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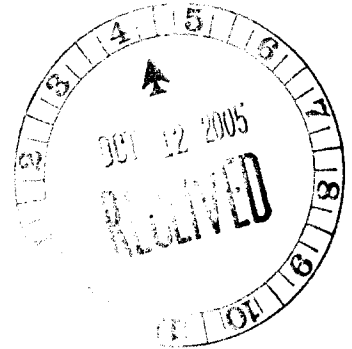
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October 12, 2005

BY HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
Washington, D.C. 20423-0001



Re: Ex Parte No. 658, The 25th Anniversary of the
Staggers Rail Act of 1980: A Review and Look Ahead

Dear Secretary Williams:

Enclosed for filing in the referenced docket please find an original and ten copies of the Comments of the Concerned Captive Coal Shippers. We have enclosed copies of these Comments in electronic form on three computer diskettes.

Finally, we have enclosed an additional copy of these Comments to be date-stamped and returned to the bearer of this letter. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script that reads 'C. Michael Loftus'.

C. Michael Loftus
An Attorney for the Concerned Captive
Coal Shippers

Enclosures

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RECEIVED

Ex Parte No. 658

CONCERNED CAPTIVE
COAL SHIPPERS.

By: C. Michael Loftus
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Dated: October 12, 2005

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

THE 25TH ANNIVERSARY OF	)	
THE STAGGERS RAIL ACT OF 1980:	)	
A REVIEW AND LOOK AHEAD	)	Ex Parte No. 658
	)	

**COMMENTS OF CONCERNED CAPTIVE
COAL SHIPPERS**

On September 14, 2005, the Board invited interested parties to submit comments on the subject of the “impact, the effectiveness, and the future of the Staggers Rail Act of 1980 (Staggers Act).” The Concerned Captive Coal Shippers (“Concerned Coal Shippers”) hereby submit their Comments in response to that invitation.

The Concerned Coal Shippers previously submitted Comments to the Board in Ex Parte No. 657, Rail Rate Challenges Under the Stand-Alone Cost Methodology, suggesting that there are a number of significant respects in which the agency’s recent application of the stand-alone cost (“SAC”) methodology (e.g., the toleration of gaming in the establishment of common carrier rates) has left captive coal shippers without a meaningful regulatory constraint on railroad rates. To date, the Board has not issued a decision in response to the filings in that case. The Concerned Coal Shippers hereby incorporate their Comments in Ex Parte No. 657 in these Comments by reference insofar

as the application of the stand-alone cost methodology is inextricably linked with the “impact” and “effectiveness” of the Staggers Act.

SUMMARY

The Staggers Act has provided tremendous benefits to the rail transportation market. Chief among these benefits, of course, was the reliance on competition as a means of injecting financial health into what, at the time, was a struggling rail industry. This competition fostered an attitude of responsiveness amongst the large rail carriers, replaced widespread railroad bankruptcies with financial stability, and helped to generate an environment in which rail carriers have been able to achieve significant productivity gains. In keeping with the normal workings of the marketplace, the rail carriers have passed some of their productivity gains along to their customers in the form of reduced transportation rates.

The Staggers Act provision allowing contracts for rail transportation service also provided major benefits for both railroads and shippers. Freed from the obligation to provide service under tariffs that were required to be filed with the Interstate Commerce Commission (“ICC” or “Commission”), carriers were able to enter into specifically tailored commercial arrangements under which both carriers and shippers could secure long-term assurances of rate and service terms.

The Staggers Act also obligated the agency to publish a Rail Cost Adjustment Factor (“RCAF”) on at least a quarterly basis. See former 49 U.S.C. §

10707a(a)(2)(B) (“[T]he Commission shall, as often as practicable but in no event less often than quarterly, publish a rail cost adjustment factor . . . which index shall be compiled or verified by the Commission, with appropriate adjustments to reflect the changing composition of railroad costs, including the quality and mix of material and labor”). This cost index has been of great value to both shippers and carriers. Specifically, the RCAF has allowed rail carriers and their customers to structure contracts in such a manner that allows some measure of economic stability over longer contract terms, and provides an objective measure of cost and productivity changes over time.

Coal shippers have benefited in a number of ways from the manner in which the ICC and this agency have acted to implement the pro-competitive policies of the Staggers Act. Both agencies have been supportive of some of the efforts of captive coal shippers to obtain benefits enjoyed by competitively served shippers. For example, the Commission authorized competitive rail service in the Powder River Basin, while both agencies have facilitated efforts by rail shippers to construct rail spurs to introduce competition at captive destinations.

Conversely, there are a number of respects in which the goals of the Staggers Act have not been fully achieved and/or have been frustrated. As described in greater detail, infra, certain policy decisions relating to matters in which captive shippers sought to foster elements of competition contemplated by the Act (e.g., the de facto prohibition on terminal trackage rights, the refusal to allow bottleneck rate relief, and the

agency's tolerance of paper barriers) have prevented greater achievement of the benefits of competition for captive shippers.

Moreover, in recent years, the balanced approach that the agency formerly had demonstrated in its SAC decisions has given way to an approach that places ever-increasing burdens upon captive shippers seeking to constrain excessive common carrier rates. Curiously, this shift has occurred, not at a time in which rail carriers are financially struggling, but instead, during an era in which the financial health of the industry has been restored and the industry has seen unprecedented consolidation. The agency's current approach to SAC cases does not afford the reasonable balancing the Staggers Act intended between railroads' revenue needs and the protection of captive shippers from unreasonably high rail rates. As a result, the stated rail transportation policy of requiring "fair and expeditious regulatory decisions when regulation is required" (Staggers Act § 101 codified at former 49 U.S.C. § 10101a), is not being achieved.

All segments of the rail industry would benefit if the Board would fully embrace the policies inherent in the Staggers Act of allowing competition to advance the interests of both carriers and shippers wherever possible, and to impose reasonable constraints on the revenue demands of market dominant rail carriers from captive shippers.

Many of the issues addressed in these Comments have been raised before both with this Board and the Congress. In particular, shipper comments filed in 1998 in

Ex Parte No. 575, Rail Access and Competition Issues, which grew out of competition-related concerns raised with the Board by Senators McCain and Hutchinson, focused on the agency's failures to fulfill Staggers Act goals in the reciprocal switching/terminal trackage rights and bottleneck areas. However, no review of the effectiveness of the Staggers Act over the last twenty-five years would be complete without addressing these major issues. With the conditions that prevail in the industry, the need for re-addressing these areas has never been more apparent or important.

IDENTITY AND INTEREST

The Concerned Coal Shippers include the following ten entities: American Electric Power Service Corporation, City of Grand Island, Nebraska, Duke Energy Corporation, Intermountain Power Project, Lafayette Utilities System, Platte River Power Authority, Progress Energy, Inc., Seminole Electric Cooperative, Inc., South Carolina Public Service Authority (Santee Cooper), and South Mississippi Electric Power Association. Each entity consumes coal to generate electricity, relies upon rail carriers to transport that coal, and has one or more generating stations captive to a single railroad.

(1) American Electric Power Service Corporation. AEP Service Corporation acts as agent for its American Electric Power ("AEP") electric generating affiliates in securing coal transportation services for more than 35 million tons of coal annually, at a cost of more than \$350 million. AEP, with more than five million American customers, is one of the country's largest investor-owned utilities, serving parts

of 11 states. The service territory covers 197,500 square miles in Arkansas, Indiana, Kentucky, Louisiana, Michigan, Ohio, Oklahoma, Tennessee, Texas, Virginia and West Virginia.

AEP owns and operates about 80 generating stations in the United States, with a capacity of more than 36,000 megawatts. Coal-fired plants account for 73 percent of AEP's generating capacity.

One AEP electric generating company, AEP Texas North Company, is the complainant in Docket No. 41191 (Sub-No. 1), which is currently pending before the Board. Therein, AEP Texas North is challenging BNSF Railway Company's rates for service to the Oklaunion Station in Vernon, Texas.

(2) City of Grand Island, Nebraska. Grand Island, Nebraska is the third-largest stand-alone city in the State of Nebraska, and includes a population of more than 43,000. Grand Island owns and operates the 100 MW Platte Generating Station, which consumes approximately 400,000 tons of coal per year.

Union Pacific ("UP") is the only rail carrier that serves the Platte Station. Since the termination of the parties' rail transportation contract as of the end of 2004, UP has provided service to Grand Island pursuant to its Circular 111 public pricing arrangements.

(3) Duke Energy Corporation. Duke Energy is a diversified energy company with a portfolio of natural gas and electric businesses, both regulated and

non-regulated, and an affiliated real estate company. Duke Energy supplies, delivers and processes energy for customers in North America and selected international markets.

Duke Energy operates eight coal-fired electric generating stations, including one station (Marshall – 2,090 MW) that is served by both Norfolk Southern Railway Corporation (“NS”) and CSX Transportation, Inc. (“CSXT”), four stations that are served solely by NS (Allen – 1,140 MW, Belews Creek – 2,240 MW, Buck – 369 MW, and Dan River – 276 MW), and three stations that are served solely by CSXT (Cliffside – 760 MW, Lee – 370 MW, and Riverbend – 454 MW). These eight stations are capable of generating a total of 7,699 megawatts of energy.

(4) Intermountain Power Project. Intermountain Power Agency (“IPA”), a political subdivision of the State of Utah, is the owner of the Intermountain Power Project (“IPP”). IPP is located in the great basin of western Utah near Lynndyl, Millard County, Utah. The project generates more than 13 million megawatt hours of energy each year from its two coal-fired units and serves approximately 2 million customers. The units have a total capacity of 1,900 MW Gross and consume over 6 million tons of coal per year.

IPP’s generation rights are held, respectively, by the Los Angeles Department of Water and Power (44.6%), five California cities (30%), twenty-three municipal Utah purchasers (14%), six cooperative Utah purchasers (7%), and one investor-owned Utah purchaser (4%).

Rail service to IPP's generating station is provided solely by the Union Pacific Railroad Company.

(5) Lafayette Utilities System ("LUS"). LUS is a publicly-owned and operated utility serving the electric, water, wastewater, and telecommunications needs of more than 55,000 retail customers in Lafayette, Louisiana. LUS is a 50% owner of the 523 MW, coal-fired Rodemacher Generating Station in Boyce, Louisiana.

The Rodemacher co-owners collectively purchase approximately 2 million tons of coal annually for use at Rodemacher. All of this coal originates from mines in the Wyoming Powder River Basin. The only practical way to transport this coal from Wyoming to Rodemacher (a distance of over 1,500 miles) is by rail and the only carrier capable of serving the Rodemacher Station is Union Pacific.

(6) Platte River Power Authority. Platte River Power Authority is a political subdivision and public corporation of the State of Colorado, that supplies the electricity used by the municipalities of Estes Park, Fort Collins, Longmont, and Loveland, Colorado. Its headquarters is located in Fort Collins, and it has facilities located primarily along the Front Range and the western slope of northern Colorado, in addition to a wind project at Medicine Bow, Wyoming. Platte River also provides surplus electricity and support services to other utilities in the western United States.

Platte River owns and operates the Rawhide Energy Station, a 270 MW coal-fired power plant, located north of Fort Collins, along with nearly 270 miles of

transmission lines in northern Colorado. Platte River also has an 18% (154 MW) interest in the Yampa Project, consisting of Craig Station Units 1 and 2, a coal-fired plant located near the town of Craig, approximately 130 miles west of Fort Collins on the western slope of Colorado.¹

The total annual coal consumption at Rawhide is approximately 1.4 million tons, supplied entirely from mines in the Powder River Basin. BNSF provides the only rail service option for coal moving from the PRB to the Rawhide Station, and currently provides such service pursuant to a rail transportation contract. Thus, Platte River is a captive shipper for this coal movement.

(7) Progress Energy, Inc. Progress Energy, headquartered in Raleigh, N.C., is a Fortune 250 diversified energy company with more than 24,000 megawatts of generation capacity and \$9 billion in annual revenues. The company's holdings include two electric utilities serving approximately 2.9 million customers in North Carolina, South Carolina and Florida. Progress Energy also includes nonregulated operations covering competitive generation, energy marketing, natural gas production, fuel extraction and broadband capacity.

¹ Craig Units 1 and 2 are owned as tenants in common by Platte River, Tri-State Generation & Transmission, Inc., Xcel Energy, the Salt River Project and PacifiCorp. Tri-State is the operating agent for the Craig Units. The Units are directly adjacent to the Trapper Mine, which is the primary coal supplier for the Units, and which is jointly-owned by the participants.

Progress Energy's coal-fired plants include: (i) the two-unit, 392-MW Asheville Steam Plant at Skyland, N.C.; (ii) the two-unit, 316 MW Cape Fear Plant near Moncure, N.C.; (iii) the four-unit Crystal River steam complex, located near Crystal River, Fla., which includes two units built in the 1960s (Crystal River South, totaling 865 MW) and two units built in the 1980s (Crystal River North, totaling 1,437 MW); (iv) the three-unit, 407 MW H.F. Lee Plant near Goldsboro, N.C.; (v) the single-unit, 745 MW Mayo Plant near Roxboro, N.C.; (vi) the single-unit, 174 MW H.B. Robinson Steam Plant near Hartsville, S.C.; (vii) the four-unit, 2,462 MW Roxboro Steam Plant near Roxboro, N.C.; (viii) the three-unit, 613 MW L.V. Sutton Steam Plant near Wilmington, N.C.; and (ix) the three-unit, 176 MW W.H. Weatherspoon Steam Plant near Lumberton, N.C. All of Progress Energy's coal-fired plants are served by rail. Three are served solely by NS, four solely by CSXT, and two jointly by NS and CSXT.

(8) Seminole Electric Cooperative, Inc. Seminole is a rural electric generation and transmission cooperative ("G&T") headquartered in Tampa, Florida. An estimated 1.6 million individuals and businesses (as of year end 2004) rely on Seminole's 10 member distribution systems for their electric power. Seminole's members serve more than 800,000 meters in portions of 46 of Florida's 63 counties.

The primary energy resource serving Seminole's member systems is the Seminole Generating Station. This 1,300 megawatt, coal-fueled power station is located in Northeast Florida in Putnam County, on the St. Johns River, south of Jacksonville. It

consumes approximately four million tons of coal and/or petroleum coke per year. The Seminole Station is served exclusively by CSXT. CSXT currently provides service to Seminole pursuant to a rail transportation contract.

(9) South Carolina Public Service Authority (Santee Cooper). Santee Cooper serves over 143,000 retail customers in Berkeley, Georgetown, and Horry Counties, South Carolina, and supplies power to the municipalities of Bamberg and Georgetown, 32 large industries, and one military installation in North Charleston. The state-owned electric and water utility generates the power distributed by the state's 20 electric cooperatives. Santee Cooper power now flows in all 46 counties in the state serving over 625,000 customers.

Santee Cooper owns and operates four large-scale, coal-fired generating stations in South Carolina: Jefferies Station in Moncks Corner, Cross Station in Cross, Winyah Station in Georgetown, and Grainger Station in Conway. All of these plants are served exclusively by CSXT. Collectively, these four stations consume approximately 8 million tons of coal per year with a capacity of approximately 2,791 MW. Santee Cooper is constructing two additional units at the Cross Station which will increase Santee Cooper's coal consumption to approximately 11 million tons per year and its capacity to approximately 3,951 MW. Rail service to these plants is currently provided by CSXT pursuant to rail transportation contract.

(10) South Mississippi Electric Power Association ("SMEPA"). SMEPA is a rural electric power association formed for the purposes of generating and transmitting electric energy. SMEPA is headquartered in Hattiesburg, Mississippi, and provides wholesale electric energy to eleven member-owners. The member-owners, in turn, are each rural electric distribution cooperatives who sell power to homes, farms, and businesses in Mississippi. SMEPA recovers its cost of providing electric energy through wholesale rates to its eleven members. Fuel costs, including the costs to transport fuel, are eventually passed on to the electric customers by the local cooperatives.

SMEPA owns and operates an electric generating facility at Richburg, Mississippi known as the Morrow Station. This 400 MW facility consists of two coal-burning electric generating units. The Morrow Station consumes approximately one million one hundred thousand (1,100,000) tons of coal per year, and operates on a nearly continuous basis. Rail transportation is the only economical means of delivering large volumes of coal to the Morrow Station, and rail access to the Morrow Station is exclusively over the lines of NS. As such, SMEPA is captive to NS, and SMEPA has no other current transportation option for delivering its coal purchases. NS currently provides transportation service to SMEPA pursuant to a contract.

COMMENTS

I. Background

Any effort to develop a meaningful assessment of the impact and effectiveness of the Staggers Act must first consider the factual circumstances that existed prior to 1980. During the 1970s, the railroad industry experienced significant financial turmoil, with a number of railroads facing bankruptcy (e.g., Penn Central Railroad).² In 1979, "the gap between the railroads' cost of capital, estimated at 11 percent, and their earnings, which were 2.7 percent that year, discouraged investment in the railroads." Energy Information Administration, "Railroad Deregulation: Impact on Coal, " DOE/EIA-0399 (August 1983), at 6. Rail carriers provided service in accordance with complex tariffs that they were required to file with the Interstate Commerce Commission, and shippers were forced to bear the impact of steep general rate increases. In addition, only one rail carrier provided coal transportation service from the Powder River Basin, and the railroads' deferred capital needs soared into the range of \$16 to \$20 billion dollars. See Staggers Act § 2(7).

Responding to that financial and regulatory malaise, the Staggers Act sought to emphasize competition and deregulation, and in the ensuing years, the rail industry underwent a radical transformation. The Staggers Act "was a response to a

² It has been estimated that twenty-one percent of the nation's rail system operated under bankruptcy protection in the 1970s. Frank N. Wilner, Railroads and the Marketplace (Association of American Railroads, rev. ed. 1987), at 5.

concern that excessive governmental regulation both at the federal and state level had contributed to the financial difficulties of major railroads.” Michael E. Roper, “Railroad Regulation After Staggers” (Association of Transportation Practitioners 1992), at 4. Contracts, which the Staggers Act authorized, became the favored method of providing coal transportation service,³ and the rail industry invested heavily to upgrade its physical plant. See Frank N. Wilner, “Railroads and Productivity – A Matter of Survival” (Association of American Railroads 1991), at 20 (“During the 1980s, railroads invested more than \$30 billion in improved rail, crossties, ballast, signals, computers, new generation locomotives, and innovative rolling stock; and another \$100 billion in maintenance.”). To the great credit of the Congress and the ICC in implementing the goals of the Staggers Act, both rail carriers and shippers benefited: rail carriers saw their financial situation improve tremendously and shippers enjoyed substantial rate benefits as thriving rail carriers passed along the benefits of productivity enhancements in order to gain market share in a competitive industry.

The stated goals of the Staggers Act were set forth in § 3 of the Act as follows:

The purpose of this Act is to provide for the restoration, maintenance, and improvement of the physical

³ Former 49 U.S.C. § 10713 (“One or more rail carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may enter into a contract with one or more purchasers of rail service to provide specified services under specified rates and conditions.”).

facilities and financial stability of the rail system of the United States. In order to achieve this purpose, it is hereby declared that the goals of this Act are –

(1) to assist the railroads of the Nation in rehabilitating the rail system in order to meet the demands of interstate commerce and the national defense;

(2) to reform Federal regulatory policy so as to preserve a safe, adequate, economical, efficient, and financially stable rail system;

(3) to assist the rail system to remain viable in the private sector of the economy;

(4) to provide a regulatory process that balances the needs of carriers, shippers, and the public; and

(5) to assist in the rehabilitation and financing of the rail system.

Staggers Act, § 3 (emphasis added). In furtherance of these goals, the Act set forth a congressional declaration of national transportation policy that included, of particular note, the following:

(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;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;

(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; [and]

(7) to reduce regulatory barriers to entry into and exit from the industry . . .

Id. at § 101.

II. Positive Developments in the Implementation of the Staggers Act

In the wake of the Staggers Act, the ICC acted in a number of respects that fulfilled the Act's pro-competitive goals by allowing two-carrier rail service to be introduced where only monopoly service historically had existed. One leading example of this willingness was the dispute regarding dual-carrier service from the Powder River Basin. During the 1970s, only Burlington Northern Railroad Company ("BN") enjoyed access to the PRB. Following the enactment of the Staggers Act, the ICC greatly facilitated competitive rail service in the PRB through its decision to allow the Chicago and North Western Railway ("CNW"), through its Western Railroad Properties, Inc. ("WRPI") subsidiary, to buy into the existing BN line, despite significant opposition from

BN. Chicago and North Western Transp. Co. – Construction and Operation of a Line of Railroad in Niobara and Goshen Counties, Wyoming, and in Sioux and Scotts Bluff Counties, Nebraska, 363 I.C.C. 906 (1981) (“CNW Construction”).

BN had opposed CNW’s request for access into the PRB, arguing that CNW’s access would seriously jeopardize BN’s ability to continue to make investments in needed PRB capacity and would have a “disastrous financial impact on Burlington Northern.” See Petition of Burlington Northern, Inc. for Intervention in Opposition to CNW’s Application in Finance Docket No. 28934, dated February 28, 1979, at 4. BN took the position that:

North Western’s application assumes vastly overstated demand for Southern Powder River Basin coal.

. . . The revenue losses Burlington Northern would suffer, if the North Western were able to handle sufficient Southern Powder River Basin coal to render its investment financially acceptable, . . . average approximately 500 million dollars per year for the years 1983-1985. These revenue losses could place Burlington Northern in a position of financial jeopardy by reducing its internal cash flow, severely restricting its ability to reach external capital sources, thereby jeopardizing viability of existing investments, increasing the cost of transporting Southern Powder River Basin coal and directly impacting on the competitive energy problem confronting those coal movements.

Id. at 4, 6-7 (emphasis added).

The Verified Statement of Norman M. Lorentzen, President and CEO of Burlington Northern Inc., dated March 28, 1980, was similarly strident in its analysis of the impact of the CNW's access into the PRB:

If the [CNW] connector line application is granted, I will have no alternative except to recommend to my Board of Directors that Burlington Northern sharply curtail its investment to increase capacity on affected coal routes. . . . The fact is that sound business judgment will leave us no alternative. Union Pacific-CNW's invasion of our territory will be the culmination of a series of blows to our very costly efforts to meet the Nation's fuel requirements. We cannot reasonably be expected to assume the risk of loss of this service at our present low rates of return in the face of rapidly increasing capital and operating costs. In short we will be at a point where there will be no choice.

Id. at 3; accord Brief of Burlington Northern Inc., filed June 17, 1980, at 65 ("[T]he record establishes that BN service is more than adequate at present, and that its rail plant will be adequate for the foreseeable future. The most realistic projections of coal tonnages likely to move from the Powder River Basin are far more conservative than C&NW's projections. . . . In fact, BN now has more service capacity than the market demands.").

In reaching its decision to allow CNW to serve the PRB, the Commission stressed the importance of allowing competition to take the place of a railroad monopoly:

After considering the likely effects of competition for the transportation of Powder River Basin coal, we are persuaded that the adequacy of transportation to the public will be

improved by operation of this line as a joint, rather than a solely owned line. Both producers and consumers of coal have argued in this proceeding that competitive operations over the joint line will produce benefits by lowering or leveling the price of coal transportation and by increasing the quality of service available. In their testimony, shippers supporting joint use of the line stressed that without it, they would remain captive shippers of BN We are convinced that competition is crucial where a valuable natural resource exists in such quantities, where rail service is the only practical method for transporting it, and where the presence of another rail carrier would introduce a competitor into the market which is now a monopoly.

CNW Construction, 363 I.C.C. at 917 (emphasis added).

Rather than hindering BN's ability to earn adequate revenues on PRB coal service, the introduction of two-carrier service out of the PRB became an unqualified success. It has helped to maintain reasonable rates on competitively served traffic, and in so doing, has allowed the PRB to become the leading coal source in the United States. See April 24, 1986 Highlights of Department of the Interior Draft Study "Effects of Competition on Railroad Rates for Powder River Basin Coal," at 1-2 ("Consumer savings resulting from railroad competition in the Powder River Basin are estimated to be at least \$160 million annually."). The ICC's experience with CNW's request to gain access into the Basin confirms that the pro-competitive policies of the Staggers Act, if implemented properly by the agency, benefit the entire rail industry and its customers. Id. ("In virtually every respect, the study confirms with hard numbers and facts what captive shippers have been saying about monopoly rail rates and their adverse impacts on consumers, the

market for domestic coal, the royalties received by the Federal government for federal coal leases, and national energy and transportation policy.”). PRB coal volumes have skyrocketed since pre-Staggers Act levels, and productivity enhancements gained through the carriers’ efforts to improve their PRB service have enabled the carriers to substantially increase their revenues while maintaining reasonable rate levels on competitive traffic.

Similarly, the ICC also helped to foster the pro-competitive goals of the Staggers Act by authorizing the construction of a number of rail spurs that were designed to permit dual-carrier service at what previously were captive, coal-fired electric generating stations. There are a number of examples of common carrier construction projects authorized by the Commission in the years following the Staggers Act, and that pattern has continued under the Board. See, e.g., Finance Docket No. 31498, Southern Electric Generating Co. – Petition for Exemption – Construction of a Rail Line in Shelby County, AL (ICC served September 19, 1989), at 2 (“Construction of the line will enable Plant Gaston to receive more efficient and economic transportation services by allowing Segco direct access to coal supplies along CSXT’s mainline. The exemption will create competition between CSXT and Southern for the involved traffic”); Joppa and Eastern Railroad Co. – Construction Exemption – Joppa, IL (ICC served July 5, 1990), at 1 (“By building a 4.5-mile line from its Joppa plant and connecting it to Burlington Northern Railroad Company’s mainline track, EEI believes it can increase competition

among the various carriers”); Iowa Power, Inc. – Construction Exemption – Council Bluffs, IA, 8 I.C.C.2d 858 (1990); Finance Docket No. 31972, Southern Electric R.R. – Construction Exemption – Jefferson County, AL (ICC served March 17, 1992); Finance Docket No. 32067, WFEC R.R. – Construction and Operation Exemption – Choctaw and McCurtain Counties, OK (ICC served February 27, 1995); Finance Docket No. 33731, Ellis County Rural Rail Transp. District – Construction and Operation Exemption – Ellis County, TX (STB served Feb. 15, 2000); Finance Docket No. 34075, Six County Association of Governments – Construction and Operation Exemption – Rail Line Between Levan and Salina, Utah (STB served Oct. 26, 2001); Finance Docket No. 34210, Sunflower Rail Company, LLC – Construction and Operation Exemption – Finney County, KS (STB served March 28, 2003). The agency has also facilitated the construction of private spurs through its precedents recognizing the distinctions between jurisdictional and private trackage, which have contributed to the pro-competitive goals of the Act. See, e.g., Finance Docket No. 34013, B. Willis, C.P.A. – Petition for Declaratory Order (STB served October 3, 2001).

III. The Agency’s Unwillingness to Fully Implement the Pro-Competitive Policies of the Staggers Act

Unfortunately, during the past twenty-five years, there also have been a number of developments that have diminished the benefits of the Staggers Act, particularly regarding the interests of captive coal shippers. These developments

pertained to instances in which captive shippers – hoping to obtain relief from the rate demands of market dominant rail carriers – endeavored to find some means through which competition could help to constrain their rates. One of the policies sought to be advanced through the Staggers Act, of course, was “to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail.” Staggers Act, § 101(a), codified at former 49 U.S.C. § 10101a.

As such, these efforts were entirely consistent not only with the Staggers Act, but also with the pro-competition initiatives that the agency previously had endorsed (i.e., dual-carrier PRB service, and the authorization of rail spur construction). These agency-thwarted efforts related to: (1) reciprocal switching and terminal trackage rights; (2) bottleneck rate relief; and (3) relief from paper barriers.

A. Reciprocal Switching/Terminal Trackage Rights

One of the first post-Staggers Act efforts made by captive shippers to develop competition for their service involved the use of “reciprocal switching” or “terminal trackage rights” under former 49 U.S.C. § 11103.⁴ This provision authorized the Commission to require a destination monopolist to switch traffic for another long-haul

⁴ “Reciprocal switching is the movement, for a fee, by one carrier of the car or cars of another between a point of interchange and a point on the first carrier’s lines. . . . Terminal trackage rights raise similar considerations as reciprocal switching, except that one carrier gains the right to operate its trains over the lines of another carrier.” See Midtec Paper Corp. v. Chicago & North Western Transp. Co., 3 I.C.C.2d 171, 176-77 (1986), aff’d sub nom. Midtec Paper Corp. v. United States, 857 F.2d 1487 (D.C. Cir. 1988) (“Midtec”).

carrier that lacked the ability to serve a particular destination, or to require one carrier to permit another carrier to provide service over its lines. Notably, the Staggers Act itself introduced a broader concept of reciprocal switching than had existed previously. In particular, the Staggers Act changed the statutory language to permit the agency to compel a carrier to enter into a reciprocal switching agreement “where it finds such agreements to be practicable and in the public interest, or where such agreements are necessary to provide competitive service.” Former 49 U.S.C. § 11103 (emphasis added).

The ICC’s Midtec decision, however, effectively precluded relief in the form of terminal trackage rights/reciprocal switching, notwithstanding the fact that such relief is entirely consistent with the pro-competition policies of the Staggers Act. In reaching its decision, the Commission was largely dismissive of the concerns of captive shippers and failed to give adequate deference to the pro-competitive policies of the Staggers Act:

While the Staggers Act incorporated new emphasis on the importance of intramodal competition, we think it correct to view the Staggers changes as directed to situations where some competitive failure occurs. There is a vast difference between using the Commission’s regulatory power to correct abuses that result from insufficient intramodal competition and using that power to initiate an open-ended restructuring of service to and within terminal areas solely to introduce additional carrier service.

Id. at 174.

On the basis of this rationale, the Commission concluded that in order to merit a decision requiring reciprocal switching, a complainant would be required to show anticompetitive abuse by the monopolist carrier:

The key issue in this case is whether CNW has engaged in or is likely to engage in conduct that is contrary to the rail transportation policy or is otherwise anticompetitive. The essential questions here are: (1) whether the railroad has used its market power to extract unreasonable terms on through movements; or (2) whether because of its monopoly position it has shown a disregard for the shipper's needs by rendering inadequate service.

Id. at 181 (emphasis added). Anti-competitive conduct, as defined by the agency, includes the "classical categories of competitive abuse: foreclosure; refusal to deal; price squeeze; or any other recognizable forms of monopolization or predation." Id. at 173-74.

This interpretation of the statute effectively nullifies the Staggers Act's language authorizing mandatory reciprocal switching "where such agreements are necessary to provide competitive rail service."

In his dissenting opinion in Midtec, Vice Chairman Simons sharply criticized the majority for its failure to appreciate the questionable nature of CNW's post-complaint responsiveness to Midtec's needs, and for the high burden that it placed upon complainants seeking reciprocal switching:

To my dismay, the majority ignores the Administrative Law Judge's reasonable determination that CNW blatantly disregarded Midtec's transportation needs prior to the filing of the complaint. It now uses this "new" evidence, purportedly showing CNW's improved service with respect to

Midtec since the complaint was filed, as justification for once again denying competitive access. This approach ignores CNW's past conduct. In my view, we should consider CNW's overall record as an indication of whether it will be responsive to Midtec's transportation needs once this complaint is dealt with. In any event, I maintain that subsections 11103(a) and (c) are not intended to focus simply on the carrier's alleged misconduct or punish a rail carrier with a monopoly for some acts which could be labeled anticompetitive. Rather, the statute requires that the issue we should address is whether the availability of another line-haul carrier has the potential for providing needed service and rate options to the affected shipper.

Id. at 185 (emphasis added).

On appeal, the United States Court of Appeals for the District of Columbia Circuit relied heavily upon the discretionary language of the Staggers Act (i.e., "The Commission may require rail carriers . . ." (emphasis added)) as a basis for finding that the Commission was at liberty to constrain its own exercise of discretion. See 857 F.2d at 1499 ("Our own review of the legislative history confirms this interpretation: the Commission is under no mandatory duty to prescribe reciprocal switching where it believes that doing so would be unwise as a matter of policy."). This basis for approving of the Commission's resolution, however, simply amplifies the fact that the Commission had the discretion to allow reciprocal switching to be used to introduce greater competition into the rail industry, but declined to do so.

Following the Commission's development of this anti-competitive conduct standard in the mid-1980's, there have been no meaningful shipper efforts to obtain

reciprocal switching, and no shipper has been able to demonstrate in a terminal trackage rights case that the incumbent carrier has engaged in anti-competitive conduct. In fact, because the required showing is so onerous, efforts to obtain such relief have been nearly nonexistent. In its limited decisions involving terminal trackage rights relief, the Board has gone out of its way to emphasize that terminal trackage rights are a “drastic” and disfavored remedy. See Docket No. 41987, Western Fuels Service Corp. v. Burlington Northern and Santa Fe Ry. (STB served July 28, 1997), at 7 (denying complainant’s request for terminal trackage rights, citing Midtec, 3 I.C.C.2d at 174 and Shenango, Inc. v. Pittsburgh, Chartiers and Youghioghenny Ry., 5 I.C.C.2d 995, 1001 (1989)). In short, the Staggers Act’s attempt to facilitate competitive rail service for captive shippers through the use of reciprocal switching was effectively negated by the ICC and this agency.

B. Bottleneck Rate Relief

During the “Staggers Act era,” coal shippers that lacked competition at their electric generating facilities also attempted to foster competition between upstream long-haul rail carriers through requests for so-called “bottleneck” rate relief. These captive shippers had seen the manner in which competitively-served coal shippers obtained significantly improved rates for coal transportation service following the enactment of the Staggers Act. They attempted to obtain some measure of those competitive benefits by taking advantage of the fact that the possibility of service from two rail carriers existed

for significant portions of the distances their coal traffic had to travel between mine origins and their coal-fired power plants.

Specifically, a bottleneck rate complaint sought to challenge the common carrier rate only on service for the final, non-competitive portion of a substantially longer through movement, the vast majority of which could be provided by more than one carrier. Since the agency was precluded by statute from prescribing any rate below the jurisdictional threshold (i.e., 180% of variable costs), a rate complaint that had to cover the entire origin-to-destination service would have yielded – at best – a rate prescription that afforded the defendant carrier an 80% premium over its variable costs for the entire length of the movement.

The complainants in the bottleneck cases, however, expected to be able to obtain contracts for the competitive portions of their movements at rates that were lower than the 180% jurisdictional threshold if they were successful in first obtaining a rate for the captive, or “bottleneck” portion of the movements. By limiting the litigation before the agency to only that captive portion of the movement, bottleneck complaints had the virtues of greater simplicity, reduced costs to litigate, and more reliance upon the marketplace (rather than the regulatory agency) as the principal driver of the total rail transportation costs to be paid for origin-to-destination service. Each of these virtues, of course, was entirely consistent with the Staggers Act which sought “to allow, to the maximum extent possible, competition and the demand for services to establish

reasonable rates for transportation by rail” (49 U.S.C. § 10101a(1)), and “to maintain reasonable rates where there is an absence of effective competition . . .” Id. at (2).

After an extraordinarily long delay in ruling upon motions to dismiss the bottleneck cases, and after deciding to open the bottleneck cases for comments from interested members of the industry, the agency ultimately declined to permit bottleneck rate relief, thereby allowing rail carriers with monopoly control over a portion of a through rail movement to extend their influence as monopolists over the entire route of movement in practically all circumstances. See Docket No. 41242, Central Power & Light Co. v. Southern Pacific Transp. Co. (STB served Dec. 31, 1996), clarified (STB served April 30, 1997), aff’d sub nom. MidAmerican Energy Co. v. STB, 169 F. 3d 1099 (8th Cir. 1999). In particular, the agency found that destination monopolists who also could participate in upstream service were not obligated to quote common carrier rates for the bottleneck segment that could be used in conjunction with the contract rate of another rail carrier:

[I]n providing service from a mine to a utility plant – either by itself or in interline service with another carrier – the bottleneck carrier is not required to establish a local rate for the bottleneck segment. . . . The utilities’ argument that they have a right to a local rate rests on the mistaken belief that, under the common carrier obligation, a carrier must hold out to provide all possible rates and services that a shipper may request. In fact, where a destination bottleneck carrier establishes proportional or joint rates for unit-train or trainload coal transportation to the generating station, it is not required to provide a local unit-train coal rate as well for transportation that is not local to the bottleneck carrier.

Id. at 5. In reaching its decision to deny bottleneck rate relief, the Board relied to a significant extent upon the Commission's Midtec decision, supra. Id. at 6-9.

Without destination-segment common carrier rates to challenge, captive shippers could not successfully invoke a bottleneck strategy. The bottleneck decisions thus represented a major victory for monopolist rail carriers, and a major impediment to the full implementation of the pro-competitive policies of the Staggers Act for captive shippers.

As indicated supra, the bottleneck decisions contemplated that relief would be available in certain limited circumstances. Specifically, the bottleneck decision, as clarified by the Board, permitted challenges to bottleneck rates in situations where the destination monopolist could not serve the origin of the movement and the shipper already had obtained a contract for the upstream portion of this movement. See Docket No. 41242, Central Power & Light Co. v. Southern Pacific Transp. Co. (Decision served April 30, 1997), at 8-9. Captive shippers warned that prospects for this relief were very poor, because the major railroads would respect one another's captive "turf" by refusing to enter into contracts that would facilitate a challenge to a bottleneck rate. This has proven to be the case. The Board's expectation that its exception to the rule against bottleneck rate relief would afford some meaningful avenue for relief has proven to be unwarranted.

The Concerned Coal Shippers respectfully submit that the Board's bottleneck precedent remains a significant obstacle for captive shippers to the full realization of the pro-competitive policies of the Staggers Act.

C. Paper Barriers

A third effort made in the post-Staggers Act era by captive shippers to obtain the benefit of competition involved relief from so-called "paper barriers." A paper barrier is a contractual device through which a long-haul carrier that transfers an interest in a branch line (often through a lease) preserves its control over all or nearly all of the traffic that originates or terminates on that line by requiring the new branch line carrier to pay an excessive lease penalty if it interchanges traffic with another long-haul carrier. Because these barriers to competitive service are not based on physical interchange limitations, but instead, arise only through contracts, they are referred to as "paper" barriers.

Some paper barriers are sought to be justified as alternative financing arrangements. Because most short lines lack the capital to buy branch lines, the leases allow them to operate and return value to the lessor over time. In many cases, however, the barrier remains in effect long after the reasonable value of the line has been realized by the lessor, and the rent penalty for traffic diversion far exceeds the value of the branch line itself. These restraints on competition permit line-haul Class I carriers to continue to charge monopoly rates on their long-haul service. Many electric generating facilities are

located on branch lines that are subject to these paper barriers. For example, Missouri & Northern Arkansas Railroad Company ("M&NA") has a publicly available lease agreement with Union Pacific that includes two provisions that operate as paper barriers. See Lease Agreement By and Between Missouri Pacific Railroad Company and Missouri & Northern Arkansas Railroad Company, Inc., dated December 11, 1992. The first provides that if the M&NA interchanges 95% or more of its traffic with the lessor (UP), the rent for the year is \$0.00. If the M&NA were to interchange more than 5% of its traffic with other carriers it would be required to pay annual rental amounts that begin at \$10,000,000 and extend up to \$90,000,000, based upon the percentage of traffic interchanged with other carriers.

As though that were not enough, the lessor (UP) also retains the right under a separate lease provision to step in upon seven days' notice and provide exclusive service to one of the coal-fired generating facilities located on the leased line. These two lease provisions effectively eliminate rail competition. Were it not for these provisions, BNSF, in conjunction with the M&NA, could provide a competitive alternative to UP from PRB origins to the coal-fired power plants located on the M&NA leased lines.

During the 1990s, opposition to paper barriers mounted, and requests were made to modify the Board's regulations to preclude the enforcement of certain paper barriers. Rather than attempting to resolve this issue itself, the Board instead suggested that "the large and small railroads should endeavor to resolve their differences regarding

rail access and competition issues and reach a private sector agreement.” See Ex Parte No. 575, Review of Rail Access and Competition Issues, Request of the American Short Line and Regional Railroad Association (“ASLRRA”) for Administrative Action: Service-Related Access to an Additional Rail Carrier, dated September 25, 1998, at 2.

In response to that suggestion, the Association of American Railroads (“AAR”) and the ASLRRA entered into an agreement on September 10, 1998 entitled the Railroad Industry Agreement (“RIA”), which was intended to provide some solution to the paper barrier dispute. See Assn. of American Railroads – Agreement – 49 U.S.C. 10706, 3 S.T.B. 910 (1998). Specifically, the RIA stated that:

Only legitimate “paper barriers” should be enforceable.

Paper barriers are restrictions on interchange imposed by contract at the time of the creation of the Short Line.

Legitimate paper barriers are those that are designed as fair payment for the sale or rental value of the line that created the Short Line. Such barriers should not restrict the Short Line’s ability to develop New Traffic with another carrier if the selling or leasing Large Railroad can not or will not participate in the New Traffic. Excessive per car charges or other penalties imposed if a car is interchanged to another Large Railroad (other than legitimate paper barriers) are unreasonable and should not be permitted.

RIA at 3 (emphasis in original).

The AAR and ASLRRA jointly petitioned the Board to approve their agreement insofar as it dealt with rate-related issues. Interim approval was granted on September 21, 1998, with final approval granted on December 11, 1998. Docket No. S5R 100, Association of American Railroads and American Short Line and Regional Railroad

Association – Agreement – Application Under 49 U.S.C. 10706 (STB served September 21, 1998 and December 11, 1998).

On December 21, 1998, in Ex Parte No. 575, the Western Coal Traffic League (“WCTL”) filed a “Petition for Further Rulemaking to Eliminate Unreasonable ‘Paper Barriers’ to Interchange.” Therein, WCTL argued that public policy, “as articulated in both the Rail Transportation Policy and the antitrust laws, mandates the proactive promotion of competition within the railroad industry, and not simply the minimization of harm to whatever competition presently survives.” WCTL Petition at 2. WCTL added that the RIA “constitutes a good beginning on a proper resolution of the issues raised by paper barriers to interchange,” but that “it is at best an incomplete solution to those issues; apparently even ASLRRRA recognizes this, judging from its September 25 petition seeking further Board action to address procedures for overcoming paper barriers during service emergencies.” Id. at 5-6.

Specifically, it was argued, the AAR-ASLRRRA Agreement “does not really define what is, or is not, an unreasonable paper barrier” and “the Agreement does not take the duration of the paper barrier into account.” Id. at 12-13. The Agreement also “provides no mechanism for implementation” and “provides no right of enforcement at all for affected shippers.” Id. at 13. Ultimately, it was suggested that a rulemaking proceeding was necessary to permit the Board to complete the work needed to protect shippers from the harm associated with paper barriers, since the Board had only invited

comments on the RIA insofar as they related to a pending Board proceeding (Ex Parte No. 628) regarding “Expedited Relief from Service Inadequacies.” Id. at 6.

Rather than granting further consideration, the Board instead found that it would hold the matter in abeyance pending further experience under the RIA. See Ex Parte No. 575, Review of Rail Access and Competition Issues (STB served March 2, 1999), at 3 (“We will not act on the petition at this time, but rather will hold it in abeyance. . . . We believe that a more responsible approach would be to develop a better record with the benefit of experience under the RIA before we act on WCTL’s petition.”).

On March 21, 2005, after more than six years of experience under the RIA, WCTL filed a “Renewed Petition for Rulemaking to Eliminate Unreasonable ‘Paper Barriers’ to Interchange” in Ex Parte No. 575, explaining that “pre-existing paper barriers have continued to restrain competition for substantial volumes of traffic originating or terminating on small railroads, and Class I carriers have continued to create new paper barriers as they have spun off more of their marginal rail lines to smaller, typically non-union, carriers.” Id. at 4. In the intervening six years, “there has been nothing done to address the RIA’s twin failings that were the primary focus of WCTL’s 1998 Petition: the agreement’s exclusion of any remedies for the pernicious effect of unreasonable paper barriers on *pre-existing* traffic, and its denial of any remedy for adversely affected *shippers*, whose interests do not necessarily coincide with those of the short lines serving them.” Id. The Board has not yet taken any action in response to this renewed petition.

The Board's treatment of paper barriers has left numerous shippers without an adequate means of seeking relief from monopoly rail pricing. The experience of the rail shipping public in recent years has shown that this Staggers-era development has hindered the pro-competitive goals of the Act, and has been resistant to the purported solution to the problem that the rail industry crafted for itself. This continuing problem significantly impedes the reliance on competition that the Staggers Act sought to bring to the coal transportation marketplace.

* * *

To summarize, although the ICC contributed greatly to the achievement of the pro-competitive policies of the Staggers Act by granting dual-carrier access to the Powder River Basin and through its favorable treatment of requests to construct "build-outs" from captive destinations to the lines of competing carriers, there are a number of other respects in which the ICC's and this agency's decisions have directly compromised the ability of captive shippers to enjoy the benefits of competition. In its approaches to reciprocal switching, bottleneck rate relief, and paper barriers, the agency has consistently frustrated the ability of captive coal shippers to obtain some measure of the competitive relief that the Act contemplated. These approaches represent major impediments to the national transportation policies, and have represented a significant hindrance to a large share of the shipping public.

IV. Unbalanced Rate Regulation

The Staggers Act recognized that it would not always be possible to rely on competition to avoid the need for rate regulation to protect captive rail shippers from excessive revenue demands from market dominant rail carriers. See former 49 U.S.C. § 10101a(6). In fact, the need for reasonable rail rates for captive coal shippers was a major issue in the legislative hearings and debates that preceded enactment of the Staggers Act. For example, the Staggers Act Conference Report singled coal out in its description of the Rail Transportation Policy provision of the law, stating: “The Conferees intend that this policy include the encouragement and promotion of the transportation of coal by rail in accordance with the objective of energy independence at rates which do not exceed a reasonable maximum where there is an absence of effective competition.” Conference Report No. 96-1430, 96th Cong., 2d Sess. (“Conference Report”), at 80.

The receptiveness of the agency to complaints regarding excessive rates on captive traffic has shown a decidedly mixed history, and represents a second principal area in which the implementation of the Staggers Act has failed to live up to the potential contemplated by the Congress. During the first two decades of experience under the Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985), aff’d sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987) (“Guidelines”), the agency issued decisions that were perceived in the industry as reasonably balancing the interests of

carriers and shippers, and afforded a reasonable basis for commercial solutions to rail pricing disputes. For example, the Commission's decisions in the West Texas, Arizona Public Service, and Wisconsin Power & Light cases each granted meaningful rate relief to the complaining shippers but nevertheless ensured that carriers would continue to recover at least 180% of their variable costs of service. Not all SAC decisions in this time period favored complaining shippers (see, e.g., Docket No. 37809, McCarty Farms, Inc. v. Burlington Northern, Inc. (STB served August 20, 1997)), but nevertheless, captive shippers and rail carriers alike understood that the agency stood ready to restrain excessive rate demands from market dominant carriers in order to protect the interests of captive shippers.

In recent years, however, the STB's administration of the rate regulatory function has become decidedly unbalanced, imposing increasingly strict burdens and litigating costs on captive shippers, and affording increasingly greater deference to rail carriers. The results have been huge rate increases on captive coal traffic. See Docket No. 42054, PPL Montana, LLC v. The Burlington Northern and Santa Fe Ry. (STB served Aug. 20, 2002, and Aug. 31, 2004) (dismissing the complaint on the basis of a new cross-subsidy test); Docket No. 42056, Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Ry. (STB served March 24, 2003, and Sept. 27, 2004) ("TMPA") (granting only modest rate relief for a brief portion of the twenty-year life of the SAC model); Docket No. 41185, Arizona Public Service Co. and PacifiCorp. v. The Burlington

Northern and Santa Fe Ry. (STB served May 12, 2003, Oct. 14, 2003, and Dec. 13, 2004) (“APS”) (“suspending” the effectiveness of a prior rate prescription because of the Board’s lack of “confidence” in the continuing validity of that prescription and radically changing the application of its SAC methodology in order to justify vacating its rate prescription on a retroactive basis); West Texas Utilities Co. v. The Burlington Northern and Santa Fe Ry. (STB served May 29, 2003) (“West Texas”) (reopening the record for additional proceedings seven years after its original prescription); Docket No. 42069, Duke Energy Corp. v. Norfolk Southern Ry. (STB served Nov. 6, 2003, Feb. 3, 2004, and Oct. 20, 2004) (“Duke/NS”) (denying any rate relief on rates of unprecedented magnitude); Docket No. 42070, Duke Energy Corp. v. CSX Transportation, Inc. (STB served Feb. 4, 2004 and Oct. 20, 2004) (“Duke/CSXT”) (same); Docket No. 42072, Carolina Power & Light Co. v. Norfolk Southern Ry. (STB served Dec. 23, 2003, and Oct. 20, 2004) (“CP&L”) (denying any rate relief based on a reduced forecast of CAPP coal production, while ignoring forecasted coal-fired generation requiring that such coals would simply travel over the SARR from other origin areas); Docket No. 42057, Public Service Co. of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Ry. (STB served June 8, 2004, and Jan. 19, 2005) (“Xcel”) (affording limited rate relief but declining to modify the Board’s percentage reduction methodology despite its acknowledged flaws); Docket No. 42058, Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Ry. and Union Pacific R.R. (STB served March

15, 2005) (“AEPCO”) (dismissing AEPCO’s complaint because its SARR utilized trackage rights notwithstanding the fact that the Board had explicitly authorized the use of such rights).

The unbalanced approach to these cases is manifestly evident from an examination of the common carrier rate levels that the Board either prescribed or found not to be unreasonable therein. In that regard, the Concerned Coal Shippers respectfully submit that the Board’s handling of recent SAC cases has resulted in a widespread perception in the industry that effective maximum rate regulation is not currently available. To the extent that perception is accurate, the policy of the Staggers Act to ensure reasonable rates where there is an absence of competition clearly is not being fulfilled.

This shift in regulatory policy is particularly inappropriate in light of the current financial situation of the rail carriers. In marked contrast to the situation that existed at the time of the enactment of Staggers, there has been tremendous consolidation in the railroad industry through mergers of Class I carriers, and the remaining railroads currently enjoy very sound financial health. In fact, rail carriers now find themselves approaching, or already achieving, revenue adequacy even under the Board’s highly criticized Revenue Adequacy Standard. See Presentation of STB Commissioner Francis P. Mulvey before the Transportation Research Forum-New York Chapter (“Railroads and Railroad Regulation in a Capacity Constrained Environment”), September 8, 2005, at 20.

A small sampling of the many reports of rail industry analysts confirms this major shift in the financial status of the railroad industry. See, e.g., James Valentine, Morgan Stanley Report, dated September 20, 2005 (“We have even greater conviction that the [rail] industry will consistently earn its cost of capital over the next few years (a feat not achieved in decades), led by secular upward pricing initiatives that should continue into 2006 and beyond.”); “BNSF Railway on the Fast Track, Analysts Say,” Star-Telegram, September 21, 2005 (“‘I think we’re in a sustained era where railroads are no longer economically vulnerable because of overcapacity or lack of growth in freight,’ [BNSF’s Matt Rose] says.”); id. (“So strong is demand for rail service now that BNSF and other carriers now can do something the airlines can only dream of: impose higher rates.”); “Freight Costs Pick Up Speed,” Bloomberg News Service, October 6, 2005 (“North American railroad freight rates, already at unprecedented levels, may rise faster in the next six months, helping companies such as Union Pacific Corp. increase profit, according to a Morgan Stanley survey, according to the Bloomberg News Service.”); id. (“‘Railroads have had a taste of the good life for the first time in their history,’ Morgan Stanley’s Mr. Valentine said. ‘These managements know that the fastest way to go back to the old world is to go back to discounts,’ he said. ‘Unless we have an outright recession, I don’t see the prices decelerating.’”); id. (“In a separate report on the railroads, Standard & Poor’s analyst Philip Baggaley said: ‘Strong demand, tight capacity and

improved pricing power should lead to healthy increases in earnings and cash flow for companies over the coming year.””).

The Constrained Market Pricing methodology promulgated in the Coal Rate Guidelines includes four separate rate constraints. All coal rate cases presented to the Board (and to the ICC) under the Guidelines have relief upon the Stand-Alone Cost Constraint. With the railroads becoming revenue adequate (as defined by the agency), the day is approaching when the Revenue Adequacy Constraint may come directly into play. In describing the Revenue Adequacy Constraint in the Coal Rate Guidelines, the ICC stated that: “[c]arriers do not need greater revenues than [the revenue adequacy] standard permits, and we believe that, in a regulated setting, they are not entitled to any higher revenues.” Id. at 535. The Commission added that “the logical first constraint on a carrier’s pricing is that its rates not be designed to earn greater revenues than needed to achieve and maintain this ‘revenue adequacy’ level” and that “captive shippers should not be required to continue to pay differentially higher rates than other shippers when some or all of that differential is no longer necessary to ensure a financially sound carrier capable of meeting its current and future service needs.” Id. at 535-36.⁵

⁵ The Coal Rate Guidelines further indicate that a rail carrier seeking to earn revenues that would provide it, over the long term, a return on investment above the cost of capital would bear the burden of demonstrating, “with particularity: (1) a need for the higher revenues; (2) the harm it would suffer if it could not collect them; and (3) why the captive shippers should provide them.” Guidelines at 536 n.36.

A railroad's revenue adequacy is not directly relevant under the SAC methodology. The SAC costs should be the same whether the railroad does or does not enjoy "adequate" revenues. However, a case can be made that the Board has been influenced by a perceived need to enhance the railroads' revenues in making the numerous evidentiary rulings and legal determinations that arise in the course of such cases. Certainly, the railroads have argued to the Board that their need for revenues demands SAC findings that will allow rates above certain levels. In the current situation where railroad revenues have increased sharply and "competitive" traffic is providing greater contributions to railroad revenues, it is clearly appropriate that the pendulum which has swung so far to the railroads' side in recent SAC cases be allowed to swing back toward a center of balance. Simply stated, under current circumstances, any perceived revenue-need justification for the extremely high levels of differential pricing approved on captive traffic in recent rate cases is greatly diminished due to the carriers' ability to generate greater revenues/margins from competitive traffic.

V. Rail Service Concerns

Another disturbing trend in the rail transportation market in recent years is the repeated occurrence of significant episodes in which rail carriers are unable to provide service in a manner that is consistent with the requirements of their customers. From the 1997-1998 western rail crisis, through the recent service difficulties in the east and the ongoing problems associated with the extended service problems this year in the Powder

River Basin, coal shippers have been increasingly burdened with inadequate rail service. These deficiencies, to which the significant consolidation in the rail industry has clearly contributed, are even more difficult for captive shippers to accept in light of the fact that rail rates have been increasing at an alarming pace, as noted supra.

The impact of inadequate coal deliveries on electric utilities and other coal-fired electric generators can be severe. Frequently, shrinking coal stockpiles due to railroad service failures force curtailment of generation from coal-fired facilities. In order to make up for the lost generation, electricity must be generated from more expensive fuels or purchased at costs well in excess of coal-fired generation costs. Often, opportunities to sell electricity from affected coal-fired units are lost, resulting in lost profits as well. Other adverse financial impacts can also be caused, such as higher coal costs due to an inability to purchase contracted volumes at favorable contract pricing since the coal can not be delivered. When replacement coal is purchased to make up for the missed deliveries, higher prices may govern. Of course, in extreme circumstances, loss of a coal-fired unit could trigger brown-outs, black-outs, or worse.

Continuing and substantial rail service problems run directly counter to the goals set forth in the Staggers Act. Specifically, these types of service failures are inconsistent with the stated goals of the Act to “meet the demands of interstate commerce” and to “preserve[] a safe, adequate, economical, efficient, and financially stable rail system.” Staggers Act, § 3.

THE FUTURE OF THE STAGGERS ACT

The Board's Notice of Public Hearing solicits comments not only regarding the impact and effectiveness of the Staggers Act, but also regarding its future. The Concerned Coal Shippers respectfully submit that although the history of the Staggers Act has been largely beneficial to the rail industry, the benefits to captive shippers have been more limited and such shippers face serious problems in the current environment.

First, the future of the Staggers Act reforms depends upon the willingness of the Board to implement fully the pro-competitive relief contemplated by Congress. As discussed in these Comments, there are several respects in which the ICC and this agency could have – but chose not to – allow competition between carriers to supplant the need for rate regulation by this agency as Congress clearly intended should occur wherever possible. 49 U.S.C. § 10101(1) (“[I]t is the policy of the United States Government – (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail.”). These respects include the decision to eliminate reciprocal switching and terminal trackage rights as meaningful remedies for captive shippers, the refusal to permit bottleneck rate relief, and the failure to take meaningful steps to ameliorate the impact of paper barriers. Whether through Board action or new legislation, these lost opportunities to further Staggers’ pro-competitive goals should be addressed anew.

Second, in situations in which effective competition is unavailable and a maximum rate reasonableness complaint to this agency therefore offers the only protection against excessive rates, the Board should strive to achieve more balanced findings and results in its consideration of SAC cases as carriers become increasingly more aggressive in seeking to exact ever-greater premiums upon their monopoly service. As the Revenue Adequacy Standard becomes more directly applicable, the Board should act to make it a realistic remedy rather than implement it in a manner that renders it ineffective as a means to impose reasonable limits on captive rail rates.

Third, the Board should endeavor to protect captive rail shippers from deficient rail service, doing whatever is in its power to ensure that carriers either invest adequately to fulfill their transportation obligations without continuing major service failures, or be forced to allow captive shippers competitive options so that they may at least have the opportunity to obtain reliable service from a different carrier.

Finally, the Board should encourage, or at a minimum, refrain from discouraging, the use of contracts as a means of providing rail transportation service. Contracts have provided benefits to both carriers and shippers, and afforded a significant measure of stability to all parties involved.

Both shippers and rail carriers ultimately will benefit if the agency can fully implement the pro-competitive policies of the Act.

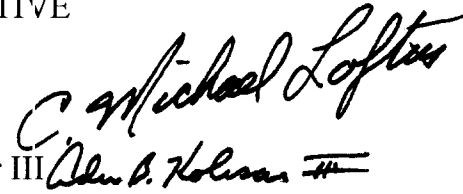
Respectfully submitted,

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Washington, D.C. 20036

Handwritten signatures of C. Michael Loftus and Andrew B. Kolesar III. The signature of C. Michael Loftus is in cursive and appears to be 'C. Michael Loftus'. The signature of Andrew B. Kolesar III is also in cursive and appears to be 'Andrew B. Kolesar III'.

Dated: October 12, 2005

Attorneys & Practitioners