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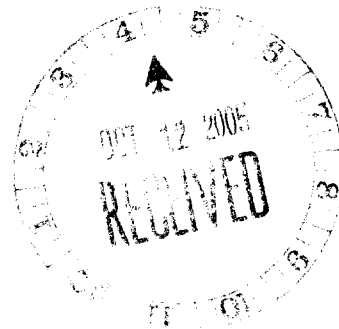
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October 12, 2005

VIA HAND DELIVERY

The Honorable Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 711
Washington, DC 20423



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 proceeding, please find an original and 10 copies of the Statement of the Western Coal Traffic League, along with a computer disc which contains the filing. Please note that this filing contains several pages in color (in the Exhibits). Their locations are marked with tape flags on the unbound originals.

An additional copy of the Statement also is enclosed. Kindly indicate receipt and filing by time-stamping this copy and returning it to the bearer of this letter.

Thank you for your attention to this matter.

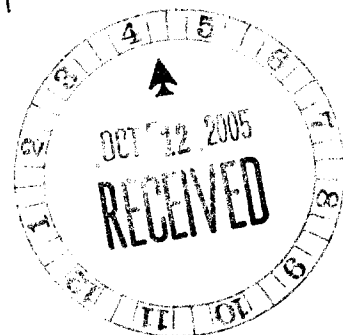
Sincerely,

Peter A. Pfohl
An Attorney for
The Western Coal Traffic League

Enclosures

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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

**STATEMENT OF
THE WESTERN COAL TRAFFIC LEAGUE**

Of Counsel:

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

Dated: October 12, 2005

**By: William L. Slover
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Attorneys & Practitioners

THE 25TH ANNIVERSARY OF THE STAGGERS RAIL ACT OF 1980; A REVIEW AND LOOK AHEAD

WCTL is an association formed in 1976 whose membership is composed of shippers, receivers, and consumers of coal mined from sources west of the Mississippi River. WCTL members collectively consume more than 140 million tons of coal annually that is moved by rail. Its members include investor-owned electric utilities, rural

electric cooperatives, state power authorities, municipalities, and a non-profit fuel supply cooperative.¹ Because of the considerable consolidation of the railroads occurring since the enactment of the Staggers Act, all WCTL members are now either captive to a single railroad at destination or, at best, subject to railroad duopoly pricing and service power.

The topic of this hearing, the impact, the effectiveness, and the future of the Staggers Act, is of considerable interest to the members of WCTL. The Act significantly changed federal regulatory policies affecting the railroads. WCTL participated in the formulation of the Staggers Act, and has actively participated in matters before the Surface Transportation Board ("STB") and its predecessor, the Interstate Commerce Commission ("ICC"), since the enactment of the Staggers Act in an effort to promote and fulfill the goals and protections accorded by that Act. These include the promotion of pro-competition policies and helping to ensure that, in the absence of competition, sufficient regulatory measures remain in place to provide protection for captive rail shippers from railroad monopoly pricing and service failures. Accordingly, WCTL has a direct and substantial interest in this proceeding.

SUMMARY

The Staggers Act was carefully designed by Congress to strike a balance between the need to restore the financial well-being of the railroad industry, the promotion of competitive rail service, and the need to retain regulatory protection where

¹ See the listing of WCTL members in Exhibit 1.

market forces are not adequate to ensure efficient service at reasonable rates. What has been the effect of the Staggers Act? As demonstrated below, in the 25 years since enactment, the railroads have experienced a financial renaissance and have fully achieved the Act's goal of returning to financial stability.

Unfortunately, progress toward achieving the essential countervailing goals of the Act – to provide captive shippers with effective regulatory relief from monopoly pricing and promote access to competitive service – has been decidedly mixed. There has been some good (e.g., the initiation of competitive origin service in the Wyoming Powder River Basin (“PRB”)), but much that is not (e.g., lack of competitive-access and bottleneck rate case relief, and recent problems in the application of the Coal Rate Guidelines). Additionally, as a result of the massive railroad industry consolidation that has occurred since the Act's passage, new problems have developed even for “competitive” coal shippers who have no effective remedy available to protect themselves from railroad duopoly pricing and service abuses.

In the areas where captive shippers have clearly failed to obtain any meaningful relief (e.g., competitive access), the ICC and the Board have, through administrative decisions, undermined the goals of the Staggers Act. Such administrative actions have caused harm to consumers and defeated the balance of carrier and shipper interests that lies at the heart of the Staggers Act. That balance needs to be restored.

DISCUSSION

A. THE STAGGERS ACT WAS PURPOSELY DESIGNED BY CONGRESS TO BALANCE CARRIER AND SHIPPER NEEDS

The enactment of the Staggers Act was a watershed event, ushering in a new era in the railroad industry. The Staggers Act was in part designed to shore-up the lagging financial position of railroad carriers, to help the railroads compete more effectively, and to reduce the federal regulatory structure. The Act also retained as a core safety net remedies to address rate protection and access to facilities for shippers dependent upon a single railroad for service. The Staggers Act marked a turning point in the history of railroad transportation in the United States, with many of the Act's core provisions remaining intact today.

As stated, an important goal of the Staggers Act was to promote the financial health of the rail industry, and the opportunity to obtain adequate earnings and rehabilitate the national rail system. The specific goals of the legislation in this area, as set forth in section 3 of the Act, included:

- (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;

* * *

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

Pub. L. 96-448, 94 Stat. 1897. To carry out these goals, the Staggers Act included provisions allowing the railroads increased freedom to set prices and engage in private contracting; easier cancellation of joint rates; and relaxed line abandonment standards.²

Besides seeking to promote the financial well-being of the railroads, Congress intended through the Staggers Act (at Section 3) to "provide a regulatory process that balances the needs of carriers, shippers, and the public." Pub. L. 96-448, 94 Stat. 1897. WCTL was actively involved in Congress's Staggers Act hearings, where it stressed the need for balance in the legislation, particularly as it pertained to the need to ensure that electric utilities are able to secure reasonable rates and service terms for movements from the nation's vital coal reserves.³ In this respect, through the Act, Congress was specifically concerned about balancing the financial needs of the railroads with the need for rate protections by captive coal shippers:

[t]he conferees intend that (the Rail Transportation) 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

² See, e.g., Staggers Act §§ 201 (prices), 208 (private contracts), 217 (joint rates), and 402 (abandonments). 94 Stat. at 1898-1900, 1916-25, 1941-42.

³ See, e.g., Testimony of WCTL before the Subcommittee on Transportation and Commerce of the House Committee on Interstate and Foreign Commerce, (H.R. Rep. No. 96-186) Apr. 2, 1980.

reasonable maximum where there is an absence of effective competition.

Conference Report on the Staggers Act, H.R. Rep. No. 96-1430 (1980) at 80 (“Conference Report”); see also Omaha Public Power District v. Burlington Northern R.R., 3 I.C.C. 2d 123, 158 (1986) (“the Staggers Rail Act requires the Commission to strike a balance between revenue need and shipper protection”). The intended railroad/shipper balance, said Congress, would best be fulfilled through the promotion of railroad competition:

the Conferees intend that competition be recognized as the best control on the ability of railroads to raise rates [because] . . . by allowing the forces of the marketplace to regulate railroad rates wherever possible the financial health of the railroad industry will be improved and will benefit all parts of the economy, including shippers, consumers, and rail employees.

Conference Report at 89. Thus, Congress authorized the ICC to aggressively encourage and promote intra-rail competition through rate regulatory relief and rail access relief.⁴

B. THE STAGGERS ACT HAS PRODUCED A RENAISSANCE IN THE RAILROAD INDUSTRY

By almost any measure, the railroad industry has fared remarkably well under the Staggers Act. The railroads themselves declared back in 1998 that the Act has been an “unqualified success” for the industry, explaining that “[t]he pricing and routing

⁴ See, e.g., Staggers Act §§ 201 (railroad rates), 221 (access) 217, 94 Stat. at 1898-1900, 1929.

freedoms of the Staggers Act have enabled railroads to rationalize their systems, reinvest in productive rail infrastructure, generate higher levels of service and dramatically increase productivity.” See Testimony of Karen Borlaug Phillips on Behalf of the Association of American Railroads, U.S. House of Representatives, Committee on Transportation and Infrastructure, Hearing on Rates, Access, and Remedies (May 13, 1998) at 2-3. As explained below, the railroads’ financial health is robust today.

1. Railroad Infrastructure, Operations, and Productivity have been Greatly Enhanced Under the Staggers Act

The railroads have significantly improved their performance since 1980, leading to bottom line growth. For example, as the enclosed Exhibits 2 and 3 show, the railroads’ operating revenues per employee and gross ton-miles per employee have improved significantly since 1980. Additionally, as shown in Exhibit 4, the Class I railroads’ average operating ratios improved significantly in the early years following the Staggers Act, although the ratios have been somewhat flat in recent years, caused at least in part by recurring service lapses. Overall, the railroads have experienced significant reductions in operating expenses per ton mile since 1980, as shown in Exhibit 5.

Railroads frequently point out to regulators 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 5 shows, the railroads’ operating expenses per ton-mile have remained consistently and substantially below revenues, with the differential between revenues and expenses remaining relatively stable over time,

allowing the railroads to become more financially secure. Also, the railroads have enjoyed significant productivity gains. Exhibit 6 shows the Class I railroads' annual and cumulative productivity, with cumulative productivity gains of over 140% between 1982 and 2003.

Additionally, 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 30% through abandonment or sale of non-essential facilities⁵ -- 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.

2. The Railroads' Financial Performance has been Strong under the Staggers Act

The railroads have been substantially and steadily improving their financial performance, as well as their standing in the financial markets, since the Staggers Act was passed. For example, as Exhibit 7 shows, the equity returns on railroad stock are far greater than market returns as a whole over the last five years. A company's stock price is an important forward-looking indicator of the financial health of the business, reflecting current operations and the market's expectations of future earnings. Since

⁵ In 1980, Class I railroads operated over 178,000 miles of road. By 2004, Class I railroads' route miles declined to 126,000 miles.

2000, Class I railroad stocks have increased an average of 133%, compared with a decline of 16% for the S&P 500 index over the same period. See Exhibit 7.

The debt markets also are positive on the railroad sector. In its July 15, 2005, transportation Industry Report Card, Standard & Poor's, the lead debt rating agency, reiterated its investment-grade BBB rating on the railroad industry and noted that "fundamentals in the North American rail sector remain very favorable."⁶ As a UBS analyst recently reported, "for the first time since deregulation, railroads appear to be on track to earn their cost of capital."⁷

Railroad revenues are at all-time highs today, with the railroads enjoying record revenues on a consistent quarterly basis.⁸ The large dividend increases and enormous cash flows being generated in recent years by the railroads are yet another indication of their strong financial performance. For example, this summer, BNSF Railway Company ("BNSF") raised its quarterly dividend by 18% over 2004 dividend levels.⁹ Since September 2003, BNSF's dividends have increased by 56%. BNSF also has generated significant free cash flow of between \$711 million and \$1.139 billion

⁶ P. Baggaley, Industry report card: Global airfreight railroads, transportation leasing, and trucking, Standard & Poors (July 15, 2005).

⁷ W.C. Vantuono, Twenty-five years after Staggers: new challenges, huge opportunities, Railway Age (July 2005).

⁸ In 2004, operating revenues for the UP, BNSF, NS and CSXT were \$12.2, \$10.9, \$7.3, and \$7.1 billion respectively, and were record revenues for each company. See Companies' Annual Reports to Shareholders and Annual Report Form R-1s for 2004.

⁹ See BNSF 2nd Quarter 2005 Investors' Report, at 2.

annually in the last five years.¹⁰ This is cash available to BNSF after providing for all of its capital investments, and it is a very strong indicator that BNSF has enough cash to pay for its capital investment initiatives.

Additionally, BNSF has re-purchased approximately 27% of its outstanding shares over the past 8 years, spending over \$4 billion to repurchase 142 million shares from the market.¹¹ Clearly, BNSF's officers and shareholders would not allow it to engage in such an enormous stock buyback program if they believed BNSF was not making a good investment or otherwise had a better place to invest its significant cash profits. Elsewhere, the Union Pacific Railroad Company ("UP") has generated \$5.6 billion in free cash flow between 2000 and 2004, and it forecasts similar levels of free cash flow into the future.¹² UP also has substantially raised its dividend in the past 5 years.¹³

As Exhibit 8 shows, the Class I railroads have been consistently investing in their infrastructure in recent years. But even after paying for these considerable investments, significant stock buybacks, and record dividend payouts – the railroads have still been able to generate enormous amounts of cash. As shown in Exhibit 9,

¹⁰ See BNSF Annual Report Form R-1, 2000 to 2004.

¹¹ See BNSF Annual Report to Shareholders, 1997 to 2004.

¹² See UP Annual Report Form R-1, 2000 to 2004.

¹³ See UP Annual Report to Shareholders, 2000 to 2004.

collectively, the Class I railroads' free cash flow has been approaching or exceeding \$3 billion dollars annually in recent years.

3. Intense Railroad Consolidation has Produced Significant Railroad Monopoly and Duopoly Pricing Impacts

The railroad industry has aggressively consolidated under the Staggers Rail Act, which has enabled the railroads to consolidate their market power and improve their financial position. Since 1980, the number of major Class I railroads in the U.S. has shrunk from 35 to 4. The result: there are now only two large carriers in both the West (UP and BNSF) and the East (CSX Transportation, Inc. and Norfolk Southern Railway Company), and many customers are served by only one railroad.

As mentioned, most railroad customers, and all western coal shippers, are now either captive to a single railroad at destination or, at best, subject to railroad duopoly pricing and service power. This concentration in railroad market power has, in the words of the railroads, allowed them to expand their "market reach" and become "stronger." See Testimony of Karen Borlaug Phillips on Behalf of the Association of American Railroads, U.S. House of Representatives, Committee on Transportation and Infrastructure, Hearing on Inter-Carrier Transactions, Construction and Abandonments (May 6, 1998) at 6. The consolidation has emboldened, and in fact, facilitated and enabled the major carriers in recent years to seek and impose higher rates on their coal customers, through "public pricing" initiatives and other means. The extent and impacts of these initiatives is discussed in the next section below.

The railroads claim 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 increasing demand for rail service. The facts show that the railroads can and are able to meet their investment requirements through both internally generated and privately raised resources.

For example, in its 2002 SEC 10-K filing, BNSF stated that it has and will in the future have no trouble generating cash and obtaining financing when needed to meet all of its investment needs:

For 2003 and the foreseeable future, the Company expects that cash from operating activities, access to capital markets and bank revolving credit agreements will be sufficient to enable the Company to meet its obligations when due. The Company believes these sources of funds will also be sufficient to fund capital additions that are necessary to maintain its competitiveness and position the Company for future revenue growth.

BNSF 2002 Form 10K, at 18. Since then, BNSF has experienced the same financial growth and stability seen throughout the railroad industry. Union Pacific's chairman and chief executive officer recently stated that "we are encouraged by the changes we see in our day-to-day operations and firmly believe that the long-term future of this great railroad has never looked brighter."¹⁴ As explained above, the stock and debt markets agree, and they remain extremely positive on the railroad sector.

¹⁴ M. Beck, Union Pacific profit up on revenue growth, AP Wire (July 21, 2005).

The railroads have made it clear that they not only have the ability to add capacity to meet future demand, but control its timing. In the east, CSX CEO Michael Ward stated that from a “physical plant perspective,” we do not see any major constraints to handling additional traffic. We firmly believe that we can produce “free capacity by operating our network more efficiently.”¹⁵ In the west, BNSF’s Chairman, President, and CEO Matt Rose stated that “we don’t bring capacity on sooner than we need it, so we always have a natural tightness.”¹⁶

Additionally, the conclusions reached in a recent rail infrastructure study prepared by the American Association of State Highway and Transportation Officials (“AASHTO”) with respect to western coal movements confirms that there is no railroad profitability concerns with regard to the important PRB coal corridor.¹⁷ The AASHTO Study described the PRB coal corridor, which “extends from the low-sulfur coal fields of the Powder River Basin in northeastern Wyoming to the power plants throughout the Midwest and South . . . [as] the single largest rail market in the country” with current traffic levels expected to grow significantly over time. Id. at 117. The AASHTO Study found that the railroads will be able to make all necessary capital investments in the PRB

¹⁵ W.C. Vantuono, W.C., Fluidity, velocity, capacity, consistency. *Railway Age*, (Dec. 2004) at 15-19.

¹⁶ Id.

¹⁷ The study is entitled “Transportation – Invest In America, Freight-Rail Bottom Line Report” (Jan. 2003) (“AASHTO Study”).

corridor over the next twenty years because railroads “will remain effective at attracting, retaining, and financing unit train business. . . .” *Id.* at 93. The AASHTO Study confirms that the railroads are earning substantial profits on their coal traffic that have been more than enough to finance infrastructure growth, and will continue to do so in the future. A discussion of the profits earned by the railroads from western coal shippers is made below.

C. THE STAGGERS ACT’S COMPETITIVE AND RATE PROTECTION GOALS REMAIN UNFULFILLED

With the railroads financially secure and their business increasing 25 years after the enactment the Staggers Act, how fare the shippers? For western coal shippers, the answer is mixed at best. As an initial matter, and as explained below, Chicago and North Western Railway Company (“CNW”)/UP competed aggressively with BN¹⁸ for western PRB coal traffic after CNW began serving the Joint Line mines in 1984. This competition was brought about by the ICC’s correct, pro-competitive reading of the Staggers Act. Also, the ICC adopted the Coal Rate Guidelines¹⁹ rate reasonableness standards as a means of providing backstop regulatory protections for captive unit-train coal shippers facing unreasonable rates. Additionally, with the strong support of WCTL, and over the strong objections of the railroads, the ICC adopted the

¹⁸ Predecessor to the BNSF Railway.

¹⁹ 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 (3rd Cir. 1987).

productivity-adjustment methodology that ultimately led to the Rail Cost Adjustment Factor-Adjusted (“RCAF-A”) in Ex Parte 290 (Sub-No. 4), Railroad Cost Recovery Procedures--Productivity Adjustments. RCAF issues have been particularly important to contract shippers using RCAF-based rate adjustments.

Unfortunately, the positive effects of these early ICC and Board actions have not been sustained. Twenty-five years later, the rate protection and competitive goals of the Staggers Act are far from realized, and the efforts taken by captive utilities to obtain reasonably-priced rail transportation have largely been thwarted – especially in recent years. Why is that? Because the railroads have been insistent that they should be allowed to extract huge mark-ups over competitive rate levels from their captive customers.

Apart from their pro-competitive rail construction decisions, the ICC and STB have largely failed to implement the Staggers Act mandate for meaningful shipper rate protections, and have refused to sanction most attempts by captive shippers seeking to enhance their competitive transportation situation. The ICC/STB decisions, combined with the market developments resulting from the massive industry consolidation, have emboldened the railroads today to extract significant rate concessions from coal customers – even from “competitive” shippers.

1. The STB has Properly Used its Rail Construction Authority to Promote Competition

Shortly after the Staggers Act was passed, the ICC took actions to protect the CNW's position as a participant in a joint line construction project to access several Wyoming PRB mines, over the vehement objections of Burlington Northern. Finance Docket No. 28934, et al., Chicago and North Western Transp. Co. -- Construction and Operation of a Line of Railroad, 363 I.C.C. 906 (1981). The ICC emphasized in its 1981 decision that competition for coal transportation was a vital public interest:

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.

In 1985, the ICC approved CNW's request to build a new rail line to access three additional PRB mines previously solely served by BN. The BN again strenuously opposed CNW's construction proposal. BN argued that the line construction, if approved, would cut into its profits, require it to raise rates elsewhere, and cause it other commercial harm. The ICC rejected BN's arguments, finding that the public interest in competition outweighed BN's potential revenue losses. The ICC stated:

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.

Finance Docket No. 29975, Chicago and North Western Transp. Co. -- Notes and Assumption of Obligations, 1985 ICC LEXIS 9, at *42 (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.)

Though western coal shippers in the mid-1980s had several origin carrier choices, most remained captive to a single carrier at destination. The ICC recognized in the 1985 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. at *46.

In light of the ICC’s decision shutting off competitive access remedies in the Midtec case (discussed below), captive coal receivers had only one choice to break destination rail monopolies – rail construction. In the past 20 years, several utilities, or carrier subsidiaries of utilities, have built new rail access lines to break their destination captivity. The ICC, and now the STB, has consistently found that such rail construction projects promote the public interest in increasing rail competition.²⁰

²⁰ See, e.g., Finance Docket No. 32607, WFEC R.R. -- Constr. and Operation Exemption -- Choctaw and McCurtain Counties, Okla., (ICC served Sept. 1, 1995) at 6; Finance Docket No. 32321, Southern Gulf Ry. -- Construction Exemption -- In Calcasieu Parish, LA, (ICC served Sept. 9, 1993) at 2.

The ICC, and the STB, have also routinely approved petitions filed by carriers constructing new rail lines to cross the lines of incumbent carriers.²¹ In these cases, the ICC and the STB have rejected incumbent carriers' arguments that their potential loss of revenues requires rejection of the crossing, or the imposition of draconian crossing fees. As the STB observed in a 1996 crossing case 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).

²¹ See, e.g., Finance Docket No. 32630, Omaha Pub. Power Dist. -- Petition Under 49 U.S.C. § 10901(d), (STB served Aug. 1, 1996) at 4; Finance Docket No. 32433 (Sub-No. 1), 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), (ICC served Aug. 11, 1995) at 4-5.

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), at 3-4.

Additionally, in proceedings before the STB and the Courts on appeal, the WCTL has strongly supported the Dakota, Minnesota & Eastern Railroad Corporation's ("DM&E's") plan to construct and rebuild approximately 880 miles of rail lines to enable it to reach the Wyoming PRB. The STB in 1998 approved the DM&E transaction as a means of providing new, competitive, and efficient rail service to the FRB. See Finance Docket No. 33407, Dakota, Minn. & Eastern R.R. Corp. Constr. into the Powder River Basin (STB served Jan. 30, 2002) and id. (STB served Dec. 10, 1998); remanded in part, Mid States Coalition for Progress v. STB, 345 F.3d 520, 556 (8th Cir. 2003). While this proceeding has been pending for far too long (the case is currently before the Board on remand from the United States Court of Appeals for the Eighth Circuit with respect to four discrete environmental issues), WCTL is hopeful that the Board will promptly resolve this proceeding as soon as possible so that this important project can proceed to fruition. See WCTL Letter to STB Chairman Nober (dated Sept. 20, 2005) (urging the Board to resolve the proceeding as soon as possible).

The agency's actions in rail construction cases represent a correct, pro-competitive reading of the Staggers Act.

2. The Rate Reasonableness Protections Afforded by the Staggers Act have been Undermined

After the Coal Rate Guidelines were implemented, WCTL members early on had some success in bringing long-haul maximum rate cases before the ICC and STB, whereby the railroads' origin-to-destination rates were challenged.²² The ICC's and STB's early administration of the Guidelines from their adoption through the end of 2001 was reasonably predictable and consistent, and usually yielded results that provided sound returns to the railroads while still imposing some meaningful restraint on monopoly pricing. But that modicum of relief afforded coal shippers by the ICC and STB in some of the early Guidelines cases has been largely non-existent in more recent cases that have come before the Board. Exhibit 10 contains a review of the results of recent coal rate cases. Unfortunately, as detailed in this Exhibit, the manner in which the Board has been administering the Guidelines since 2001 has called into question whether the regulatory rate protections afforded under the Staggers Act can, as they have in the past, provide meaningful rate protection for captive coal shippers..

While the underlying principles used to evaluate rate cases have not changed since the establishment of the Coal Rate Guidelines, the results in the cases have. The only logical conclusion that can be drawn from these decisions is that the Board in

²² See e.g., West Texas Util. Co. v. Burlington N. R.R., Docket No. 41191 (decision served May 3, 1996) aff'd sub nom Burlington N. R.R. v. STB., 114 F.3d 206 (D.C. Cir. 1997); Arizona Pub. Serv. Co. v. Atchison. T. & S.F.R.R., No. 41185 (decision served July 29, 1997); Wisconsin Power & Light Co. v. Union Pacific R.R., No. 42051 (decision served September 13, 2001).

recent years is sanctioning substantially higher coal rates than it did only a few years ago. What is even more disturbing is that there appears to be little recognition by the Board of the fundamental upward push in coal rates -- which is making the situation worse for shippers as they attempt to negotiate reasonable rate and service terms with the carriers.

3. **The Competitive Goals of the Staggers Act have not been Met**

To understand the plight of captive shippers today, it is useful to review the various means that captive shippers have utilized to obtain competitive rail service, and how the ICC's and STB's governing regulations and policies have precluded captive shippers from gaining access to competitive rail transportation service.

Three principal options are theoretically available to captive coal shippers to obtain some competition for their movements: (1) rail spur construction, (2) competitive-access cases, and (3) bottleneck rate cases. As explained above, as for the first option, the construction of rail lines to second carriers, the Board has consistently approved such requests by shippers, and several WCTL members have successfully constructed such spurs to obtain competitive rail service. WCTL is grateful that the Board has supported such a pro-competitive policy for the construction of rail spurs. Unfortunately, the construction of a rail spur is a costly undertaking, and one which the vast majority of captive shippers are unable to utilize due to geographic or environmental obstacles.

The second option that captive shippers have attempted to utilize to achieve competitive rail service – pursuing a competitive-access case – is unfortunately an unavailable competitive remedy because the Board has put in place a roadblock denying relief to 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). 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). 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 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.²³ 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

²³ Midtec Paper Corp. v. Chicago & North Western 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).

oppressive standards and very few have 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.

The final competitive avenue of relief sought by captive shippers is the undertaking of bottleneck rate case relief. Bottleneck relief is a pro-competitive remedy. With a bottleneck rate (or rate prescription) in hand, a captive shipper can use the forces of competition to obtain market-driven, competitive rates over the non-bottleneck line segments used to transport their shipments. However, railroads usually establish rates only on a through (total) movement basis and refuse to establish rates for their individual segments.

In the Bottleneck cases,²⁴ the shippers argued that their rate reduction strategies 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

²⁴ Docket No. 41242, Central Power & Light Co. v. Southern Pacific Transp. Co. (Decision served Dec. 31, 1996).

STB. In its Bottleneck decision, the Board again elected to tilt the balance in favor of railroad monopolies and against competition.

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. However, nine years after the Bottleneck decision, no Class I railroad has offered a non-bottleneck contract when the bottleneck carrier operates in the same region, even on long-haul, unit-train bulk movements that provide very high profits. Yet the STB has done nothing to address this matter. STB regulation and industry practice thus combine to suppress competition in bottleneck situations.

As noted above, of the three principal options available to captive coal shippers to obtain competition for their movements, the only meaningful pro-competitive remedy that the STB has seen fit to grant has been the approval of shippers' requests for authority to construct common carrier rail spurs to a competitive carrier. However, construction is not an option for most utilities, and even if construction is an available option, given the existing concentrated (duopoly) market environment and the western coal carrier's insistence on public pricing, there is no guarantee that the carriers will offer competitive rates and service terms for the movement once the access spur is built.

Finally, Class I carriers frequently spin-off lower density lines to short-line railroads, but impose "paper barriers" that suppress competition by preventing the short-line carriers from diverting business to other railroads. WCTL has formally brought this

problem to the Board's attention on two separate occasions in recent years, but the Board has refused to conduct any investigation to address or remedy this competitive problem. Instead, the Board has left the issue to the Class I railroads and short-lines to work out -- but the anti-competitive aspects of this problem have never been fully resolved.

4. The Current Railroad Pricing Environment is Unhealthy

As set forth above, the recent STB decisions have implied a reticence in affording rate or competitive relief to shippers seeking to challenge the railroads' monopolistic pricing practices on captive traffic. The railroads continue to exert their market power by imposing large rate increases, and coal shippers have had little choice but to pay their significant price-premium demands. There is no question that many coal shippers are exploited economically by the railroads because of their captivity.

Exhibit 11 shows the average revenue per ton-mile for western coal transportation versus the western carriers' variable service costs. As shown, the railroads' costs for western coal moves has been declining, which makes sense given the increasing density, productivity improvements, and cost savings realized by the carriers under the Staggers Act. At the same time, the carriers' annual revenues have stayed consistently and substantially above the costs of providing service. Overall, the differential between revenues and costs has produced significant coal shipper annual contributions to BNSF's and UP's bottom lines totaling \$1.9 Billion annually in recent years.

a. The Existing Market Environment has Led to Service Problems, Inflicting Serious Harm on Shippers

As noted above, a railroad duopoly exists for all practical purposes in the west, dominated by two giant carriers: BNSF and UP. The harm caused by the lack of available remedial pro-competitive relief for shippers has been exacerbated by the consolidation of the railroad industry since Staggers, leaving shippers with fewer transportation options.²⁵ Consolidating railroads have routinely represented in their merger applications that service disruptions would be avoided and there would be ample savings and benefits for all as a result of increased efficiencies, particularly through additional single-line service and the elimination of interchanges. However, with rare exception, the railroads have utterly failed to deliver on those claims and representations – severe service disruptions have ensued and competitive service offerings have not been enhanced.²⁶ Regrettably, much of the cost and other burden has fallen on shippers, who have received poor service and escalating rates based on inflated costs and heightened

²⁵ As explained below, even those WCTL members who enjoy competitive rail transportation options are extremely concerned about the pricing practices of the railroads as a result of the virtual service duopoly enjoyed by BNSF and UP in the provision of western rail service.

²⁶ Compare UP/SP's 1995 Merger Application (Vol. 1) at 26-27 ("[t]he UP/SP merger will provide more significant opportunities to improve service quality, reliability and efficiency than any rail merger proposed since the Staggers Act") with August 31, 1998 UP Press Release ("[w]e have assumed too often that the product was there when capacity . . . was not. Best intentions aside, we failed our customers") and UP's 2004 Annual Report at 1 ("we did not fully meet [2004] demand as we experienced considerable operating difficulties").

market power demands. Meanwhile, the Board itself has candidly acknowledged that the recent round of Board-approved rail mergers has severely hurt the shipping public:

In [recent] years, the railroad industry in the United States underwent several mergers involving the nation's largest railroads, with the result that now only four large railroads remain – two in the West and two in the East. Unfortunately, with those mergers came severe service disruptions that have cost shippers nationwide hundreds of millions of dollars in lost freight or delayed shipments, and, again unfortunately, many of those problems persist even to this day.

* * *

The well-publicized service crisis that developed shortly after approval of the UP/SP merger cost American business (including both railroads and their customers) hundreds of millions of dollars and crippled railroad activities throughout the United States for nearly a year. The subsequent service problems following the Conrail division “threatened to bring parts of rail service in the East to a standstill” and “cost corporate shippers millions [of dollars] in delays.” The problems with the BN/SF merger, while less publicized, were also substantial, even though, as pointed out by several shippers and shipper groups, . . . that merger was considered to be largely an “end to end” combination that presumably would not create such difficulties. And even the CN/IC merger . . . has not left all shippers satisfied.

Western Coal Traffic League v. STB, (D.C. Cir. No. 00-1115, et al.), STB Brief at 4, 10-11 (footnotes omitted).

In response to current service problems that erupted beginning in the spring of 2005, particularly on Western coal movements, UP and BNSF have each announced they would curtail demand for service by increasing prices, which, at a minimum, displays the current carriers' attitude that railroads exist not to serve customers' needs, but rather,

customers exist to serve carriers' needs. These actions also raise questions of whether these duopolists recognize their shared economic interest in refraining from competing and in setting their prices at profit-maximizing, supracompetitive levels. The need to protect their revenues often leads Class I railroads to make widely divergent statements to investors and regulators. For example, compare BNSF Second-Quarter 2004 Earnings Report (July 27, 2004) ("Record all-time volumes coupled with a 2-percent average price increase contributed to our third consecutive quarter of double-digit earnings growth") with BNSF "Fall Peak" demand letter to STB of June 23, 2004 ("we can not afford to invest for future demands when we have declining yields").

**b. The Current Market Environment has
Led to Significant Rail Pricing Abuses**

Beginning in 2002, the four remaining major coal-hauling railroads embarked on very public campaigns seeking sustained, significant increases in coal revenues. Railroad chief executives and marketing officers have openly expressed intentions to impose double-digit percentage increases on coal rates across-the-board.²⁷ As referenced above, in 2004, BNSF and UP took their aggressive campaign for higher coal rates to another level.

²⁷ See, e.g., "Railroad Coal Prices on the Upswing," Coal Transportation Report, May 10, 2004, at 1; "Shippers Seek Answers to UP Pricing Plan," Coal Transportation Report, April 12, 2004, at 1; "Rose Details BNSF's Coal Pricing Plans," Coal Transportation Report, June 7, 2004, at 1.

After nearly a quarter-century of extolling the virtues of bilateral, confidential contracts brought about by the Staggers Act as the preferred medium for doing business with coal shippers, BNSF and UP coincidentally announced a new commitment to “public pricing” programs to apply on western coal movements once existing contracts expired. The result: private contracts and individual customer negotiations, which the railroads once lauded as innovative and essential to their commercial marketplace success, are now derided as too “complex” and “inflexible” to meet modern business needs. Instead, the new programs, implemented under UP Circulars 111 and 112 and BNSF Tariff 90068, are intended by the railroads to be adhered to by coal shippers with no opportunities for negotiation or modification.

As part of this public pricing scheme, the railroads are refusing to include rate adjustment escalator provisions tied to their productivity savings -- even for competitive shippers. They have also implemented fuel surcharge provisions that do not correlate with their actual fuel costs, but instead are tied to a percentage of their rates or other non-direct cost methodology. These actions are undermining the Board’s continued publication of cost-adjustment mechanisms (and in particular, productivity-adjusted mechanisms) to be used as a fair and impartial means of adjusting rates – thus conferring additional profits on the railroads.

The magnitude of individual coal rate increases resulting from the carriers’ new pricing policies is difficult to gauge with specificity, since the lower former contract

rates usually are confidential and not subject to public disclosure. However, one representative captive BNSF customer – City Utilities of Springfield, MO – publicly reported an overnight increase of \$5.00 per ton, or 34%, before application of an 11.5% BNSF mandatory “fuel surcharge.”²⁸ Similarly, Basin Electric Power Cooperative, Inc. and Western Fuels Association, Inc. have experienced BNSF tariff rate increases of over 100%. Indeed, the railroads themselves have been touting their ability to increase rates through these tools as contributing significantly to improved bottom lines. UP’s 2004 Annual Report declares:

Across all business groups, we are obtaining solid price increases in the marketplace. At the same time, we are working to reduce the complexity and inflexibility of long-term contracts so that we can respond more quickly to changing market conditions.

One clear example is in our coal business where we have instituted new coal pricing mechanisms for all shipments from the Southern Powder River Basin (SPRB) in Wyoming, as well as spot movements out of Colorado and Utah. We have simplified the way we do business with our customers by clearly communicating the revenue we need in order to reinvest in our coal business, while sharply reducing the administrative burden of dozens of separate contracts.

UP 2004 Annual Report to Shareholders, Letter to Shareholders at 1.

Similarly, BNSF’s Chief Executive Officer Matt Rose has recently proclaimed that BNSF is now faced with “managing prosperity in coal.” See Presentation

²⁸ “Electric Rates at CU Could Jump In March,” Springfield News-Leader, January 2, 2005, p. 1E.

of BNSF's Matt Rose before the National Coal Transportation Association, Sept. 13, 2005. While BNSF is now enjoying "prosperity" on record coal volumes and revenues, Wall Street analysts who have been in close contact with BNSF's upper management report that there is no end in sight to the carrier's rate increase demands.

Pricing Environment . . . Pricing remains strong. After 25 years since the Staggers Act deregulated the industry, demand finally outstrips capacity. BN believes that 2-3% pricing growth is sustainable with 3-5% volume increases, which will more than offset 2.5%-3% cost inflation, resulting in double-digit EPS growth over the foreseeable future.

Rapid price increases have been painful for BN's customers, although the railroad has provided transportation managers with data to help explain the increases to their bosses. The goal is obviously to obtain greater acceptance of price increases and manage expectations for the future, i.e. get used to price increases.

UBS Investment Research, BNSF, Highlights from Meeting with Management (Aug. 29, 2005) at 4. Thus, the clear message being sent by the management of at least one Class I railroad is not one of successful marketplace competition enabling financial success, but rather, financial success being enabled by the carrier enjoying a monopoly stranglehold on its markets. Railroad customers, says the carrier, should "get used to" even more rate increase "pain."

This is a very substantial problem. Over half of the nation's electricity comes from coal, a domestic energy source with substantial national security benefits. Coal transportation costs are amongst the highest expenses of producing electricity, and

these costs flow directly into individual electric bills. The increased costs borne by consumers because of the Staggers Act failings is substantial.

**D. THE FUTURE OF THE STAGGERS ACT -- THE NEED TO
ADDRESS THE RAILROADS' NEW COMPETITIVE MINDSET**

Along with the Staggers Act's impact and effectiveness, the Board has asked for comments on the "future" of the Staggers Act. As explained above, the Staggers Act was designed to address the needs of two constituencies: (1) railroads who were facing serious financial problems and (2) captive shippers who were subject to railroad monopoly abuse and in need of rate protection and access to facilities. As concerns the needs of the railroads, the Staggers Act has been an unqualified success, and their future economic prospects under the Act have never looked better.

For captive coal shippers, while there was some early progress in achieving Congress' intended goals, 25 years later the Staggers Act clearly has not been a success overall, and the balance envisioned by the Act has not been realized by any objective measure. As explained above, captive shippers continue to face monopoly pricing and service abuses from the railroads, their rates are going up significantly, and service has become erratic. The message currently being sent by the railroads to customers is to expect additional rate "pain" and shippers should be "managing" expectations. WCTL also notes with concern Chairman Nober's statements that it would be "unwise" to inject additional competition into the railroad industry (see Testimony of STB Chairman Roger Nober before the House Subcommittee on Railroads, Hearing on the Status of Railroad

Economic Regulation (March 31, 2004) at 14), and the Board's failure, to date, to address obvious problems in its application of the Coal Rate Guidelines (e.g., issues involving the percentage reduction methodology).

If the Board is unwilling to objectively re-evaluate its treatment of captive shippers under the Staggers Act, then WCTL believes Congress should step in and restore the balance between the railroads and their shippers that was intended by the Staggers Act. The modest regulatory reforms proposed by CURE, the Alliance for Rail Competition and other shipper groups in S. 919 and H.R. 2047, presently pending in the 109th Congress, would help achieve this.

With respect to shippers who have or have had competition, these shippers clearly have been harmed by the massive consolidation of the railroad industry that followed passage of the Staggers Act. This consolidation has resulted in heightened duopoly pricing concerns and problems for western coal shippers. Today, western coal shippers with two-carrier service face a duopoly enjoyed by two massive carriers: BNSF and UP. A duopoly situation, as WCTL emphasized to no avail in the UP/SP and BN/Santa Fe mergers, is fraught with the potential for pricing abuses and service shortages. Unfortunately for western coal shippers with "competitive" options, such concerns are being realized today through the railroads' insistence on increased rates, take-it-or-leave-it service terms, imposition of non-cost based fuel surcharges, unfavorable rate adjustment mechanisms, etc.

Therefore, a new set of competitive problems has developed. At a minimum, this situation casts serious doubt on whether the availability of service from two mega-railroads constitutes "effective" competition. These problems are of considerable concern to WCTL. For this reason, WCTL supports legislation that would remove the railroads' remaining (and unnecessary) exemptions from the federal antitrust laws.

CONCLUSION

The Staggers Act was designed by Congress to balance carrier and shipper interests. Since the enactment of the Staggers Act, there has been a decided lack of balance in agency decisionmaking, and thus, the competitive and rate protection goals of the Act remain unfulfilled. Without decisionmaking that balances both carrier and shipper interests, the goals of the Staggers Act will not be fulfilled.

Respectfully submitted,

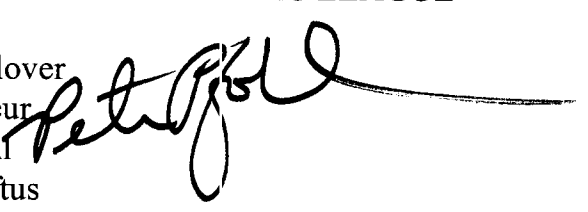
THE WESTERN COAL TRAFFIC LEAGUE

Of Counsel:

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Dated: October 12, 2005

By: William L. Slover
John H. LeSeur
Peter A. Pfohl
Slover & Loftus
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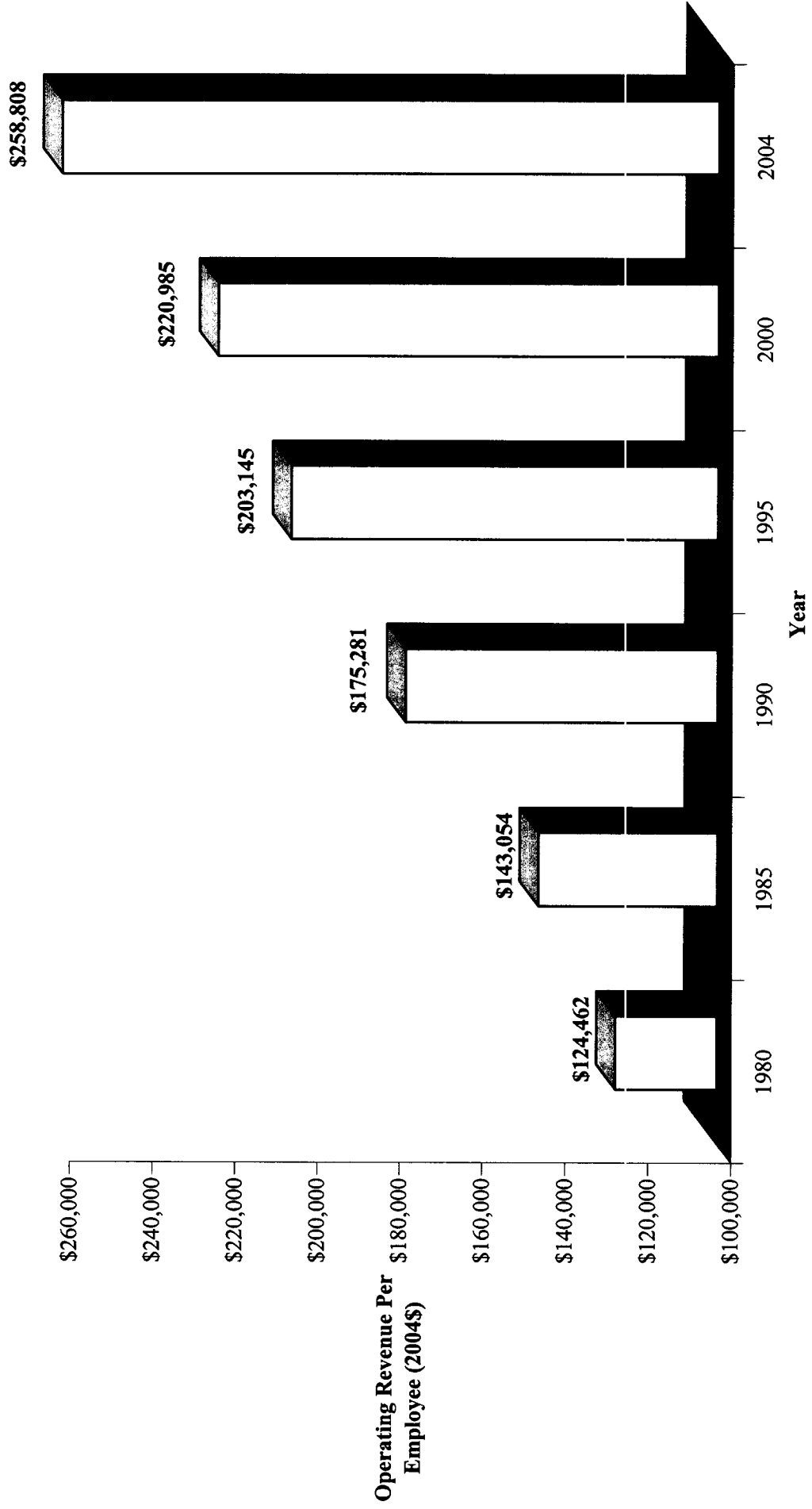
Attorneys & Practitioners

Exhibit No. 1

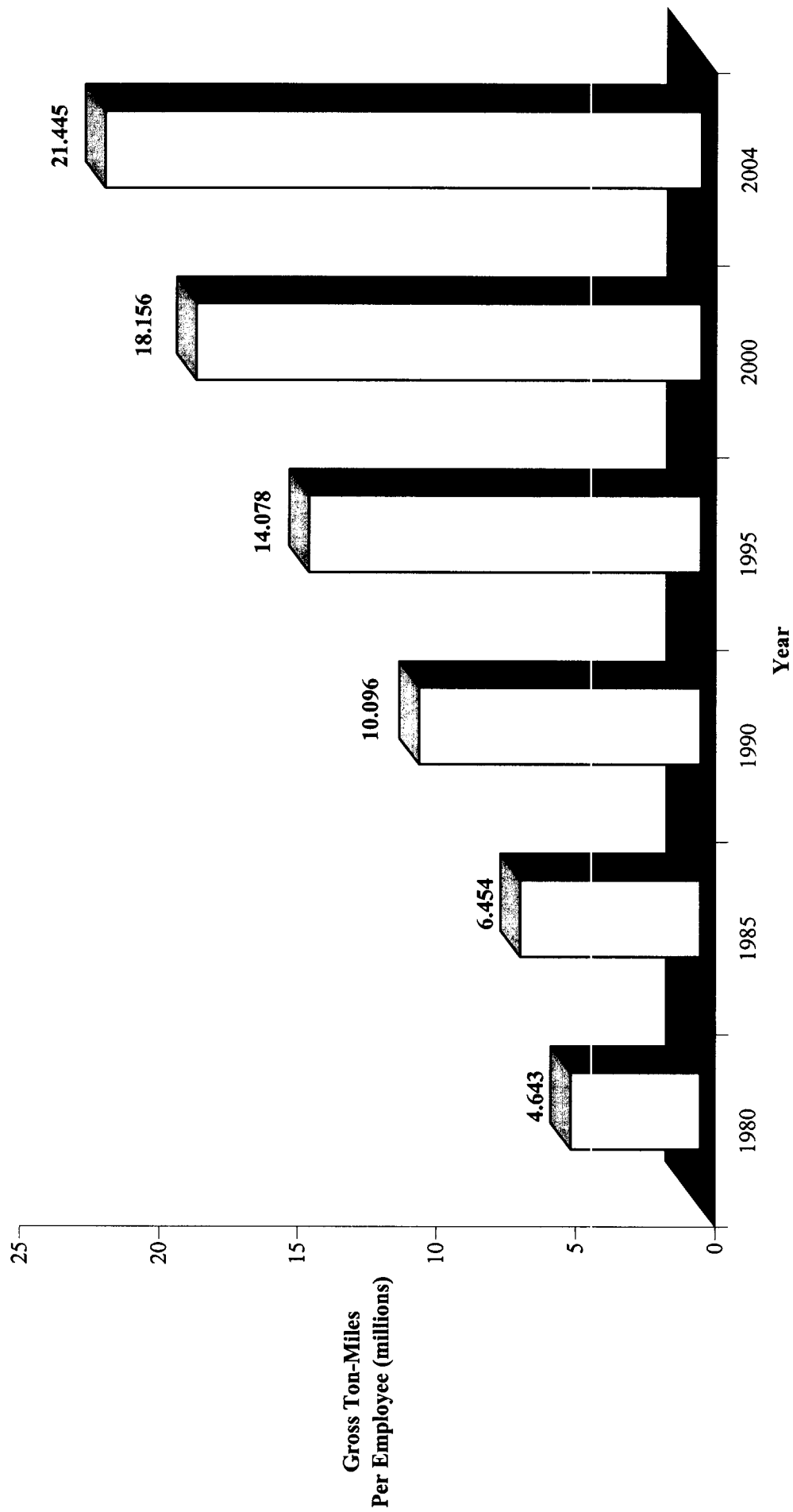
**MEMBERS OF THE
WESTERN COAL TRAFFIC LEAGUE MEMBERS**

Alliant Energy
Ameren Energy Fuels and Services
Arizona Electric Power Cooperative, Inc.
Arizona Public Service
Associated Electric Cooperative, Inc.
Cleco Corporation
City of Austin, Texas
CPS Energy
Kansas City Power & Light Company
Lower Colorado River Authority
MidAmerican Energy Company
Minnesota Power
Nebraska Public Power District
Omaha Public Power District
Texas Genco, LP
Texas Municipal Power Agency
Western Farmers Electric Cooperative
Western Fuels Association, Inc.
Wisconsin Public Service Corporation
Xcel Energy

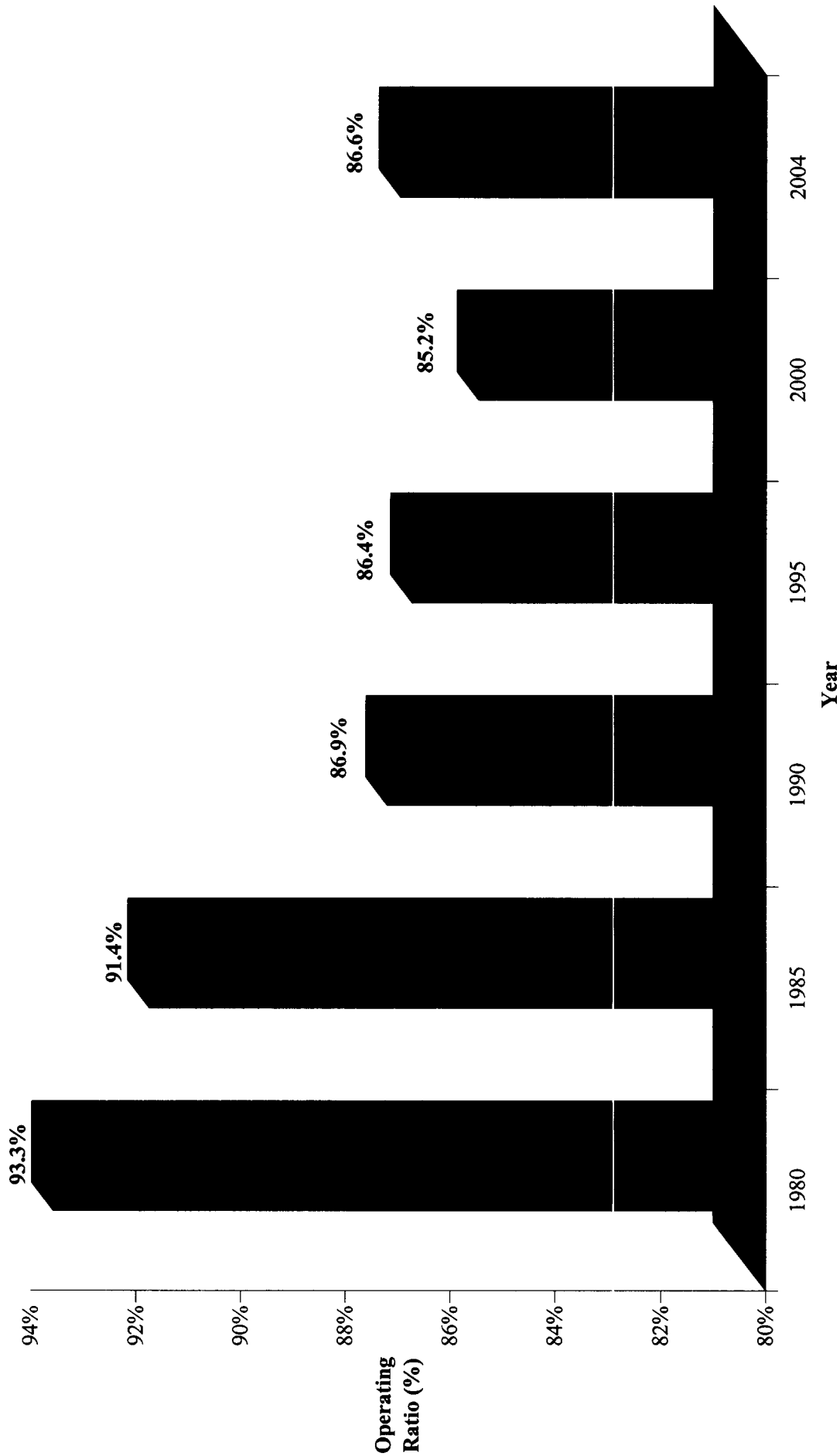
Average Class I Operating Revenue Per Employee
(1980 to 2004)



Average Class I Gross Ton-Miles Per Employee
(1980 to 2004)

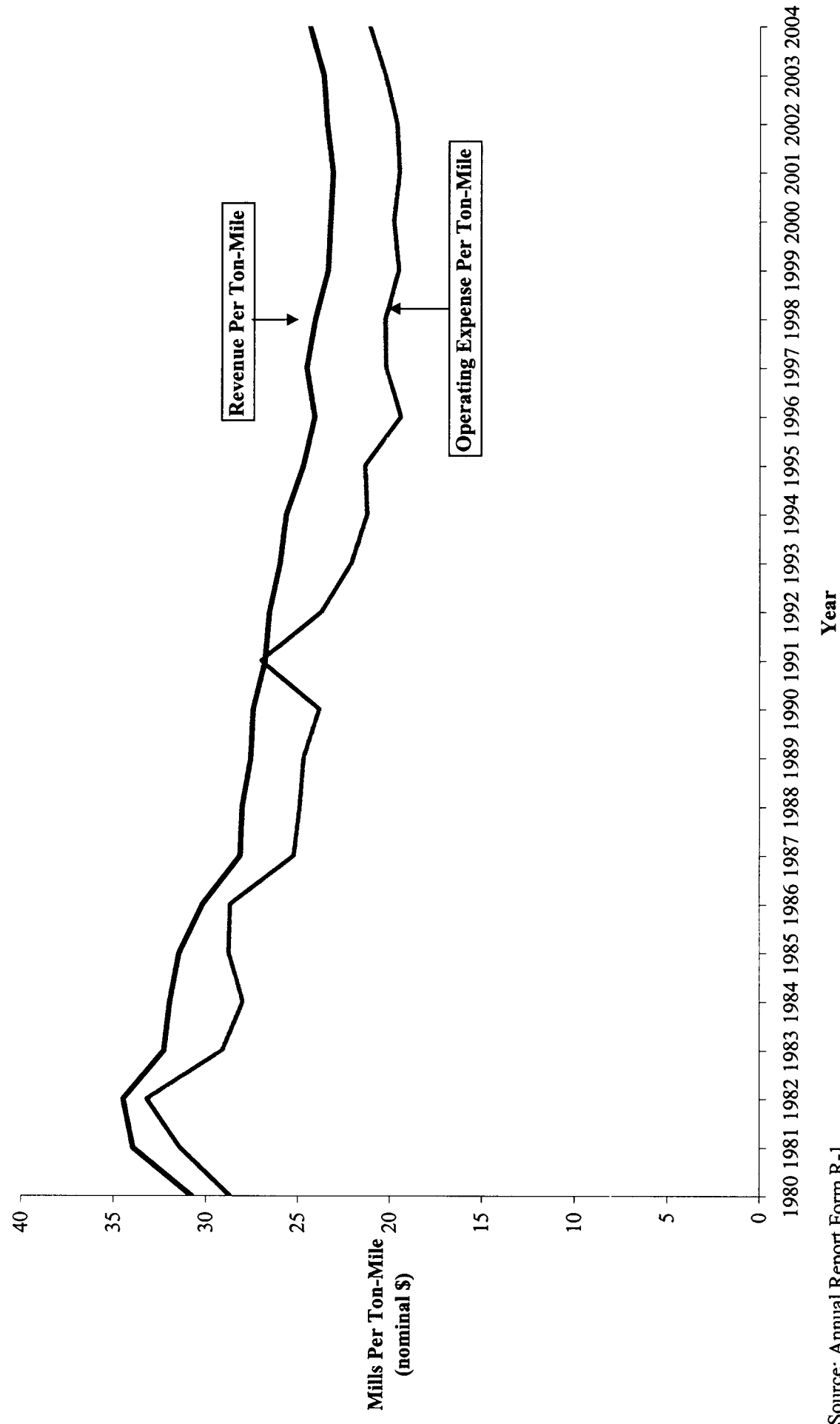


Average Class I Railroad Operating Ratios
(1980 to 2004)

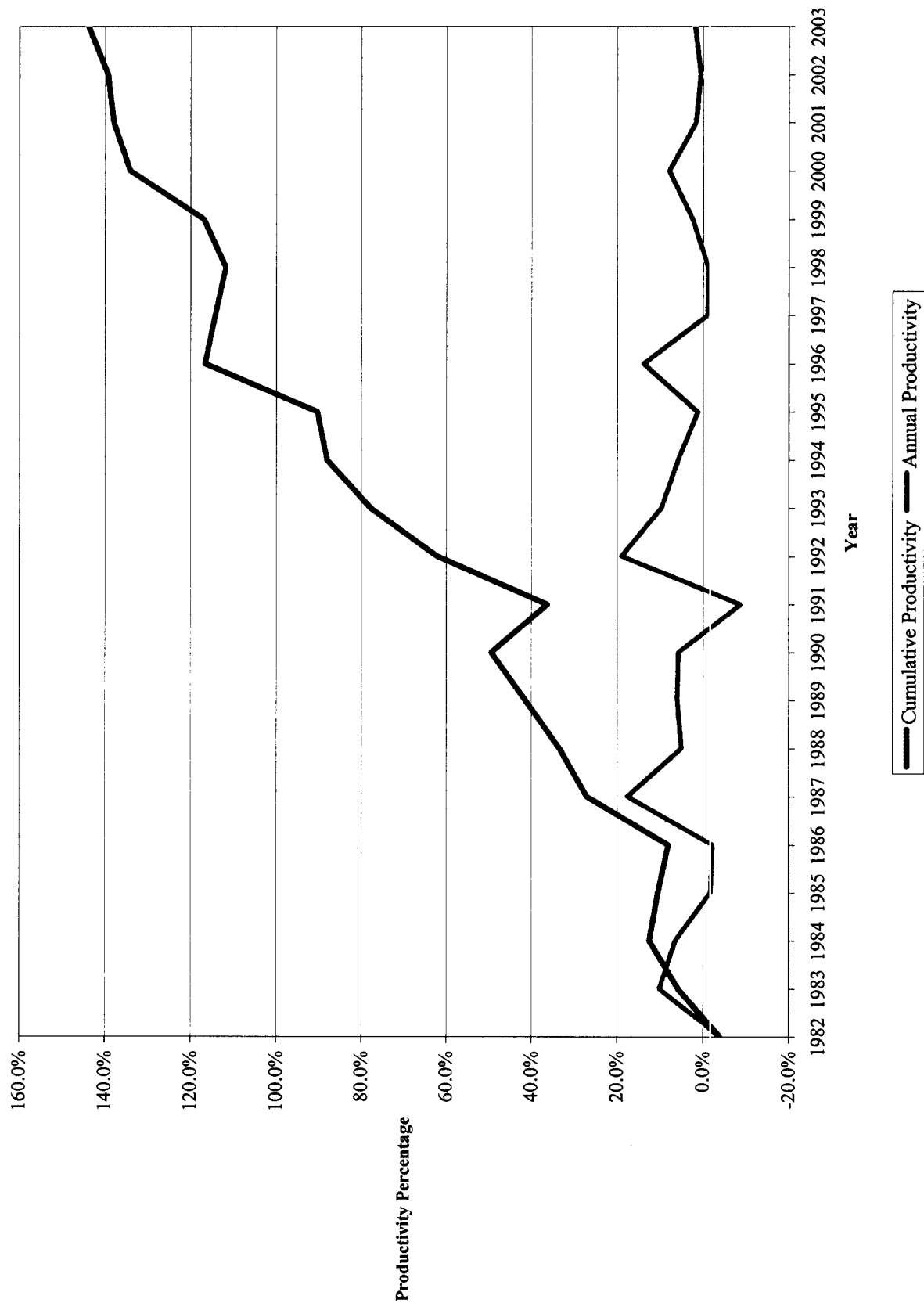


Source: Annual Report Form R-1

Class I Railroad Revenue and Operating Expense Per Ton-Mile (1980 to 2004)



Annual and Cumulative Class I Railroad Productivity - 1982 to 2003



Source: STB workpapers for Ex Parte No. 290 (Sub-No. 4), "Railroad Cost Recovery Procedures - Productivity Adjustment," Decided February 18, 2005.

Annual and Cumulative Class I Railroad Productivity - 1982 to 2003

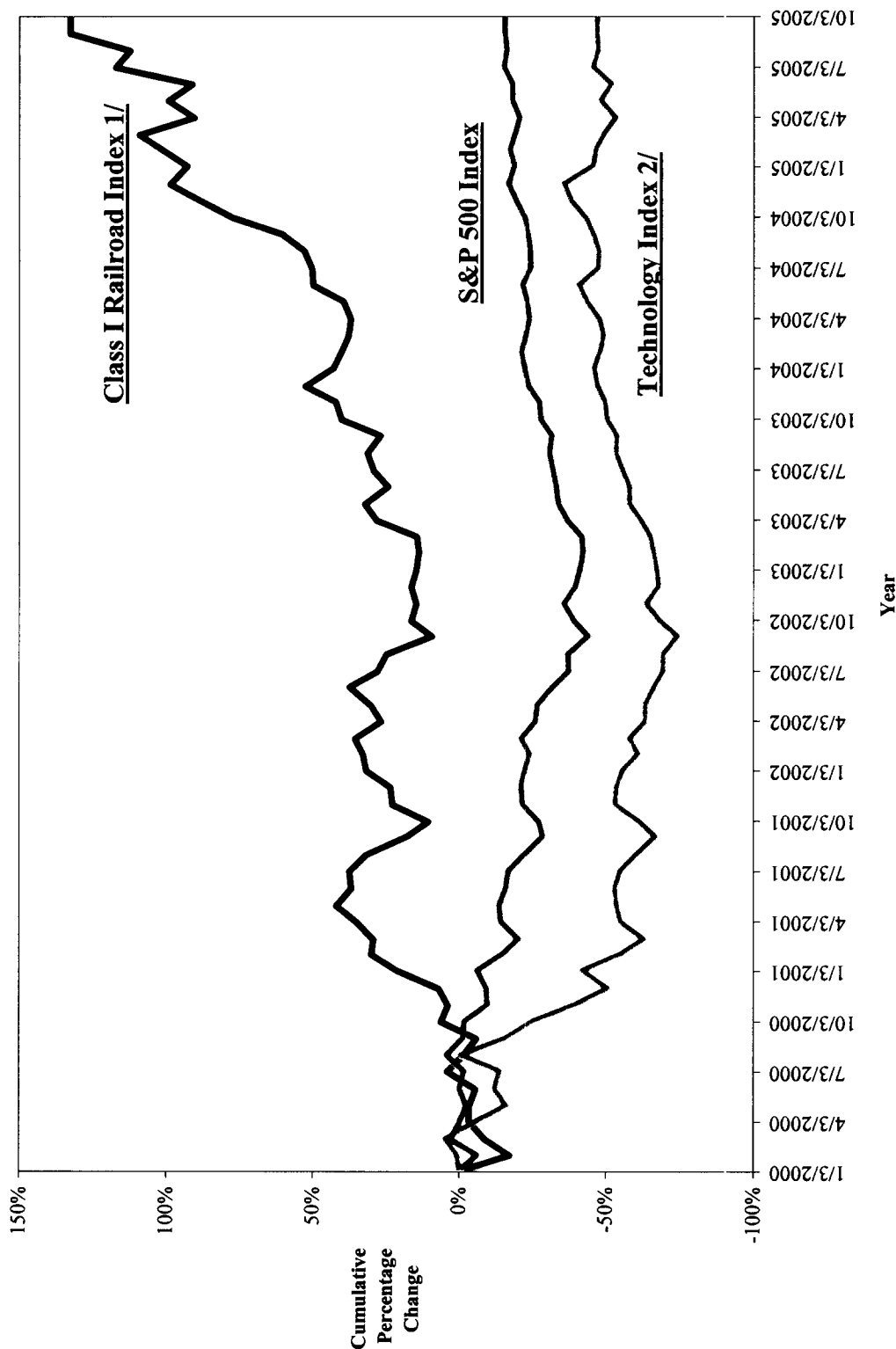
<u>Year</u>	<u>Input Ratio 1/</u>	<u>Output Ratio 1/</u>	<u>Annual Productivity2/</u>	<u>Cumulative Productivity 3/</u>
(1)	(2)	(3)	(4)	(5)
1. 1982	0.873	0.838	-4.0%	-4.0%
2. 1983	0.941	1.037	10.2%	5.7%
3. 1984	1.034	1.100	6.4%	12.5%
4. 1985	0.968	0.951	-1.8%	10.4%
5. 1986	1.003	0.981	-2.2%	8.0%
6. 1987	0.908	1.068	17.6%	27.0%
7. 1988	0.990	1.040	5.0%	33.4%
8. 1989	0.965	1.023	6.0%	41.4%
9. 1990	0.947	1.001	5.7%	49.4%
10. 1991	1.082	0.987	-8.8%	36.2%
11. 1992	0.878	1.045	19.0%	62.1%
12. 1993	0.958	1.051	9.7%	77.8%
13. 1994	1.025	1.084	5.8%	88.1%
14. 1995	1.045	1.058	1.2%	90.3%
15. 1996	0.918	1.045	13.8%	116.6%
16. 1997	1.019	1.008	-1.1%	114.3%
17. 1998	1.018	1.006	-1.2%	111.8%
18. 1999	1.008	1.032	2.4%	116.9%
19. 2000	0.953	1.029	7.9%	134.1%
20. 2001	0.955	0.971	1.6%	138.0%
21. 2002	1.006	1.012	0.6%	139.3%
22. 2003	1.020	1.039	1.9%	143.8%

1/ STB workpapers for Ex Parte No. 290 (Sub-No. 4), "Railroad Cost Recovery Procedures - Productivity Adjustment," Decided February 18, 2005.

2/ Column (3) ÷ Column (2)

3/ [(1+ Current Year Column (4)) x (1 + Previous Year Column (4))] -1

**Cumulative Percentage Change In An Index Of Class I Railroad Stocks Versus
An Index Of Representative Technology Stocks And The S&P 500 Index**
January 2000 To September 2005



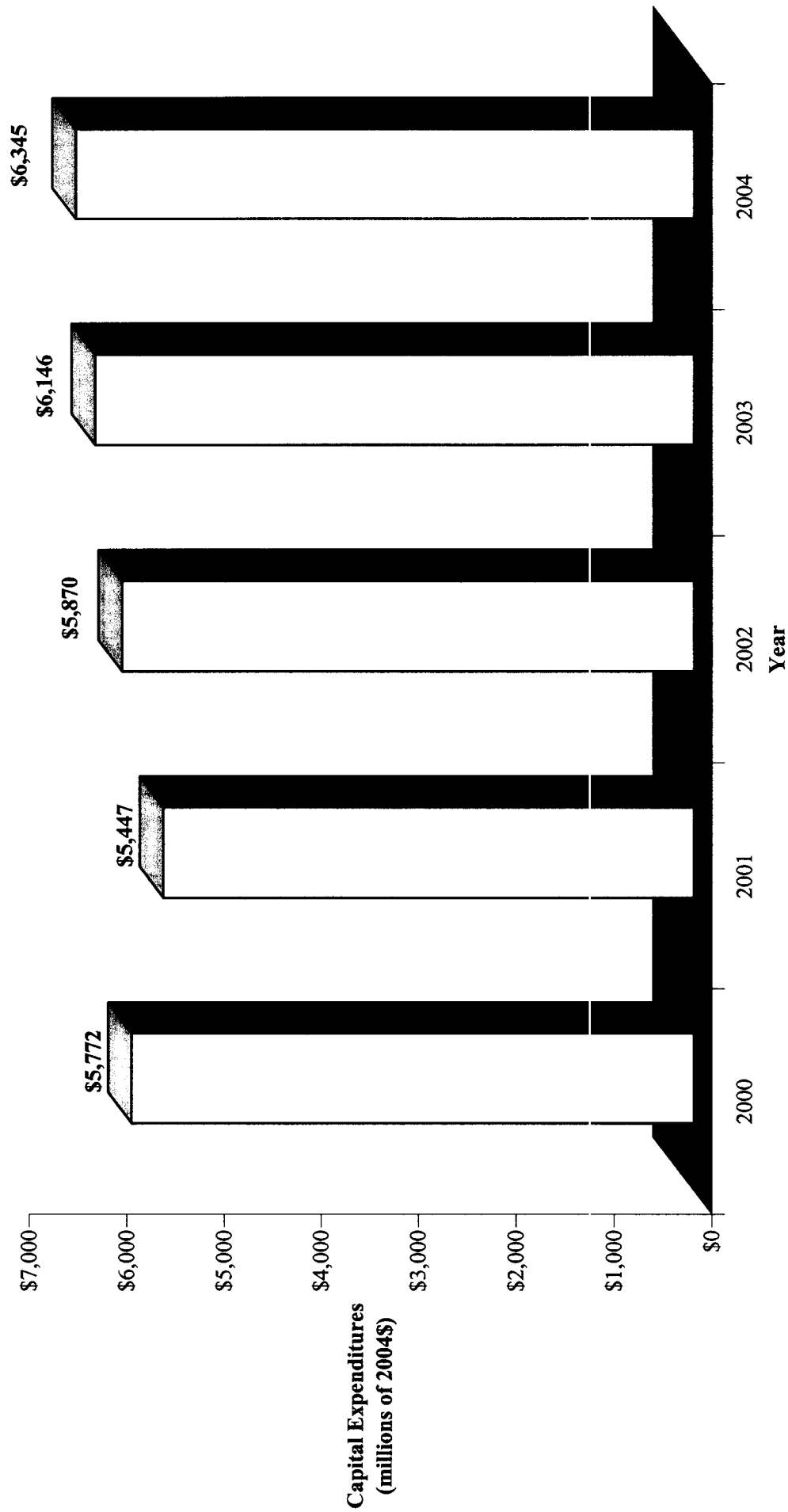
1/ Class I Railroad Index includes Burlington Northern Santa Fe Corp., Canadian National Railway Co., Canadian Pacific Railway Ltd., CSX Corp., Norfolk Southern Corp., and Union Pacific Corp.
2/ Technology Index includes Amazon.com Inc., Cisco Systems, Inc., Computer Sciences Corp., eBay Inc., Intel Corp., International Business Machines Corp., Microsoft Corp., Sun Microsystems, Inc., VeriSign Inc., and Yahoo! Inc.
Source: <http://finance.yahoo.com>; historical prices reflect stock splits.

**Change In Class I Railroad Stock Prices Versus The Change In
Technology Hardware, Software and Services Stock Prices And The S&P 500 Index**
January 1, 2000 to September 30, 2005

<u>Company/Index</u>	<u>Price/Index Level</u>		<u>Percent</u>
(1)	<u>1/3/2000</u>	<u>9/30/2005</u>	<u>Change</u>
	(2)	(3)	(4)
CLASS I RAILROADS			
1. BNSF Railway Co.	\$23.56	\$59.80	153.8%
2. CSX Corp.	30.94	46.48	50.2%
3. Norfolk Southern Corp.	19.88	40.56	104.0%
4. Union Pacific Corp.	43.06	71.70	66.5%
5. Canadian National Railway Co.	17.08	70.99	315.6%
6. Canadian Pacific Railway Ltd.	20.87	42.96	105.8%
7. Class I Railroad Average			132.7%
TECHNOLOGY PROVIDERS			
8. Amazon.com Inc.	\$89.38	\$45.30	-49.3%
9. Cisco Systems, Inc.	54.03	17.92	-66.8%
10. Computer Sciences Corp.	93.25	47.31	-49.3%
11. eBay Inc.	23.54	41.20	75.0%
12. Intel Corp.	43.50	24.65	-43.3%
13. International Business Machines Corp.	116.56	80.22	-31.2%
14. Microsoft Corp.	56.00	25.73	-54.1%
15. Sun Microsystems, Inc.	38.25	3.93	-89.7%
16. VeriSign Inc.	190.12	21.37	-88.8%
17. Yahoo! Inc.	118.75	33.84	-71.5%
18. Technology Average			-46.9%
19. S&P 500 INDEX	1,455.22	1,228.81	-15.6%

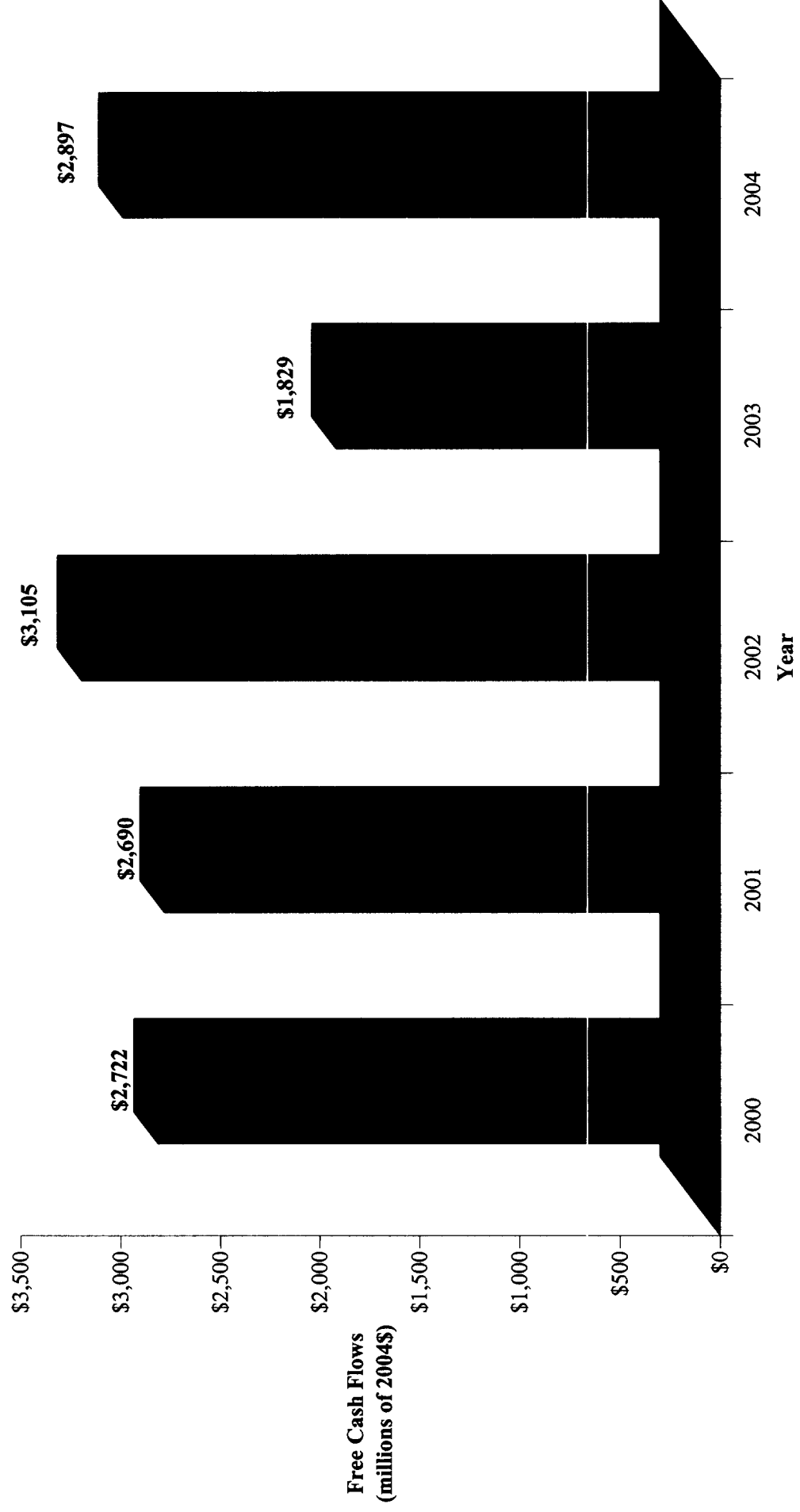
Source: <http://finance.yahoo.com>; all historical prices adjusted to reflect stock splits.

Class I Railroad Capital Expenditures
(2000 to 2004)



Source: Annual Report Form R-1

Class I Railroad Free Cash Flow
(2000 to 2004)



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

RECENT COAL RATE CASE HISTORY

In public presentations, the Board's Chairman has explained that under his leadership, the Board's actions in coal rate cases have been varied:

"When I took over we had 12 pending cases.

* * * * *

The results are all over the map, which is what you would expect. In some cases you had a big reduction. In some cases the rates were shown to be reasonable, and in other cases it was dismissed."¹

WCTL respectfully disagree with Chairman Nober's characterization.

Chairman Nober recently presented a slide summarizing the results in ten rate cases – nine of which were coal cases. That slide (Exhibit 10, Attachment 1) shows that in six of the nine cases five complainant shippers obtained no rate relief (PPL Montana, Duke/NS, CP&L, Duke/CSXT, APS and AEPCO). The slide also shows that three shippers obtained some rate relief, which the slide measures in terms of initial percentage reductions from published tariff rates (e.g., WPL – 11% reduction; TMPA 1-3% reduction and Xcel – 16% percent reduction). The slide, however, does not tell the complete story.

In the WTU decision in 1996 (not shown on the slide) and the WPL decision (shown), the STB determined that the maximum SAC rates were less than the

¹ Coal Review #1560, September 19, 2005 at 1, 15.

180% R/VC jurisdictional threshold and prescribed rates at the jurisdictional threshold.

The results were rates prescribed at 180% of the defendant carrier's costs and which, over time, remained at 180% – effectively a cost-based rate adjustment procedure.

In TMPA and Xcel, the Board found that the SAC rates -- on comparable PRB traffic to that at issue in WPL and WTU – were substantially higher than the jurisdictional threshold. For example, in Xcel the Board prescribed maximum SAC rates on PRB traffic that produce initial R/VC ratio in excess of 250%. And, unlike the case in WTU and WPL, these R/VC ratios will substantially increase over time since the Board's initial SAC rate prescription is adjusted over time using profit-enhancing procedures – not the cost-based procedures used in WTU and WPL.

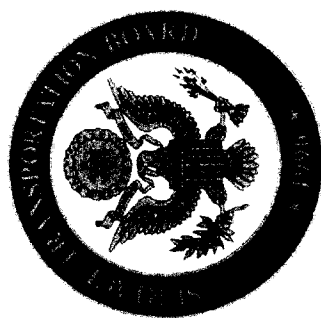
The results are even worse for shippers who have lost STB cases. For example, in the Eastern Cases,² the STB found rates with R/VC ratios as high as 478% were “reasonable” (see, e.g., CPL/NS). Thus, from WCTL's perspective it is clear that the rate levels the Board has approved have not been “all over the map.” Instead, there is clearly and noticeably a substantial increase in Board-approved coal rate levels since 2002.

These increases are due in part to the Board's continued reliance on the flawed “percentage reduction” methodology – a methodology where the carrier's starting

² Duke/NS; Duke/CSXT; CPL/NS.

tariff rate dictates the maximum SAC rate. So-called shipper “victories” are pyrrhic where – in the end – all a shipper obtains is a slight reduction off of a bloated carrier tariff rate.

WCTL submits an alternative chart in Attachment 2 to this Exhibit. There one can see the upward spike in coal rate levels (measured on a mills per ton-mile basis) which the Board has, since 2002, authorized on captive coal movements.



Summary of Recent SAC Cases

Case Name	Decision Date	Tariff Rates (per ton)	Shipper Requested Reduction	Result
FMC	2000	wide range*	wide range	~15% reduction
WPL	2001	\$14.66	~ 32%	~11% reduction
PPL Mont.	2002	\$5.33 - \$7.74	~ 31%	dismissed
TMPA	2003	\$19.09	~ 30-42%	~1-3% reduction
Duke/NS	2003	\$16.00 - \$21.01	~ 53-62%	Not shown unreasonable
CP&L	2003	\$16.56 - \$16.86	~ 57%	Not shown unreasonable
Duke/CSXT	2004	\$16.66 - \$19.00	~ 53-63%	Not shown unreasonable
APS	2004	\$4.21 prescription	no change	prescription vacated
Xcel	2004	\$8.98 - \$9.24	~ 44%	~16% reduction
AEPCO	2005	\$9.05 - \$10.17	~ 25-40%	dismissed

* 16 origin/destination pairs involving 5 commodities

Recent PRB STB Maximum Rate Case Decisions						
Docket Number	Case Name/ Year of Decision	Movement Involved	Equipment Supplier/Type	Period	Prescribed or Permitted Rate	Prescribed or Permitted Rate (Mills per Ton-Mile)
1996-2002						
41191	WTU v. BN (1996)	PRB to Texas	RR/Steel	4Q95	\$13.68 ^{1/}	12.2
42051	WPL v. UP (2002 Reconsideration)	PRB to Wisconsin	SH/Aluminum	1Q00	\$13.65 ^{2/}	10.7
2003-2005						
42056	TMPA v. BNSF (2004 Reconsideration)	PRB to Texas	RR/Aluminum	2Q01	\$18.61 ^{3/}	13.4
41191	WTU v. BNSF (2003 Reopening)	PRB to Texas	RR/Steel	2Q03	\$18.04 ^{4/}	16.2
42057	Xcel/PSCo v. BNSF (2005 Reconsideration)	PRB to Colorado	SH/Aluminum	1Q01	\$7.87 ^{5/}	20.5

1/. Mills per ton-mile based on Rawhide to Oklaunion O-D pair.
2/. Mills per ton-mile based on Black Thunder to Edgewater O-D pair.
3/. Mills per ton-mile based on Jacobs Ranch to Gibbons Creek O-D pair.
4/. Mills per ton-mile based on Rawhide to Oklaunion O-D pair.
5/. Mills per ton-mile based on Eagle Butte to Pawnee O-D pair.

Recent Non-PRB STB Maximum Rate Case Decisions						
Docket Number	Case Name/ Year of Decision	Movement Involved	Equipment Supplier/Type	Period	Prescribed or Permitted Rate	Prescribed or Permitted Rate (Mills per Ton-Mile)
1997-2002						
41185	APS v. ATSF (1997)	NM to AZ	RR/Steel	2Q95	\$3.60 ^{1/}	31.2
2003-2005						
42069	Duke v. NS (2003)	Cent. App. To NC	RR/Steel	1Q02	\$16.45 ^{2/}	50.5
42072	CP&L v. NS (2003)	Cent. App. To NC	RR/Steel	3Q02	\$16.74 ^{3/}	49.3
42070	Duke v. CSXT (2004)	Cent. App. To NC/SC	RR/Steel	2Q02	\$17.30 ^{4/}	59.8
41185	APS v. BNSF (2004 Reopening)	NM to AZ	RR/Steel	2Q03	\$6.91 ^{5/}	59.9
42058	AEPCO v. BNSF and UP (2005)	NM to AZ	SH/Mixed	1Q01	\$9.35 ^{6/}	21.1

1/. Mills per ton-mile based on McKinley to Cholla O-D pair.

2/. Mills per ton-mile based on High Power Mountain to Belews Creek O-D pair. The Board found the tariff rate was not unlawful.

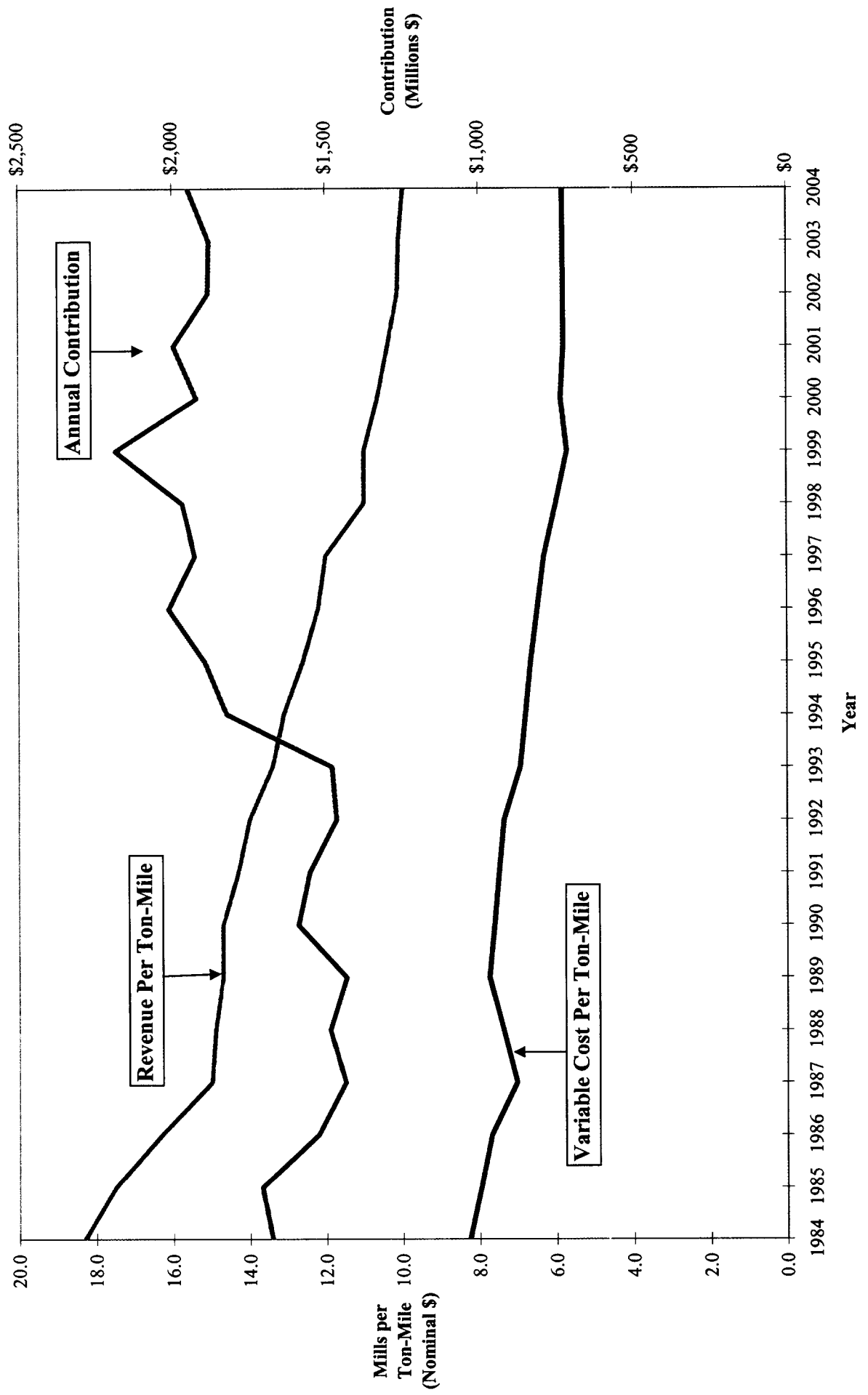
3/. Mills per ton-mile based on Marrowbone to Mayo O-D pair. The Board found the tariff rate was not unlawful.

4/. Mills per ton-mile based on Sara to Cliffside O-D pair. The Board found the tariff rate was not unlawful.

5/. Mills per ton-mile based on McKinley to Cholla O-D pair.

6/. Mills per ton-mile based on Lee Ranch to Apache (Low Capacity Cars) O-D pair. The Board did not prescribe a rate. The case was dismissed.

Average Revenue and Variable Cost Per Ton-Mile, and Annual Contribution for Western Coal Transportation



Average Variable Cost and Revenue Per Ton-Mile and Annual Contribution For Western Coal

<u>Year</u> (1)	<u>Revenue</u> <u>Per Ton-Mile</u> <u>(mills) 1/</u> (2)	<u>Variable Cost</u> <u>Per Ton-Mile</u> <u>(mills) 2/</u> (3)	<u>Contribution</u> <u>Per Ton-Mile</u> <u>(mills) 3/</u> (4)	<u>Annual</u> <u>Tons</u> <u>(millions) 4/</u> (5)	<u>Average</u> <u>Miles 5/</u> (6)	<u>Annual</u> <u>Contribution</u> <u>(millions) 6/</u> (7)
1. 1984	18.30	8.26	10.04	207.3	806.0	1,676.9
2. 1985	17.50	7.97	9.53	221.4	811.0	1,711.0
3. 1986	16.30	7.69	8.61	217.2	816.0	1,526.4
4. 1987	15.00	7.03	7.97	226.7	796.0	1,437.4
5. 1988	14.90	7.38	7.52	248.3	797.0	1,488.2
6. 1989	14.70	7.74	6.96	254.4	810.0	1,433.7
7. 1990	14.70	7.61	7.09	287.5	781.0	1,591.1
8. 1991	14.30	7.49	6.81	273.9	833.0	1,554.3
9. 1992	14.00	7.36	6.64	268.2	824.0	1,466.7
10. 1993	13.40	6.94	6.46	268.6	853.0	1,481.2
11. 1994	13.10	6.80	6.30	338.6	855.0	1,824.3
12. 1995	12.60	6.66	5.94	369.1	865.0	1,895.0
13. 1996	12.20	6.49	5.71	392.6	897.0	2,012.1
14. 1997	12.00	6.31	5.69	389.0	871.0	1,926.9
15. 1998	11.00	6.00	5.00	437.2	900.0	1,966.2
16. 1999	11.00	5.71	5.29	447.6	922.0	2,183.9
17. 2000	10.63	5.87	4.77	441.5	912.9	1,920.4
18. 2001	10.37	5.79	4.57	482.8	903.5	1,994.9
19. 2002	10.11	5.80	4.31	481.4	906.7	1,882.1
20. 2003	10.07	5.81	4.27	491.8	895.5	1,879.3
21. 2004	9.96	5.82	4.14	501.9	936.8	1,947.9

1/ Sources: 1984 to 1999, STB December 2000 Report "Rail Rates Continue Multi-Year Decline." 2000 to 2004, Union Pacific and Burlington Northern and Santa Fe Annual Investor Reports

2/ L. E. Peabody & Associates, Inc. analysis of coal unit train costs based on Rail Form-A and Western Region URCS

3/ Column (2) - Column (3)

4/ Sources: 1984 to 1999, STB December 2000 Report "Rail Rates Continue Multi-Year Decline." 2000 to 2004, Union Pacific and Burlington Northern and Santa Fe Quarterly Commodity Surveys

5/ Sources: 1984 to 1999, STB December 2000 Report "Rail Rates Continue Multi-Year Decline." 2000 to 2004, Union Pacific and Burlington Northern and Santa Fe Quarterly Commodity Surveys and Annual Investor Reports

6/ Column (4) x Column (5) x Column(6) ÷ 1,000