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**BEFORE THE
SURFACE TRANSPORTATION BOARD**



**COMMON CARRIER
OBLIGATION OF
RAILROADS**

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) **Ex Parte No. 677**
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**COMMENTS OF
WESTERN COAL TRAFFIC LEAGUE**

Of Counsel:

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Dated: April 17, 2008

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Attorneys & Practitioners

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In accordance with the Notice served by the Board in the captioned proceeding on February 22, 2008 ("Notice"), the Western Coal Traffic League ("WCTL" or "League") submits these Comments to express its views regarding issues related to the railroads' common carrier obligation. These comments support the points that will be raised by WCTL's representative during the Board's hearing scheduled for April 24-25, 2007.

IDENTITY AND INTEREST

WCTL is an association formed in 1976 whose membership is composed of shippers, receivers, and consumers of coal mined from sources west of the Mississippi River.¹ WCTL members collectively consume more than 140 million tons of coal

¹ WCTL's members are: Alliant Energy; Ameren Energy Fuels and Services; Arizona Electric Power Cooperative, Inc.; CLECO Corporation; Austin Energy (City of Austin, Texas); CPS Energy; Kansas City Power & Light Company; Lower Colorado River Authority; MidAmerican Energy Company; Minnesota Power; Nebraska Public Power District; Omaha Public Power District; Texas Municipal Power Agency; Western Farmers Electric Cooperative; Western Fuels Association, Inc.; Wisconsin Public Service Corporation; and Xcel Energy

annually that is moved by rail. Its members include investor-owned electric utilities, rural electric cooperatives, state power authorities, municipalities, and a non-profit fuel supply cooperative.

The topic of this hearing – the common carrier obligation of railroads – is of considerable interest to the members of WCTL. WCTL members rely on the railroads to construct, maintain, and operate adequate systems to enable them to meet coal customers' transportation requirements and maintain electric system reliability. Vigorous enforcement of the railroads' fundamental common carrier obligation is essential to helping to ensure the efficient and reliable movement of coal. Accordingly, WCTL has a direct and substantial interest in this proceeding.

DISCUSSION

The Board's Notice explains that the purpose of this proceeding 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." Id. at 2. The Board further explains that its hearing will focus on all aspects of the extent of the common carrier obligation, including, but not limited to, the following eight (8) areas: (1) capacity constraint service limitations; (2) the movement of hazardous materials; (3) carrier imposed infrastructure requirements on customers; (4) traffic volume requirements/incentives; (5) economically motivated service reductions (e.g., "metering of the demand for service"); (6) the use of rail embargoes; (7) regulatory abandonment authorization mandates; and (8) the applicability of the common carrier obligation. Id.

WCTL addresses the Notice issues pertinent to the movement of coal below.

A. The Railroad Common Carrier Obligation

49 U.S.C. § 11101(a) requires common carriers to provide service “on reasonable request.” This common carrier obligation is fundamental. See, e.g., G.S. Roofing Products Co. v. STB, 143 F.3d 387, 391 (8th Cir. 1997) (discussing the “higher standard of responsibility” to which the railroads are held and the special public interest considerations involved in the provision of rail services because of the carriers’ “quasi-public nature”). For example, in a 1994 study regarding its regulatory responsibilities, the Board’s predecessor, the Interstate Commerce Commission (“ICC”), commented as follows with respect to this special public interest obligation:

[T]he dependence of our nation’s economy on rail transportation of essential raw materials makes the network of rail lines an important national resource and the smooth provision of uninterrupted service over those lines a matter of national importance. The nation has an interest in the availability and operation of these lines that transcends the interests of the particular company that owns or operates the lines (or even the shippers that currently utilize them). . . . Without continued regulatory oversight . . . service over some lines could be needlessly interrupted or lost altogether.

See Study of Interstate Commerce Commission Regulatory Responsibilities Pursuant to Section 210(a) of the Trucking Industry Regulatory Reform Act of 1994, 1994 WL 639996 at *73 (Oct. 25, 1994) (“ICC Regulatory Study”).

Electric utilities' ability to secure reasonable rates and service terms for transportation of the nation's vital coal reserves depends on the railroads living up to their crucial common carrier obligation. This matter is an essential component of the Board's responsibilities. In a speech in May, 2006, STB Vice Chairman Buttrey remarked:

[C]oal helps keep us warm in winter, cool in summer, and keeps factory assembly lines and hospital operating rooms in business. The efficient movement of coal is essential to the economic health and national security of this country. The Board will use its authority, at least as long as I am there, to do whatever is within its power to do, to facilitate a steady supply of coal to the Nation's power grid.

W. Douglas Buttrey, Remarks to the Chicago Traffic Club (May 18, 2006) (available at www.stb.dot.gov/testandspeech.nsf/9c0ecd4a0be1c80f852570ff004b208a/ed1a8428e2fc2a598525717e0051b821?OpenDocument). WCTL agrees with this statement and is pleased that Board members are interested in ensuring energy system reliability through the efficient rail transport of essential generating fuels. Quite simply, electric utilities cannot meet their obligation to satisfy the electric power demands of their customers unless the railroads adequately meet the utilities' service needs and fulfill the common carrier obligation.

The Board has inquired as to whom the common carrier obligation applies. As an initial matter, the Board's general grant of jurisdiction is found at 49 U.S.C. § 10501(a)(1), which states that the STB has "jurisdiction over transportation by rail carrier." "Rail carrier" is in turn defined at 49 U.S.C. § 10102(5) as "a person providing common carrier railroad transportation for compensation." The phrase "common carrier"

is not defined in the statute, but it has long been established that a critical determinant of whether an entity provides common carrier services is whether it holds itself out to provide service to the general public. See, e.g., Status of Bush Universal, Inc., 342 I.C.C. 550, 564 (1973); State of Vermont & Vt. Ry., Acquisition and Operation in Vt., 320 I.C.C. 609, 611-12 (1964); Atchison, Topeka & Santa Fe Ry. v. Kansas City Stock Yards Co., 33 I.C.C. 92, 100 (1915); Tap Line Case, 23 I.C.C. 277, 292 (1912). The common carrier obligation applies to all common carrier railroads and services, including services for both “competitive” and “captive shippers” (e.g., a shipper need not establish market dominance, or other maximum rate case jurisdictional prerequisites when seeking relief from failures to meet the common carrier obligation or reasonable practice violations).²

² The common carrier obligation does not apply to private service in instances where a utility constructs a private build-out line to its electric generating station. In this respect, the Board has clarified that “if a shipper does not hold out to provide common carrier railroad service over a line it constructs and maintains to serve its own facility, and no other shippers are served by the line, then neither that construction, nor a railroad’s operation over that track to reach the shipper’s facility” is subject to Board jurisdiction or approval, and there is no common carrier obligation. B. Willis, C.P.A., Inc. Petition for Declaratory Order, Finance Docket No. 34013, 2001 WL 1168090 (STB served Oct. 3, 2001) (private utility spur track); Hanson Natural Res. Co. – Non-Common Carrier Status – Petition for a Declaratory Order, ICC Finance Docket No. 32248 (ICC served Dec. 5, 1994).

B. Carrier Practices Impacting the Common Carrier Obligation

1. The Board's Role/Responsibility Over Railroad Practices

The Board's jurisdiction over transportation of rail carriers and remedies with respect to rules, practices, services, routes, and facilities of such carriers is "exclusive," and there is no other governmental entity capable of directly enforcing rail transportation policies and programs affecting coal and other energy commodity deliveries. See 49 U.S.C. § 10501(b). Therefore, the Board has a crucial role to play in ensuring that the common carrier obligation is upheld.

Title 49 of the United States Code gives authority to the STB to evaluate and prescribe railroad common carrier practices. Specifically, under 49 U.S.C. § 10702, rail carriers are required to "establish reasonable . . . rules and practices on matters related to . . . transportation." As the ICC has illuminated "[t]his statutory requirement derives from the common law common carrier obligation" and is "intended to protect against unreasonable carrier actions that impede interstate commerce." ICC Regulatory Study, 1994 WL 639996 at *20. In its 1994 regulatory responsibilities study, the ICC expressed the scope of its unreasonable practices jurisdiction:

Not only must a carrier's rates be reasonable, but so must its practices. . . .

This statutory requirement derives from the common law common carrier obligation. It is intended to protect against unreasonable carrier actions that impede interstate commerce. In evaluating carrier practices, '[t]he question is not whether the [questioned practice] can be described as 'rational' from the railroads' perspective, but instead whether

the practice . . . is reasonable when viewed from the public perspective of the Commission, which must reconcile a multitude of factors in exercising its expert judgment on tariff issues, including economy, efficiency, fair wages and working conditions, and safety, in addition to the financial conditions of the carriers.'

. . . Rail practices that the Commission has been asked to evaluate in recent years include collection of storage charges on empty rail cars awaiting loading,[] limiting the use of private cars,[] attempting to limit carrier liability and place responsibility on a shipper to make a "reasonable" inspection of grain cars,[] refusal to compensate a shipper for the use of its cars,[] and adoption of minimum weight rates where rail cars were incapable of being loaded to the minimum weight. . . The Commission has also barred carriers from refusing to carry hazardous materials that have been certified as safe for transport.[]

. . . . Unreasonable practices can result in abusive treatment of shippers. Federal oversight of railroad practices is therefore necessary and should be retained in order to protect the public interest.

Id. at *20-*21 (footnotes omitted).

As indicated, the Board's responsibility is to insure that carrier practices are "reasonable when viewed from the public perspective." Imbedded in this "public perspective" are the Rail Transportation Policy goals at 49 U.S.C. § 10101, including the following enumerated policies:

- (1) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;
- (2) to operate transportation facilities and equipment without detriment to the public health and safety;

(3) to encourage honest and efficient management of railroads; and

(4) to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination.

Id. at §§ 10101(4); 10101(8); 10101(9); 10101(12).

Additionally, a crucial element of Rail Transportation Policy is “to maintain reasonable rates where there is an absence of effective competition” (id. at § 10101(6)) and under the law, rates on market dominant traffic “must be reasonable.” Id. at § 10701(d)(1). A captive common carrier rail customer’s only redress for unreasonable rates is to seek relief from the Board by filing a complaint under the Board’s rate reasonableness standards. To the extent that a shipper is successful in that process and utilizes STB prescribed rates to move its required traffic volumes, it is essential that the shipper obtain adequate and efficient service – otherwise, the hard-earned rate relief it has obtained could be rendered meaningless. Accordingly, the Board’s vigilant upholding of the common carrier obligation also serves as a crucial component of the Board’s rate reasonableness mandates.

2. Carrier Practices Affecting Unit Coal Train Service

a. Imposition of Infrastructure Investment Obligations

WCTL members have long worked closely with their railroad service providers in making facility improvements on their electric generating plant property as necessary for the efficient movement of unit coal train service (e.g., construction and

upgrading of loop tracks, unloading facility improvements, etc.). These improvements have been made because it is in the best interest of coal shippers to help improve their rail service and maximize coal deliveries. However, no shipper should be compelled to provide funding of repairs, maintenance, or upgrades of general system common carrier lines in order to receive service.

Railroads are precluded from making service contingent upon the shipper making specified infrastructure investment contributions to increase general mainline capacity as such demands are a violation of the carrier's common carrier obligation. See e.g., Pejepscot Industrial Park, Inc. d/b/a Grimmel Indus. – Petition for Declaratory Order, STB Finance Docket No. 33989 (STB served May 15, 2003) at 13 (“[a] rail carrier cannot make its service contingent upon . . . the shipper’s advance funding of repairs to the rail line over which the service would then be provided”) (“Pejepscot”).

Additionally, all coal transportation arrangements, whether by private contract or common carriage, include provisions relating to equipment obligations of the parties. The Association of American Railroad’s (“AAR’s”) Interchange Rules are made a part of virtually all such arrangements. These rules focus exclusively on railcar maintenance and usage and are intended to facilitate interchange of cars between railroads. The rule-setting process is controlled by the railroads even in instances where the rules being set may impact rail cars that are predominantly owned or controlled by shippers. In fact, the Federal Railroad Administration has recently criticized the AAR for attempting to use the interchange rules to unilaterally “force” economically advantageous

tank car rules on shippers. See Regulatory Impact Analysis at 8 (issued Mar. 19, 2008), of the Notice of Proposed Rulemaking, Hazardous Materials: Improving the Safety of Railroad Tank Car Transportation of Hazardous Materials, Docket No. FRA-2006-25169, 73 Fed. Reg. 17818 (Apr. 1, 2008) (“[AAR’s] Circular 1178 will . . . require huge expenditures by the . . . shippers for only modest actual benefits to the railroads or the public at large”).

In recent years, coal shippers have also become concerned about efforts by railroads to unilaterally impose new interchange rules outside of a collaborative process including all railcar stakeholders. This is of particular interest to western coal shippers who generally provide and maintain the coal train sets in their service at the cost of hundreds of millions of dollars. Any railroad practices that unilaterally “force” new rail car maintenance rules or standards on coal customers (e.g., standards designed to enhance railroad profits, produce maintenance cost savings, etc.) amount to an indirect assault on the prohibition against railroads conditioning service upon the shipper’s funding of railroads’ common carrier responsibilities.

b. Service Volume Requirements/Commitments

As the Board is aware, the railroads have, for several years, been using certain “hybrid” coal pricing instruments such as Union Pacific Railroad Company’s Circular 111. Generally, these instruments contain no tonnage commitments for shorter periods (e.g., up to one year), but for longer periods (e.g., periods up to three years) the instrument may contain annual tonnage volume commitments. Private contracts also

generally contain volume commitments. Unit coal train shippers generally are not adverse to such annual tonnage commitments, although they believe that there should be a mutuality of obligation (e.g., cycle time service standards, carrier commitments to move tendered coal with deficit make-up requirements, etc.).

Also, although 49 U.S.C. § 11101(a) explains that a rail carrier providing common carrier service “shall not be found to have violated this section because it fulfills its reasonable commitments under contracts authorized under section 10709 of this title before responding to reasonable requests for service,” this section also states that “[c]ommitments which deprive a carrier of its ability to respond to reasonable requests for common carrier service are not reasonable.” Id. As such, if a carrier has made contractual commitments to serve certain customers which have unreasonably deprived it of its ability to provide reasonable service to the public, it could be found to have violated its fundamental duty as a common carrier.

Additionally, carriers have, at times, declined to provide common carrier rates upon request by individual WCTL members. Carriers may not unilaterally disavow their common carrier obligation by refusing to provide rates for service on reasonable request from any customer (including both “captive” and “competitive” customers). The Board has clarified that the common carrier obligation imposes on rail carriers a two part, “interconnected” obligation:

First, it must provide written common carrier rates to any person requesting them. 49 U.S.C. 11101(b). Second, it must provide rail service pursuant to those rates upon reasonable request. 49 U.S.C. 11101(a). These requirements are linked, because a rate is a necessary predicate to any specific request for service. Without rates, and any attendant terms setting forth the particulars of service, a shipper cannot make a specific service request. It is axiomatic that a rail carrier may not indirectly avoid its common carrier obligation to provide service by evading its obligation to establish rates upon request.

Pejepscot at 13.

Accordingly, a railroad's common carrier obligation requires it to provide both rates and service upon reasonable request. Under applicable Board precedent, "a reasonable request is one that is specific as to the volume, commodity, and time of shipment." Meyer v. North Coast Railroad Authority, STB Ex Parte No. 346 (Sub-No. 25B) (STB served July 27, 2005). If a shipper makes such a common carrier request "specific as to the volume, commodity, and the time of shipment," a railroad may not refuse to provide the service (and first provide the underlying rates necessary to utilize that service).

Additionally, WCTL appreciates that the Board has recognized the threat to competition caused by the carriers' "hybrid" pricing programs. See Ex Parte No. 669, Interpretation of the Term "Contract" in 49 U.S.C. 10709, (STB Notice of Proposed Rulemaking served March 29, 2007) at 5 (recognizing that "a carrier's hybrid pricing mechanism may not contain the same protections against collusion as do traditional confidential transportation contracts"). It has long been recognized that, for purposes of

the Commission's jurisdiction, the term "practice" broadly embraces all policies or practices of a carrier that affect its relationship with other carriers and/or the service that it offers to the shipping public. See e.g., Rail & River Coal Co. v. Baltimore & Ohio Railroad, 14 I.C.C. 86, 90-91 (1908). A practice may be "observed as well in dealing with a single individual or with the general public or a class," and the proscription against unreasonable practices may be violated where the carrier's action is for the purpose or effect of hampering competition. Postal Telegraph-Cable Co. v. Western Union Telegraph Co., 59 I.C.C. 512, 516 (1920). Thus, if the carriers are engaged in practices that effectively communicate to competitors the price and service standards that they are willing to provide, there is a real risk that competition will be unreasonably harmed by such practices.

c. Service Limitations Due to Claimed Capacity Constraints

The western railroads have made it clear that they not only have the ability to add capacity to meet future demand, but control its timing. In the west, BNSF's Chairman, President, and CEO Matt Rose stated that "we don't bring capacity on sooner than we need it, so we always have a natural tightness."³

In response to service problems that erupted beginning in the spring of 2005, particularly on western coal movements, UP and BNSF each announced they would curtail demand for service by increasing prices. These actions raise questions of whether

³ W.C. Vantuono, Fluidity, Velocity, Capacity, Consistency, Railway Age, Dec. 2004, at 15-19.

these duopolists recognize their shared economic interest in reducing service. See Letter to Customers from Jack Koraleski, Executive Vice President – Marketing and Sales of Union Pacific Railroad Company, (dated Apr. 15, 2004) (“[W]ith 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.”).

Additionally, as the Board is well aware, certain railroad investors have publicly requested that the railroads decrease infrastructure investments with the current high profits being earned and utilize their profits to instead buy back stock and increase shareholder dividends. It should be recognized that all the railroads are private sector, publicly traded companies, whose allegiances favor that of their private shareholders. STB Chairman Nottingham recently testified to Congress 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.” See Hearing Regarding Investment in the Rail Industry, before the House Subcommittee on Railroads, Pipelines, and Hazardous Materials of the Committee on Transportation and Infrastructure, 110th Cong. at 6 (2008) (statement of Charles D. Nottingham) (“Rail Investment Hearing”).

The common carrier obligation is designed to ensure that the private interests of railroads do not undermine the public’s need for essential railroad services. For example, the Board may compel carriers under 49 U.S.C. § 11101 to provide

adequate service on lines through appropriate track and equipment upgrades. See, e.g., Winnebago Farmers Elevator Co. v. Chicago & N.W. T. Co., 354 I.C.C. 859 (1978).

“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 or embargo.” Pejepscot at 13.

Chairman Nottingham has further emphasized that the statutory common carrier obligation and the Board’s reasonable practice jurisdiction are remedial tools available to the Board as a means of protecting the public from any railroad “policy of diverting revenues, neglecting shippers, and cutting back on capital spending,” explaining:

A railroad controlled by a large non-railroad investor, however, is still bound by the same obligations of all railroads: it must fulfill the common carrier obligation; it must maintain reasonable rates and practices; and it must file for abandonment or discontinuance authority if it is not going to provide service over a line. Given the Board’s ability to address concerns that may arise in the future, I would not recommend doing anything at this time to deter needed investment in the industry.

Rail Investment Hearing at 6.

WCTL is pleased that the Board intends to be vigilant in insuring that the railroads’ common carrier obligation is upheld with regard to the need for sufficient and essential capital investments by carriers. In this respect, WCTL cautions the Board to closely examine the carriers’ “infrastructure needs” or “capacity constraints” assertions as a guise to unilaterally seek limitations on their common carrier obligation. In fact, as

WCTL has previously explained, the railroads have devoted more of their recent increases in earnings and profits to increasing their dividends and stock buybacks (and even to reduce their long-term debt), rather than for capital expenditures. Indeed, in recent years the railroads have reduced their capital expenditures expressed as a percentage of revenues. See, e.g., Forum on Freight Rail Finance before the House Transportation & Infrastructure Committee, 110th Cong. (2007) (Submission of Edward M. Wolfe, Senior Managing Director of Bear, Stearns & Co. Inc.) (showing capital expenditures by United States railroads averaged 17.7% of revenues over 1995-2006, but only 15.9% over 2001-2006).⁴ These facts further support the need for close Board scrutiny of any carrier arguments that the common carrier obligation needs to somehow be “limited” or “reduced” in light of so-called system “capacity constraints” facing the industry.

d. Use of Embargoes/Force Majeure Notices

The railroads’ “just in time” capacity investment strategy appears to have substantially contributed to recent railroad service failures and to have helped bring about a railroad system that has become increasingly incapable of handling periodic events (e.g., severe weather storms) that occur in the regular course of railroading. In this respect, UP put in place a Wyoming Powder River Basin (“PRB”) service embargo from July 2005 until March 2007 – or more than a year and a half – to avoid taking on new coal

⁴ While capital expenditures may have increased in nominal dollar terms, that nominal increase reflects the impact of inflation, and thus the comparison of capital expenditures to revenues is particularly telling since both the capital expenditures and revenues are subject to inflation.

business or adding traffic under its existing contracts. Additionally, UP issued a force majeure notice to its Wyoming PRB coal customers in May 2005, which it held in place until November 2005 due to deferred track maintenance as an attempted excuse not to perform under its coal transportation agreements. BNSF similarly issued a force majeure notice on Wyoming PRB traffic beginning in May 2005 to excuse performance under its transportation contracts, but BNSF's force majeure period lasted only three weeks. Both UP and BNSF have drastically increased the number, frequency, and duration of embargoes/force majeure notices to coal customers in recent years.

Railroad embargoes are generally designed to be temporary in nature, and are prohibited as a measure to control traffic or limit carrier service liability claims. A railroad embargo of service is "permitted as temporary emergency measure" when service has become an impossibility. See Overbrook Farmers Union Cooperative Ass'n – Petition for Declaratory Order – Violation of 49 U.S.C. § 11101(a), 5 I.C.C.2d 316, 322 (1989). In examining embargoes, the Board looks to the reasonableness of the embargo employing a balancing test. That test examines whether the circumstances of the embargo were beyond control of the involved railroad, the length of the service cessation, the intent of the railroad, the cost of the involved repairs, and the shipper's needs. Id. at 322-23.

The unilateral imposition by railroads of unnecessary service embargoes has the potential to undermine the carriers' common carrier obligations. Railroad practices concerning embargoes should be closely reviewed to ensure that (1) embargoes are taken

because of valid circumstances beyond the reasonable control of the carrier; (2) embargoes are kept in place no longer than necessary during the period in which the involved service is impossible; (3) embargoes are lifted as soon as practicable and that all reasonable steps are taken to restore immediate service; and (4) if embargoes are not lifted within a reasonable amount of time, the carriers must seek and obtain abandonment authority and they may not unilaterally withdraw service.

e. Economically-Motivated Service Reductions and Metering of the Demand for Service

In recent years, the western railroads have resisted the continuation of meaningful service standards for coal service, and have in fact unilaterally reduced their service commitments. Many rail customers have no, or very marginal, service performance standards. There has also been a plethora of misinformation about coal service performance by the railroads without any detailed or objective independent assessment of railroad service performance. For example, the western railroads stated that in 2005 they “moved more coal than ever before” – intimating that their service performance was adequate, but ignoring the fact that 15% to 20% delivery shortfalls occurred for most individual customers costing consumers enormous sums of money in added electric generation costs. See, e.g., Letter from WCTL to STB (dated June 24, 2005).

With respect to economically-motivated service constraints, the STB has concluded that where a carrier has refused to provide common carrier service, the carrier:

cannot lawfully make fulfilling [its] statutory obligations contingent upon whether [it] 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. . . . 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 or embargo.

Pejepscot at 12-13.

CONCLUSION

WCTL appreciates the opportunity to present these comments to the Board and urges the Board to carefully consider its views.

Respectfully submitted,

THE WESTERN COAL TRAFFIC LEAGUE

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