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Before the
SURFACE TRANSPORTATION BOARD



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Ex Parte No. 665
RAIL TRANSPORTATION OF GRAIN

Statement on Behalf of
John D. Fitzgerald, General Chairman
United Transportation Union--General
Committee of Adjustment (GO-386)
November 2, 2006

This statement is submitted on behalf of John D. Fitzgerald, who serves as General Chairman for United Transportation Union--General Committee of Adjustment (UTU/GO-386), with offices at 400 East Evergreen Boulevard, Vancouver WA 98660. UTU/GO-386 represents persons employed by BNSF Railway (BNSF). Mr. Fitzgerald began railroad service with BNSF and its predecessors in 1970, and represents BNSF employees engaged in train and engine service, including those employed on the so-called "northern lines." For a description of the northern lines, including map, see: Northern Lines Merger Cases, 396 U.S. 391 (1970).

Mr. Fitzgerald serves UTU/GO-386 in a full-time elective position, which he has held since 1993. Mr. Fitzgerald cannot attend today's hearing to summarize his statement, and asks that it be submitted for the record, with his counsel who assisted in its preparation, present to respond to questions, as may be appropriate.

1. This proceeding was instituted hastily, without notice to the general public through the Federal Register, or otherwise. Railroad employees have an interest in the rail transportation of commodities, and with grain in particular. BNSF employees, especially those engaged in moving grain on BNSF's so-called "Northern Lines" have a special concern for this proceeding.

2. The genesis for this public hearing, announced October 11, 2006,^{1/} was the issuance on October 6, 2006, by the Government Accountability Office (GAO), of a report, Freight Railroads- Industry Health Has Improved, but Concerns about Competition and Capacity Should Be Addressed (GAO-07-94) (GAO Report). The Board's October 11 notice for this proceeding, was accompanied by a news release (STB No. 06-15), which also emphasized GAO Report.

3. Although GAO Report is a lengthy 90-page document, dealing with a number of matters, the STB's hearing announcement and news release, placed emphasis on the general rail rate level, and with particular focus upon grain rates:

GAO found that most rates have declined since 1985. However, one category of rates examined by GAO--grain rates--diverged from the industry trends. According to the GAO report, the amount of grain traffic with comparatively high markups over variable costs increased notably between 1985 and 2004. (STB Ex Parte 665, 10/11/06, 1-2)

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Although GAO reported....a healthier industry generally charging lower rates--it stated that grain rates have diverged from industry trends. (STB News 06-15, 10/11/06, 1).

Grain is a major commodity moving by rail over the BNSF

^{1/} The proceeding was announced personally by the STB's Chairman during a meeting held October 11 at Great Falls, MT. See: Great Falls Tribune (Great Falls, MT. Oct. 12, 2006).

northern lines between the U.S. Midwest and the Pacific Coast port areas. Railroad employees desire the maximum flow of traffic, and remunerative revenues, to ensure stable and growing employment for themselves and their communities. Of course, railroad employees are interested in the economic health of their customers, and support reasonable rates for all, to the extent feasible and to maintain the revenue adequacy of the railroad industry.

4. The hearing today is concerned with the overall railroad rate level, which purportedly has generally declined since Staggers Rail Act, whereas rail grain rates generally are said to have incurred a net increase since 1985. Examination of the available data does not support key findings of the GAO report.

A. General Rate Index. The GAO's finding that rail rates across the freight railroad industry have generally declined since enactment of the Staggers Rail Act (1980)^{2/} is incorrect. The GAO does not present actual data. Indeed, rather than present indices based upon 1980, when Staggers was enacted on October 14 of that year, GAO begins its time series from the year 1985, indicating a more than 20% decline in the general rate level between 1985 and 2004. (GAO Report 11-12). The GAO report states its general rate index is based upon a traffic pattern bundle in terms of broad commodity, census region of origin, and mileage block categories. (GAO Report 11 n.11).

The GAO's methodology is not set forth in sufficient detail for analysis, and at this point should not be accepted by the STB, absent a public proceeding and availability of workpapers. The

2/ GAO Report 11.

GAO's "declining rate" conclusion appears to track earlier ICC/STB staff reports for a somewhat similar result. The STB has primary responsibility for the compilation of rail rate indices.

Railroad employee organizations have been critical of broad "declining rate" statements, many coming from the predecessor ICC, purporting to show that rail rates have been declining. Outside the ICC/STB regulatory scheme, but using ICC/STB reports, the "declining rate" contention has been advanced in various railroad labor-management negotiations as exemplifying competitive pressures on railroads to support carrier moderation of employee economic requests. Moreover, the "declining rate" format has been utilized in some agency proceedings.^{3/}

Background of ICC/STB Rate Compilation Since Staggers. The ICC staff reports indicating declining rates since Staggers appear to have commenced with a five-page issuance on April 19, 1989 (No. 89-91), ICC Issues Staff Report Showing Decline in Inflation-Adjusted Rail Rates since Passage of Staggers Rail Act.^{4/} The report claimed a 22.4% decline in the average rail rate between 1980 and 1987, and a 25.7% decline in 1981 through 1987.

^{3/} For example, see STB reference to "declining rate" since Staggers, in Union Pacific-Southern Pacific Merger, 1 S.T.B. 233, 370, 537 (1996).

^{4/} Prior to the first 1989 report, the ICC at least since 1987, had presented information to the U.S. Congress asserting rates had declined since Staggers. See: U.S. Senate Subcommittee on Antitrust, Hearings on S. 443, The Clayton Act Amendments of 1987 (Railroad Antitrust Immunity), 38-39, 82-84 (May 13, 1987); U.S. Senate Subcommittee on Surface Transportation, Hearings: Rail Industry/Staggers Act Oversight, 143-44, 187-89 (June 17, 1987); and U.S. House Subcommittee on Transportation, Hearings: Staggers Rail Oversight, 432-33, 475-77 (May 28, 1987).

Similar five-page reports were issued in 1990 (No. 90-63, May 4, 1990), and in 1991 (No. 91-55, May 14, 1991), but with the title changed to Rail Rates Continue Multi-Year Decline.^{5/} The reports for 1992 (No. 92-95, June 11, 1992), and for 1993 (Nov. 1993), were lesser three-page documents. The Gross Domestic Product (GNP) Implicit Price Deflator was substituted for the former GNP figure.^{6/}

Beginning in 1991, and for 1992 and 1993, the reports listed the purported actual increase in the average rail rate of 1.2%, 1.1%, and 1.1%, respectively, in current dollars.

The ICC's annual reports to the U.S. Congress for the years 1989 through 1994, included the above five "Rate Decline" studies in its list of agency publications,^{7/}

The 1995 rate report (Feb. 1995) claimed the average rate fell 35.9% between 1980 and 1993, and added the average rate fell 37.7% from the peak rate in 1981 through 1993.

The STB's first rate report, issued February 1998, asserted the inflation-adjusted average rail rate fell 46.4% between 1982 and 1996. The data is said to derive from two sources, the annual

5/ The 1990 report claimed the average rail rate, converted to constant 1988 dollars, had fallen 22.4% between 1980 and 1988, and 25.0% between 1981 and 1988; the 1991 report claimed the average rail rate, converted to constant 1989 dollars, had fallen 24.6% since Staggers, and the overall rail rate declined 2.8% from 1988 to 1989.

6/ The 1992 report claimed the average rail rate, converted to constant 1990 dollars, fell 28.8% between 1980 and 1990, and the overall rail rate declined 3.1% from 1989 to 1990. The 1993 report claimed the average rail rate, converted to constant 1991 dollars, fell 31.2% between 1980 and 1991, and 33.3% between 1981 and 1991.

7/ ICC 103rd Report, 126 (1990); ICC 104th Report, 109 (1991); ICC 105th Report, 112 (1992); ICC 106th Report, 123 (1993); ICC 107th Report, 99 (1994); and ICC 108th Report, 114 (1995).

railroad freight commodity statistics, and the railroad carload waybill sample. This differed from the earlier ICC rate index, which was based on revenue per ton, requiring data only from the freight commodity statistics.^{8/}

The STB's second report, issued December 2000, Rail Rates Continue Multi-Year Decline, claimed rates fell 2.7% in 1999, but inflation-adjusted rates had fallen 45.3% since 1984.^{9/} There does not appear to have been a subsequent and publicly available STB update.

Background to GAO Report. The current GAO Report lists previous GAO reports (since 1986) dealing, in general, with ICC and STB regulatory matters. GAO Report, 88-89. Examination of these prior reports indicates GAO followed or adopted the ICC's "declining rate" staff conclusions at least until the GAO's 1999 report.^{10/} GAO in its 1999 report concluded that rail rates have generally decreased since 1990, but that rail rates for some grain shipments have remained flat or increased since 1990. The GAO departed in some respects from prior reliance upon ICC methodology, and based its analysis on cents per ton-mile, and distance categories of long, medium, and short. (GAO 1999 Report, Ch. 3).

The current GAO report points to Staggers Rail Act of 1980 as the primary rail deregulation legislation, but does not indicate

8/ STB First Annual Report (1996-97), 53 (1998).

9/ STB Second Annual Report (1998, 1999, 2000, 2001), 80 (2002); STB Third Annual Report (2002-2004), 76 (2005).

10/ Cf. Railroad Regulation-Economic and Financial Impacts of the Staggers Rail Act of 1980 (GAO/RCED-90-80, May 1990); Railroad Regulation-Changes in Railroad Rates and Service Quality Since 1990 (GAO/RCED-99-93, April 1999).

the specific statutory provisions upon which it places reliance for rate changes. (GAO Report, 1, 2, 3, 4, 6, 7, 8, 9, 11, 15, 24). Little attention is directed to the so-called 4-R Act (GAO Report, 1, 6) or ICCTA (GAO Report, 4, 6, 7). The omission of specific statutory terms is unfortunate, as the three pieces of legislation are lengthy.

Contrary to GAO Report, most of the rail deregulation came as a result of the 4-R Act (1976), rather than the Staggers Act (1980). Although Staggers Act refined certain features of the 4-R Act, the principal substantive deregulatory feature in Staggers was contract rates. The basic deregulatory provisions were already earlier in place from the 4-R Act. The watershed year for rail deregulation was 1976, not 1980.^{11/} If there is to be a "base year" from which to measure the effect of deregulation on rail rates, the year 1976 is preferable to 1980.

The principal director of the current GAO report indicated in a recent presentation^{12/} that a panel of "experts" and others, along with representatives of the railroads, major shipper, and other transportation interests, conducted a one-day session with GAO, concerning the GAO Report during its preparation. However, railroad employee representatives were not present during this critical meeting. This omission is significant.

11/ See: Ex Parte No. 658, The 25th Anniversary of the Staggers Rail Act of 1980--A Review and Look Ahead (Stmt. of John D. Fitzgerald, Oct. 12, 2005); Stone, Richard D., The Interstate Commerce Commission and the Railroad Industry (Praeger, 1991).

12/ Transportation Research Forum, Highlights of the Recent GAO Report on Key Freight Rail Issues (Washington, DC, October 25, 2006).

It is believed that railroad employee organizations will not have confidence in the GAO calculations; indeed, railroad employees did not endorse the ICC/STB rail rate indices.^{13/}

The GAO's information, primarily stated in revenue per ton-mile, does not appear to adequately account for disparate length of haul, various revenue accounting systems, differing equipment, adjustments for inflation, and host of factors recognized by those experienced in railroads ratemaking. The GAO Report lists a panel of 12 so-called experts which were consulted for the report, but the backgrounds of these experts appear outside the field of railroad ratemaking. (GAO Report 72-73). The GAO claim that "real" rail rates decreased by more than 20% between 1985 and 2004, is about one-half the decrease shown in the most recent STB report. It appears that a major difference between STB and GAO may be the latter's failure to make an adjustment for inflation.

Bureau of Labor Statistics Rail Freight Index. The STB uses the Bureau of Labor Statistics (BLS) Rail Freight Price Index for the average railroad rate, for the STB's annual classification of railroads, and perhaps for other purposes as well. The most recent STB index for the annual operating revenues of railroads was issued in October 2006. 71 Fed. Reg. 58911 (Oct. 5, 2006). This BLS price index gives a more realistic and credible indication for the overall direction of railroad freight rates.

^{13/} See: Joint Comments of United Transportation Union-Illinois, and Chicago Board of Trade, in Ex Parte No. 347 (Sub-No. 2), Rate Guidelines--Non-Coal Proceedings (May 2, 1994).

The BLS data is published annually in Statistical Abstract of the United States, and thus is available to the public.^{14/}

The BLS publication shows the general rail freight index increased 66% between 1980 and 2004, and increased 26% between 1985 and 2004. This 26% increase contrasts with GAO's 20% purported decrease for the same period. If the real onset of deregulation is shifted from Staggers Act (1980), to the 4-R Act (Feb. 5, 1976), the BLS rail freight index increased by 178% during the 29-year period between 1975 and 2004.

It is incongruous for STB to use the BLS rail freight price index for classification of rail carriers, and not to do so for shippers.

It is suggested the STB may wish to institute its own public proceeding to examine the general rail rate index.

B. Grain Rate Index. The GAO report asserts grain rates increased about 9% between 1985 and 2004. (GAO Report 13-14). The BLS data contains a general index for "Farm Products," but this classification of farm products is not broken down to illustrate grain, or for various categories of grain shipments. The BLS rail freight index for farm products indicates a 47% increase in the rail index between 1985 and 2004.^{15/}

The index for farm products does not indicate an unusual or widespread variance from the general rail freight index.

^{14/} The most recent edition is the 125th (2006). The index covers line-haul operating railroad.

^{15/} Statistical Abstract of the United States (Table 1106, 2006); Ibid. (Table 1061, 1990).

The GAO Report provides little guidance regarding the measure of rail rate increases on grain shipments in BNSF territory.

JOHN D. FITZGERALD
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