

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 665
RAIL TRANSPORTATION OF GRAIN

COMMENTS
OF
MONTANA WHEAT & BARLEY COMMITTEE
COLORADO WHEAT ADMINISTRATIVE COMMITTEE
IDAHO BARLEY COMMISSION
IDAHO WHEAT COMMISSION
IDAHO GRAIN PRODUCERS ASSOCIATION
MONTANA GRAIN GROWERS ASSOCIATION
NEBRASKA WHEAT BOARD
NEBRASKA WHEAT GROWERS ASSOCIATION
OKLAHOMA WHEAT COMMISSION
SOUTH DAKOTA WHEAT COMMISSION
SOUTH DAKOTA WHEAT INC.
TEXAS WHEAT PRODUCERS BOARD
TEXAS WHEAT PRODUCERS ASSOCIATION
WASHINGTON WHEAT COMMISSION
NATIONAL ASSOCIATION OF WHEAT GROWERS
NATIONAL BARLEY GROWERS ASSOCIATION

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Dated: October 30, 2006

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BEFORE THE
SURFACE TRANSPORTATION BOARD

I. INTRODUCTION

The above listed parties, collectively known as the Wheat & Barley Commissions, by and through their representative submit these Comments in *STB Ex Parte No. 665 Rail Transportation of Grain*, the Board's inquiry into the current state of rail transportation of grain. The Wheat and Barley Commissions welcome the opportunity to provide these Comments. This hearing was called by the Board on short notice shortly after the publication of the recent GAO study and several of the studies and surveys that we are conducting responsive to this inquiry will not be done for the next 60 days. One of the surveys we are working on will be taken at various grower group listening and convention settings from now until mid-December. We must respectfully request that the Board give consideration to allow us to complete these studies by holding the record open for an extended time or alternatively consider a follow-up hearing in a few months out in the Western U.S. to allow us to present the results of some of the studies.

II. STATEMENT OF INTEREST

The Wheat & Barley Commissions, various Grower groups, the National Association of Wheat Growers and the National Barley Growers Association col-

lectively represent over 100,000 farm producers in the United States. The Wheat & Barley Commissions represent wheat and barley producers in the major wheat and barley producing areas of the United States covering large parts of the grain growing belts of the Great Plains and many other parts of the country from the eastern U.S. to the West coast. The Wheat & Barley Commissions are charged with representing the interests of wheat and barley producers in the marketing of their grains both domestically and internationally. The National Association of Wheat Growers and the National Barley Growers Association represent virtually all of the wheat and barley growers in the United States. A vast majority of the wheat and barley producers represented by the Wheat & Barley Commissions are captive to single rail carriers for significant portions of their freight shipments. There will be many participants in this proceeding covering a whole host of issues and the Wheat & Barley Commissions would like to focus on factual predicate matters for your consideration. The Alliance for Rail Competition Statement filed in this proceeding focuses on the Board-created barriers to reasonable rates, adequate service, and rail to rail competition; that the STB shows little inclination to remedy and the Wheat & Barley Commissions together with the National Association of Wheat Growers and the National Barley Growers Association concur in that statement. This statement is designed to focus on factual predicate support for grain transportation issues and concurrence with the GAO findings.

ARGUMENT

III. WHEAT AND BARLEY GROWERS ARE UNIQUE RAIL TRANSPORTATION USERS

The Wheat & Barley Growers are unique in the rail transportation world. Why? The growers are the parties that bear the transportation costs when grain moves via rail. The uniqueness is embodied by the fact that although the wheat & barley growers bear the freight charges, they are not the payers of freight and unlike other industries – the farm producer is unable to pass their rail costs onto anyone else.

Does this make them victims? No, but it does make them unique. And when a grain producing area is captive – it is truly captive. If this Board were to ask the railroads in this hearing room – who are your grain customers? The answer would be grain merchandisers and grain elevator companies. Why is that? It is because those companies are the ones that physically pay the freight bills.

We frequently hear reports from the railroads to the Board that 'the grain shippers' are generally happy with the railroads. While that may or may not be factual, "Happy" is not a word that would convey the sentiments of the bearer of the freight charges in grain transportation. The grain producers are frustrated with this Board's lack of focus on providing solutions and relief to their vulnerability to exploitation.

Wheat & Barley producers work very closely with grain merchandisers and elevator companies – the merchandisers and elevators take market risks and they provide to the grain producer's a window to the market. The grain producer and the grain merchandiser/elevator are truly partners in the marketing of grain. This Board must learn however, that the grain producers in this country are the ones that bear the transportation costs and need potential relief. The Wheat & Barley Commissions and the growers they represent are faced with the combined effects of increasing railroad monopoly and market power, ineffective rail regulation, and little or no ability to invoke the antitrust laws.

IV. WHAT IS THE STATE OF THE STATE OF RAIL TRANSPORTATION FOR WHEAT AND BARLEY GROWERS TODAY?

The Wheat & Barley Commissions represent farm producers, many of whom have little or no rail transportation choices and have long been subject to very high rate levels. Past discussions with the railroads about rate levels or the unfairness of fuel surcharge methodology have been met with indifference.

Grain is grown in areas of the country where the distances to elevation are far, the markets are distant, and the transportation options are few. The grain farm producer in the United States are the most efficient in the world and produce some of the best grain product in the world. But, farm producers are price takers not price makers.

Today they are faced, in large parts of the growing area, with a single railroad. Percent of rail system controlled by one Class I railroad:

- Montana-94% (#1 in US)
- Delaware-83%
- Idaho-80%
- North Dakota-54%
- South Dakota-54%

Many of these states are the same ones identified in the GAO study suggesting further study.

How did we get to a situation where there is little or no rail-to-rail competition? In the Northern tier states in 1970 there were up to five Class I railroads serving the grain areas. Today most of the northern Great Plains has a single carrier. The ICC/STB allowed the consolidations to occur over the objections over every affected state Governor, every State Attorney General, the Justice Department and Congressional delegations coupled with multitudes of local governments. The ICC, in the Northern Lines merger (1970) which created the BN, designated the Chicago, Milwaukee, St. Paul and Pacific (Milwaukee Road) as the 'official' competitor of the newly formed giant Class I railroad, the BN.

This new 'designated' competitor, the Milwaukee Road, by 1976, was petitioning the ICC to allow it to become part of the BN. The ICC turned down the request in 1976 stating that to allow the Milwaukee into the BN would not leave a competitive balance in the Northern plains. By 1979, the Milwaukee declared

bankruptcy – went out of business – and NEVER has the ICC nor the STB ever made a move to correct the formation of this virtual monopoly.

In 1980, Montana farm producers filed a Section 229/Class action case in what became known as the *McCarty Farms* case in an attempt to pull themselves up by their bootstraps through regulatory intervention and regulatory oversight – result - although the ICC judged the BN rates were unreasonably high in 1987, fully 17 years after the case was filed and two appeals, and \$3.2 million later, in 1997, this Board ruled against the farm producers, McCarty Farms, Inc. v. Burlington Northern, Inc., Docket No. 37815S, et al., decision served Aug. 20, 1997.

Similar experiences have occurred in virtually every state in the wheat and barley growing areas from Texas to the Pacific Northwest. Areas, 30 years ago, that all had competitive rail service no longer have competitive rail service - the southern plains, the central plains, the far-west, the Pacific Northwest, the Midwest and the eastern growing areas.

V. THE STB HAS NOT PROVIDED REMEDIES NOR HAVE THEY SOUGHT TO PROTECT COMPETITIVE BALANCES BETWEEN RAIL CUSTOMERS AND RAILROADS

This Board has not provided remedies, nor have they made moves to correct competitive imbalances that the Board, or the ICC before them, were instrumental in creating.

After the recent BNSF and UP/SP mergers in the western half of the United States, the grain producing areas have been subjected to high or escalat-

ing rail rates, higher R/VC levels, poor service, and the existence of a railroad system that believes it is their right to dictate grain pricing in the market place. This practice should be alarming to those charged with overseeing and regulating the railroad industry. The railroads today want efficiency in the rail movement of grain and it is that striving for efficiency that frequently clashes with what is good for the farm producers economics.

VI. THE RAILROADS BELIEVE THAT IT IS THEIR RIGHT TO SET THE PRICE OF THE COMMODITY IN THE MARKETPLACE

The railroad can and does dictate what crops can be marketed efficiently off the farm and today, and can and does dictate the price of grain in the marketplace. In a Senate Commerce Committee hearing in April, 2002 a VP of Grain for a major Class I railroad in the West made the following statement,

"What we do as a rail transportation provider is look at the difference between the value of the grain at the origin and value of the grain at the destination, and try and determine the level of charges for transportation with margin for the elevators to operate and make money."

"The fact that winter wheat off Texas gulf at the destination has a lower value than hard Spring wheat off the PNW...it is clear Spring wheat has a higher value. Therefore, it can stand a higher transportation cost and still move in the marketplace."

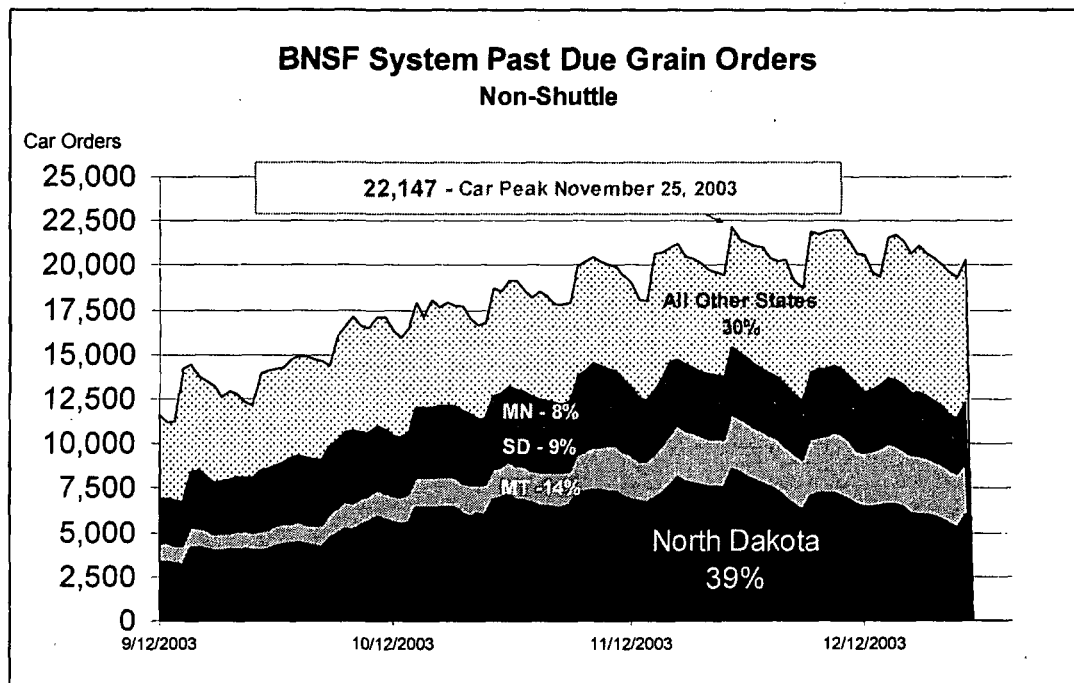
The Board needs to be mindful that the railroad here is making the price in the marketplace and the farm producers are the ones paying for the transporta-

tion cost that is now dictated by his/her captivity not by market demands. Only a company with absolute power and little or no effective competition can price in this way.

VII. ELEVATED FREIGHT RATES AND POOR SERVICE GO HAND IN HAND IN CAPTIVE AREAS

Those areas that are captive pay the highest freight rates and coincidentally receive some of the worst service. Given the high rates and charges they must pay, grain shippers should receive good rail service. They don't. Why? If the grain in captive areas is not moved by the railroad due to whatever reason the railroad has, in favor of moving grain from an area that has rail-to-rail competition, will the grain in the captive area still be there next week? Or next month? The captive grain producer has no alternative but to wait until the service is resumed and usually the return of adequate supply is coupled with a price decrease that slackens demand.

During the 2003 car shortage, data produced by the BNSF showed that the most captive areas on the system were singled out for the highest level of past due grain orders. Of the 22,147 cars that were past due, over 70% of the past due orders were in the captive northern tier states of Montana, Minnesota, North Dakota and South Dakota yet this area of the country comprises less than 20% of that rail system.



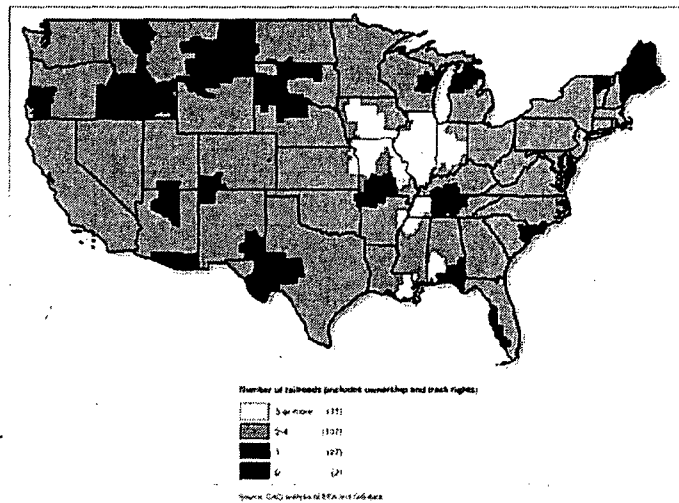
VIII. FREIGHT RATE LEVELS IN CAPTIVE AREAS

The wheat and barley rates in the western agricultural areas are among the highest found on the Class I systems.

The GAO found the entire Western United States agricultural areas has one or two railroads serving the needs for the grain producers. Large areas (larger than some states) shaded in black in the figure 12¹ below show portions of Oregon, Idaho, Montana North Dakota, South Dakota, Colorado, Texas, Oklahoma, Arkansas growing areas are single railroad served.

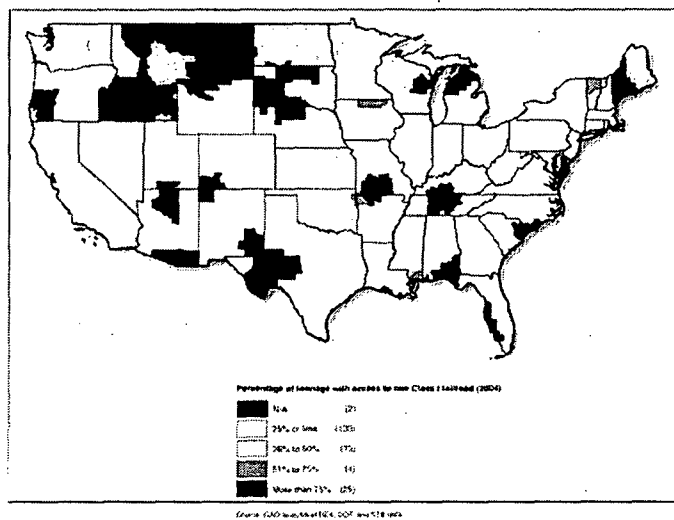
¹ GAO Report 7-94 Freight Railroads, Industry Health Has Improved, but Concerns about Competition and Capacity Should Be Addressed, Page 26

Figure 12: Number of Class I Railroads Serving Economic Areas, 2004



Additionally, the GAO shows that the All Industry Tonnage originating with Access to one Class I Railroad mirrors the previous graph – Figure 13².

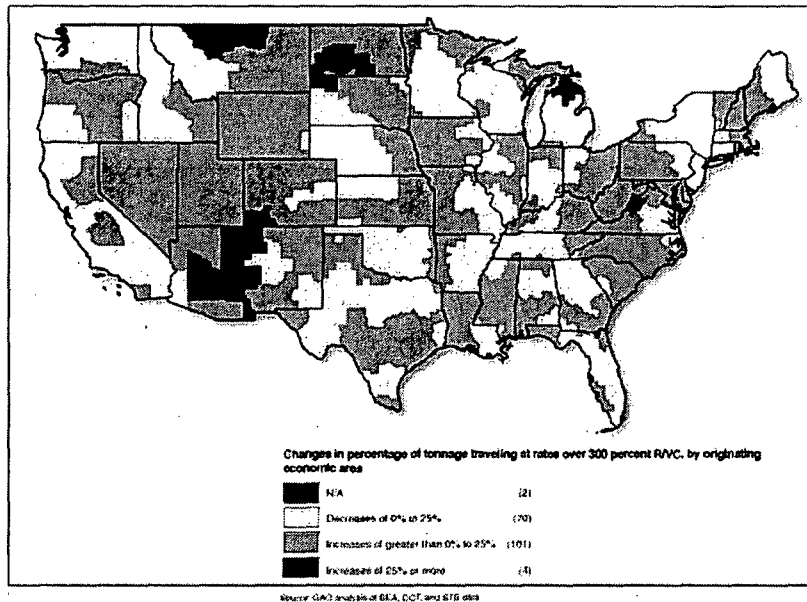
Figure 13: Percentage of All Industry Tonnage Originating in Economic with Access to One Class I Railroad, 2004



² Ibid, Page 27

The GAO pulls these observations together with Figure 18 – wherein it measured the Changes in Tonnage Traveling at Rates over 300 Percent RVC, by Economic Area, 1985-2004³.

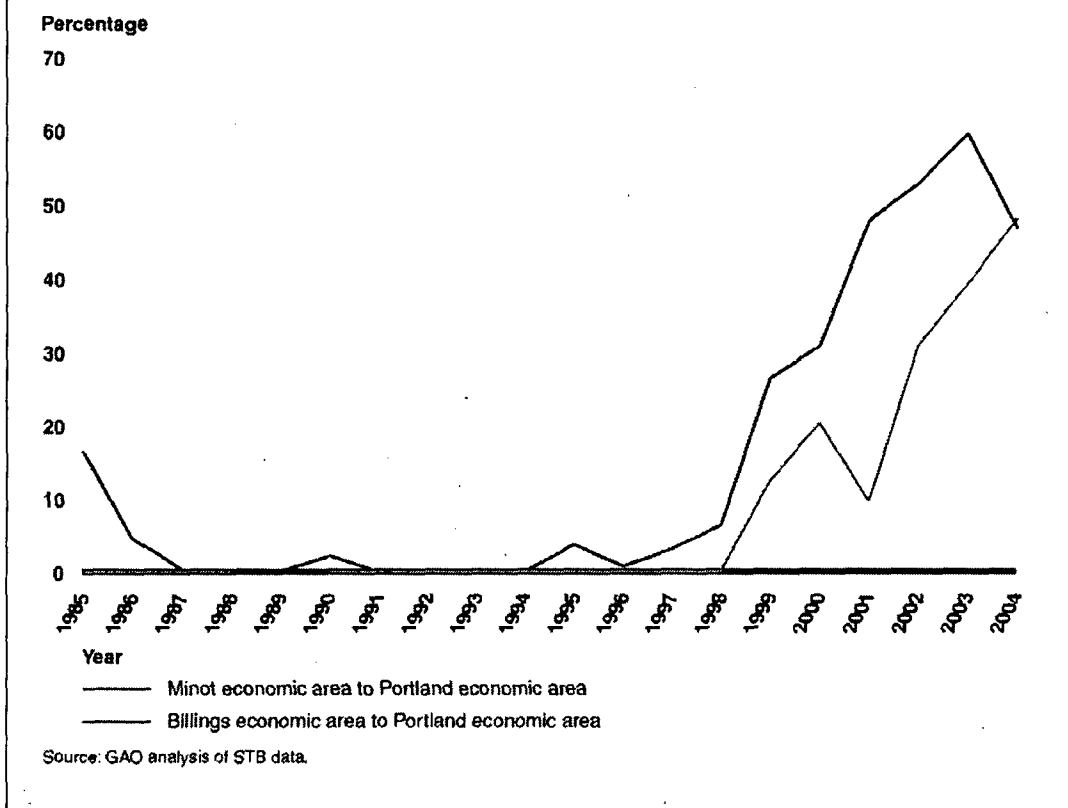
Figure 18: Changes in Percentage of Tonnage Traveling at Rates over 300 Percent RVC, by Originating Economic Area, 1985 through 2004



The GAO report on Page 35 confirms what Wheat & Barley Commissions experience everyday.

³ Ibid, Page 34

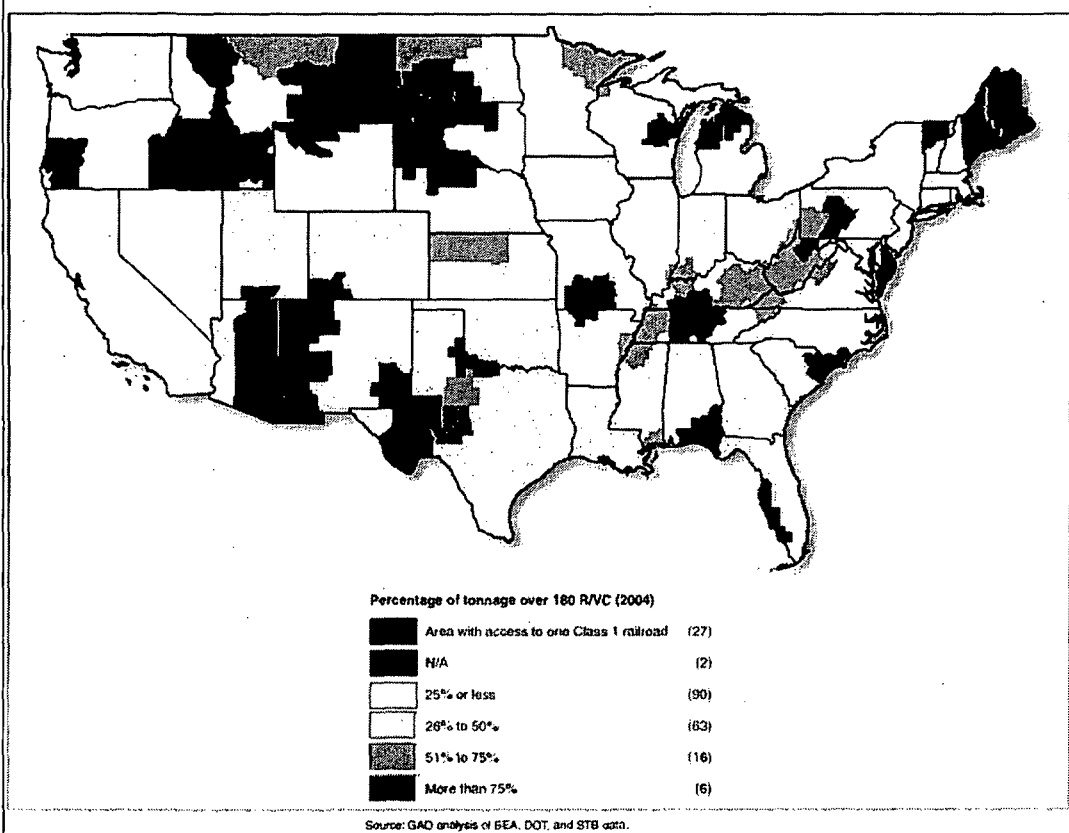
Figure 19: Long-distance Grain Route Changes in Percentage of Tonnage Traveling at Rates over 300 Percent R/VC, 1985-2004



Perhaps not noticed by the GAO, was the timing of the sharp increases in the percentage of tonnage traveling at rates over 300 percent. Note that it started to rapidly increase in 1997-1998. Coincidentally, that is the same time the STB allowed first, the BNSF merger and next, with the UP/SP merger to be consummated which put in place the elimination of the last vestiges of rail competition in the western U.S.

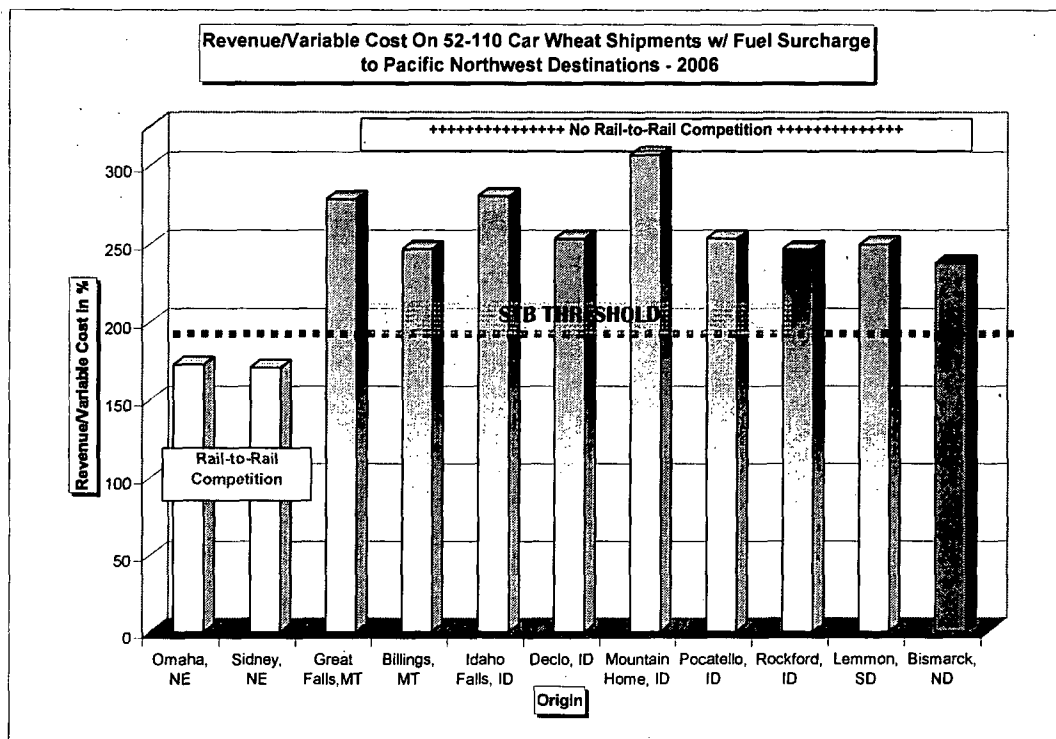
Finally, the GAO report correctly establishes the link between single railroad access and elevated percentage of tonnage above the threshold for Rate Relief.

Figure 20: Overlap between Percentage of Tonnage over Threshold for Rate Relief and Access to Only One Class I Railroad



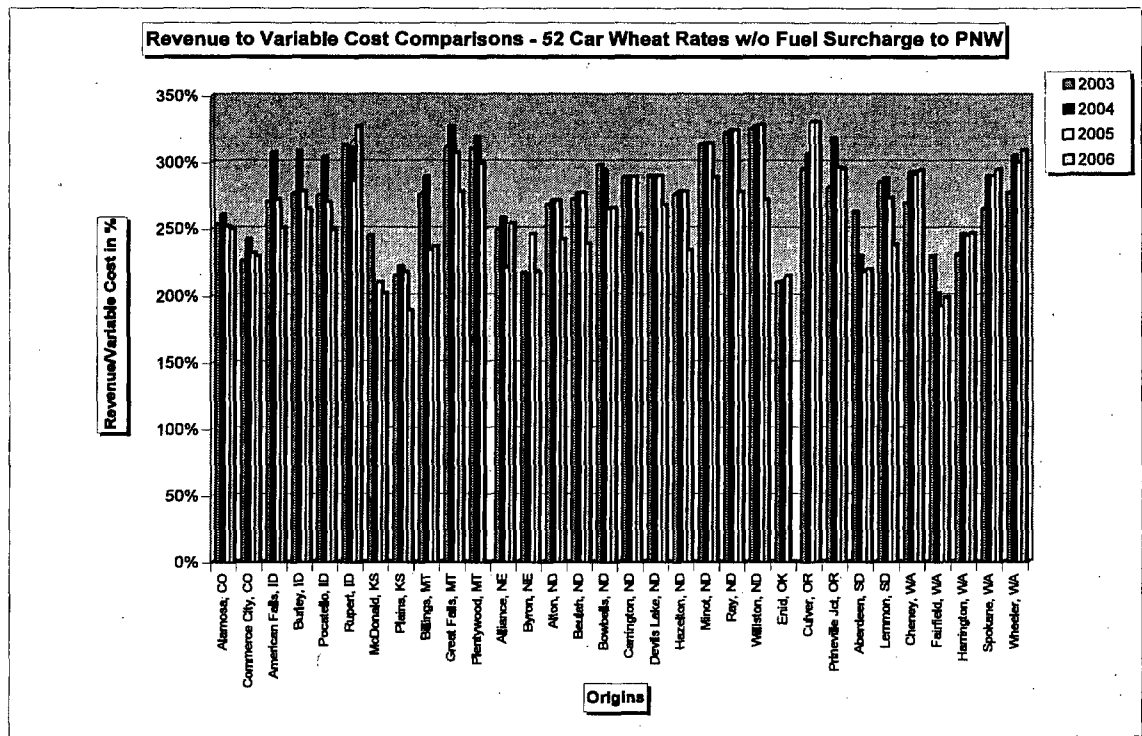
Wheat and Barley Commission's research of Revenue to Variable Cost levels on grain from the western growing areas confirm what the GAO found.

In examining the R/VC levels on rates to common destinations of PNW, we find the large areas that are being served are moving at rates considerably above the threshold. The Chart below shows the areas, where little or no rail-to-rail competition exists, that are exposed to high Revenue/Variable Costs as shown in the GAO study. This graph shows points in MT, ID, SD, and ND that experience R/VC levels upwards to 300%.

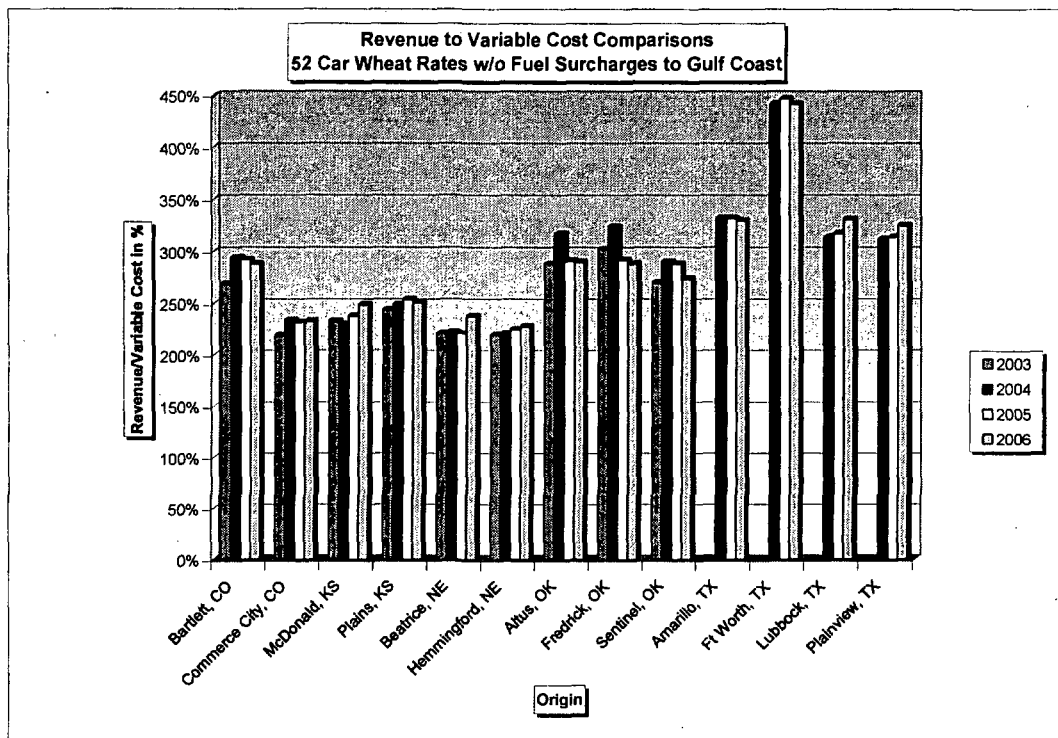


This analysis can be done for points in all parts of the grain growing areas of the Western U.S. An historical look of the RVC ratios for various markets further confirms the hypothesis presented by the GAO.

The Chart below shows a historical look 2003-2006 (without the fuel surcharges applied) that RVC ratios well in excess of the threshold exist on the movements from origins all over the plains to the PNW – Colorado, Kansas, Idaho, Montana, North Dakota, South Dakota, Oklahoma, Oregon, Nebraska and Washington origins. If the railroad applied fuel surcharges were added to these rates, the RVC ratios would be even higher.

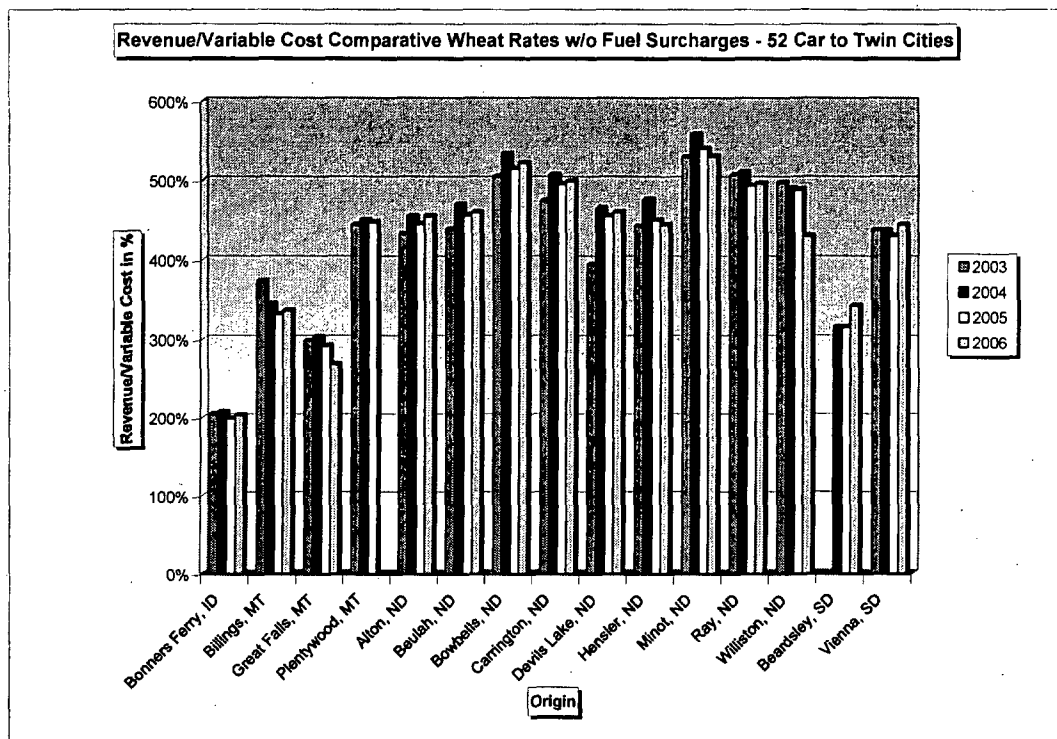


Examination of RVC historicals for the period 2003-2006 into the Gulf Coast destinations from the states that market into the destinations finds a similar story. Origin states affected include Colorado, Kansas, Nebraska, Oklahoma and Texas routinely see wheat rates well above the threshold and some as high as twice the threshold level.



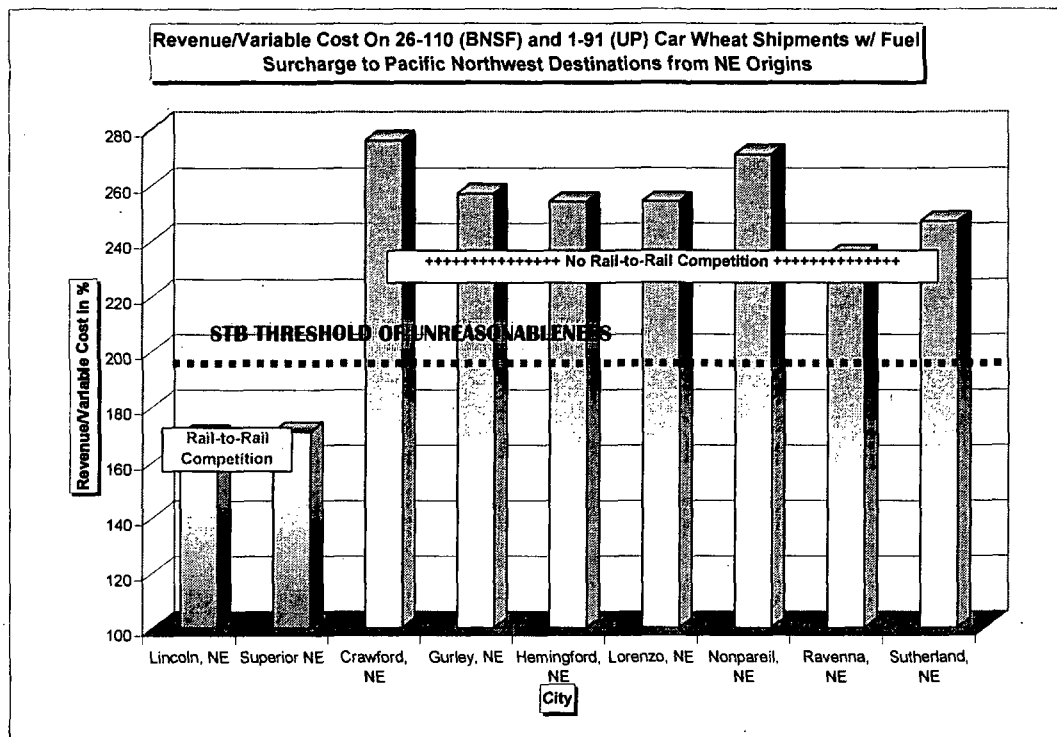
Some of the highest RVC cost historical numbers in North American grain can be found on the movements into the Twin Cities from origins in the northern plains.

The chart below illustrates where one can find rates as high as 500+% RVC over the 2003-2006 period. In all of these examples, the Wheat & Barley Commissions did not select just certain points but found that the analysis showed, as the GAO report reported, that the trend is all over the affected states. Here the affected states (which also have little or no rail-to-rail competition) are Idaho, Montana, North Dakota and South Dakota.



What is clear is the areas of the country served by single and dual rail are experiencing increasing rate levels that are not found in areas that experience some rail-to-rail competition.

Even states that have rail-to-rail competition have areas of the state that are captive.



The chart above compares areas in Nebraska with other areas of Nebraska that are not fortunate to have rail-to-rail competition and the same story emerges.

While one might debate the exact level of the R/VC costs with railroad experts, however what is indisputable is the highest R/VC will be found in the captive areas and they occur in west in AZ, CA, CO, ID, KS, MN, ND, NE, SD, OK, OR, TX, and WA. We also know that the grain experience is mirrored in the rail transportation of coal, silica, sand, plastics, chemicals as well as many other industries covering the width and breadth of this country. The important point is that the wheat and barley growing areas in this country are troubled. As stated in the Alliance for Rail Competition Comments in this proceeding and echoed here, "At every turn, they (the grain farm producers) face Board-created barriers to rea-

sonable rates, adequate service, and rail to rail competition that the STB shows little inclination to remedy. In these and other respects, the promise of the Act is belied by the way its provisions have been interpreted by the ICC and STB, so as to insulate the railroad industry from effective regulatory oversight and from marketplace discipline.” The grain producers recognize the need of railroads to make adequate return, but what is concerning is the Board has not focused on the price being paid by the grain producers and have not seen fit to provide reasonable remedies to guard against market abuse.

The evidence presented by the GAO studies in 2006, 2002 and 1999 point to the same evidence that the Board is not adequately protecting large parts of the country from market abuse.

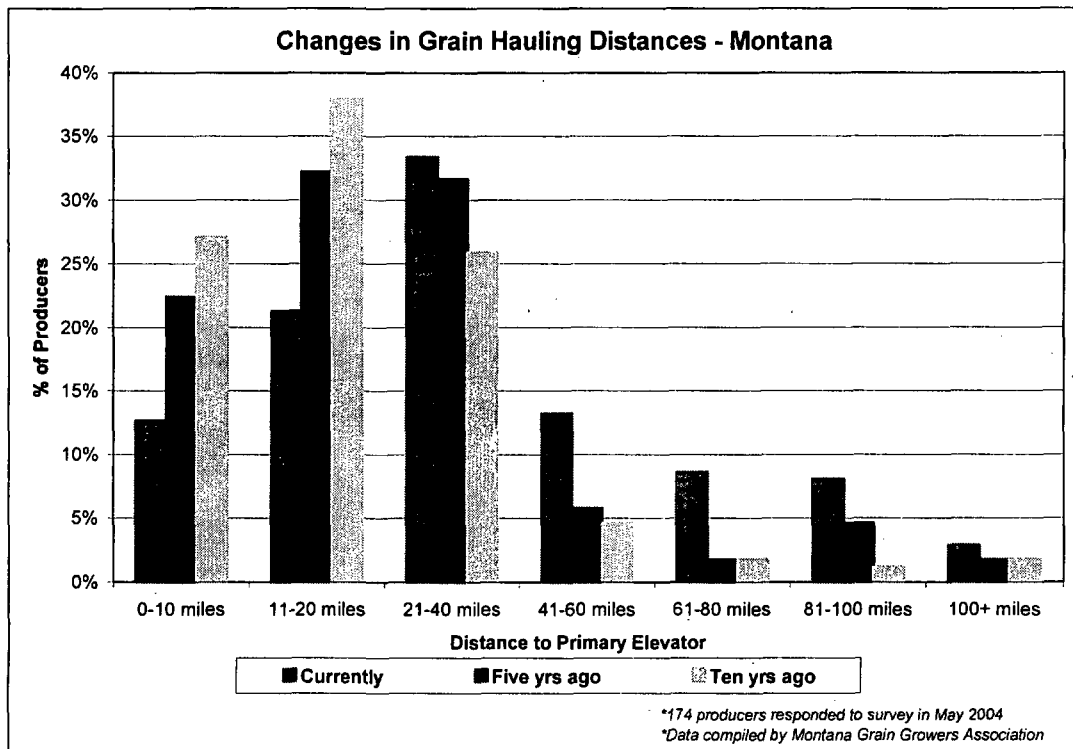
IX. THE RAIL GRAIN RATES HAVE CONTINUED TO ESCALATE FOR THE PAST 30 YEARS

It is clear from the GAO report a railroad claim that rail rates have fallen since Staggers Rail Act was passed in 1980, may not be the whole story in the transportation of grain.

The RR's in the captive areas are shifting the costs to the farm producers and merchandisers and that is not reflected in the rail rates. The transportation costs to the farm producers and state governments are rising as the railroads cost shift to the private and public sectors from the railroad balance sheet.

A recent study done by the Montana Grain Growers Association sought to quantify a trend the grain producers have known about for a long time. Namely,

as the railroads move the grain industry from single, 26 car and 52 car to shuttle loading facilities, the grain elevators associated with the hauling of grains are becoming ever more distant. This is requiring farm producers to incur the expense of hauling their grain further and further to get to a local elevator. The costs of gathering have been shifted to the farm producers and the state and local highways and in virtually ever mileage block we see increasing length of haul – a cost borne by the grain producers.



This small study has prompted the Rail Service Competition Council in Montana to commission a larger study that this practitioner is working on. However, the results of that study will not be completed until mid-December. Hopefully we will be able to provide the Board with a copy of the results of that study in

this record in the event the Board will grant us leave to file this additional data in the record.

The preliminary results already show that farm to rail costs are continuing to increase and that burden of transportation has been shifted from the railroads to the farm and public sector. We find some areas having to truck their grain over 100 miles one way to deliver their grain. The railroads have simply shifted the gathering costs to farm producers and then claim their rail rates are declining.

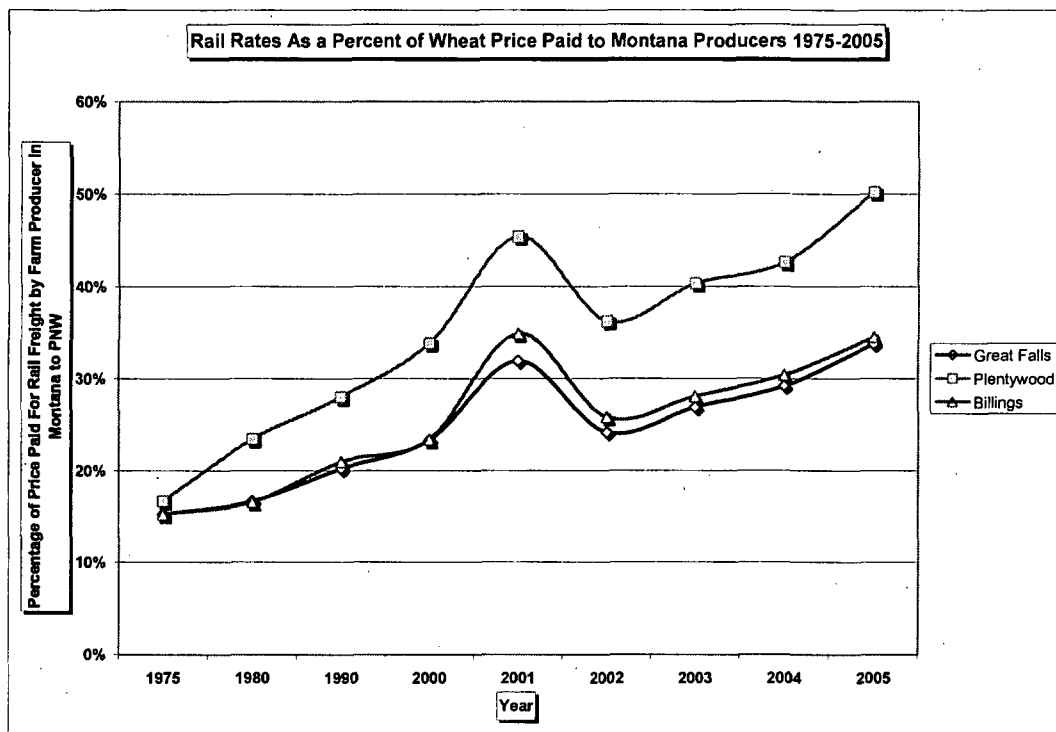
An additional concern by farm producers being expressed in this new Rail Service Competition Council study is that the wait time to unload at these larger, more distant facilities has ballooned as there are fewer and fewer facilities. Sometimes farm producers report 4-6 hours waits to unload a single truck – all costs now borne by the farm producers.

Thus while the railroads and national statistics may show 'decreasing rail rates' the question Wheat & Barley Commissions want this Board to consider is that, in large part, this reported decrease is offset by escalating cost shifting to farm producers and the rate reduction may be a myth.

The same observations are made in value-added agriculture experiences where malt plants are being required by the Class I railroads to invest hundreds of thousands of dollars in private cars similar to the utilities. The railroads may tout that the rates went down in such an instance but the cost shifting does not make the transportation bill for the users of transportation (farm producers) any lighter.

X. RAIL RATES, AS A PERCENTAGE OF THE PRICE OF WHEAT, CONTINUES TO ESCALATE TO ALL TIME HIGHS

If one tracks the rail rates against the price of wheat one finds an alarming trend. While in the short time frame to get ready in this proceeding, we could not complete the analysis for all of the states, experience has shown that the graphic displayed below is fairly typical of what we would find in all the captive shipper areas.

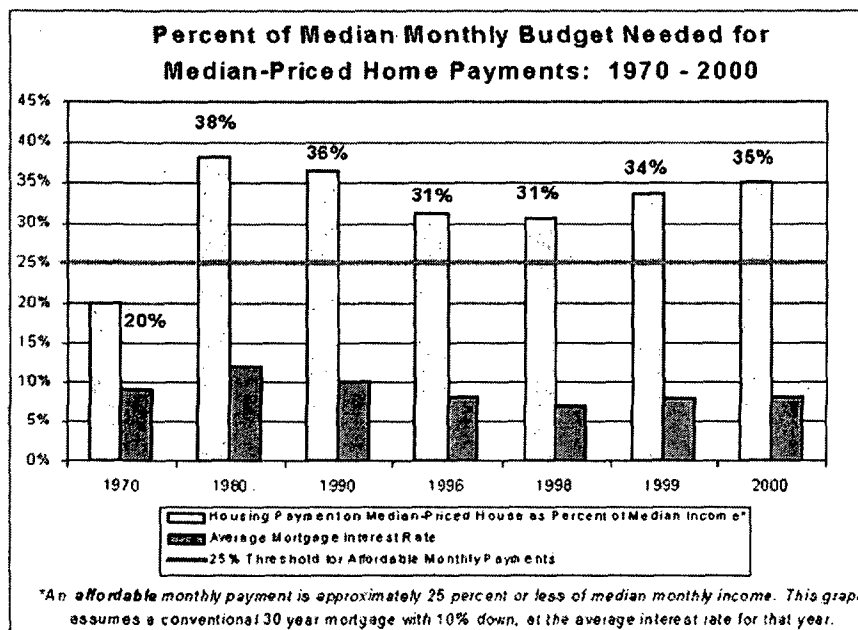


The chart looks at the 1975-2005 period. The data before that period was unavailable in the time constraints necessary to prepare for this hearing. However, it is clear that in this captive area - Montana, the price of rail vs. the price of the product being transported continues to escalate. Many grain producers have expressed alarm at paying 30-40-50% of the price they receive for their wheat to

rail and that does not include the costs associated with gathering of grain and re-location to the ever more distant elevator.

To put this in non-agriculture perspective, the general consensus is that whenever, a home owner is paying more than 25% of their income towards housing it becomes a burden on the homeowner. The chart below is from a FL study and illustrates the concern of officials when the stretch becomes a burden.

The burden on the captive farm producer is tremendous when the rails take 30-50+% of their price to transport their wheat to market.



XI. THE BOARD REQUESTED A REVIEW OF THE CANADIAN SYSTEM

The Canadian regulatory system has for over 100 years been tethered to the idea of placing regulatory oversight over the duopoly system that has existed. Some brief points:

➤ Two Monopoly Rail System since inception

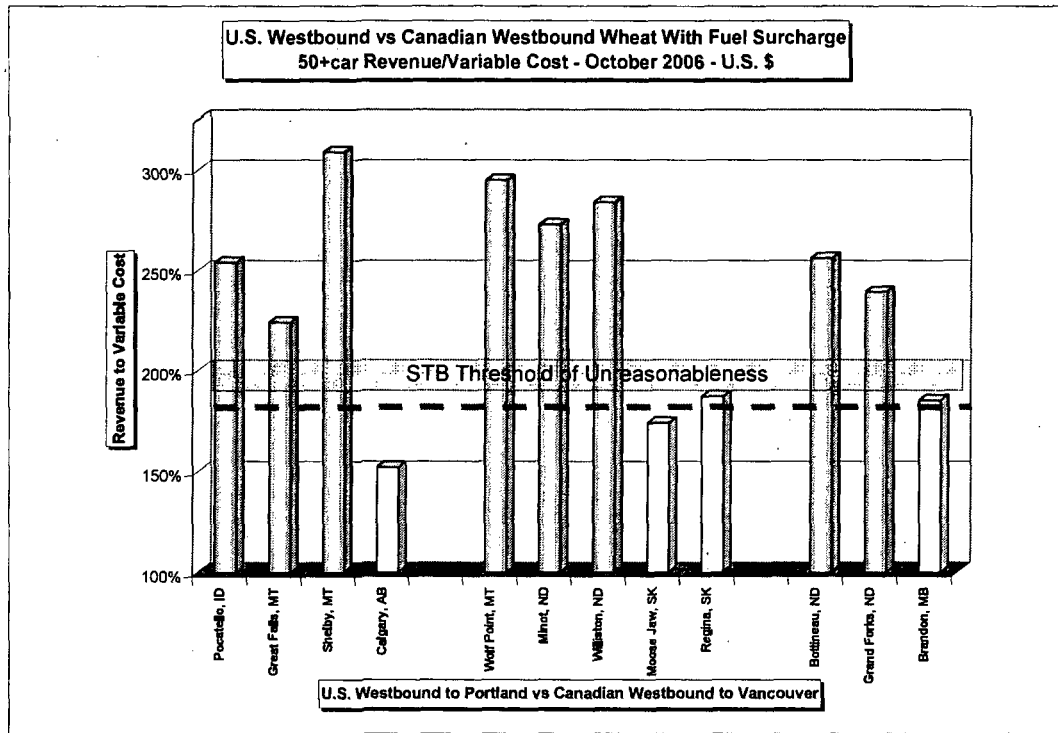
- **Canadians have chosen to regulate because they have a two monopoly railroad system serving the country**
- **1st Crow Nest Pass rates**
- **Western Canada Transportation Act**
- **Rate caps (regulate maximum revenues)**
- **Canadian Governments have always had a Common Theme – Control the Two Monopoly System**
- **1897 – Crow's Nest Pass Agreement**
 - **Grain export rate caps**
- **1983 – Western Grain Transportation Act**
- **Allows grain-shipping rates increase gradually but never to exceed 10% of world price of grain. Aka Rate Cap sets upper limit on rail rates**
- **1993 – NAFTA required eliminating some subsidies. Put in place Western Grain Transition Payment Program and eliminated subsidy payments**
- **defined purpose in Canadian politics – serve public interest**
- **CN built, as a Crown company, solely to serve those areas of Western Canada not served by CP (generally north of the CP territory) and privatized today**

Today there are rate caps in place; the Canadian railroads are doing well financially and the grain rates are 20-30% lower on westbound movements from Canadian prairie origins to Vancouver, BC (Canadian west coast port) than from Montana and ND origins on movements to Portland, OR.

It is hoped that the Canadian Wheat Board will participate in this proceeding as they have in various STB proceeding in the past. However, they are in the

middle of Board seat elections right now and this may preclude their participation in this noticed proceeding.

Canadian and U.S. grain producers are competitors in the world market.



XII. OTHERS IN THIS PROCEEDING WILL COVER RELATED TOPICS

Other participants in this proceeding are describing in detail the unique features of grain transportation that make shippers of grain and other agricultural commodities particularly vulnerable to abuses of railroad market power. The loss of barley markets by railroad actions, the wheat industries concerns, the U.S. bean industries frustration with rail transportation are call to send a strong message of general overall concern with the rail transportation by agricultural America to this Board.

What are we facing in the agricultural rail transportation world; high rail rates, poor rail service and ineffective remedies are not unique to grain shippers. Conversations with rail customers, large and small, clearly articulate frustration with the concentration of rail power and the lack of attention to the rail customers' plight by this Board. However, as stated in the statement by the Alliance For Rail Competition Comments, "grain shippers tend to be small, tend to be isolated, and tend not to be able to increase their own prices to protect themselves from abuses by railroads. Perhaps because they are more vulnerable than other captive shippers, grain shippers have experienced greater exploitation than other captive shippers." While the Board is working on new potential remedies relief has continued to be more theoretical than real. Rail Transportation Policy in Title 49, Part A, Chapter 101, Sec. 10101, that being " (12) to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination."

XIII. CONCLUSION

The Wheat & Barley Commissions are appreciative that the Board has initiated this grain hearing but want to express their disappointment the Board chose not to embrace the findings and recommendations of the GAO study. Rather this Board has chosen to challenge the GAO's findings. The disappointment is not so much that the Board may have disagreed with a certain set of numbers, but that the Board did not chose to embrace the concept that something is wrong here.

The Board responded to the GAO study that it preferred to focus on rate remedies and thereby ignore competitive remedies. The rate remedies that this Board has suggested won't work.

The problems outlined in the GAO study and the three previous studies clearly require that this Board and Congress address these problems.

You will hear today of grain shippers (producers) who are losing or have lost competitive options.

The Wheat and Barley Commissions urge this Board to find methodologies and initiate systems to correct the imbalance in the rail transportation of agricultural commodities.

Additionally, this Board has not ever nor is it now contemplating, in their proposed remedies, a rate reasonableness determination for whole states or whole regions of the country. Yet whole states and whole regions are suffering. The U.S. Rail Transportation Policy in Title 49, Part A, Chapter 101, Sec. 10101,

"In regulating the railroad industry, it is the policy of the United States Government" and continuing in Paragraph 12 "(12) to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination." Agricultural producers continue to observe this part of the U.S. Rail Transportation Policy knowing it should provide methodologies and remedies to meet there environment at this Board; yet relief seems ephemeral at best.

In reports to State governments' contemplating rate reasonableness actions before this Board, the railroads have countered that such a process will prove to be too expensive for states to pursue actions on their own to correct unreasonableness across an entire state. A point to point adjustment to an unreasonable rate after a successful rate reasonableness case before this Board would necessarily require a series of successive actions by the state/shippers to address each unreasonableness rate in the state. A system that would require potentially hundreds of rate cases (or said another way - multi-millions of taxpayer dollars) to address a monopoly problem created by this Board and sanctioned by this Board in order to allow railroads to become 'revenue adequate.' This situation does not sound to many Governors, farm producers or rail shippers as a system that is protecting the public interest. Surely this Board can develop a system of inquiries and overall adjustments that will address entire states or regions of the country such as identified in this testimony and the GAO study.

It is time after successive GAO reporting, for this Board to recognize the uniqueness of agricultural transportation and address these issues. The GAO

findings are confirmed over and over, everyday in the hinterlands. The exploitation continues everyday.

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "Terry C. Whiteside". The signature is fluid and cursive, with a large initial "T" and "W".

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