 394 (Sub-No. 1), 1993 ICC LEXIS 280 at *5.

The law is clear that a shipper can file a complaint challenging the maximum reasonableness of an existing "local rate" and obtain a prescription of a maximum "local rate" if the shipper demonstrates that the existing local rate is unreasonably high. Such cases are permissible both when the local rate applies to traffic that originates and terminates on a carrier's line,²⁷ and in those cases where a shipper challenges a local rate, used in combination with other local rates, to achieve an

²⁶ See St. Louis Southwestern Ry., 245 U.S. at 139 n.4. A joint rate establishes a single rate applicable over a multi-carrier through route. Id.

²⁷ See West Tx. Utils. v. Burlington N. R.R., No. 41191 (Decision served Apr. 25, 1996), aff'd sub nom. Burlington N. R.R. v. STB, No. 96-1229 (D.C. Cir. May 23, 1997) (prescribing maximum origin-to-destination rates).

origin-to-destination movement. See Midland Coal Co. v. Midland Valley R.R., 91 I.C.C. 571 (1924); Phoenix Util. Co. v. Southern Ry., 173 I.C.C. 500, 503 (1931).

Great Northern did not address the ICC/STB's power to set maximum reasonable local rates, much less conclude that the STB lacks the power to prescribe local rates. The cases that have addressed this issue, discussed supra, uniformly conclude that the STB does have the power to prescribe local rates when it finds an existing local rate exceeds a maximum reasonable rate level. Thus, had the STB properly exercised its authority (as discussed in Argument I, supra), to determine the maximum reasonableness of the local class rates at issue in CPL, MidAmerican and PPL, or had the STB ordered the bottleneck carriers to publish local unit train rates as it could have done (see Argument II, supra), the STB clearly had the power to prescribe a maximum reasonable unit train rate in the CPL, MidAmerican and PPL cases.

IV.

THE STB ERRED IN DISMISSING THE CPL AND MIDAMERICAN COMPLAINTS

CPL and MidAmerican explain in their briefs why the STB erred in dismissing their cases. WCTL/NITL provide only brief supplemental arguments here.

Motions to dismiss in STB practice are "disfavored" and "rarely granted":

As a general rule, a motion to dismiss is a disfavored request and rarely granted in judicial and administrative proceedings.

See Garden Spot & N. Ltd. Partnership and Ind. Hi-Rail Corp. -- Purchase and Operate -- Ind. R.R. Line Between Newton and Browns, Ill., Docket No. 31593, slip op. at 2 (Decision served Jan. 5, 1993) (unprinted). Nevertheless, the STB summarily granted the extraordinary relief of dismissal in the CPL, MidAmerican and PPL cases in a most arbitrary and capricious fashion.

The STB's use of the three misguided principles as the basis for dismissing CPL's and MidAmerican's complaints clearly requires vacation of the dismissal orders and remand to the STB. See 5 U.S.C. § 706(2)(A), (E); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. at 43-44. Moreover, as CPL and MidAmerican explain in their briefs, even if the Court accepts the STB's three principles as legally correct, the STB's truncated, arbitrary and capricious attempt to apply these principles to specific facts in each case also compels vacation and remand of the dismissal orders. Id.

The STB also claims that it was justified in dismissing the MidAmerican case because that case was not "ripe" for administrative adjudication. (Decision at 17; J.A. 3115). The STB cites the D.C. Circuit's decision in Burlington Northern²⁸ as the sole support for its ripeness conclusions. The STB's reliance on Burlington Northern is misplaced. Burlington North-

²⁸ Burlington N. R.R. v. STB, 75 F.3d 685 (D.C. Cir. 1996).

ern involved a case where the STB ordered the BN to publish a unit train tariff approximately a year and a half in advance of the time that service could commence under the tariff. Id. at 687-88. The D.C. Circuit concluded that the STB lacked the statutory authority to order the tariff filing that far in advance of the commencement of service. Id. at 692-95. The D.C. Circuit cited the San Antonio decision in Burlington Northern, but found that decision not controlling because, in Burlington Northern, the ICC chose not to adjudicate the reasonableness of an existing class tariff rate. Id. at 695.

Unlike the case in Burlington Northern, the STB did not order UP to file a unit train tariff rate applicable to MidAmerican's coal traffic. Instead, MidAmerican -- following the San Antonio approach -- challenged an existing class rate. As discussed, supra, the San Antonio decision, affirmed by this Court, does permit the STB to adjudicate challenges to class rates well in advance of the actual tariff movement.

Moreover, the rationale underlying the Burlington Northern case has no application to MidAmerican. The Panel in Burlington Northern held that the ICC's tariff order was invalid because it "compel[ed] rail carriers to serve at rates other than those of their choosing before completion of a Commission proceeding assessing the rates." Id. at 694. In MidAmerican, however, MidAmerican challenged local class rates voluntarily filed by UP.

Finally, the D.C. Circuit reached the wrong result in Burlington Northern.²⁹ In Burlington Northern, the ICC did not direct the BN to publish or serve under "rates other than those of [BN's] choosing. . . ." Id. Rather, the STB simply directed the BN to file whatever rate it saw fit to charge on the shipper's unit train coal traffic. Thus, the ICC did not direct BN to publish a particular rate, it simply directed BN to publish whatever rate it thought should apply to the shipper's unit train traffic. That rate could -- and did -- remain in effect pending the STB's resolution of the shipper's case assailing the maximum reasonableness of the published rate. See West Tex. Util. Co. v. Burlington N. R.R., No. 41191 (Decision served May 3, 1996) (unprinted), aff'd sub nom. Burlington N. R.R. v. STB, No. 96-1229 (D.C. Cir. 1997).

V.

**THE STB'S DISPOSITION OF THE
BOTTLENECK CASES CONFLICTS WITH THE
NATIONAL RAIL TRANSPORTATION POLICY**

In the Staggers Rail Act, Congress promulgated a new national rail transportation policy. That policy, building upon legislative principles first enunciated in the 4-R Act, declares that rail rates should be set by competition, where competition exists, with maximum rate regulation limited to markets where

²⁹ The STB argued vigorously in support of the exercise of its jurisdiction in Burlington Northern.

there is no competition. The national rail policy was codified at 49 U.S.C. § 10101a and states in pertinent part:

- (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
- (2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

* * *

- (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;
- (5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;
- (6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

* * *

49 U.S.C. § 10101a (emphasis added).³⁰ The actions taken by the shippers in the Bottleneck Cases fully comply with the pertinent national transportation policy.

The first, fourth and fifth transportation policies call upon shippers and carriers to "maximize" inter-railroad competition. The bottleneck shippers' actions clearly adhere to these policies, because they seek to allow the market to determine the rates for the traffic to the maximum extent possible, i.e., over the segment of the route subject to competition.

The sixth national transportation policy recognizes that where competition is absent, rail carriers providing common carrier service must "maintain reasonable rates. . . ." 49 U.S.C. § 10101a(6). The gravamen of the bottleneck shippers' separate complaints was that the bottleneck carriers faced no effective competition, and, as a consequence, sought to extract unreasonably high rates over the bottleneck line segments. The bottleneck shippers' resort to the STB to adjudicate their maximum rate complaints thus also fully complies with the sixth national transportation policy.

The STB reads the national rail transportation policy differently. According to the STB, the pro-competitive policies

³⁰ Congress intended that the national railroad transportation policy guide the ICC and STB in interpreting and applying the regulatory provisions in Subtitle IV of Title 49. Chesapeake & Ohio Ry. v. United States, 704 F.2d 373, 376 (7th Cir. 1983); Schaffer Transp. Co. v. United States, 355 U.S. 83, 87-88 (1957) (explaining that the National Transportation Policy "is the yardstick by which the correctness of the Commission's actions will be measured").

that lie at the heart of the rail transportation policy must give way to the specific requirements of its three Principles. Those Principles, in effect, relieve the bottleneck carrier of any necessity to compete with other available origin carriers serving both the origin and destination and, when the bottleneck carrier does not serve the origin, allocate the benefits of origin competition to the bottleneck carrier.

The STB's three Principles are wrong for the reasons discussed, supra. Moreover, the result of those policies -- aggrandizing bottleneck carriers' revenues at the expense of captive rail shippers -- finds no support in the 4-R Act, the Staggers Act, the Termination Act, or the national rail transportation policy. In these laws and statutes, Congress intended that shippers skillfully deploy marketplace strategies to maximize competition. American Short Line R.R. Ass'n v. United States, 751 F.2d 107, 113 (2d Cir. 1984). That is precisely what the shippers in the proceedings below attempted to do.

Ultimately, the STB appears to have been swayed by the railroad industry's repeated admonitions that requiring carriers to compete over bottleneck line segments could bankrupt the rail industry. (J.A. 836-37, 856-58). Not only are the railroads' pleas of financial hardship preposterous,³¹ the railroad industry's collective position that competition will ruin the industry constitutes a direct repudiation of Congressional intent, codified in the rail transportation policy, that the commercial

³¹ See J.A. 2508-21.

interests of both shippers and carriers is best advanced by promoting rail competition and competition-set rates.

Congress clearly was concerned about the financial health of the rail industry when it enacted the 4-R Act and Staggers Act. However, Congress concluded that the best way for the rail industry to become financially healthy, and to obtain adequate revenues, was to allow the railroad industry to compete for business, rather than permitting the industry to exploit captive rail shippers with monopoly prices via unrestrained "differential pricing" -- i.e., pricing in accordance with demand for services. As the STB itself observed in a 1996 decision:

[T]he rail transportation policy (RTP) found at 49 U.S.C. 10101a states that, in regulating the railroad industry, it is the policy of the United States Government "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail; * * * and to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers * * * to meet the needs of the public * * *."

...
We recognize that carriers in competitive markets are less able to price differentially than carriers in monopoly situations, and that differential pricing is one way in which carriers can move toward revenue adequacy. But, while it was aware of the potential conflict between revenue adequacy and competition, Congress determined that the public would benefit from increased competition. Staggers Act Conference Report [H.R. Rep. No. 96-1430] at 114. Indeed, while it clearly sought to promote railroad earnings, Congress concluded that the best "way to attain revenue adequacy [was] by means of the interaction of competitive forces." American

Short Line R.R. Ass'n v. United States, 751
F.2d 107, 113 (2d Cir. 1984).

Thus, we do not believe that we should
administer the Congressional policy directing
us to promote revenue adequacy at the expense
of the clearly articulated policy, in the RTP
. . . that we advance competition. . . .

Omaha Pub. Power Dist. -- Petition Under 49 U.S.C. 10901(d), slip
op. at 3-4.

The STB's failure to properly implement the national
rail transportation policy provides yet another ground for
setting aside the decisions under review.

CONCLUSION

For the reasons set forth herein, the STB's Decision
and its Clarification Decision should be vacated in the manner
requested herein, and remanded to the STB.

Respectfully submitted,


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DATED: June 16, 1997

EXHIBIT 3

BEFORE THE
INTERSTATE COMMERCE COMMISSION

In The Matter Of:

INTRAMODAL RAIL COMPETITION

)
)
)
) Ex Parte No. 445 (Sub-No. 1)
)
)
)

JOINT COMMENTS OF
THE WESTERN COAL TRAFFIC LEAGUE
AND
THE CONSUMER OWNED POWER COALITION

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Dated: May 31, 1985

BEFORE THE
INTERSTATE COMMERCE COMMISSION

In The Matter Of:

INTRAMODAL RAIL COMPETITION

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JOINT COMMENTS OF
THE WESTERN COAL TRAFFIC LEAGUE
AND
THE CONSUMER OWNED POWER COALITION

The Western Coal Traffic League ("WCTL") and the Consumer Owned Power Coalition ("COPC") hereby submit these Joint Comments in response to the Notice of Proposed Rulemaking served on March 28, 1985, and published in the Federal Register on April 2, 1985 (50 Fed. Reg. 13051).

IDENTITY AND INTEREST

A. The Western Coal Traffic League

WCTL is a voluntary association formed in 1976. It is comprised of shippers and receivers of coal mined west of the Mississippi. Each WCTL member is a major consumer of western coal, and each moves substantially all of its coal by rail. Presently, the total coal requirements of WCTL members exceed 40 million tons per year.

WCTL was an active participant in the Ex Parte No. 456 process which led directly to the instant proceeding. Because the preponderance of its members enjoy little or no effective competition for the transportation of their coal, WCTL was especially involved in the phase of Ex Parte No. 456 devoted to consideration of issues and problems of competitive access. Its continued commitment to pursuit of its members' interests in this important area prompts WCTL's participation in this proceeding.

B. Consumer Owned Power Coalition

COPC is an association comprised of the American Public Power Association, the National Rural Electric Cooperative Association, and numerous other power service organizations, non-profit consumer owned electric utilities, and joint power agencies. COPC members represent a wide national cross-section of coal users. All members, to varying degrees, depend upon coal to fuel their power generation facilities.

Like WCTL, COPC was an active participant in the "competitive access" phase of Ex Parte No. 456. As an association whose members generally find themselves captive -- at origin, destination, or both -- to individual rail carriers, COPC likewise harbors a serious interest in this proceeding, and in the attendant claims that one or both of the proposals under consideration by the Commission here would "solve" existing problems of competitive rail access.

COMMENTS

In this proceeding, the Commission has asked for comments on its proposal to adopt, as final rules, a set of guidelines proposed jointly by the Association of American Railroads ("AAR") and the National Industrial Transportation League ("NITL"), to govern the Commission's future handling of disputes over certain intrarailroad operating practices, i.e., the cancellation and/or prescription of joint rate and through route agreements, and the establishment of reciprocal switching arrangements. The AAR/NITL proposal, which is also subscribed to by the Chemical Manufacturers Association ("CMA"), is an outgrowth of a private agreement reached by these two parties in the context of Ex Parte No. 456, The Staggers Rail Act of 1980 -- Conference of Interested Parties.

As an alternative, the Commission has proposed to adopt a competing plan suggested by a group known as Railroads Against Monopoly ("RAM"). The RAM proposal is very similar to that of AAR/NITL with respect to joint rates and through routes, though it differs somewhat on the issue of reciprocal switching and addresses briefly the matter of terminal trackage rights, a subject avoided altogether in the AAR/NITL agreement.

WCTL and COPC do not object in principle to the adoption of either the AAR/NITL or the RAM proposals. They acknowledge that for some shippers, the guidelines set forth in those proposals may be of some help in certain situations. Moreover, there is nothing in either of the proposals in and of themselves

which would be contrary to the interests of the members of either WCTL or COPC.

The principal purpose of these Comments, however, is to voice -- forcefully and for the record -- the strong objection of WCTL and COPC to the efforts of certain parties to portray this proceeding as containing the "solution" to all shipper problems of competitive rail access, and in particular those of captive shippers of bulk commodities. In truth, these proposals offer no real "solutions" at all. The AAR/NITL agreement is basically a substantive affirmation of the status quo. The RAM proposal offers a minimal improvement in the existing state of affairs, but it is opposed by virtually all the Class I railroads. Neither proposal offers meaningful relief to captive shippers; in the absence of positive, significant Commission action on other substantive issues -- particularly those relating to competitive trackage rights -- only Congressional intervention can help.

A. The Proposals Set Forth In The Notice Would Not
Resolve Problems of Competitive Access Faced By
Captive Rail Shippers

Since the initiation of the Ex Parte No. 456 process, WCTL/COPC have been fearful that the proceeding would be used by some to attempt to sabotage ongoing legislative efforts on behalf of captive shippers -- particularly coal shippers. From the outset, it was clear that captive shippers were the only parties affected by the proceeding who had absolutely nothing to gain by it. While the AAR -- currently holding the upper hand before the

ICC on all major substantive issues -- was not about to grant any meaningful concessions which would significantly disturb the status quo, it was at the same time plain that any "agreement" reached in any of the different phases of Ex Parte No. 456 would be touted as a "solution" to the particular issue addressed. If captive shippers refused to participate in this illusory process, it was made clear to them that they would be labeled "obstructionists," unwilling to negotiate answers to their disputes with the railroad industry (notwithstanding the essentially non-negotiable status of those issues which were of concern to shippers, but already had been "resolved" in the carriers' favor by the ICC or the courts).

The Hobson's Choice facing captive shippers, and the potential for Ex Parte No. 456 turning by default into a white-wash for the status quo, was recognized by various Members of Congress, who communicated their concerns to the Commission (see Exhibits A-D, attached hereto). Shippers, too, tried to avert this undesirable result by asking the Commission to define the scope of Ex Parte No. 456 to exclude consideration of issues where it was known (a) that a meaningful agreement could not be reached, or (b) that even if agreement were reached, implementation would require Congressional action or the reopening of a settled ICC proceeding (see Exhibit E). The Commission, however, supported by the AAR, pressed ahead: Congress was reassured that no effort to supplant or sidetrack pending legislation was

underway, and the captive shippers' procedural motions were denied.

In the so-called "competitive access" phase of Ex Parte No. 456, negotiations began almost immediately among representatives of the AAR, NITL and CMA in connection with issues of major concern to the two shipper groups -- joint rates and through routes. Without belittling the value of those negotiations to the parties involved, WCTL/COPC did not join in the discussions, since the interests of their members would be largely unaffected by changes in ICC policy respecting those issue areas. One area in which WCTL/COPC did hold an interest was trackage rights as a tool for enhancing competition, but from the start it was clear that the AAR would not discuss this particular issue, and would actively oppose any effort to bring it within the rubrick of the competitive access phase of Ex Parte No. 456. WCTL/COPC therefore retired to the role of observer, refraining from opposing the ongoing negotiations, but anxious to point out that the results were not to be taken as a comprehensive resolution of all outstanding differences between shippers and carriers with regard to competitive access issues.

Unfortunately, the agreements subsequently reached by AAR/NITL and AAR/CMA have been advertised as precisely that, and WCTL/COPC now have no doubt that whatever is ultimately adopted by the Commission in this proceeding (be it the AAR/NITL plan, the RAM plan, or some combination) will become the basis for claims that any pre-existing problems of competitive access have

been solved, and further action by the Commission, the courts or the Congress is unnecessary (see, e.g., Exhibit F hereto). The Commission, to be sure, has not as yet attempted to promote this view before either Congress or the public, but it has nevertheless already taken hold in some quarters (see Exhibit G).

In point of fact, neither the AAR/NITL agreement nor the alternative RAM proposal is responsive to the fundamental competitive access problem experienced by coal and other captive shippers: the refusal of market dominant rail carriers to grant trackage rights on reasonable terms to competing carriers or to the shipper to allow access to another carrier or mode of transportation. Thus, while these proposals may find favor with their sponsors and certain segments of the shipping public, and may in fact provide some minimal improvement in the status quo for these shippers, they do not offer meaningful relief to captive shippers and do not obviate the need for corrective measures such as those embodied in the Consumers Rail Equity Act and the Railroad Anti-monopoly Act of 1985.¹

As noted above, WCTL/COPC do not object per se to the adoption of either proposal as set forth in the March 28 Notice. WCTL/COPC submit, however, that should the Commission issue formal rules embodying one or the other (or a combination

¹ Indeed, the AAR/NITL "compromise" is even viewed with skepticism by some of the signatories' own members. See, e.g., Comments of Eli Lilly and Company, May 17, 1985 (a member of NITL, Lilly found itself unable to endorse the agreement with AAR on grounds that it failed adequately to serve shipper interests on issues of competitive access).

of both), they should be accompanied by a clear statement that (a) the rules will not represent the exclusive means by which shippers can seek to make use of the "pro-competitive" provisions of the Interstate Commerce Act -- especially those provisions not addressed by the rules; (b) the rules do not represent a consensus among users of rail service as to the proper resolution of competitive access problems; and (c) the rules do not address the fundamental competitive access problems of concern to captive shippers.

B. The Commission Should Still Proceed To
Re-evaluate Its Policy Concerning Trackage Rights

The fact that neither of the proposals included in the Notice contains substantive guidelines for aggressive use of the Commission's power to order trackage rights pursuant to 49 U.S.C. §11103(a)² should not distract the Commission from the availability of this tool to foster competition in connection with origin and/or destination service for many captive shippers. In the case of coal, for example, §11103(a) -- if properly interpreted and actively utilized -- could take the Commission a long

² Section 11103(a) provides that the ICC may:

require terminal facilities, including main-line tracks for a reasonable distance outside of a terminal, owned by a rail carrier . . . , to be used by another rail carrier if the Commission finds that use to be practicable and in the public interest without substantially impairing the ability of the rail carrier owning the facilities . . . to handle its own business

way toward engendering effective competition in the transportation of coal from origin mines to mainline tracks, or from such tracks to end-use destination points.

The words "terminal" and "terminal facilities" are not specifically defined in the Interstate Commerce Act. However, the case law holds that the terms must be construed broadly, in light of the "remedial purposes" of §11103(a). City of Milwaukee v. Chicago and Northwestern Railway, 283 I.C.C. 311, 314 (1951); accord, Union Pacific -- Control -- Missouri Pacific; Western Pacific, 366 I.C.C. 459, 575 (1982), affirmed sub nom. Southern Pacific Transportation Company v. I.C.C., 736 F.2d 708 (D.C. Cir. 1984).³ In keeping with these principles, the Commission has construed "terminal facilities" to include spurs, sidings and industrial team tracks -- i.e., facilities designed for the pick-up or delivery of freight. See Use By Erie of Niagara Junction Railway Company Terminals, 269 I.C.C. 493, 497-99 (1947), and cases cited therein. Indeed, the ICC traditionally has included in the term "terminal facility" any property of a carrier (or in respect to which a carrier is "entitled to the enjoyment") which "assists in the performance of the functions of a terminal." CSX

³ In Union Pacific the ICC reviewed the legislative history of §11103(a) and the case law applying it, and concluded that the primary purpose of the provision was to eliminate the duplication of rail facilities that would result if every railroad had to build its own line into an area in order to compete for traffic in that area. Id., 366 I.C.C. at 575. The ICC went on in that case to prescribe trackage rights under §11103(a) for both DRGW and Southern Pacific specifically in order to permit those railroads to compete for traffic without building new lines to reach it. Id. at 576, 588.

Corporation -- Control -- Chessie and Seaboard Coast Line, Inc.,
363 I.C.C. 518, 585 (1980).

The foregoing principles and precedents clearly would support a finding that a coal mine loading facility or, alternatively, a utility plant unloading facility could qualify as a "terminal" under the Act. Each would constitute a station at which coal pick-up or delivery service -- as opposed to line-haul service -- is performed, a clear and traditional earmark of a terminal facility. See Pick-Up and Delivery Limits at Los Angeles, California, 293 I.C.C. 663, 671 (1954).

Similarly, WCTL/COPC submit that in most cases the dominant carrier's trackage between the origin or destination point and the nearest lines of a competing carrier could be considered to be within a "reasonable distance" of the origin or destination. What is to be considered a "reasonable distance" is determined on the basis of the particular facts of each case. Union Pacific, supra, 366 I.C.C. at 575. However, the Commission has already found mainline tracks for 12 miles outside terminals to be within a reasonable distance from those terminals,⁴ on grounds that just as easily would support a similar finding with regard to trackage twice as long.⁵ This conclusion is fully

⁴ Also worthy of note is the case of Florida East Coast Railway Company v. U.S., 256 F. Supp. 986 (M.D. Florida 1966), where in it was held that a line otherwise qualifying as a "terminal facility" would not be removed from ICC authority simply because the owning carrier also used the track for mainline through trains. See also City of Milwaukee, supra 283 I.C.C. at 315.

⁵ Parenthetically, it should be pointed out that the so-called
(Continued)

consistent with the purpose of §11103(a) noted supra: to permit inter-carrier competition without a duplication of physical facilities. Moreover, such an interpretation is supported by holdings in Florida East Coast and City of Milwaukee, supra, that the determinative consideration must be the use that will be made of the tracks by the tenant carrier. See also Union Pacific, supra, 366 I.C.C. at 575, 588. So long as the tenant would be using the tracks simply to reach the origin or destination to which it seeks to provide competitive service, and is not asking to use more trackage than necessary for that purpose, the trackage it needs should be considered a "reasonable distance" from the terminal facility involved. Id.⁶

WCTL/COPC also submit that the "public interest" and "substantial impairment" tests of §11303(a) can in most cases be met in connection with the imposition of trackage rights as a means to generate competition for otherwise captive coal traffic.

Reebie Study recently completed for the Commission proposed to consider "competitive" any rail line interchange located within 25 miles of a shipper's origin or destination point. While WCTL/COPC do not agree with this characterization in the context in which it is used in the Study, it is nevertheless supportive of the notion that a competing rail interchange 25 miles from origin or destination could be considered a "reasonable distance" away from such a terminal for purposes of §11103(a).

⁶ Compare Finance Docket No. 29908, Delaware and Hudson Railway Company and New York Department of Transportation -- Exemption for Use of Terminal Facilities, unprinted decision served May 3, 1983, in which the ICC held that certain Conrail tracks, which the D&H needed to use in order to reach shippers on two branch lines that Conrail was abandoning, were terminal facilities; but that an additional Conrail track which D&H wanted to use for its own operating convenience but which it did not need in order to reach shippers, was not a terminal facility.

The ICC has essentially treated the "substantial impairment" test as a question of physical capacity: would the addition of the tenant's traffic and trains so congest the facilities that the owning railroad's own operations would be adversely affected? See, e.g., Union Pacific, supra, 366 I.C.C. at 575-76. In most cases, operations by one carrier over relatively short stretches of another carrier's track to serve a specified origin or destination -- which will not constitute added traffic but rather will handle traffic that otherwise would move in the dominant carrier's trains -- would not interfere materially with the owning carrier's use of its tracks and other facilities. This would be particularly true if the line "chosen" by the tenant is one that is not integral to the owning carrier's other train operations.

The "public interest" test should also be met in most cases. In addition to the aforementioned ICC statements regarding the purpose of §11103(a), the 1984 Review Board decision in Finance Docket No. 30137, Southern Pacific Transportation Company v. Missouri Pacific Railroad Company, decision served May 25, 1984, supports active use of §11103(a) in the manner described here. In that case, the Review Board addressed the public interest test by noting that "[u]nder the Staggers Rail Act of 1980, competition is presumed to be in the public interest. See, 49 U.S.C. §10101a(1), (4), and (5)." Id. at 14. The Board went on to find that trackage rights under the circumstances involved would promote head-to-head competition between the carriers in-

volved for traffic destined for the terminal in question, without materially impairing the owning carrier's other operations, and thus served an "actual [public] necessity." Id.

The use of §11103(a) to require the granting of track-age rights over lines connecting mainline track to captive origin and destination facilities in order to generate head-to-head rail competition plainly would be in the public interest, and would further Congress' goal of substituting free market competition for regulation wherever possible. It would also advance the admirable commitment to intramodal competition for coal transportation services reflected in, e.g., the ICC's several decisions in Finance Docket No. 29066, Chicago and Northwestern Transportation Company Approval Of Terms Of Construction, Ownership And Operation Of A Line Of Railroad In Campbell And Converse Counties, Wyoming.

WCTL/COPC and others advanced the position outlined above in the course of Ex Parte No. 456, in the hope of influencing the sub-conference on competitive access issues to include a suitable recommendation in its final report. As matters turned out, of course, there was no "final report" as such, and the Commission instead has instituted this proceeding at the behest of AAR/NITL and CMA. The pendency of this proceeding and the limited scope of the proposals under consideration herein, however, should not hamper the Commission in its deliberation of alternative or additional options in the area of competitive access. Included specifically among these options, WCTL/COPC

submit, should be an aggressive policy on trackage rights under §11103(a).

C. Comments On Specific Questions
Posed By The Commission

In the Notice, the Commission posed ten specific questions concerning the AAR/NITL and RAM proposals. While the questions are phrased in such a way as to be directed in the first instance to the proponents of the proposals, other parties are not (and should not be) precluded from responding or commenting on the issues raised by the Commission's inquiries. In the interest of providing the Commission with as much public input as possible prior to its resolution of the matters raised herein, WCTL/COPC will address each inquiry in turn.

1. Is it the petitioners' intention that the stated circumstances would be the only ones under which the Commission would suspend competitive access disputes?

Obviously, WCTL/COPC cannot speak to the intent of the proponents of the two proposals (though CMA, in its comments, makes clear that it is not its intent to so limit the Commission's exercise of its discretion). WCTL/COPC submit, however, that the circumstances described in the proposals should not be the only conditions under which a suspension could be ordered. At most, those circumstances should be considered grounds for a "guaranteed" suspension. If a shipper or challenging railroad can show other sound reasons supporting suspension of a proposed

tariff which would impact upon issues of competitive access (e.g., a defective tariff publication under 49 U.S.C. §10762 and the Commission's regulations thereunder), the Commission should still act to grant the petition, even though the specific conditions set forth in Part (c) of the AAR/NITL proposal and Part (a) of the RAM proposal may not be met.

2. Do the caveats/prohibitions on use of geographic and product competition reflect an agreement among the parties that intermodal competition is relevant and should be considered in competitive access proceedings?

The plain language of the proposals indicates that certainly on the question of suspensions under both proposals (and investigations under the RAM plan), potential intermodal competition is to be excluded from consideration. Because Parts (d) and (e) of the AAR/NITL plan (on the subject of joint rates and through routes) and Part (d) of the RAM proposal make specific reference to the "policies of 49 U.S.C. §10101a," however, WCTL/COPC assume that intermodal competition considerations would be relevant under these provisions.

With regard to reciprocal switching, WCTL/COPC submit that the language and legislative history of 49 U.S.C. §11103(c) make clear that only direct rail competition is to be taken into account. The Commission has itself confirmed this interpretation as recently as 1983. See Delaware & Hudson Railway Co. v. Consolidated Rail Corp., 367 I.C.C. 718, 727 (1983). The AAR/NITL and RAM proposals should be interpreted accordingly.

3. Are the 49 U.S.C. 10705a protections regarding Class III carriers intentionally outside the scope of the proposals?

By their terms, the AAR/NITL and RAM proposals do not address the protections afforded Class III carriers under 49 U.S.C. §10705a. This omission, however, should not be given any significance by the Commission. The Class III protections in the area of joint rates and through routes are established by statute, and therefore cannot be altered or diminished by the outcome of this administrative proceeding.

4. How do the parties intend the Commission define "would utilize," in Parts (c) and (e) of the AAR/NITL agreement and Part (e) of the RAM proposal? Is a simple allegation intended to be sufficient?

WCTL/COPC submit that the only minimum threshold that should be set is that which would exclude situations where no traffic was moving at all, and there was not reasonable prospect for future movements. The cost of prosecuting a complaint proceeding should be a sufficient deterrent to the bringing of "academic" actions; a substantive, Commission-imposed threshold would run the risk of improperly excluding a complaint which rightfully may be maintained under the governing standards of relief.

5. Are the rules intended to have only prospective effect, or do the parties intend that they be applied to pending cases?

WCTL/COPC find it difficult to conceive of a circumstance wherein application of the standards set forth in either

proposal to a pending case would result in manifest injustice to any party. This being so, and in the absence of legislative direction to the contrary, it is submitted that such rules as may be adopted herein should be applied to pending matters, consistent with established principles of administrative law. See National Labor Relations Board v. New Columbus Nursing Home, Inc., 720 F.2d 726, 729 (5th Cir. 1983); New England Power Co. v. United States, 693 F.2d 239, 244 (1st Cir. 1982).

6. What role, if any, is the Commission expected to play in implementing Part (f) of the [AAR/NITL] agreement?

Litigation under the federal antitrust laws is the exclusive province of the courts. WCTL/COPC therefore see no role for the Commission in implementing Part (f) of the AAR/NITL proposal, should it be adopted. In light of this jurisdictional fact, however, WCTL/COPC have serious doubts as to the authority of the Commission to formally adopt such a rule. Should the Commission do so, the final notice should include a full discussion of the legal authority for the action.

7. What is included in the term "costs" as used in Parts (d) and (e) [of the AAR/NITL proposal]?

WCTL/COPC submit that a proper interpretation would be Rail Form A variable costs, given that a cost-to-revenue ratio is prescribed for use.

8. The Union Pacific has expressed concern that the [AAR/NITL] agreement does not preserve the distinction between the statutory standards for reviewing proposed cancellations [49 U.S.C. 10705(e)(1)] and those for establishing new joint rates and through routes [49 U.S.C. 10705(a)(2)]. Is this concern warranted?

As noted supra, the outcome of this proceeding cannot alter or diminish existing statutory protections or distinctions. The Union Pacific's concern, therefore, would appear to be met by its ability to plead its case under the applicable statutory provisions as they now stand, unaffected by such action as might be taken by the Commission here.

9. What is the effect of Parts (e)(5) and (f)(1) [of the RAM proposal]?

The plain meaning of the provisions is that Class III railroads, and Class I and II railroads with less than the stated revenue shares, are exempted from application of the reciprocal switching and terminal trackage rights provisions insofar as they would require those carriers to engage in reciprocal switching or grant trackage rights to others.

10. What is intended by Part (f)(2) [of the RAM proposal]?

The impact of the provision appears to be that in establishing trackage rights fees, the Commission should take care to avoid setting the fee so high that the tenant carrier cannot offer shippers rates competitive with those of the owning car-

rier, and still generate a sufficient return to justify bidding for the traffic.

CONCLUSION

If the Commission decides to adopt final rules in this proceeding of the type proposed by AAR/NITL and RAM, they should be accompanied by a clear statement that (a) the rules do not represent the exclusive means by which shippers can seek to make use of the "pro-competitive" features of the Interstate Commerce Act (particularly the trackage rights provision set forth at 49 U.S.C. §11103(a)); (b) the rules do not represent a consensus among users of rail service as to the proper resolution of competitive access problems; and (c) the rules do not address the fundamental competitive access problems of concern to captive shippers.

Respectfully submitted,

THE WESTERN COAL TRAFFIC LEAGUE
THE CONSUMER OWNED POWER COALITION

By: William L. Slover 
C. Michael Loftus
Kelvin J. Dowd
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Attorneys & Practitioners

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Date Due: May 31, 1985

NICK J. RAHALL, II
4TH DISTRICT, WEST VIRGINIA

COMMITTEES:
PUBLIC WORKS AND
TRANSPORTATION

SUBCOMMITTEES:
AVIATION
WATER RESOURCES
SURFACE TRANSPORTATION

INTERIOR AND INSULAR AFFAIRS

SUBCOMMITTEES:
MINES AND MINING
ENERGY AND ENVIRONMENT
STANDARDS OF OFFICIAL
CONDUCT

Congress of the United States
House of Representatives
Washington, D.C. 20515

October 3, 1984

Exhibit A

400 CANNON BUILDING
WASHINGTON, D.C. 20515
(202) 225-3483

DISTRICT OFFICES:
815 FIFTH AVENUE
HUNTINGTON, WEST VIRGINIA 25701
(304) 522-NICK

BAIR BUILDING
BECKLEY, WEST VIRGINIA 25801
(304) 252-5000

1005 FEDERAL BUILDING
BLUEFIELD, WEST VIRGINIA 24701
(304) 325-6222

R K BUILDING
LOGAN, WEST VIRGINIA 25801
(304) 752-4934

Chairman Reese Taylor
Interstate Commerce Commission
Washington, D.C. 20423

Dear Chairman Taylor:

The ICC's initiative in a number of proceedings in the areas of maximum reasonable rate guidelines, standards for railroad revenue adequacy and the market dominance guidelines have given me a strong indication of the manner in which the Commission is implementing the Staggers Rail Act of 1980.

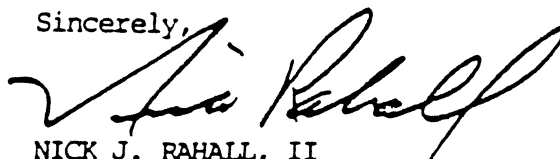
It was based on the Commission's initial and final decisions in these proceedings that I determined little consideration was being given to the so-called "captive shipper" provisions of the 1980 Act. For this reason, I introduced H.R. 2584 to, in effect, remove much of the discretion the Commission has had in these key areas.

I now note the Commission's issuance of the notice instituting Ex Parte No. 456, The Staggers Rail Act of 1980 — Conference of Interested Parties. Frankly, I view this proceeding as being counterproductive to the orderly resolution of the more substantive issues already on the Commission's plate. Many of these issues, such as the maximum reasonable rate guidelines, have been pending for years and the Commission could accomplish far more by devoting its full attention to their final resolution.

At this point, I fully intend to pursue a legislative remedy to what I view as a serious deficiency in the 1980 Act's implementation during the next Congress. Based on the record established during oversight hearings on the Act, I would expect that consideration will be given to such legislation early in the 99th Congress. However, as always, I would welcome any suggestions the Commission may have in this regard and would recommend that if the proceeding in Ex Parte No. 456 is completed, it be in the form of a report to the Congress.

With warm regard, I am

Sincerely,



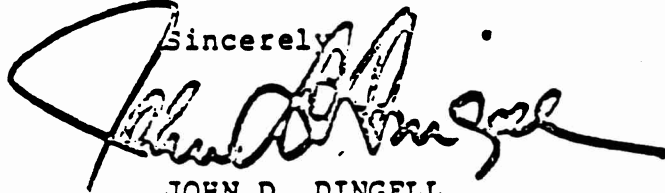
NICK J. RAHALL, II
Member of Congress

NJR/jz

Honorable Reese Taylor
October 4, 1984
Page 2

I look forward to your prompt and continuing response to this request. The Commission's first report should be submitted to the Committee no later than October 15, 1984.

Sincerely,

A large, stylized handwritten signature in dark ink, likely belonging to John D. Dingell, written over the word "Sincerely,".

JOHN D. DINGELL
CHAIRMAN

cc: Commissioners

Honorable Malcolm M. B. Sterrett
Honorable Heather J. Gradison
Honorable J. J. Simmons III
Honorable Andrew J. Strenio, Jr.
Honorable Paul Lamboley

United States Senate

WASHINGTON, D.C. 20510

October 9, 1984

The Honorable Reese Taylor
Chairman
Interstate Commerce Commission
ICC Building
Washington, D.C. 20423

Dear Mr. Chairman:

We have noted with interest the Interstate Commerce Commission's issuance of the notice instituting Ex Parte No. 456, The Staggers Rail Act of 1980 -- Conference of Interested Parties. The notice indicates that this undertaking will be a combination of information gathering for the benefit of the Commission and supervised discussion groups among industry participants that might lead to a "greater consensus" or to "resolving commercial disputes." The subjects to be covered include almost the entire range of the Commission's jurisdiction over rail matters. The notice is careful, however, to explain that the Commission will not use the proceeding as a means of changing rules or decisions on these subject matters that have been reached or are pending in other dockets.

Given the history of the Commission's implementation of the Staggers Rail Act of 1980, we have concerns about the outcome of Ex Parte No. 456. We note, for example, that an ICC Administrative Law Judge said in April that the Commission:

does not intend, as can be seen from both its actions and inactions, to find a rail rate, no matter how high, to be above a maximum reasonable level.

Similarly, in reversing the ICC's exemption from regulation of all coal transported by rail for export, the Court of Appeals for the District of Columbia Circuit said, on September 18, 1984, that the Commission had tried to:

The Honorable Reese Taylor
October 9, 1984
page two

maximize railroad revenue with no reference to the actual revenue needs of the carriers involved or the size of the revenue gain they would likely receive from the exemption, or the degree to which needed revenue gains would be disproportionately subsidized by one group.

On September 7, 1984, that same Court also reversed the Commission's dismissal of a railroad rate complaint filed by Arizona Public Service Company in terms highly critical of the Commission's decision. We also note that the Commission's ex parte proceeding on coal rate guidelines has now been pending eighteen months -- during which time volumes of filings have been received -- and is only now reaching oral argument before the Commission. Since these guidelines are only one of a broad range of subjects to be covered pursuant to Ex Parte No. 456, the extent of the undertaking of the new proceeding is decidedly ambitious and potentially endless.

We reference the above proceedings simply to emphasize the important and fundamental policy disagreements that are associated with the Commission's implementation of the Staggers Rail Act. We are not taking any position on the merits of these cases or the issues proposed to be reviewed in the Ex Parte No. 456 proceedings.

Many of our shipper and consumer constituents have been indicating to us with increasing frequency and fervor their dissatisfaction with the Commission's decisions. Shippers and consumers have expressed doubts about the wisdom of committing their limited resources to participation in another broad proceeding at the Commission. Frankly, we understand their concerns. Nonetheless, we do hope that the proceeding can overcome its handicaps and provide the Commission -- and the Congress -- with useful and persuasive information.

We do share with the Commission at least one common realization: the time has come to address the repeated concerns of shippers and consumers about the implementation of the Staggers Rail Act. During the early part of 1985, we anticipate that Congress will closely examine the implementation of the Staggers Rail Act and any legislative action that must be taken to assure the careful balance struck in that Act. Due to the urgency of the complaints we are hearing, we will not await the conclusion of Ex Parte No. 456 to undertake any legislative initiatives nor would it be fair for us to regard

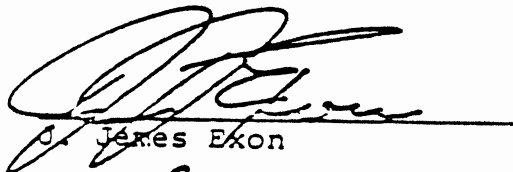
The Honorable Reese Taylor
October 9, 1984
page three

participation in that proceeding as the only acceptable evidence of the sincerity of a shipper's or consumer's complaint. We will, as always, welcome any constructive suggestions from the Commission, whether or not generated as a result of Ex Parte No. 456.

Very Truly Yours,


Russell Long


Wendell H. Ford


J. James Exon

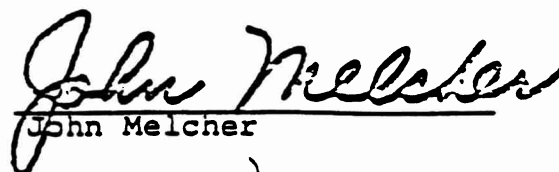

Mark Andrews


Don Nickles

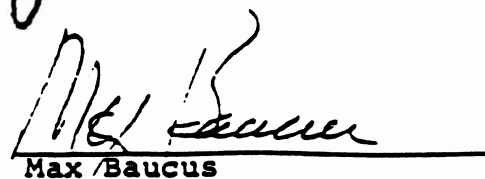

Nancy Landon Kassebaum

The Honorable Reese Taylor
October 9, 1984
page four


J. Bennett Johnston


John Melcher


Lloyd Bentsen

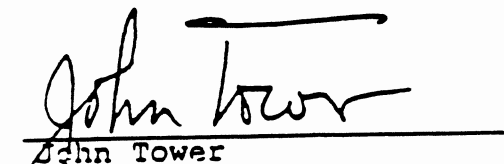

Max Baucus

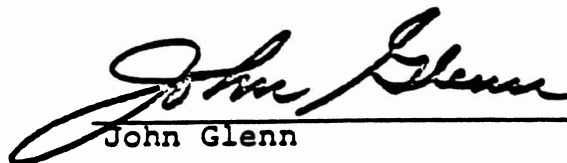

Quentin Burdick


Jennings Randolph


Dennis DeConcini


Walter D. Ruddleston


John Tower


John Glenn


Arlen Specter


Thad Cochran

JAMES J. FLORIO, R.I., CHAIRMAN

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EX OFFICIO

U.S. House of Representatives**COMMITTEE ON COMMERCE, TRANSPORTATION, AND TOURISM****SUBCOMMITTEE ON COMMERCE, TRANSPORTATION, AND TOURISM****Washington, D.C. 20515**

October 11, 1984

The Honorable Reese Taylor
Chairman
Interstate Commerce Commission
Twelfth and Constitution Avenue, N.W.
Washington, D.C. 20423

Dear Mr. Chairman:

I understand the Commission has instituted a proceeding, Ex Parte No. 456, the Staggers Rail Act of 1980 -- Conference of Interested Parties. I understand the purpose of this proceeding is to gather information regarding the effects of the Staggers Rail Act and to provide a forum for the possible informal resolution of commercial disputes.

As you know, questions have been raised about the implementation of the Staggers Rail Act. The Subcommittee has previously held oversight hearings on the Act and we expect to continue that oversight process next year. Obviously, the results of the new proceeding will be useful to the Subcommittee in its oversight efforts. While I believe the ICC should review the effects of its policies, the Subcommittee must continue its oversight activities and will hear from all interested and affected parties.

I look forward to following the progress of the proceeding and would appreciate it if the Commission would keep the Subcommittee informed of the proceeding's progress.

Thank you for your cooperation.

Sincerely,

James J. Florio, Chairman
Subcommittee on
Commerce, Transportation and Tourism

JJF:rh d

cc: Chairman John Dingell

Exhibit D

ROOM 505-101
HOUSE OFFICE BUILDING ANNEX
PHONE (202) 225-3100

GABRIEL E. LAMLER
CHIEF COUNSEL AND STAFF COUNSEL

EXPEDITED CONSIDERATION REQUESTED

Exhibit E

BEFORE THE
INTERSTATE COMMERCE COMMISSION

In The Matter Of:)

THE STAGGERS RAIL ACT)
OF 1980 -- CONFERENCE OF)
INTERESTED PARTIES)

Ex Parte No. 456

PETITION TO DEFINE
SCOPE OF PROCEEDING

The subscribing parties, participants in this proceeding, hereby petition the Commission to define further the scope of this proceeding by excluding from consideration those issues which are presently the subject of separate, pending Commission proceedings or which can be resolved only by the Commission itself. Due to the circumstances presented, expedited consideration of this Petition is requested.

In support hereof, Petitioners show as follows:

1. According to the Commission's Notice served September 14, 1984, the purpose of this proceeding is to gather information concerning the effects of implementation of recent rail "reform" legislation -- most notably the Staggers Rail Act of 1980 -- in order to facilitate the resolution of disputes "without recourse to agency, court or legislative intervention."

2. Assuming arguendo that this represents a proper agency function under applicable administrative procedure and antitrust statutes (which we believe is subject to doubt), there are nevertheless a number of issues which arise under the Interstate Commerce Act which either cannot be resolved in the proceeding envisioned by the Notice, or would not be a proper subject for consideration herein. Such issues therefore should be excluded, in order to avoid redundant agency proceedings and an unacceptable waste of public and private resources.

3. Issues which are not a proper subject for consideration here include those that are already the subject of separate, pending Commission proceedings or which can be resolved only by the Commission. These issues include:

- a. Maximum reasonable rate guidelines (including implementation of the Long-Cannon Amendment);
- b. Standards for railroad revenue adequacy (including issues raised in Ex Parte No. 393 and Ex Parte No. 393 (Sub-No. 1));
- c. Railroad cost recovery procedures (including an adjustment for railroad productivity); and
- d. Market dominance guidelines.

4. For these issues, and possibly others which may be raised in this proceeding, substantial resources have already been devoted to building records in anticipation of final Commission resolution, or in seeking judicial review and Congressional oversight. Any benefit to the Commission (or the parties) which could flow from consideration of these issues here can already be obtained through an examination of existing

agency, court, and Congressional oversight committee records. Redundantly opening consideration of these matters in the instant proceeding would not only involve a duplication of time, effort and expense, but in all likelihood would result in further delays in the completion of the individual proceedings, many of which are already several years in progress. Such a waste of public and private resources simply cannot be justified.

5. In addition, no matter how amenable the parties might be to resolving their differences regarding these issues, they cannot implement an agreement in the context of this proceeding. Neither the participants in this proceeding nor the Chief Administrative Law Judge have the authority -- by agreement or otherwise -- to alter prior Commission and court decisions; only Congress has such power (in the absence of a Commission order to reopen the subject proceedings).*

6. If, as the Commission states in its Notice, its goal is to facilitate the resolution of outstanding disputes over interpretation and implementation of the Staggers Act, it would serve that purpose better by expediting completion of pending proceedings, rather than through the institution of a new, duplicative one. Petitioners urge the Commission to resolve promptly the questions presented in binding proceedings now before it, and avoid actions which will delay final consideration

* The Notice makes clear that this proceeding will not have a binding effect upon the Commission or the parties.

of those questions. This proceeding is clearly not the proper place for consideration -- or reconsideration -- of such issues.

WHEREFORE, Petitioners submit that the Commission should promptly serve an order excluding from consideration in this proceeding all issues that are or were the subject of proceedings which meet the criteria set forth herein, including specifically those issues described in Paragraph 3, supra. Petitioners further request an order holding in abeyance any consideration of those issues until such time as a final ruling in response hereto shall be served.

Respectfully submitted,

MICHAEL A. TRYKOSKI
EDWARD H. COMER
Edison Electric Institute
1111 Nineteenth Street, N.W.
Washington, D.C. 20036

Representing Edison Electric
Institute

CHARLES J. MCCARTHY
DANIEL J. SWEENEY
JOHN M. CUTLER, JR.
McCarthy, Sweeney & Harkaway,
P.C.
1750 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Representing Atlantic City
Electric Company, Cleveland
Electric Illuminating
Company, Commonwealth Edison
Company, Madison Gas and
Electric Company, Monongahela
Power Company, Pennsylvania
Power and Light Company,
Union Electric Company,
Wisconsin Electric Power
Company, and Wisconsin
Power & Light Company

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C. MICHAEL LOFTUS
KELVIN J. DOWD
Slover & Loftus
1224 Seventeenth Street, N.W.
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Representing Western Coal
Traffic League, Consumer
Owned Power Coalition,
Eastern Coal Transportation
Conference and American
Bakers Association

J. RAYMOND CLARK
MARY TODD FOLDES
1225 Nineteenth Street, N.W.
Suite 350
Washington, D.C. 20036

Representing Potomac Electric
Power Company

Dated: October 3, 1984

JOHN C. SANFORTH, MISSOURI, CHAIRMAN
 BOB PACKWOOD, OREGON
 BARRY GOLDWATER, ARIZONA
 MARY LAMON CASSEBAUM, KANSAS
 LARRY PRESSLER, SOUTH DAKOTA
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W. ALLEN MOORE, CHIEF COUNSEL AND STAFF DIRECTOR
 RALPH S. EVERETT, MINORITY CHIEF COUNSEL AND STAFF DIRECTOR

United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
 AND TRANSPORTATION

WASHINGTON, DC 20510

March 14, 1985

The Honorable Reese H. Taylor, Jr.
 Chairman
 Interstate Commerce Commission
 12th Street and Constitution Avenue, N.W.
 Washington, D.C. 20423

Dear Mr. Chairman:

I am writing to urge you and the other Commissioners to give serious and expedited consideration to two important petitions for rulemaking that were recently filed with the Commission. The first petition deals with competitive access by railroads and was filed on January 24, 1985 by the National Industrial Transportation League (NIT League) and the Association of American Railroads (AAR). The second petition deals with market dominance determinations and was filed on March 1, 1985 by the NIT League, the AAR, and the American Paper Institute (API).

Last year, I introduced S.J. Resolution 331, which would have required the Commission to revise its rules and guidelines governing a number of key railroad regulatory matters, including competitive access and market dominance. In introducing the joint resolution, I stated that I was doing so in order to meet the concerns of shippers and other interested parties that the Commission was not doing enough to encourage competition and to protect captive shippers. At the same time, I said that I believed that most of these concerns could be addressed by means other than legislation, in other words, through private negotiations and additional Commission rulemakings.

The two petitions now pending before the Commission are precisely what I had in mind when I said the concerns addressed by my joint resolution could be addressed by non-legislative means. The petitions seek the institution of rulemakings dealing with two of the specific matters that were of serious concern to shippers who testified before my

“If I had refused
to institute a negotiation
or had not persevered in it,
I should have been degraded
in my own estimation
as a man of honor.”

John Adams, 1809

John Adams clearly believed in negotiated, mutually agreeable settlement of problems. For nearly 100 years, a restrictive regulatory system stood between railroads and their customers, making negotiated resolution of problems extremely difficult — in some cases illegal. The debilitating effects of this regulation nearly destroyed our freight rail system.

The 1980 Staggers Rail Act lightened the regulatory burden, allowing railroads to compete vigorously in the transportation marketplace. With new flexibility granted by Staggers, railroads have negotiated more than 22,000 rate contracts with willing customers in just four years.

This ability to negotiate contracts

brought about improved service for customers and a more stable business environment for the railroads. Many contracts resulted in lower rates or lower rate increases, and many more provided special service guarantees or customer incentives.

Negotiation also resolved legitimate problems several customer groups had with some features of the Act. Railroads negotiated new agreements with the National Industrial Transportation League, the American Paper Institute and the Chemical Manufacturers Association. Those agreements solved problems for large numbers of railroad customers and helped thwart special interest shippers seeking to reregulate the rail system for their own benefit.

These special interest shippers, masquerading as a consumer group (CURE), are urging Congress to revise Staggers and reimpose restrictive regulations that would, in effect, force other shippers and the railroads to share freight costs of the companies CURE represents.

The Staggers Act must remain intact if America is to have a viable railroad system. Now is not the time to return to the regulatory morass that stifled competition and fostered economic decay.

For more information, write:



Staggers Integrity, Dept. 519
Association of American
Railroads, 1920 L St., N.W.
Washington, D.C. 20036.

ASSOCIATION OF AMERICAN RAILROADS

The Honorable Reese H. Taylor
March 14, 1985
Page Two

Committee. The petitions also are the result of tough, honest negotiations by the interested parties. Further, if the Commission ends up adopting new or revised rules on these matters, I believe these actions would help encourage competition and protect captive shippers.

In closing, I want to commend the petitioners and other parties who worked with them for their tenacious efforts to accomodate the various interests and to reach agreements. The Commission also deserves credit for providing the forum for the negotiations through Ex Parte 456. This proceeding was well-conceived and conducted. Further, if the two petitions and others like them lead to the adoption of rules, the proceeding will have been productive as well.

I would appreciate it if you would keep me advised of the Commission's actions on the petitions, as well as on any of the other matters covered by the joint resolution.

Sincerely,



John C. Danforth

cc: Commissioner Sterrett
Commissioner Andre
Commissioner Gradison
Commissioner Strenio
Commissioner Simmons
Commissioner Lamboley

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Comments on all parties of record by first-class United States mail, postage pre-paid.

Dated this 31st day of May, 1985 at Washington, D.C.


Kelvin J. Dowd

EXHIBIT 4

MARKET DOMINANCE POLICY STATEMENT

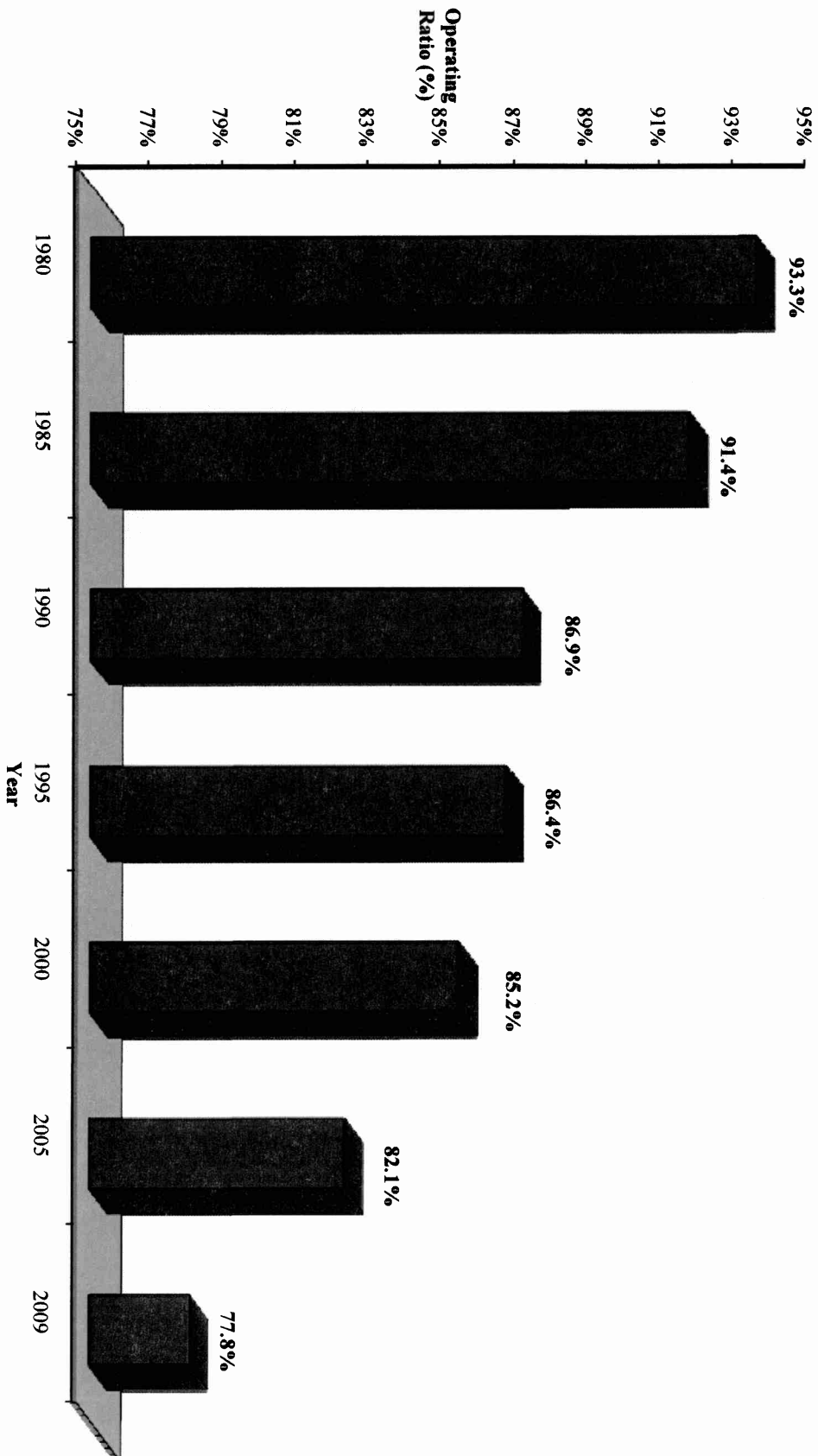
Under existing law, the Board only has jurisdiction to consider the reasonableness of the rates of market dominant traffic. “Market dominance” is defined as “an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies.” 49 U.S.C. § 10707(a). The STB has jurisdiction over challenged rates where a rail shipper lacks “effective competition” and where the rates are at or above the jurisdictional threshold level of 180% of variable service costs (under 49 U.S.C. § 10707(d)(1)(A)).

Determining whether effective competition exists requires a factual inquiry taking into account relevant evidence presented in an individual proceeding (e.g., meaningful rail-to-rail or rail-to-truck competition, if any, as well as differences in rates and other terms offered, evidence of railroad interest (or lack thereof) in serving the traffic, service terms, capacity constraints, and any other relevant facts and circumstances). However, the market dominance standard is a threshold test, and as such, should not be used as a barrier to unreasonably deny shippers lacking effective competition access to regulatory relief remedies. Additionally, *nominal* competition is not *effective* competition. If the evidence shows that one or more serving railroads are not effectively competing for the business (e.g., where a shipper is dually served, one carrier is not providing a bid, or each of the potential competitors is offering rates above 180% of variable costs) then the market dominance test is met. Of course, a finding of market dominance does not establish a presumption that a challenged rate is unreasonable, but such a finding is jurisdictional prerequisite that allows the Board to determine that a rate is unreasonable if it exceeds a reasonable maximum.

EXHIBIT 5

Exhibit 5

Average Class I Railroad Operating Ratios (1980 to 2009)

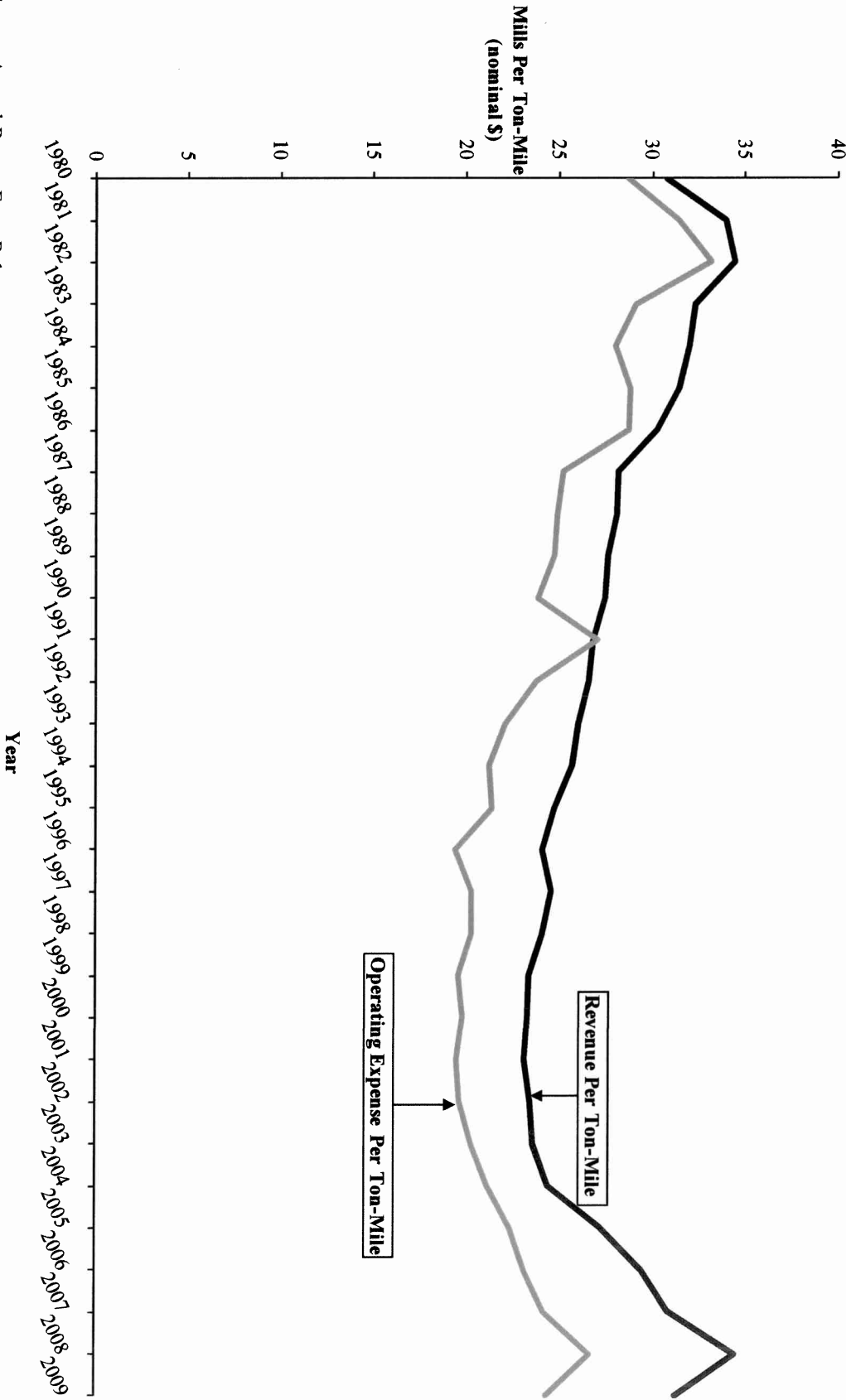


Source: Annual Report Form R-1

EXHIBIT 6

Exhibit 6

Class I Railroad Revenue and Operating Expense Per Ton-Mile
(1980 to 2009)



Source: Annual Report Form R-1

EXHIBIT 7

**Average Revenue And Variable Cost Per Ton-Mile,
And Annual Contribution For Western Coal Transportation
1984 - 2010**

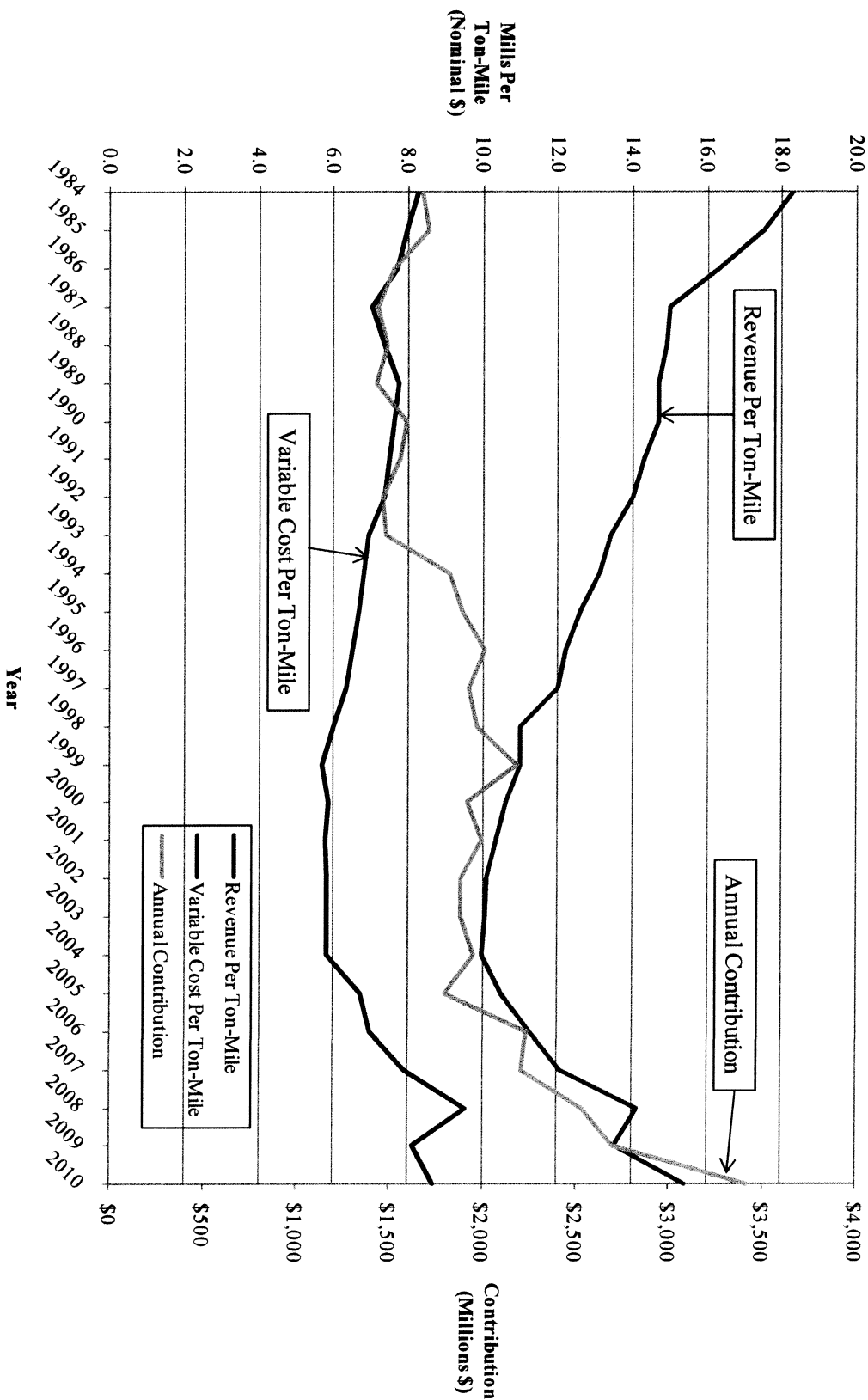


EXHIBIT 8

Between 2000 and 2010, the return on UP and BNSF common stock significantly outperformed the market reflecting the railroads' financial health

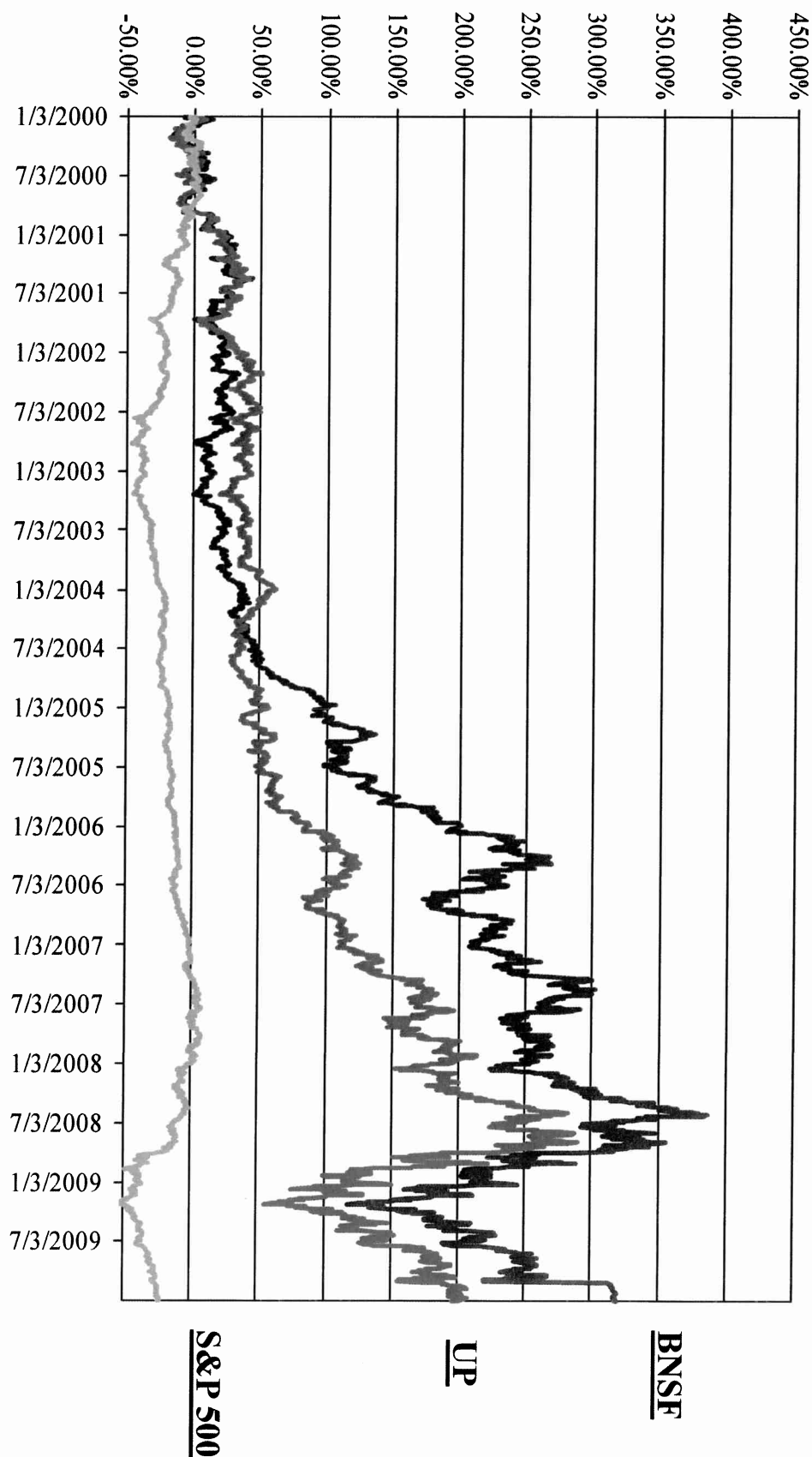


EXHIBIT 9

Exhibit 9

The railroad industry as a whole has not reinvested in itself as much as other capital intensive industries

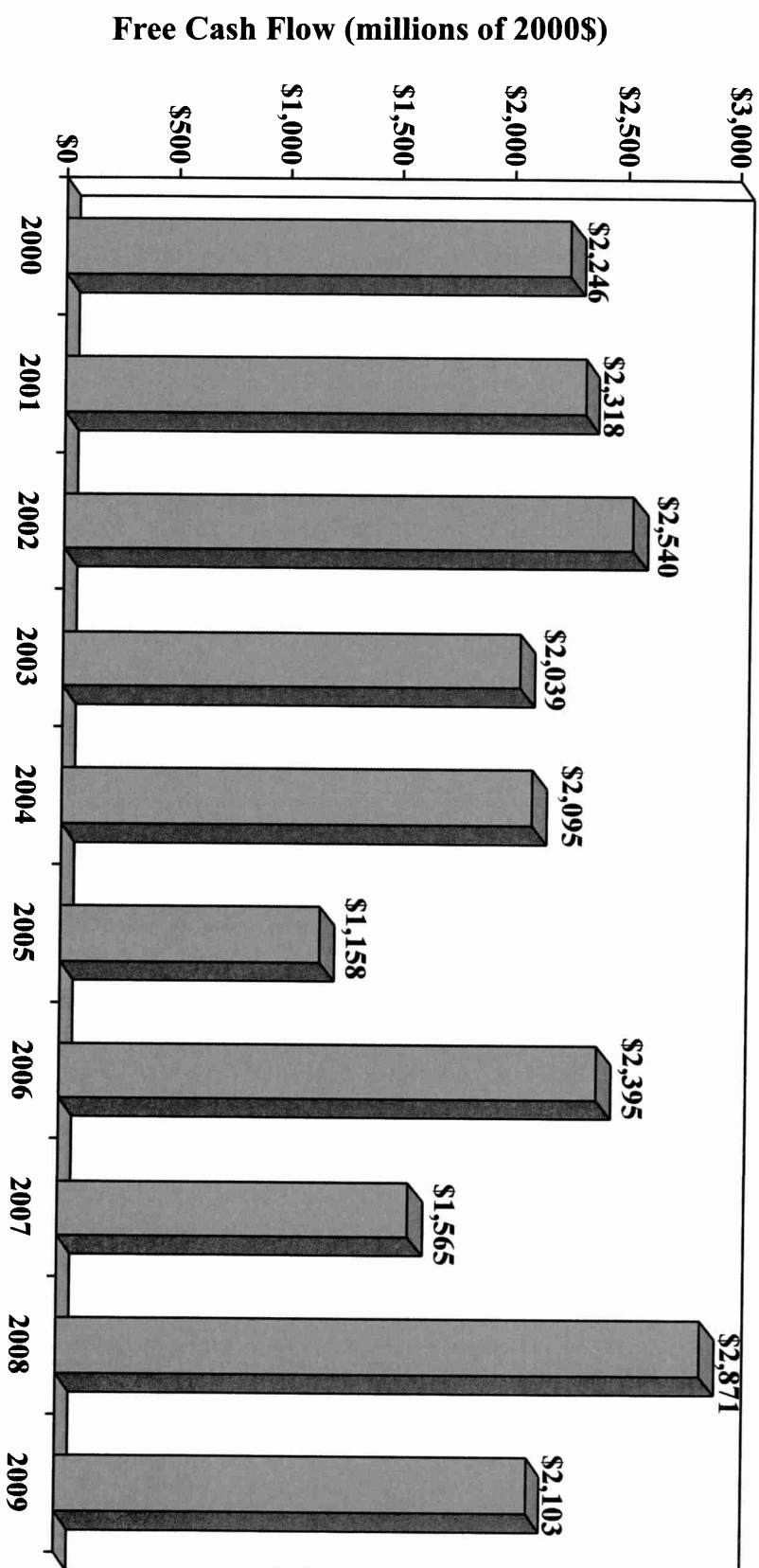
Industry Capital Expenditures to Sales

Rank (1)	2007		2008		2009	
	Industry (14)	CapEx/Sales (15)	Industry (16)	CapEx/Sales (17)	Industry (18)	CapEx/Sales (19)
1	Property Management	89.7%	Property Management	55.4%	Natural Gas (Div.)	47.3%
2	Canadian Energy	84.6%	Maritime	53.9%	Water Utility	38.4%
3	Maritime	37.6%	R.E.I.T.	38.6%	Precious Metals	37.3%
4	Natural Gas (Div.)	34.8%	Natural Gas (Div.)	35.7%	Maritime	34.9%
5	Utility (Foreign)	33.9%	Trucking	34.5%	R.E.I.T.	34.3%
6	R.E.I.T.	31.1%	Precious Metals	34.5%	Trucking	28.2%
7	Precious Metals	29.2%	Petroleum (Producing)	30.9%	Petroleum (Producing)	27.6%
8	Water Utility	29.1%	Water Utility	29.3%	Canadian Energy	27.2%
9	Petroleum (Producing)	26.4%	Canadian Energy	27.8%	Utility (Foreign)	25.2%
10	Trucking	20.6%	Hotel/Gaming	21.8%	Electric Utility (West)	21.3%
11	Hotel/Gaming	18.9%	Electric Utility (West)	21.3%	Electric Utility (East)	19.7%
12	Electric Utility (West)	18.6%	Cable TV	18.7%	Power	19.2%
13	Telecom. Services	17.5%	Electric Util. (Central)	18.1%	Electric Util. (Central)	19.0%
14	Cable TV	17.0%	Electric Utility (East)	17.8%	Property Management	18.4%
15	Class I Railroad	16.0%	Oil/Gas Distribution	16.2%	Hotel/Gaming	17.3%
16	Electric Util. (Central)	15.2%	Oilfield Svcs/Equip.	15.6%	Class I Railroad	16.8%
17	Semiconductor	14.4%	Telecom. Services	15.6%	Oil/Gas Distribution	16.6%
18	Oilfield Svcs/Equip.	13.8%	Class I Railroad	14.7%	Cable TV	16.4%
19	Electric Utility (East)	13.6%	Metals & Mining (Div.)	13.4%	Telecom. Services	15.8%
20	Coal	12.5%	Semiconductor	13.3%	Metals & Mining (Div.)	15.7%

Sources: Railroad percentages developed from Annual Report Form R-1 data for all Class I railroads. Non-railroad percentages from Dr. Aswath Damodaran, Professor of Finance, Leonard N. Stern School of Business, New York University.
<http://pages.stern.nyu.edu/~adamodar/>

EXHIBIT 10

UP and BNSF Free Cash Flow



Source: Annual Report Form R-1. Free Cash Flow is defined as net cash from operating activities and fixed charges less net cash used in investing activities