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April 17, 2008

BY E-FILING

Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: Ex Parte No. 677, Common Carrier Obligation of Railroads

Dear Secretary Quinlan:

Enclosed for filing in the referenced docket please find the Comments of the Concerned Captive Coal Shippers.

Thank you for your attention to this matter.

Sincerely,



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

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

COMMON CARRIER OBLIGATION)
OF RAILROADS)

Ex Parte No. 677

**COMMENTS OF
CONCERNED CAPTIVE COAL SHIPPERS**

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Dated: April 17, 2008

Their Counsel

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

COMMON CARRIER OBLIGATION	)	Ex Parte No. 677
OF RAILROADS	)	
	)	

**COMMENTS OF
CONCERNED CAPTIVE COAL SHIPPERS**

The Concerned Captive Coal Shippers ("Concerned Coal Shippers") hereby provide these Comments in response to the Board's Notice of Public Hearing served February 22, 2008 ("Notice"). Therein, the Board expresses its intention to examine issues related to the common carrier obligation of railroads and the Board suggests that its purpose in doing so is to "highlight the importance of the common carrier obligation, to provide a better understanding of it, and to assist the Board in its monitoring and compliance work." Notice at 1-2.

The Concerned Coal Shippers commend the Board for its interest in underscoring the importance of the common carrier obligation through this proceeding. As the principal defender of the public interest with respect to the obligations of common carriers, the Board has a significant duty to ensure that railroads provide service – particularly service to captive shippers – in an adequate and responsive manner.

In this regard, the Concerned Coal Shippers particularly welcomed Chairman Nottingham's recent testimony before the Subcommittee on Railroads, Pipelines, and Hazardous Materials of the House Committee on Transportation and

Infrastructure during its March 5, 2008 hearing regarding investment in the rail industry. Therein, Chairman Nottingham emphasized that the Board “will remain vigilant and proactive to ensure that interstate commerce is not harmed by a short-sighted effort to extract large profits while neglecting the infrastructure and rail customers.” Testimony of Chairman Nottingham at 6; *see also id.* at 5 (“More importantly, any owner – even a current rail owner – has the capability of over-leveraging its firm’s assets, neglecting to maintain its capital infrastructure, or degrading service.”).

The Board should not countenance any suggestion that carriers should be permitted to excuse themselves from their common carrier obligation to certain shippers because it would be more economically advantageous to serve higher-margin traffic, particularly where the carriers’ own decisions have contributed to the supposed inability to serve all of their customers in an adequate manner. In addition, the Board should preclude common carriers from attempting to impose unreasonable pre-conditions on their service-in-the-form of requirements that shippers perform train-inspections (and assume liability for such inspections) or construct facilities simply for the operational convenience of the carrier.

* * *

The following comments include: (i) a description of the identity and interest of the Concerned Coal Shippers; (ii) an explanation of the general nature and interpretation of the common carrier obligation; (iii) a brief overview of the agency’s historic responses to service-related complaints and (iv) a discussion of the topics set forth-in the-Board’s Notice-in-this-proceeding.

IDENTITY AND INTEREST

A. The Concerned Coal Shippers

The Concerned Coal Shippers include the following entities: (1) the City of Grand Island, Nebraska; (2) Duke Energy Corporation; (3) Dynegy, Inc./LS Power Associates, L.P.; (4) Entergy Services, Inc.; (5) Intermountain Power Project; (6) Lafayette Utilities System; (7) Progress Energy, Inc.; (8) Seminole Electric Cooperative, Inc.; (9) South Mississippi Electric Power Association; and (10) Wisconsin Electric Power Company d/b/a We Energies. Each entity consumes large volumes of coal to generate electricity and relies upon rail carriers to transport that coal. Each, by virtue of its circumstances, has a strong interest in the subject matter of this proceeding.

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

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

(2) Duke Energy Corporation. Duke Energy is a diversified energy company with a portfolio of electric and natural gas businesses, both regulated and non-regulated, and an affiliated real estate company. Duke Energy supplies, delivers and processes energy for customers in North America and selected international markets.

Duke Energy owns two regulated electric companies which use rail transportation: Duke Energy Carolinas, LLC ("Duke Carolinas") and Duke Energy Indiana, Inc. ("Duke Indiana"). Duke Carolinas operates eight coal-fired electric generating stations, including one station (Marshall 2,090 MW) that is served by both Norfolk Southern Railway Corporation ("NS") and CSX Transportation, Inc. ("CSXT"), four stations that are served solely by NS (Allen - 1,140 MW, Belews Creek - 2,240 MW, Buck - 369 MW, and Dan River - 276 MW), and three stations that are served solely by CSXT (Cliffside - 760 MW, Lee - 370 MW, and Riverbend - 454 MW). Duke Indiana operates three coal-fired electric generating stations which use rail transportation, including one served by NS (Gibson - 3,340 MW), one served by CSXT (Cayuga - 1,062 MW), and one served by Canadian Pacific Railway (Wabash River - 860 MW). These eleven stations are capable of generating a total of 12,961 megawatts of energy.

(3) Dynegy, Inc./LS Power Associates, L.P. Dynegy, Inc. ("Dynegy") and its operating subsidiaries provide wholesale power, capacity and electric services to utilities, cooperatives, energy companies and retail electric customers in 15 states in the Midwest, Northeast and the West Coast. The company's power generation portfolio consists of approximately 20,000 megawatts of baseload, intermediate and peaking power plants fueled by a mix of coal, fuel oil and natural gas. Dynegy affiliates operate a number of existing coal-fired power plants that are served by rail. Dynegy and LS Power have other new power plant projects in various stages of construction that will be rail served.

LS Power Associates, L.P. ("LS Power") is part of a fully integrated development, investment and asset management group of companies focused on the power industry. LS Power and Dynegy have a joint venture relationship (the "DLS JV"). The DLS JV has several coal-fired power plant projects under development across the U.S. representing over 5,000-MW. These projects are expected to be rail-served and are expected to be fueled by coal produced in the Wyoming Power River Basin. LS Power, along with Dynegy, has a substantial interest in this proceeding as it relates to future rail rates and service to these power plant projects.

(4) Entergy Services, Inc. Entergy Services, Inc. is a wholly owned subsidiary of Entergy Corporation and acts as agent for the various Entergy electric utility operating subsidiaries with respect to the acquisition and transportation of coal. Entergy co-owns and operates five coal-fired generating units located in Arkansas and Louisiana that total 3,887 MW of capacity. These units include the White Bluff and Independence Stations in Arkansas, and the Nelson Station in Louisiana. Entergy is also a co-owner of one of the Big Cajun Station units located in Louisiana. All of these stations were designed to burn 100 percent PRB coal.

All of the Entergy operated coal units are served directly by railroad and have historically received virtually all of the coal that they burn via railroad. Entergy Services coordinates the transportation of approximately 15 million tons of coal per year to Entergy's various generating stations via Union Pacific Railroad Company and BNSF Railway Company.

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

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

IPP’s generating station is served only by the Union Pacific Railroad Company.

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

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

/

(7) **Progress Energy, Inc.** Progress Energy, headquartered in Raleigh, N.C., is a Fortune 250 diversified energy company with more than 24,000 megawatts of generation capacity and \$9 billion in annual revenues. The company's holdings include two electric utilities serving approximately 2.9 million customers in North Carolina, South Carolina and Florida.

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

(8) **Seminole Electric Cooperative, Inc.** Headquartered in Tampa, Florida, Seminole Electric Cooperative, Inc. is one of the largest non-profit generation and transmission (G&T) cooperatives in the United States. As a G&T, Seminole generates, sells and transmits bulk supplies of wholesale electricity primarily to its ten member distribution cooperatives. The Members, in turn, provide retail electric

distribution services to residential, commercial and industrial consumers. Seminole and its Members serve nearly 900,000 metered residential and business consumers (as of the end of 2007) in 46 of Florida's 67 counties. In 2007, Seminole generated annual revenue of more than \$1.2 billion. In 2007, more than 99% of Seminole's total operating revenues were generated from sales to its Members and approximately 70% of its Members' total retail sales were to residential consumers. In 2007, Seminole sold more than 17 billion kilowatt hours (kWh) of energy, 99% of which was comprised of energy sales to Seminole's Members. Seminole's aggregate coincident peak demand for the summer of 2007 and the winter of 2007/2008 were 3,833 MW and 4,104 MW, respectively.

The primary energy resource serving Seminole's member systems is the Seminole Generating Station. This 1,300 megawatt, coal-fueled power station is located in Northeast Florida in Putnam County, on the St. Johns River, south of Jacksonville. It consumes approximately four million tons of coal and/or petroleum coke per year. The Seminole Station is served exclusively by CSXT.

(9) South Mississippi Electric Power Association ("SMEPA"). SMEPA is a rural electric power association formed for the purposes of generating and transmitting electric energy. SMEPA is headquartered in Hattiesburg, Mississippi, and provides wholesale electric energy to eleven member-owners. The member-owners, in turn, are each rural electric distribution cooperatives who sell power through more than 400,000 meters to homes, farms, and businesses in 56 of the 82 counties in Mississippi. SMEPA recovers its cost of providing electric energy through wholesale rates to its

eleven members. Fuel costs, including the costs to transport fuel, are eventually passed on to the electric customers by the local cooperatives.

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

(10) Wisconsin Electric Power Company d/b/a We Energies. Wisconsin Electric Power Company d/b/a We Energies (“We Energies”) is a subsidiary of Wisconsin Energy Corporation and is headquartered in Milwaukee, WI. We Energies distributes and sells electric power at retail to more than one million electric customers in Wisconsin and the Upper Peninsula of Michigan, and also sells wholesale power, primarily to several municipal and cooperative utilities.

We Energies operates four coal-fired power plants, three in Wisconsin and one in Upper Michigan. Two of these power plants (the Pleasant Prairie Generating Station near Kenosha, WI and the Oak Creek Generating Station near Milwaukee) are

served by rail;¹ the coal origins for these plants are in the Wyoming Powder River Basin ("PRB"). The other two plants (the Valley and Presque Isle Generating Stations) are served by water and receive bituminous coal from Colorado (and, in the case of Presque Isle, also sub-bituminous coal from the PRB) that is transported by rail to rail/water transfer terminals on the upper Great Lakes. The PRB coal for the Pleasant Prairie and Oak Creek plants presently moves pursuant to Option 2 of Union Pacific's Circular 111 (which is due to expire at the end of 2008), and in the future this coal (as well as Colorado coal) may move pursuant to either a rail transportation contract or a common carrier pricing and service arrangement. Additionally, a new coal-fired power plant is currently under construction at the Oak Creek site. We Energies will operate this plant, which will begin commercial operation in 2009 and which initially will burn bituminous coal from Northern Appalachia.

**B. Interest of the Concerned Coal Shippers in
the Subject of the Common Carrier Obligation of Railroads**

The proper understanding and enforcement of the common carrier obligation are fundamental to the relationship between rail carriers and their captive coal transportation customers. As such, the Concerned Coal Shippers have a substantial interest in the subject of this proceeding.

Coal units are ordinarily base-load, must-run generating assets that play a vital role in meeting the nation's requirement for a reliable electric supply and transmission grid and the ever-growing demand for electric power. The coal needed to

¹ The Pleasant Prairie plant is served by both the Union Pacific and Canadian Pacific Railroads; the Oak Creek plant is served exclusively by and thus is captive to the Union Pacific.

fuel these units moves over the rails in very high volumes and utilities are heavily dependent on reliable rail service to deliver the coal in a timely manner. In the absence of proper enforcement of the common carrier obligation, the danger exists that rail carriers will elect to manage their various transportation obligations in a manner that maximizes railroad profits at the expense of timely service to some or all coal shippers. The absence of consistent rail service increases the risk that coal-burning utilities and their customers will incur substantial damages associated with the need to curtail coal-fired generation and to substitute higher-cost generation (if available) and/or purchased power.

COMMENTS

The scope of the common carrier obligation is a matter of great significance to rail shippers and certainly warrants the attention that the Board has directed toward it through this proceeding. Captive shippers depend upon the Board to ensure that common carrier railroads deliver coal in a timely manner. Absent vigilant oversight from the Board, there is a danger that the rail carriers' economic self-interest would prompt them to dedicate more of their transportation resources to meeting the needs of competitive traffic to the detriment of their captive traffic. That same economic self-interest could prompt carriers to use a disproportionate share of their resources to favor their highest-margin traffic or to meet the service needs of traffic as to which the carriers have made specific "on-time" delivery commitments (*e.g.*, intermodal traffic). These dangers are the

most acute, of course, in situations in which demands for rail service on a given corridor exceed present capacity.²

Even in the absence of outright favoritism of one shipper's traffic over another's, however, an improperly narrow or deferential view of the common carrier obligation would create the possibility that a broad cross-section of shippers could suffer service degradation. As discussed in greater detail below, the possibility that carriers have intentionally permitted their capacity to fall below demand levels in certain markets only increases the degree to which the Board's protection of captive shippers is required.

An overly permissive interpretation of the fundamental service requirements of a common carrier effectively would allow the railroads to self-regulate the industry and would eviscerate the statutory common carrier obligation. In this regard, a carrier that is free from meaningful oversight regarding the quality and adequacy of the service that it performs is largely free from any regulation whatsoever since even the most zealous rate regulation would be of little value to the public in the absence of a genuine service obligation. In fact, if the notion of economically motivated service prioritization were permitted to rise to the level of a Board-approved policy, the very act of obtaining a maximum rate prescription from the Board could subject a captive shipper

² In this regard, it is not sufficient to assume that the carriers' self-interest is necessarily consistent with the public interest that the Board is obligated to protect. *See* 49 U.S.C. § 10101(3) (it is the policy of the United States Government to promote an efficient rail transportation system); *id.* at § 10101(4) (it is the policy of the United States Government to ensure the development and continuation of a sound rail transportation system)

to the most egregious service discrimination by a carrier seeking to excuse itself from compliance with its common carrier obligation.³

As the Board is aware, there has been a substantial increase in the volume of coal traffic moving in common carrier service during the past four years. This increase has resulted in large measure from the two western carriers' decisions to impose public pricing (*i.e.*, UP Circular 111 and BNSF Pricing Authority 90068) upon their Powder River Basin coal transportation customers. Although recent indications are that this trend toward public pricing may have ended in the wake of the Board's consideration of the distinction between common carrier and contract service,⁴ it nevertheless remains the case that a substantial volume of coal traffic now moves in common carrier service. The shippers receiving their traffic via public pricing are entirely dependent upon the Board for ensuring the railroads' compliance with the common carrier service obligation.

Eastern coal shippers likewise are dependent on the Board to maintain the historic understanding of the scope of the common carrier obligation. Service quality has been an issue for the eastern carriers as well, with periods of substantial service degradation both in the time period following the Conrail transaction and in 2003-2004 timeframe. Moreover, recent developments with regard to substantial investments by The Children's Investment Fund and 3G Capital Partners in CSXT raise concerns that investors may seek to exert control over the operations of railroads in a manner that

³ During the time in which the Board considers a maximum rate case, and upon the prescription of a maximum reasonable rate, the Board constitutes the only means of recourse for a complainant shipper in the event of service inadequacies

⁴ See *Interpretation of the Term "Contract" in 49 U.S.C. 10709*, STB Ex Parte No. 669 (Notice of Proposed Rulemaking served March 29, 2007 and STB served March 12, 2008); *Rail Transportation Contracts Under 49 U.S.C. 10709*, STB Ex Parte No. 676 (STB served March 12, 2008)

would compromise the quality of the common carrier service provided to captive customers in the interest of short-term profits or speculation. *Accord* Statement of Norfolk Southern Railway Company, *Hearing on Rail Infrastructure and Capacity Requirements*, STB Ex Parte No. 671 (April 4, 2007), at 16 (“[T]here are threats to the railroad industry’s ability to continue to invest. The participation of financial entities looking to make a quick buck rather than taking the long view is one threat.”) (emphasis added).

Indications also exist that prioritization issues in the East may be having an impact on service with major increases in CSXT’s coal export traffic coinciding with a reduction in service quality to CSXT’s domestic utility coal shippers. As with service prioritization issues experienced by customers of the western carriers, the possibility that lucrative export coal may be impeding the ability of utility shippers in the East to receive timely service is a subject worthy of Board consideration.

In addition to the threats that exist in the form of degraded service quality through restrictions on rail capacity spending, captive coal shippers also face new impositions from common carrier railroads in the form of efforts to transfer responsibility for train inspections – and potential liability – from the railroads to shippers. Coal shippers also are facing demands from carriers for the construction of railroad facilities to relieve operating burdens that otherwise would be borne by the railroads.

Finally, even where contracts are offered by railroads, the common carrier obligation serves as a critical backstop on the minimum level of service that a shipper

may demand from a carrier. Any minimization of the common carrier service obligation thus could have a collateral impact on the interests of contract shippers as well.

I. The Common Carrier Obligation

A. The Statutory Duty to Provide Service on Reasonable Request

Title 49 of the United States Code provides that “[a] rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request.” 49 U.S.C. § 11101(a). The Board and the Commission before it have held that a reasonable request is one that is specific as to the volume, commodity, and time of shipment. *Meyer v. North Coast R.R. Authority*, STB Finance Docket No. 34337, at 4 (STB served July 27, 2005) (citing *LI Acquisition Corp. – Abandonment Exemption – In Montgomery County, PA*, Docket No. AB-405 (Sub-No. 1X) at 9 (ICC served Aug. 23, 1994) and *The Atchison, Topeka and Santa Fe Ry. – Abandonment Exemption – In Lyon County, KS*, Docket No. AB-52 (Sub-No. 71X) at 6 (ICC served June 17, 1991)).

It is imperative that the common carrier service provided by a carrier in response to such a request be adequate to meet the shipper’s needs. While the notion of “‘adequate service’ (as opposed to just ‘service’)” is not specifically included within the language of section 11101, the requirement that service be adequate is “a part of the general definition of common carrier obligations.” *Granite State Concrete Co. v. STB*, 417 F.3d 85, 92 n.10 (1st Cir. 2005) (citing *Nat’l Grain and Feed Ass’n v. United States*, 5 F.3d 306, 311 (8th Cir. 1993) and *Wales Transp., Inc. v. ICC*, 728 F.2d 774, 780 n.9

(5th Cir. 1984)); *see also* 49 U.S.C. 11121(a)(1) (“A rail carrier providing transportation subject to the jurisdiction of the Board under this part shall furnish safe and adequate car service . . .”).

The statutory common carrier provision currently set forth in 49 U.S.C. § 11101(a) has been in place for more than 100 years, having first been added to the Interstate Commerce Act in 1906. Early in the history of the Interstate Commerce Commission (*i.e.*, prior to 1906), Congress left the common carrier obligation largely as a matter of common law. In this regard, the “original Act to Regulate Commerce merely stipulated that the carriers must provide ‘reasonable and equal facilities for the interchange of traffic,’ their general service obligation being governed by the common-law duties of common carriers.” 1 I.L. Sharfman, *The Interstate Commerce Commission: A Study in Administrative Law and Procedure* 96 n.32 (The Commonwealth Fund 1931) (“*Sharfman*”). Not until the “enactment of the 1906 legislation [*i.e.*, the Hepburn Amendments, 34 Stat. 584] was there an express statutory recognition of the obligation ‘to provide and furnish (such) transportation upon reasonable request therefore.’” *Id.*

In the years following this initial enactment of the common carrier obligation, the Commission and Congress continued to address the importance of adequate transportation service and the corresponding need for regulatory oversight to ensure that common carriers’ actions were consistent with the public interest. For example, in its 1916 Annual Report, the Commission emphasized the importance of federal regulatory oversight and commented upon the danger of leaving questions of service adequacy solely to the discretion of the carriers themselves:

It seems to us beyond question that largely increased railroad facilities are necessary to adequately handle the commerce of the country, and that in some way those facilities must be provided. It seems, also, that it would be sound public policy to exhaust all reasonable efforts to secure the highest possible degree of efficiency from the facilities already possessed. Obviously this cannot be done by leaving these matters for determination by unanimous vote of all the carriers in the country. . . . From these facts and experiences and a study of these considerations over a substantial period we are led to the conclusion that a reasonable degree of the desired and necessary improvement can be reached within any reasonable time only by vesting power to regulate these questions for all railroads in the appropriate federal body, and also providing means by which rules and regulations promulgated can be enforced.

See Sharfman at 98 n.36 (quoting the Commission's *Annual Report* for 1916 at pp. 67-74) (emphasis added).⁵

Similarly, during the time period of federal control of the railroads, the Commission commented to Congress that “[t]ransportation service and adequate service are demanded by the welfare, the industry, the commerce, and the social life of the whole people.” *Sharfman* at 99 n.38 (quoting the Commission's Memorandum to the Senate Committee on Interstate Commerce in conjunction with the *Hearings on Extension of Tenure of Government Control of Railroads*, 65th Cong., 3d Sess.).⁶

⁵ The suggestion that carriers should be permitted to use their own economic interests to determine which shippers will, and which shippers will not, obtain common carrier service in an adequate manner represents a contradiction of the position taken by the Commission in this Report.

⁶ Federal control of the railroads existed between January 1, 1918 and March 1, 1920. *See Railroad Commission of Wisconsin v Chicago, B & Q R R*, 257 U.S. 563, 583 (1922) (“*Railroad Commission of Wisconsin*”). In this case, the Supreme Court explained that prior to federal control, the railroads had “availed themselves of the weakness and cumbrous machinery of the original [Interstate Commerce Act of 1887] to defeat its purpose, and this led to various amendments Whatever the causes, the fact was that the carrying capacity of the railroads did not thereafter develop proportionately with the growth of the country, and it became difficult for them to secure additional investment of capital on feasible terms. When the extraordinary demand for transportation arose in 1917, the Congress and the President concluded to take over all the railroads into the management of the Federal Government

In accordance with the then-existing statutory formulation of the common carrier obligation (49 U.S.C. § 1(4)), it was recognized that it was the “duty of a railway to afford the shipper desiring its service a reasonable opportunity to deliver his freight for shipment, to transport the freight with reasonable dispatch and safety, and to place it in a reasonably accessible place for the consignee to receive.” 1 *Interstate Commerce Act Annotated*, at 255 (1930); *id.* (“Custom has largely determined what is reasonable service.”).

Congress shared the Commission’s view of the importance of ensuring adequate common carrier service, and through its amendment of the Interstate Commerce Act in 1920, emphasized the need for the Commission to foster improved common carrier service. In this regard, the adoption of the Transportation Act of 1920, 41 Stat. 456, marked the “beginning of a new approach in railroad regulation. . . . The basic contribution [of this Act, as] evidenced by the character of many of its provisions, lay in the statutory recognition of a positive public responsibility, in the exercise of the Commission’s regulating functions, toward the establishment and maintenance of an adequate transportation service.” *Sharfman* at 177; *id.* at 178 (“The 1920 Act sought to ensure, also, adequate transportation service.”); *see also Railroad Commission of Wisconsin, supra*, 257 U.S. at 585 (1922) (“[The Transportation Act of 1920] imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United

. . . .” *Id.* at 582-83. Notably, the government did not react to the significant shortfall in railroad capacity at the time simply by excusing the railroads from their common carrier obligations.

States.") (emphasis added). Among other changes, the 1920 Act required the Commission to give "due consideration to the 'transportation needs of the country'" and to promote railroad service "in the interest of the public and the commerce of the people." *Akron, C. & Y. Ry v. United States (The New England Division Case)*, 261 U.S. 184, 189 n.6 (1923) (quoting sections 402 and 422 of the 1920 Act).

The United States Supreme Court also was active during this time period in helping to shape the understanding of the scope of the common carrier service obligation, and in particular, in formulating an understanding of the situations in which a carrier will be relieved from its service obligation as the result of heightened demand levels. For example, in *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 133-34 (1915), the Supreme Court explained that the proper understanding of the common carrier obligation would exempt a carrier from liability if "sudden and great" demands which "it had no reason to apprehend would be made" prevented it from providing service:

Ordinarily a shipper, on reasonable demand, would be entitled to all the cars which it could promptly load with freight to be transported over the carrier's line. But that is not an absolute right, and the carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made, and which it could not reasonably have been expected to meet in full. The common law of old, in requiring the carrier to receive all goods and passengers, recognized that 'if his coach be full' he was not liable for failing to transport more than he could carry. . . . The same principle is applicable to those who transport freight in cars drawn by steam locomotives. The law exacts only what is reasonable from such carriers, but, at the same time, requires that they should be equally reasonable in the treatment of their patrons.

Pennsylvania R.R. v. Puritan Coal Mining Co., 237 U.S. 121, 133 (1915) (“*Pennsylvania R.R.*”) (emphasis added).⁷ In addition, the Supreme Court in *Pennsylvania R.R.*

explained that in situations in which “unexpected” demand exceeds capacity, carriers are bound to treat their customers “fairly” if not “identically,” and that in the process of determining whether fairness requires some modification to a proportionate distribution, consideration may be made of the needs of a particular customers or class of customers:

In case of car shortage occasioned by unexpected demands, they are bound to treat shippers fairly, if not identically. In determining how the inadequate supply shall be distributed, it might be necessary to consider the character of the freight tendered -- whether perishable or staple, and whether a necessity of life, needed in crowded cities, and the like. In the distribution of cars to coal companies it might be necessary to determine whether account should be taken of system cars, foreign cars, private cars, and the company’s own coal cars. In many cases the determination of such an issue would call for the exercise of the regulating function of the Commission.

Id. at 133-34 (emphasis added). Notably, the Supreme Court did not suggest that carriers could engage in economically based metering to determine their allocation systems in times of scarcity.

Given the many different contexts in which questions regarding the scope of the common carrier obligation could arise, the Supreme Court at that time also emphasized the fact that the interpretation of the obligation was a matter that fell within the competence of the Commission:

⁷ As discussed *infra*, there can be no reasonable suggestion that a carrier’s affirmative decision to limit its capacity spending such that anticipated demand increases will generate a spike in prices can constitute a “sudden and great” demand which “could not reasonably have been expected.”

The prohibitions of § 3 of the commerce act require that cars shall be fairly allotted to shippers without unjust discrimination or unfair preference. But the statute does not define what is the proper method of distribution in case of car shortage, and at the time of the transactions out of which this suit arose, no general rule had been adopted by the carriers or promulgated by the Commission. As late as 1910, it was said . . . that the question was in a state of flux, and an examination of the decisions in the numerous cases brought about that time will show that it was a matter about which there was much difference of opinion. In some cases it was held that private cars and fuel cars of foreign railroads, consigned to particular mines should not be counted in making the distribution. Others held that such cars should be counted, but that if the foreign cars, or those owned by the private corporations, exceeded their percentage, the excess might be retained by those coal companies. This view was adopted by the Commission . . . It was, however, recognized that there could be no hard and fast rule, and that circumstances might arise which would otherwise warrant a departure so as to enable the carrier to meet emergencies arising from a strike on its own road, or embargoes by connecting lines which refused to haul certain articles of merchandise, in order to supply communities with necessities of life. . . . These rulings as to the validity of a particular practice and the facts that would warrant a departure from a proper rule actually in force are sufficient to show that the question as to the reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the Commission.

Morrisdale Coal Co v Pennsylvania R.R , 230 U.S. 304, 312-13 (1913) (emphasis added).

Subsequent interpretations of the statute by the courts and by the agency consistently have affirmed the importance of compliance with the common carrier obligation. -See, e.g., *American Trucking Associations, Inc. v. The Atchison, T. & S.F. Ry.*, 387 U.S. 397, 407 (1967) (“[Railroads’] obligation as common carriers is

comprehensive and exceptions are not to be implied.”); *Winnebago Farmers Elevator Co. v. Chicago and North Western Transp. Co.*, 354 I.C.C. 859, 868 (1978) (“*Winnebago*”) (“We believe that the power to enforce the duty of adequate service is imperative to our ultimate purposes and responsibilities, and thus that we have jurisdiction to enforce section 1(4).”); *id.* at 872 (“[T]he duty to provide ‘transportation’ under section 1(4) . . . includes not only transportation services provided and vehicles used, but also ‘all instrumentalities and facilities,’ such as tracks. Thus, section 1(4) is broad enough to encompass the entire subject matter of the complaint.”).

B. Congressional Retention of the Common Carrier Obligation

It is noteworthy that despite the many instances in which it has revisited the Interstate Commerce Act throughout its history, and despite the fact that efforts have been made to modify or eliminate the statutory common carrier obligation, Congress has consistently retained the fundamental duty of a common carrier to provide service on reasonable request. *See, e.g.*, ICC Termination Act of 1995, Report of the Committee on Conference, Report No. 104-422 (Dec. 18, 1995), at 183 (the House provision adopted by the Committee in a modified form “retains the existing legal duty of a rail carrier [set forth in Section 11101] to provide transportation upon reasonable request – the ‘common carrier obligation.’”); Staggers Rail Act of 1980, Report of the Committee on Conference, Report No. 96-1430 (Sept. 29, 1980), at 37, 116 (leaving the fundamental common carrier obligation intact despite the authorization of contract service).

Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute

without change. *See, e.g., Lorillard v Pons*, 434 U.S. 575, 580-81 (1978) (citing *Albemarle Paper Co. v Moody*, 422 U.S. 405, 414 n.8 (1975) and *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951)); *id.*, 434 U.S. at 581 (“So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.”). Similarly, courts have observed that “a prior interpretation of a statute must be deemed to have received legislative approval by the reenactment of a statutory provision if done without material change.” *Marubeni-Iida (America), Inc. v. Toko Kaiun Kabushiki Kaisha*, 327 F. Supp. 519, 522 (S.D. Tex. 1971) (citing *United States v Dakota-Montana Oil Co.*, 288 U.S. 459, 466 (1933)).

The retention of the common carrier obligation in the Staggers Act should be regarded as particularly significant because certain sectors at that time (including the Department of Transportation) appeared to be prepared to help maximize railroad profits in a manner that would lead to the elimination of the statutory obligation and would excuse the railroads from service requirements. In this regard, the written testimony of the Grain and Feed Association of Illinois submitted in Hearings before the House Subcommittee on Transportation and Commerce is instructive. This testimony characterized the potential removal of the common carrier obligation from Title 49 as the “overriding issue” then under consideration and suggested that while adequate service and railroad profits were not incompatible goals, priority as to service must be retained in the event of any perceived conflict:

Insofar as the railroad service obligation and discrimination laws are concerned, the essence of the policy issue is whether the common carrier service obligation and fairness requirements should be retained, or whether they should be minimized or eliminated in order to hasten the achievement of increased railroad profitability. . . . We think that this apparent dilemma [between adequate service and profitability] can be resolved without sacrificing either goal. We make concrete suggestions in this statement toward that end. However, to the extent that those goals are thought to be irreconcilable, we submit that the nation's rich tradition of fairness and justice for all of its citizens dictates full retention of the common carrier standards

The common carrier service obligation is not a radical or oppressive concept. The principle is that a railroad is obligated to serve all shippers equally, subject only to the qualification that it be able to make a profit in doing so. The extent of the profit is immaterial to application of the principle.

. . . Many aspects of the House Bill would significantly retreat from the common carrier obligation, or would abandon it entirely. To that extent, the Bill reflects the views of the current Administration, through the Department of Transportation (DOT), and many railroads who want to junk the common carrier concept in favor of a quick and dramatic increase in railroad profitability. Several theories have been advanced by DOT and its railroad allies in favor of the economic goal of maximizing railroad profits at the expense of the common carrier obligation. None of such theories, however, supports the public policy of sacrificing the common carrier concept.

See Statement of the Grain and Feed Association of Illinois – Hearings before the Subcommittee on Transportation and Commerce of the Committee on Interstate and Foreign Commerce, House of Representatives, 96th Cong., 2d Sess., Regulatory Reform Legislation for the Rail Industry, March 31 and April 2, 1980, No. 96-186, at 133-35; id. at 138 (“The common carrier concept is the keystone of railroad law. . . . [T]here is

neither a need, nor justification for legislation which would retreat from that concept or which would abrogate it.”).

Again, the decision to retain the common carrier obligation despite arguments that it is an impediment to profitable railroading constitutes persuasive evidence of a Congressional endorsement of the historic understanding of the obligation.

C. Additions to the Statute

Congress also has supplemented the original formulation of the obligation in the statute in two respects, neither of which compromises the integrity of the basic common carrier duty. In fact, the more recent of the two additions emphatically supports the view that carriers can be held responsible for actions which compromise their ability to provide common carrier service.

First, through Section 222 of the Staggers Rail Act of 1980, Congress added language to 49 U.S.C. § 11101(a) explaining that “[a] rail carrier shall not be found to have violated this section because it fulfills its commitments under contracts approved under section 10713 of this title before responding to reasonable requests for service.” *See Staggers Rail Act of 1980, Report of the Committee on Conference, Report No. 96-1430 (Sept. 29, 1980), at 37.* In explaining the addition of this language to the statute, the Conference Committee suggested that “this provision does not abrogate the power of the Commission to refuse to approve contracts on the grounds that they will impair a carrier’s ability to meet its common carrier obligation.” *Id.* at 116.

Moreover, the Staggers Act addressed the addition of this new language under the heading “Service During Periods of Peak Demand.” *Id.* at 37, 116. It is

entirely reasonable to infer from this heading that Congress did not intend to create an ongoing, blanket exception to the common carrier obligation to apply when carriers believe that reducing capacity spending would help to enhance their pricing power. To the contrary, this additional language is consistent with the notion expressed by the Supreme Court in *Pennsylvania R.R.*, *supra*, that carriers should be excused when an unexpected spike in demand temporarily exceeds the capacity of the system.

Second, the Interstate Commerce Commission Termination Act of 1995 added language to Section 11101(a) stating that “[c]ommitments which deprive a carrier of its ability to respond to reasonable requests for common carrier service are not reasonable.” Leaving aside, for the moment, the question regarding the precise meaning of the phrase “respond to reasonable requests for common carrier service,” it is evident that the language that Congress added to Section 11101 in 1995 reflects an awareness that it is possible for a carrier to take actions in terms of business development on its system (to an extent that exceeds the rate of capacity investment) that will preclude the carrier from claiming that its violation of the common carrier obligation should be excused. *See also* ICC Termination Act of 1995, Report of the Committee on Transportation and Infrastructure, H.R. Rep. No. 104-311 (Nov. 6, 1995), at 103 (“[T]he focus on ‘reasonable’ contractual commitments is intended to clarify that, although a casual requester of service cannot legally demand equal treatment with another shipper who has made a prior contract for service, the carrier may not render itself incapable of reasonably responding to such casual requests for common carrier service, such as by effectively divesting itself of control of its car fleet through committing all or virtually all

of the fleet under prior contracts.”) (emphasis added). The language of the ICCTA Conference Report regarding “prior” contracts suggests that contract service per se does not guarantee priority of service over common carrier service, but instead, the key issue is whether a contract existed “prior” to a “casual” request for common carrier service.

II. The Agency’s Authority and Historic Responses to Requests for Relief from Inadequate Service

Section 11123 of Title 49 provides that the Board may take action to promote commerce and service to the public if it determines that “shortage of equipment, congestion of traffic, unauthorized cessation of operations, or other failure of traffic movement exists which creates an emergency situation of such magnitude as to have substantial adverse effects on shippers, or on rail service in a region of the United States, or that a rail carrier providing transportation subject to the jurisdiction of the Board under this part cannot transport the traffic offered to it in a manner that properly serves the public.” 49 U.S.C. § 11123(a). The actions that the Board may take upon making such a determination include: (i) directing the handling, routing, and movement of the traffic of a rail carrier over its own or other railroad lines; (ii) requiring joint or common use of railroad facilities; (iii) prescribing temporary through routes; or (iv) giving directions for preference or priority in transportation, embargoes, or movement of traffic under permits. *Id.*

The Board took action to protect the quality of rail transportation service in response to the western rail service crisis that followed the consummation of the Union Pacific/Southern Pacific merger. Specifically, in the proceedings associated with STB

Service Order No. 1518, the Board determined that there was a “transportation emergency” in the west, and that the Board was required to exercise its authority under 49 U.S.C. § 11123 to facilitate the resolution of that crisis, particularly with respect to the Houston area. *See Joint Petition for Service Order*, STB Service Order No. 1518 (STB served Oct. 31, 1997). The specific relief that the Board imposed in this proceeding consisted of the suspension of contract obligations, and the award of trackage rights to help mitigate congestion in the vicinity of Houston, Texas. The Board also imposed various reporting requirements upon Union Pacific to assist in the Board’s ongoing monitoring of the situation.⁸

In other instances, however – including instances related to the same UP/SP service crisis at issue in the Service Order No. 1518 proceeding – the Board declined to grant relief in response to claims of service inadequacy, instead finding that no governmental intrusion was warranted or that relief should not be granted on a shipper-by-shipper basis. *See, e.g., Joint Petition for a Further Service Order*, STB Service Order No. 1518 (Sub-No. 1) (STB served July 31, 1998). In the Service Order No. 1518 (Sub-No. 1) proceeding, the Board rejected, *inter alia*, a request for relief filed by Entergy Services, Inc. and Entergy Arkansas, Inc., which had asserted that “UP’s coal transportation services to its plant are seriously deficient, and have put its continued generation operations at risk.” *Id.* at 2. In reaching its decision, the Board first explained that Entergy had complained that “it [had], on three separate occasions in the past 8

⁸ *See also Expedited Relief for Service Inadequacies*, Ex Parte No. 628 (STB Final Rules served Dec. 21, 1998) (issuing final rules establishing procedures for obtaining temporary alternative rail service when there has been a substantial measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier)

months, asked the Board to grant BNSF, which has overhead trackage rights over a nearby UP line, direct access to the White Bluff plant, but that the Board [had] not acted on its requests.” *Id.* Ultimately, however, the Board rejected Entergy’s request for relief, commenting that “our authority to issue an emergency service order is limited to emergency situations. . . . In this case, service may not be at the levels that Entergy would prefer, but that does not entitle it to an emergency service order.” *Id.* at 7.

Similarly, in *Petition for Emergency Service Order*, STB Service Order No. 1523 (STB served Nov. 24, 1999), the Board rejected the request of Acme Steel Company for an emergency service order to address problems that arose in the Chicago area “during the transitional period since the operations of the Consolidated Rail Corporation (Conrail) were taken over by CSXT and NS.” *Id.* at 1. In its decision, the Board found that Acme’s request for relief was inappropriate because the carriers had declared that they were expending substantial effort to attempt to solve the problem and had met with Acme on more than one occasion:

Acme recognizes, as it must, that the current situation is not similar to that which compelled the Board to declare an emergency in the West, but it nevertheless seeks (petition at 9) an emergency order. Oddly, however, Acme does not seek the sort of relief provided for in the emergency service provisions of the law, and the relief that it does seek – an order “direct[ing] NS, CSXT and IHB . . . to immediately begin cooperating in coordinating their facilities to allow the prompt movement of hot metal between South Chicago and Riverdale” – is not necessary.[]

. . . [Acme] wants us to declare an emergency so that we can then issue an order on Acme’s behalf directing the carriers to cooperate. We do not see the need to issue such an intrusive order here: the carriers indicate that substantial

effort is being made to cooperate and coordinate, and Acme's own petition indicates that, on more than one occasion, it has held meetings that were attended by representatives of all three carriers. Thus, such unnecessary government involvement in private business would be inappropriate.

-Id.-at.2-3.

As the foregoing indicates, the Board's explanation suggests a general unwillingness to intrude upon the operations of a carrier in all but the most widespread and significant service crises. It is imperative that the Board exercise its jurisdiction over service complaints in a meaningful manner, and should not limit relief to situations of general, nationwide service degradation. Similarly, the Board should not decline to provide shippers with relief from service problems simply because carriers have agreed to meet with a shipper or have asserted that they are making efforts to improve service.

III. Topics Identified by the Board

The Concerned Coal Shippers will address the subjects identified in the Board's Notice in this proceeding that are relevant to their interests as captive coal shippers.

A. Service Limitation Resulting from a Capacity Constrained Environment/Economically Motivated Service Reductions and Metering of the Demand for Service

In the present industry environment, coal shippers are particularly troubled by issues regarding capacity-related service limitations, economically motivated service

reductions, and the potential “metering” of the demand for railroad service.⁹ The Concerned Coal Shippers respectfully submit that approval of the notion that a carrier may rely upon its failure to invest adequately in capacity (or its desire to maximize revenues) as a justification for inadequate service would completely eviscerate the common carrier obligation.

**1. Service Limitation Based on Capacity
Constraints and STB Ex Parte No. 671**

The first topic set forth in the Board’s Notice in this proceeding relates to “service limitation resulting from a capacity constrained environment.” Notice at 2. As an initial matter, the Concerned Coal Shippers note that there is no evidentiary basis for a general conclusion by the Board that rail capacity is constrained, or at least that it is constrained in the aggregate. To the contrary, indications exist that – to the extent that certain rail corridors may be experiencing demand that exceeds their capacity – this situation is the result of the railroads’ interest in deferring capacity spending as a means of improving pricing power.

In many respects, the instant proceeding regarding the common carrier obligation of railroads is necessarily intertwined with the Ex Parte proceeding that the Board instituted in 2007 to consider the subject of railroad capacity. *See Rail Capacity and Infrastructure Requirements*, STB Ex Parte No. 671 (Notice of Public Hearing served March 6, 2007). In its original Notice in that earlier proceeding, the Board indicated that it would examine issues related to rail traffic forecasts and infrastructure

⁹ Topics (1) and (5) in the Board’s Notice are interrelated, and the Concerned Coal Shippers will address them together

requirements. Ex Parte No. 671 Notice at 1. In addition, the Board observed that “[t]he convergence of increased demand with constrained capacity has highlighted the need to address what further infrastructure investment will be required to meet these demands.” *Id.*-at 2.

Having considered the question of railroad capacity in 2007, the Board now has turned its attention, in part, to the question of whether railroads should be relieved of their service obligations when their investment in capacity has been insufficient. As the Concerned Coal Shippers describe in greater detail below, the historic standards regarding exemption from the common carrier obligation do not contemplate that violations will be excused where capacity constraints are sustained, predictable, and in fact, the intended result of railroad campaigns to generate scarcity on their lines.

In this regard, the Concerned Coal Shippers explained in their Comments in Ex Parte No.-671-that the railroads’ practice of pursuing “just in time” capacity enhancements can leave coal shippers subject to significant effects from any disruptions in rail service. *See* Concerned Coal Shippers Comments at 24. The Concerned Coal Shipper further commented that this pattern of just in time construction has the additional effect of facilitating the railroads’ efforts to increase rates by restricting the potential supply of transportation service when demand for that service is increasing. *Id.* (citing United States Government Accountability Office, Report GAO-07-94, “Freight Railroads: Industry Health Has Improved, but Concerns about Competition and Capacity Should be Addressed”-(October 2006) at-15- (“Several factors could have contributed to recent rate increases. . . . After years of reducing the size of its workforce and shedding

track capacity, the industry is increasingly operating in a capacity-constrained environment in which the demand for its services exceeds its capacity in some areas.”)).

Various statements from railroad executives that the Concerned Coal Shippers identified to the Board confirmed the GAO observation regarding the railroads’ decisions to limit capacity spending. For example, the Concerned Coal Shippers noted in their Comments (*id.* at 24-25) that UP’s Executive Vice President-Marketing and Sales, Mr. Jack Koraleksi, explained in a public notice to UP’s customers that UP’s insufficient service was the result of an affirmative decision on UP’s part to constrain its spending on crews. *See* Letter from Jack Koraleski to UP Customers (April 15, 2004) (“Koraleski Letter”) (“Today, we find ourselves in the position of having more business in certain geographic areas that we can handle at this time, and the resulting pressure on our resources has caused a deterioration of service. . . . The problem started with a shortage of train crews. . . . [W]e made the decision to keep our manpower tight.”) (emphasis added).

The solution that UP chose to implement in order to alleviate the capacity shortage that Mr. Koraleski identified was to ration service based on the price that customers were willing to pay, or stated differently, UP elected to maximize its revenues by limiting capacity spending and driving up the price for the limited service that it chose to provide. *See* Koraleski Letter at 2 (“With the current demand for transportation far outstripping the available supply, the most effective tool we have to control volume growth on our railroad is price. -As such, we are taking pricing actions to bring supply and demand into balance.”). In this same regard, when explaining the carriers’ responses

to the recent capacity problems during a presentation in 2006, Vice Chairman Mulvey acknowledged this situation, and observed that the carriers were engaged in “[p]rice rationing of available capacity” and that the railroads were “choosing who they will serve” STB Vice Chairman Francis P. Mulvey, “Optimal Investment in Rail Infrastructure: The Divergence of Public and Private Interests,” Electric Utility Consultants, Inc., Mesa, Arizona (March 28, 2006).

The Concerned Coal Shippers further reported in their Ex Parte No. 671 submission that BNSF’s CEO Mr. Matthew Rose had commented during a January 24, 2006 Analysts’ Conference Call that “we want to keep a fairly tight rein on capacity” and that “[w]e’re not going to overbuild the network.” Concerned Coal Shipper Comments at 25 (quoting Rail StockWatch, Issue No. 86 (Feb. 9, 2006), at 3).

Issues have been raised regarding capacity spending by eastern carriers as well. For example, in his May-10, 2007-letter-to-the Board-in *Rail Capacity and Infrastructure Requirements*, STB Ex Parte No. 671, CSX’s Peter J. Shudtz (Vice President, Federal Regulation & Washington Counsel) observed that CSXT intended to increase its historic capital expenditure levels (*i.e.*, typically about one billion dollars per year) to as much as \$1.7 billion per year by 2010, but Mr. Shudtz cautioned that “[c]andidly, however, we continue to believe that even this increase in capital expenditure will not be enough to meet the demands for rail service that we anticipate farther into the future.” *Id.* at 2.

Similarly, Norfolk Southern explained to the Board in its Comments in Ex Parte No. 671 that “[w]ithout sufficient returns and sufficient revenues, NS may not be

able to continue to invest to meet tomorrow's transportation needs." *See* Statement of Norfolk Southern Railway Company, *Hearing on Rail Infrastructure and Capacity Requirements*, STB Ex Parte No. 671 (April 4, 2007), at 2; *see also id.* at 2-3 ("Threats to railroad capacity and to railroads' ability to invest in infrastructure abound today."); *id.* at 5 ("[T]he biggest challenge NS continually faces is having the resources to maintain its existing infrastructure and to expand that infrastructure to meet the increasing demand for its service and the changing shipping patterns and needs of its customers."); *id.* at 15 ("[T]he resources currently available to railroads . . . will not be enough to meet all the demand for freight growth.") (emphasis added).

Carriers, of course, have an obligation to ensure that their capacity is adequate to meet reasonably anticipated service demands. *See Winnebago, supra*, 354 I.C.C. at 868 ("We believe that the power to enforce the duty of adequate service is imperative to our ultimate purposes and responsibilities, and thus that we have jurisdiction to enforce section 1(4)."); *id.* at 872 ("[T]he duty to provide 'transportation' under section 1(4) . . . includes not only transportation services provided and vehicles used, but also 'all instrumentalities and facilities,' such as tracks. Thus, section 1(4) is broad enough to encompass the entire subject matter of the complaint.").¹⁰

It is not reasonable for carriers to claim surprise at increasing volumes on key corridors where the historic pattern reflects consistent and ongoing volume increases.

¹⁰ The obligation to provide adequate track facilities also is evident from a review of the various provisions of Title 49. In particular, Title 49 provides that a "rail carrier" is "a person providing common carrier railroad transportation for compensation" (49 U.S.C. § 10102(5)) and further provides that the term "railroad" includes "the road used by a rail carrier and owned by it or operated under an agreement." 49 U.S.C. § 10102(6). Finally, Title 49 states that "transportation" includes a "locomotive, car, . . . yard, property, [or] facility . . . related to the movement of passengers or property . . . by rail . . ."

The carriers' desire to maximize their traffic volumes without an accompanying increase in infrastructure generates a significant risk of degraded service to captive coal shippers who cannot divert their traffic to other transportation modes.

2. Common Carriers May Not Rely Upon Economic Considerations to Justify a Failure to Provide Adequate Service

In its Notice, the Board requests comments on the subject of "economically motivated service reductions and metering of the demand for service." Notice at 2. The Concerned Coal Shippers regard this subject as profoundly significant and consider any carrier effort to reduce or "meter" service for economic reasons to be a direct violation of the common carrier obligation as consistently understood by the agency and the courts.

Subject to the limitations on maximum reasonable rates imposed by Title 49, carriers have the discretion to set their rates in a manner that will permit them to earn a profit on their traffic. This rate-setting initiative, however, must be distinguished from the carriers' obligation to provide adequate service to all of their customers, not simply to those customers whose traffic yields the most profit. Stated differently, once a carrier has established its rate for a given movement, the carrier must provide service for that traffic in an adequate and reasonable manner. It may not decide that shippers paying the highest rates will receive priority service while others will receive service whenever it is convenient for the carrier. To that end, there is no distinction between "firm" and "interruptible" service under Section 11101.

Relevant case law rejects the notion that carriers may rely on economic considerations in determining whether to comply with their common carrier service

obligations. *See, e.g., Ethan Allen, Inc. v. Maine Central R.R.*, 431 F. Supp. 740, 743 (D. Vt. 1977) (“A railroad may not, for example, justify a refusal to provide service solely on the grounds that to continue to provide service would be inconvenient or less profitable.”); *General Foods Corp. v. Baker*, 451 F. Supp. 873, 875 (D. Md. 1978) (railroads may not, “on their own authority, refuse to maintain service when it becomes inconvenient to do so or because profits are declining”).

In one recent case regarding the impropriety of basing service decisions on economic considerations, *Pejepscot Industrial Part, Inc., d/b/a Grimm Industries – Petition for Declaratory Order*, STB Finance Docket No. 33989 (STB served May 15, 2003), the Board emphatically rejected the suggestion that a carrier could rely upon profitability levels to decide for itself whether it must comply with its common carrier obligation:

Respondents cannot lawfully make fulfilling their statutory obligations contingent upon whether they think it is “worth it” to do so. Rather, a carrier must adhere to its statutory obligations even if it suffers hardship in so doing. *See, e.g., Decatur County Comm’rs v. Surface Transp. Bd.*, 308 F.3d 710, 715 (7th Cir. 2002) (“[railroads] may not refuse to provide service merely because to do so would be inconvenient or unprofitable”) (citing *G.S. Roofing Prods. Co. v. Surface Transp. Bd.*, 143 F.3d 387, 391 (8th Cir. 1998)); *Classification Ratings on Chemicals, Conrail*, 3 I.C.C.2d 331, 337-38 (1986) (Classification Ratings) (railroads may not avoid their obligation to provide rates or service because the commodities in question are hazardous and, if not handled safely, could potentially expose the carriers to substantial financial liability).

Id. at 12-13 (emphasis added).

Instead, according to both parties, MEC stated that it was unwilling to provide common carrier service from Topsham unless it could be persuaded that it was in the railroad's financial interest to do so. See respondents' reply at 12 ("[MEC] from the start has been willing to serve Grimmel from the Lewiston Lower if Grimmel . . . provide[s] sufficient traffic to cover the cost of such service"); petitioner's rebuttal at 2 ("[MEC]-has consistently taken the position that it will not provide service to Grimmel because the cost of rehabilitating the track would exceed the revenues it could realize given Grimmel's status as the sole shipper on the line").

This is not an acceptable response to a shipper's request for rates or service. A rail carrier cannot make its service contingent upon guaranteed profits from that service or upon the shipper's advance funding of repairs to the rail line over which the service would then be provided. . . . [U]nder the circumstances here (i.e., the Line had not been embargoed or abandoned), MEC had an absolute duty to provide rates and service over the Line upon reasonable request, and that its failure to perform that duty was a violation of section 11101.

Id. at 13-14 (emphasis added).

There is good reason to question whether the railroads share the view espoused by the Board in the *Pejepscot* case. In the Verified Statement of Mr. Thomas C. Haley that UP submitted in conjunction with its May 1, 2006 Comments to the Board in *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1), for example, UP's Mr. Haley commented at length about the need to allocate capacity in constrained corridors on the basis of price. While one possible interpretation of the UP submission is that UP considers pricing factors solely in determining which business to pursue through marketing efforts (rather than using pricing factors to make operational decisions), there

In reaching its decision, the Board specifically rejected the argument that the Board's abandonment and embargo decisions authorize inquiry into economic considerations to determine whether the common carrier obligation will apply in the ordinary course of business:

Respondents cite selected abandonment decisions and an embargo decision to support their position that they need not provide common carrier service at a loss – *Illinois Central Gulf R.R. Co. – Abandonment*, 363 I.C.C. 690 (1980), *aff'd sub nom Bloomer Shippers Ass'n v. ICC*, 679 F.2d 668 (7th Cir. 1982) (*ICG Abandonment*); *Union Pac. R.R. Co. – Abandonment*, STB Docket No. AB-33 (Sub-No. 148X) (STB served Oct. 30, 2000), *reconsideration denied* (STB served Feb. 26, 2001); and *Overbrook Farmers Union – Petition for Declar. Order*, 5 I.C.C.2d 316, 329 (1989) (*Overbrook Farmers*). These cases are inapposite because they deal with a carrier's efforts to have its common carrier obligations permanently extinguished (in the case of abandonments), or temporarily suspended (in the case of an embargo). Here, although they obtained abandonment authority (later withdrawn), respondents clearly have opted against abandoning the line, and they have not issued a temporary embargo.

Id. at 12-13 n.28; *id.* at 13 n.28 (“[T]he proper response to an unprofitable line is to obtain abandonment authority and not to unilaterally withdraw service.”) (citing *Overbrook Farmers*, 5 I.C.C.2d at 328).

After rejecting the effort to introduce economic considerations as a justification for a violation of the common carrier duty, the Board found in *Pejepscot* that the carrier's actions had been unacceptable:

The only appropriate mechanisms a railroad may employ to excuse itself, permanently or temporarily, from its common carrier obligations on a line of railroad are abandonment and embargo, and MEC has pursued neither.

Instead, according to both parties, MEC stated that it was unwilling to provide common carrier service from Topsham unless it could be persuaded that it was in the railroad's financial interest to do so. *See* respondents' reply at 12 ("[MEC] from the start has been willing to serve Grimmel from the Lewiston Lower if Grimmel . . . provide[s] sufficient traffic to cover the cost of such service"); petitioner's rebuttal at 2 ("[MEC] has consistently taken the position that it will not provide service to Grimmel because the cost of rehabilitating the track would exceed the revenues it could realize given Grimmel's status as the sole shipper on the line").

This is not an acceptable response to a shipper's request for rates or service. A rail carrier cannot make its service contingent upon guaranteed profits from that service or upon the shipper's advance funding of repairs to the rail line over which the service would then be provided. . . . [U]nder the circumstances here (i.e., the Line had not been embargoed or abandoned), MEC had an absolute duty to provide rates and service over the Line upon reasonable request, and that its failure to perform that duty was a violation of section 11101.

Id. at 13-14 (emphasis added).

There is good reason to question whether the railroads share the view espoused by the Board in the *Pejepscot* case. In the Verified Statement of Mr. Thomas C. Haley that UP submitted in conjunction with its May 1, 2006 Comments to the Board in *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1), for example, UP's Mr. Haley commented at length about the need to allocate capacity in constrained corridors on the basis of price. While one possible interpretation of the UP submission is that UP considers pricing factors solely in determining which business to pursue through marketing efforts (rather than using pricing factors to make operational decisions), there

is nevertheless reason for concern that the railroads may view price as a legitimate consideration in prioritizing service.

The following excerpts from Mr. Haley's statement illustrate the basis for this concern. First, Mr. Haley explained that 2006 capacity exceeded demand and that UP had employed price-related measures to limit demand:

- "By 2003 the rail industry – and UP in particular – had left behind the era of surplus capacity that characterized much of the nation's rail network in the latter part of the 20th century. Unexpectedly strong economic growth coupled with developments in the trucking industry that made trucking a less-desirable, and often less-available, option . . . brought record volumes of traffic to UP and the rest of the rail industry." Haley V.S. at 1-2.
- "UP has taken extraordinary measures to meet the rising demand. . . . At the same time, we have taken steps on the demand side to limit the growth in new traffic seeking to use our constrained corridors, as a way of improving service. Our marketing department has employed a variety of measures, including at-times-substantial rate increases, to encourage shippers to moderate their demand for our services, or to channel that demand in ways that reduce stresses on congested parts of the system." *Id.* at 3.
- "Even with our metering efforts, traffic volumes have continued to climb." *Id.* at 4.
- "The traffic demand calls for us to continue to take aggressive action to expand out network and manage growth so as to match supply with demand." *Id.*

Next, Mr. Haley explained that UP's capacity investments have been insufficient to meet the anticipated demands of the system:

- "To accommodate even a substantial portion of this traffic growth, we would have to spend heavily on additional

capacity over the next several years, even if our efforts to meter the new traffic are successful.” *Id.* at 5.

- “[T]o accommodate all demand growth, we would have to *more than double* our current spending for growth capital.” *Id.* at 7 (emphasis in original).

Finally, and-with-greatest-concern to-captive coal shippers, Mr. Haley argued that coal traffic must “compete” with other, more highly-rated commodities in order to “earn” the right to receive service from UP:

- “With excess capacity long-since exhausted and demand growing, coal must compete with other commodities for scarce capacity. Conventional wisdom might suggest that this should be an easy contest for coal to win – since it has traditionally been perceived as among the most profitable commodities on the railroad. But this is an outdated view. In fact, coal contributes relatively less than other commodities that share UP’s network.” *Id.* at 12 (emphasis added).
- “A straightforward analysis of UP’s revenue and cost data shows that UP’s coal traffic generates 1.9 mills per revenue ton-mile of contribution. This is substantially less than the 3.0 mills per revenue ton-mile generated by UP’s agricultural traffic, which is next to last in a commodity group ranking, and a mere fraction of the 9.8 mills per revenue ton-mile generated by UP’s chemical traffic.” *Id.*
- “All of the traffic using our key corridors must fully pay its way. With limited space, and an inability to pay for enough new capacity to take on every piece of traffic, UP must make hard choices about which traffic to invest in.” *Id.* at 13.
- “Our conclusion is that the flood of coal flowing east out of the PRB on relatively short-haul routes has come at the expense of other growth opportunities on UP’s much longer-haul transcontinental corridors.” *Id.*
- “If coal returns do not increase, coal will not be able to earn its place at a table that does not have room for any and all comers.” *Id.* (emphasis added).

UP's Comments in this regard run counter to case law on the common carrier obligation. Captive coal shippers depend upon the Board to ensure that this approach to railroading does not receive official, agency endorsement because this type of approach to allocating service would fundamentally compromise the interests of the shipping public.

3. Implications of the Common Carrier Obligation

By way of summary, the Concerned Coal Shippers respectfully submit that the following principles are evident from the foregoing discussion of the common carrier obligation in situations in which capacity limitations exist.

First, while the common carrier service obligation is not absolute, that obligation has a long-standing history in the statute and has received repeated endorsement from the courts and from Congress through its re-affirmation of that statute on multiple occasions.

Second, questions regarding the reasonableness of a request for service or the adequacy of a carrier's service performance are committed to the sound discretion of the agency.

Third, precedent supports the view that a failure to provide adequate service will be excused where peak demands for service arise in a manner that the carrier could not reasonably have been expected or anticipated.

Fourth, precedent does not include any support for the very different proposition that failures to provide adequate service will be excused where carriers have

acted in a manner that is designed to create or perpetuate scarcity of transportation capacity as a means of generating greater pricing leverage. In evaluating any railroad defense that the lack of capacity prevented it from providing adequate service, the Board should consider evidence regarding a carrier's failure to invest adequately in its transportation capacity.

Fifth, through the 1995 introduction of language in Section 11101 regarding the unreasonableness of contractual commitments that prevent carriers from responding to reasonable requests for service, Congress has demonstrated its awareness that carriers should be held accountable for actions which have the effect of preventing service from being performed in an adequate manner.

Sixth, in situations in which carriers are forced to allocate service amongst more customers than they are able to serve in a fully satisfactory manner, carriers may not allow economic considerations regarding the profitability of different movements to influence their service allocation decisions. Instead, carriers should allocate their service in such situations on a strictly proportionate basis. As the Supreme Court held in the *Pennsylvania R.R* case, "[i]n case of car shortage occasioned by unexpected demands, they are bound to treat shippers fairly, if not identically." 237 U.S. at 133.

Seventh, to the extent that any consideration of factors should be permitted that would allow a variation from straight proportionate allocation (yet would still maintain the "fair" treatment required by the Supreme Court), that consideration should be limited to the special needs of shippers (e.g., the danger of a curtailment of generation

because of the absence of coal deliveries), rather than consideration of the financial self-interest of the carrier.

B. Carrier-Imposed Requirements for Infrastructure Investments by Shippers

The Board's Notice in this proceeding also solicits comments on the topic of "carrier-imposed requirements for infrastructure investments by shippers." Notice at 2. The Concerned Coal Shippers commend the Board for including this topic in its analysis, insofar as any carrier efforts to impose such requirements upon shippers as a precondition for receiving service would constitute a violation of the common carrier obligation. *See, e g , Pejepscot Industrial Park, Inc., d/b/a Grimmel Industries – Petition for Declaratory Order*, STB Finance Docket No. 33989 (STB served Nov. 7, 2003) at 4 ("As the Board stated in its May 15 Decision, 'A rail carrier cannot make its service contingent upon . . . the shipper's advance funding of repairs to the line over which the service would be provided.' . . . [T]he existence of an illegitimate precondition means that Guilford failed to supply a responsive rate to Grimmel's request of May 22, 1997.").

In this regard, carriers should not be permitted to require shippers to: (i) construct destination track infrastructure improvements that exceed reasonable requirements based upon the historic needs for track capacity at the destination for the number of trainsets in service to the shipper and the volume of traffic to be delivered; or (ii) demand unreasonable amounts or types of financing for capacity enhancements that may be needed in the future to accommodate their traffic.

The Concerned Coal Shippers respectfully submit that a carrier should not be permitted to impose a construction requirement upon a shipper as a pre-condition for receiving service if such construction is not strictly required to permit the delivery of products to the shipper's facility. While a shipper may agree to perform such construction in exchange for some other consideration, the carrier should not be permitted to impose this requirement upon the shipper. To the contrary, a proper understanding of the common carrier obligation suggests that the carrier should be responsible for constructing whatever track facilities are needed to permit it to provide service, and to recover whatever costs are associated with its facilities through its rates. *See, e.g., Winnebago, supra*, 354 I.C.C. at 872 (“[T]he duty to provide ‘transportation’ under section 1(4) . . . includes not only transportation services provided and vehicles used, but also ‘all instrumentalities and facilities,’ such as tracks.”).

C. Inspections

Another source of concern to coal shippers (but which does not appear in the Board's list of intended discussion topics) are the recent efforts of the carriers to transfer both responsibility and liability for various FRA inspections to shippers. The Concerned Coal Shippers respectfully submit that – although the FRA's regulations contemplate that individuals or entities other than railroads can assume responsibility for performing inspections – the common carrier obligation precludes carriers from insisting upon the performance of FRA inspections as a pre-condition for receiving service.¹¹

¹¹ According to the FRA's regulations, “[a]lthough many of the requirements of this part are stated in terms of the duties of a railroad, when any person performs any function required by this part, that person (whether or not a railroad) is required to perform that function in accordance with this part.” 49 C.F.R. § 232.9. Moreover, Section

Compliance with FRA inspection regulations represents a daunting task for a shipper to undertake. These regulations impose requirements for many different types of inspections to be performed by inspectors who have met specific training and qualification standards, and impose significant liability for the failure to perform inspections adequately. In addition, while there is reason to believe that FRA's regulation of the field of train inspections preempts state law claims for accidents involving damage to property or injury to persons, the threat of liability for a subcontractor's inspection failures would raise another potential difficulty for coal shippers seeking common carrier service if railroads were permitted to unilaterally transfer responsibility for inspections to their customers.

By way of brief overview, the FRA's regulations establish several different inspection and testing requirements that potentially could be required for coal trains at a given destination. These include inspections associated with railroad freight car safety standards (49 C.F.R. Part 215), railroad locomotive safety standards (49 C.F.R. Part 229), and brake system safety standards for freight trains (49 C.F.R. Part 232).

These three general categories of FRA safety regulations each include their own standards regarding the qualifications required of individuals who will perform safety inspections. *See, e.g.*, 49 C.F.R. § 215.11(b) ("Each person designated under this section shall have demonstrated to the railroad a knowledge and ability to inspect railroad freight cars for compliance with the requirements of this part and to make the

232.203 (regarding training requirements for brake inspectors) addresses the responsibilities of a railroad or a contractor, which it defines as "a person under contract with the railroad or car owner."

determinations required by § 215.9 of this part.”); FRA Compliance Manual at 8-14 (“[t]he qualified person must have demonstrated to the railroad, at a minimum, the knowledge and ability to inspect locomotives and provide recommendations regarding the criteria listed in [Section 229.9(a)].”); 49 C.F.R. § 232.5 (qualified mechanical brake inspectors must have received hands-on training and must be employed in a role where their “primary responsibility includes work generally consistent” with the performance of brake inspections).

In terms of liability, the FRA regulations set forth a number of different penalties that will apply for a failure to comply with the various safety regulations. Section 215.7 (applicable to railcar safety) provides that “[a]ny person . . . who violates any requirement of this part or causes the violation of such requirement is subject to a civil penalty of at least \$550 and not more than \$11,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed \$27,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense.” Section 229.7 (applicable to locomotive safety) and Section 232.11 (regarding brake inspections) provide similar penalties.

It is beyond question that forcing a shipper to assume responsibility for the foregoing train inspections cannot be considered to be reasonable, and does not fall within the scope of the common carrier obligation as that concept has been understood by the agency and by the courts for the past 100 years. To the contrary, any effort by a

common carrier to obligate a shipper to assume responsibility and liability for FRA train inspections constitutes an improper attempt to circumvent the traditional and reasonable obligations of a common carrier railroad. The Concerned Coal Shippers respectfully submit that the Board should not permit carriers to attempt to legitimize this type of responsibility transfer in the name of efficiency.

D. The Impact of Volume Requirements or Incentives

The Board's Notice also seeks comments with regard to the impact of volume requirements or incentives. Notice at 2.

There is a long, established history before the agency of permitting rail carriers to offer common carrier service in a manner that is tailored to the specific needs and volumes to be transported for a given customer. To that end, carriers have long distinguished in their common carrier pricing documents between traffic that moves at carload rates, trainload rates, or even unit train rates. The Concerned Coal Shippers view such service and price differentiation as an integral part of the common carrier obligation. As such, the Concerned Coal Shippers do not object to the use by carriers of volume requirements or incentives for certain common carrier rates as a means of more closely tailoring their rates to the services that they provide.

The subject of volume requirements or incentives also raises issues that the Board may regard as analogous to those addressed in *Interpretation of the Term "Contract" in 49 U.S.C. 10709*, STB Ex Parte No. 669 (STB served March 29, 2007 and March 12, 2008) and *Rail Transportation Contracts Under 49 U.S.C. 10709*, STB Ex Parte No. 676 (STB served March 12, 2008). Specifically, there are certain similarities

between the notion of a volume-related pricing incentive and the “hybrid” pricing mechanisms that prompted the Board’s concern regarding the distinction between common carrier and contract service.

It is beyond the scope of these Comments to attempt to address all of the topics at issue in the Board’s ongoing Ex Parte No. 676 proceeding. Nevertheless, the Concerned Coal Shippers submit that the Board’s resolution to that proceeding should ensure that carriers honor their obligation to provide common carrier rates and common carrier service upon reasonable request.

E. The Proper Use of Rail Embargoes

The sixth topic identified by the Board in its Notice in this proceeding concerns the “proper use of rail embargoes.” Notice at 2. An embargo is “an emergency measure placed in effect because of some disability on the part of the carrier which makes the latter unable properly to perform its duty as a common carrier.” *GS Roofing Products Co. v. STB*, 143 F.3d 387, 392 (8th Cir. 1998) (quoting *Chicago N.W. Ry. v. Union Packing Co.*, 373 F. Supp. 734, 736-37 (D. Neb. 1974)). Embargoes are typically valid if “justified by physical conditions such as weather and flood damage, tunnel deterioration, or lack of equipment.” *Id.* (citing *General Foods Corp. v. Baker*, 451 F. Supp. 873, 875 (D. Md. 1978)).

Well-defined standards exist regarding the criteria to be considered in evaluating the legitimacy of an embargo. In particular, in the context of damaged lines and a refusal to provide any service, the Board has adopted a balancing analysis to determine whether a carrier’s actions are reasonable under the circumstances at issue.

For example, in *Groome & Associates, Inc. v. Greenville County Econ. Devel. Corp.*, STB Docket No. 42087 (STB served July 27, 2005) (finding the carrier liable for damages), the Board explained that its approach to such question was highly fact-specific:

Complainants cite various pre-1980 precedents[] that suggest that GCEDC is subject to a standard approaching strict liability for failing to provide service. In the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980), however, Congress directed that railroads be treated more like ordinary businesses than like public utilities. Thus, under more recent cases, the Board has conducted a fact-specific balancing test to determine whether the actions of the carrier were reasonable, and the Board has found that if the actions were not unreasonable, the carrier was not liable for damages even though it failed to provide requested service.

Id. at 12 (citing *Bar Ale, Inc. v. California Northern R.R.*, STB Finance Docket No. 32821 (STB served July 20, 2001) at 6-7).

In 2005, in the wake of the derailments on the PRB Joint Line, UP declared an embargo of a significantly different nature than that typically considered by the Board. In particular, UP announced that it was declaring an embargo on all stations on the Joint Line “to prevent our constrained transportation capacity from being overwhelmed by demands for additional service.” See UP Notice to Customers “UP Embargo on SPRB Joint Line: Accepting Coal for Existing Customers Under Currently Active Contracts and Common Carrier Rate Items Only,” effective July 18, 2005; see also *id.* (“Track conditions and associated track restoration efforts have prevented UP from providing transportation for all SPRB coal that our customers and potential new customers want to receive.”). Under the embargo that UP imposed:

Union Pacific will accept only traffic moving under currently active contracts or common carrier rate items. . . . We are taking this step because we have received a number of requests from customers for new service or service under different price documents. In addition, some customers have attempted to compel Union Pacific to carry larger shares of coal for them by asking for new rates. To protect our current SPRB customers, we are not soliciting or accepting new business to be carried on the Joint Line during the embargo.

Id.

UP kept its embargo on the Joint Line in place until March 27, 2007, a period of more than twenty months. See UP News Release “Union Pacific Lifts Southern Powder River Basin Joint Line Embargo,” dated March 27, 2007. In announcing its decision, UP commented that “[i]nvestments in track infrastructure, combined with incremental operational improvements and less disruptive maintenance schedules helped expand rail capacity on the Southern Powder River Basin Joint Line. Union Pacific has the ability to move coal that its customers demand, although episodic mine production problems may affect deliveries.” *Id.*

UP declared its embargo during a time period in which it had invoked a force majeure on PRB coal traffic that ultimately would continue for more than seven months (*i.e.*, May 11, 2005 through November 23, 2005). Significantly, however, UP’s fellow joint line owner, BNSF, lifted its own 2005 force majeure declaration for the joint line after only three weeks (*i.e.*, on June 3, 2005), and BNSF did not declare an ongoing capacity-related embargo.

The Concerned Coal Shippers take no position at this time on whether UP’s declaration of a twenty month embargo on new service constituted a violation of the

common carrier obligation, other than to reiterate that the proper resolution of this question would depend upon a detailed examination of the facts and circumstances surrounding UP's declaration. The Concerned Coal Shippers submit that in light of the UP comments addressed earlier in this submission regarding UP's intention to keep its capacity tight, it would have been incumbent upon the Board in any proceeding alleging that UP's embargo violated the common carrier obligation to consider the adequacy of UP's historic efforts to address the capacity situation on the Joint Line. In other words, any Board analysis of the reasonableness of UP's actions in declining to provide service necessarily should have considered questions regarding traffic forecast levels, historic traffic growth patterns, and of course, any evidence tending to suggest that UP's inability to meet its various demands for service resulted from an intention to keep capacity "tight" for financial reasons.

F. To Whom Does the Common Carrier Obligation Apply

In its Notice, the Board indicates that the hearing also will focus on the topic "to whom does the common carrier obligation apply." Notice at 2.

The Concerned Coal Shippers submit that the common carrier obligation applies to each railroad holding itself out to provide service to a given destination. In other words, railroads should not be permitted to exempt themselves from the common carrier obligation because of the existence of another carrier providing service to the destination or because of the existence of a contract governing the movement of some portion of the coal to be received at the destination.

Any contrary interpretation of the common carrier obligation would raise concerns of market division, creating at least the appearance that a destination had been implicitly awarded to the carrier currently providing service and that the other carrier with physical access to the plant understood that it was not to interfere with service to that destination. Obviously, any regulatory approach that fostered such impressions would run counter to the fundamental responsibility to protect the public interest.

Common carrier railroads each hold a government-granted franchise. With that franchise comes the obligation to provide service on reasonable request. Carriers are entitled to receive an adequate return but they may not limit the scope of their service obligation for their convenience or in order to maximize the return that they receive on other portions of their business.

G. The Duty to Provide Rates on Reasonable Request

One final issue associated with the obligation to provide common carrier service on reasonable request relates to the question of how long in advance of the intended service a carrier must provide a rate to a shipper. This issue was raised, as the Board is aware, in the proceedings related to the West Texas Utilities Company rate reasonableness case against Burlington Northern Railroad Company in the mid-1990s. *See Burlington Northern R.R. v. STB*, 75 F.3d 685 (D.C. Cir. 1996) (finding that the Commission lacked jurisdiction to require Burlington Northern to file a unit train tariff rate more than one year prior to the anticipated termination of the parties' contractual arrangement).

Currently, however, there remains some question as to the length of time in advance of the expiration of a contract (or the date on which a new rate and service terms otherwise are needed) that a carrier must provide a rate in response to a shipper' request. In its decision in *Procedures to Expedite Resolution of Rail Rate Challenges to be Considered Under the Stand-Alone-Cost Methodology*, STB-Ex Parte No. 638 (STB served April 3, 2003), the Board declined to address this question, citing both jurisdictional ambiguity and practical concerns. *Id.* at 3 n.5 ("Given our decision not to require mediation at a pre-complaint stage, we need not consider the suggestion of some shipper parties that, to avoid the delay that would otherwise result from pre-complaint mediation, we require railroads to establish a common carriage rate 5 months prior to the expiration of a contract. In light of the court's ruling in *Burlington N. R.R. v. STB*, 75 F.3d 685 (D.C. Cir. 1996), it is uncertain that we could require a rate to be established that far in advance, and in any event we do not believe that it would be fruitful to do so in view of the intense negotiations that generally are ongoing in the months leading up to a contract's expiration.").

The Concerned Coal Shippers respectfully submit that the Board's concerns in this regard were misplaced. The Board has jurisdiction to enforce the common carrier obligation, and that obligation, as discussed herein, requires that carriers provide service on reasonable request. As such, the fundamental standard that governs the Board's analysis of issues related to compliance with the common carrier obligation is reasonableness. There certainly may be situations in which the relevant facts and circumstances would require a carrier to provide a rate far more than five months in

advance of the intended start of service. For example, it may be perfectly reasonable for a utility engaged in the construction of a new coal-fired facility to obtain a common carrier rail rate twelve months or more prior to the intended start of service. In fact, given the impact that the new service may have on the carrier (*e.g.*, the need to plan to devote crews and locomotives to the service), it would presumably be unreasonable for a shipper to wait until three months prior to the intended commencement of service to request a rate from a carrier for the contemplated movement. In fact, carriers typically will wish to receive details of the intended movement from a shipper constructing a new coal-fired facility well in advance of the date on which service will begin (18 months or more in advance of service would not be unusual). There may be other scenarios in which the relevant facts and circumstances (*e.g.*, the need to secure a coal supply agreement in a particular market well in advance of the date of purchase, the need to satisfy specific utility planning requirements, etc.) would justify an order from the Board requiring a carrier to provide a common carrier rate more than six months in advance of the intended start of service.

The Board's concerns regarding the impact of an order requiring the disclosure of a common carrier rate on the progress of contract negotiations is not well-founded. While the Board may or may not be correct that "intense negotiations . . . generally are ongoing," the fact is that requests for common carrier rates frequently occur only after negotiations toward a contract have been abandoned. Moreover, even if negotiations continue, the availability of a common carrier rate will help to foster those negotiations by providing the shipper with information regarding the cost and terms that

would be associated with common carrier service. There is no reason to believe that the absence of this information could benefit “intense” negotiations.

In light of the foregoing, the Concerned Coal Shippers request that the Board clarify that a request for common carrier rates will be deemed to be reasonable if it is made up to six months prior to the intended commencement of service. Moreover, the Concerned Coal Shippers request that the Board – upon a shipper’s articulation of specific facts and circumstances warranting even greater advance notice – order carriers to provide their rates even earlier in advance of the intended commencement of common carrier service.

CONCLUSION

For the foregoing reasons, the Concerned Coal Shippers request that the Board confirm the historic understanding of the duties of common carrier. In particular, the Concerned Coal Shippers request that the Board clarify that: (i) in considering the reasonableness of a carrier’s failure to provide common carrier service, the Board will consider the adequacy or inadequacy of the carrier’s historic investment levels and any suggestion by the carrier that reduced capacity spending would be financially advantageous in terms of pricing; (ii) carriers will not be regarded as having acted in conformity with their common carrier obligation if they rely upon economic consideration to prioritize service in constrained corridors; (iii) carriers may not impose construction requirements upon shippers as a pre-condition to receiving service where the additional rail facilities are not reasonably necessary based on historical performance or other considerations to allow the railroad a reasonable opportunity to provide timely

service; (iv) carriers may not require shippers to perform FRA railcar, locomotive, and brake system inspections as a pre-condition to receiving service; (v) in the event of a challenge to an embargo premised on railroad congestion, the Board will evaluate and consider any evidence presented to it regarding capacity-related investment decisions made by the carrier; (vi) except insofar as governed by more specific holdings under the line of "Bottleneck" authority, the common carrier obligation applies to each carrier who has received a request for service from a shipper that is in a position to tender freight to the carrier for movement; and (vii) carriers will be obligated to provide common carrier rates at least six months in advance of service or such longer period as a shipper may demonstrate as reasonable in a given instance.

Respectfully submitted,

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