

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 677

COMMON CARRIER OBLIGATION OF RAILROADS

COMMENTS OF
THE HONORABLE BRIAN SCHWEITZER, GOVERNOR, STATE OF MONTANA
MONTANA WHEAT & BARLEY COMMITTEE
MONTANA FARMERS UNION
MONTANA GRAIN GROWERS ASSOCIATION
COLORADO WHEAT ADMINISTRATIVE COMMITTEE
COLORADO ASSOCIATION OF WHEAT GROWERS
IDAHO BARLEY COMMISSION
IDAHO WHEAT COMMISSION
IDAHO GRAIN PRODUCERS ASSOCIATION
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OKLAHOMA WHEAT COMMISSION
OKLAHOMA WHEAT GROWERS ASSOCIATION
SOUTH DAKOTA WHEAT COMMISSION
SOUTH DAKOTA WHEAT INC.
TEXAS WHEAT PRODUCERS BOARD
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The Honorable Brian Schweitzer, Governor of Montana, and various Montana and other Agricultural Interests joining in this filing welcome the opportunity to address common carrier obligation issues. As the most captive state in the nation, Montana and its shippers of agricultural commodities and other commodities have a direct interest in the service obligations of BNSF (which controls over 90% of Montana rail shipments) and other rail carriers.

As shown by these Comments, including the attached Statement of Terry C Whiteside, rail shipper consultant and Chairman of the Alliance for Rail Competition, as well as comments being filed by other shipper groups and shippers, the railroad industry already has far too much leeway to refuse service, or to refuse service on reasonable terms, to shippers who require rail service. There is no sound legal, policy or economic reason for preserving the existing discretion of railroads to violate their legal obligations, let alone increasing that discretion.

The Railroads are above, at or near revenue adequacy, and the trend toward greater railroad industry financial strength appears likely to continue. Even if the Board begins to take long overdue steps to limit excessive rates, charges and rate increases on captive traffic, the Railroads have been enjoying record revenues and profits due to higher pricing of non-jurisdictional “competitive” shipments.¹ Under the circumstances, the Railroads need to do more to meet demand for service, not less, and the common carrier obligation should be strengthened, not weakened.

¹ CSX is the most recent railroad to report significantly higher revenues despite lower total volume

**I THE BOARD SHOULD BE SKEPTICAL OF RAILROAD INDUSTRY
CLAIMS CONCERNING CONGESTION AND CAPACITY**

For several years now, the Railroads have alleged that congestion and capacity constraints necessitate changes in rail regulation. The Board and Congress have been told that the railroad industry no longer has excess capacity, and that the need for expanded capacity warrants limiting the recourse of captive shippers in numerous ways.

With respect to rate regulation and ancillary matters such as railroad cost of capital calculations, the railroads have argued that they are revenue inadequate and need substantially increased revenues in order to be able to attract capital and justify capital investments, including investments in expanded rail infrastructure and capacity.

See, e.g., the Comments filed September 27, 2007 by the AAR in Ex Parte No.

664. Methodology to be Employed in Determining the Railroad Industry's Cost of Capital, at page 13:

An unrealistically low measure of the cost of equity increases the odds that one or more railroads will be found to be revenue adequate, and thus the likelihood that regulation will constrain the railroads' earnings below the level needed to cover the railroads' cost of capital, and thus the ability of the railroads to attract and retain the investment capital needed to build the additional infrastructure required to meet the expected growth in demand over the next 30 years.

As shippers have pointed out, more accurate assessments of the Railroads' cost of capital would have little or no effect on industry revenues, given the small percentage of freight subject to STB rate reasonableness jurisdiction.

See also the November 30, 2006 Reply Comments of BNSF in Ex Parte No. 646 (Sub-No. 1), **Simplified Standards for Rail Rate Cases**, at 4:

It would be particularly dangerous to establish an intrusive regime of price regulation now, at a time that new investments in railroad infrastructure are required to meet increased demand for surface freight transportation. Price regulation interferes with market signals that prompt new investments during times of increased demand. Broadly expanded regulation of rates in the rail industry could severely constrain new investment at the very time that it is badly needed.

Issues of rate regulation are relevant to the Railroads' common carrier obligation because, absent effective recourse for captive shippers, railroads will be free to avoid providing service through the simple but effective expedient of making the services they do not want to provide prohibitively expensive.

Railroad calls for minimal or no regulation based on alleged capacity constraints are not limited to rate issues. In Docket No. 42060 (Sub-No.. 1), North America Freight Car Association v. BNSF Railway Company, the Board addressed the complaint of providers of private covered hopper cars and other cars used for transportation of agricultural commodities, who were challenging the decision of BNSF to end its long-standing practice of providing storage for empty private cars awaiting loading.

BNSF defended its decision to impose unprecedented charges for such storage unless shippers provide their own storage, or lease track from BNSF, or agree to contracts with substantial volume commitments, squarely on capacity grounds. See the BNSF Reply Statement filed September 16, 2005 at 40:

In this case, the NAFCA Complainants had no basis for assuming that BNSF or any other railroad might not change their demurrage or storage charge practices with respect to empty private cars. The law is clear that they cannot claim reliance on BNSF's or any other railroad's past practice to carry their burden of proving "unreasonable practice" or a car service violation. This is particularly so in light of the necessity for BNSF and other railroads to ad-

dress the circumstance in recent years of capacity constraints on their systems. The Board has made it a priority to encourage railroads to adopt new capacity-enhancing initiatives to meet the unprecedented demand for freight rail services from almost every sector of the shipping public. Change is not only expected by the Board, but demanded.

BNSF made these arguments despite the fact that (1) Class I railroads have forced shippers to acquire freight cars for most shipments of agricultural commodities (not just peak harvest volumes);² (2) poor rail service increases the need for rail cars, and (3) BNSF had the most aggressive storage charge program of any major railroad, and imposed its charges regardless of whether cars stored on its lines actually affected capacity or congestion.

Captive shippers like virtually all shippers in Montana, as well as shippers by rail of agricultural commodities nationwide, depend on the railroads for service, and want railroads to be able to meet increasing demands for service. However, the Railroads' continuing campaign to reduce regulatory recourse, even as they approach or achieve revenue adequacy, raises the likelihood of higher rates and charges, new service charges, demands for shippers to provide services, equipment and facilities formerly provided by railroads, and outright refusals to provide service requested by shippers. (Such rationing is generally called "demarketing" of rail service.)

These developments represent a threat to the bottom lines of many shippers, particularly of agricultural commodities, and jeopardize their survival. It is often claimed by proponents of deregulation that even railroads with monopoly power will not harm the interests of their customers. However, many of these commenting parties provided evidence to the Board in Ex Parte No. 665, Rail Transportation of Grain, that the Railroads

² Class I railroads provide only about one-third of the nation's covered hopper cars and no tank cars

have managed to virtually eliminate grain elevators that do not load 100-car or more shuttle trains, through pricing and service differentials, from effective participation in grain marketing. As a result, many grain producers must truck their grain farther to fewer elevators, and states like Montana face greater costs and burdens for maintaining and expanding their highway systems. See the Comments filed October 30, 2006 and the Supplemental Comments filed January 12, 2007 in that proceeding by Montana Wheat & Barley Committee, et al.³

More fundamentally, if railroad profit margins would be best served by demarketing most (or all) shippers of certain commodities in favor of shippers of higher rated commodities, or if certain commodities are seen by the Railroads and/or Wall Street as representing growth opportunities, continued service for all shippers on reasonable request – i.e., continuation of the common carrier obligation as it has been understood for decades – will be in jeopardy.

The Railroads are likely to argue they merely seek to maximize efficient operations, and that shippers have unrealistic expectations of more and better service without higher rates and charges. In fact, shippers support reasonable efficiency improvements, but do not want railroads to be the sole arbiters of when service is provided and on what terms

Similarly, as to rates and charges, shippers do not oppose reasonable pricing practices, but do oppose unregulated pricing freedom for railroads as to captive traffic whether or not railroads are earning their cost of capital. Many captive shippers have

³ In their October 30, 2006 Comments in that proceeding, the AAR yet again called on the Board to “assist – and, just as importantly, refrain from taking steps that hinder – railroads in earning enough to make the investments they need to sustain themselves and provide the current and future transportation capability the nation requires.” AAR Comments at 2. Notably, the AAR does not commit to continued or improved service for grain producers or elevators even if the Board gives Railroads a free hand.

paid supra-competitive rates for decades under differential pricing. They have had little or no recourse to relief from unreasonable rail rates or unreasonable rail charges, despite the statutory command that rates on captive traffic “must be reasonable.” 49 U.S.C. Section 10701(d)(1).

There is no sound reason for railroads to look disproportionately to captive traffic to support capacity expansion so long as the contribution of non-captive traffic is not being maximized. As a matter of law, the Long-Cannon amendment, 49 U.S.C. § 10701(d)(2), imposes further limits on differential pricing. Now that railroads have achieved or are attaining revenue adequacy, less reliance on differential pricing should be the rule even if additional revenues for infrastructure investment are required.

Issues of rate regulation are discussed further below, but a more fundamental question arises here. Are additional revenues for infrastructure investment required? If so, how much money is needed, and when is it needed?

These questions are related to the definition of “common carrier obligation” and should be answered before questions of how any additional burdens should be allocated. Unfortunately, it appears that the railroads’ claims of capacity constraints, and their calls for light-handed or ineffective regulation, have been accepted too uncritically. With so many issues of such importance hanging in the balance – not just the future of the common carrier obligation, but also fundamental issues of rate and service regulation, and fundamental issues of how much say railroads should have in how captive shippers operate – it is incumbent on the Board to test the Railroads’ capacity and congestion claims before handing the Railroads the keys to the kingdom.

In this connection, the Board should take official notice of the recent Final Report of the National Surface Transportation Policy and Revenue Study Commission. That Commission was established by Congress in the 2005 Highway Bill, SAFETEA-LU, and charged with assessing national infrastructure needs and options for meeting increased demand, including increased demand for freight transportation.

The Commission's Final Report amply supports the proposition that additional infrastructure funding is needed. However, when the Commission analyzed the railroad industry, its findings hardly supported a free hand for Railroads with respect to raising prices or rejecting service requests. On the contrary, the Commission found, based on AAR data, as follows:

By contrast, the Nation's freight rail network is relatively uncongested at current volumes of cargo (see Exhibit 3-8). Eighty eight percent of today's primary freight rail corridor mileage is operating below practical capacity (Levels of Service (LOS) A/B/C). About 12 percent is near or at practical capacity (LOS D/E), and less than 1 percent is operating above capacity (LOS F).

Final Report at page 3-15

Moreover, the Commission's findings predate the current economic slump, which has led to overcapacity for railroads and other carriers. Transport Topics recently reported that BNSF has idled some 5% of its car fleet, parking upward of 1000 cars in Montana alone, due to the current "freight recession." Notably, BNSF CEO Matt Rose was a member of the 9-member majority voting in favor of the Final Report of the National Surface Transportation Policy and Revenue Study Commission ⁴

⁴ While a dissent was issued by three Commission members from DOT, including Secretary Peters, the dissent questioned funding highway infrastructure expansion through taxes and federal participation rather than through state and private funding. It did not argue that railroad congestion is at a critical stage. In a separate statement, Mr. Rose adhered to the railroad industry line, characterizing the Final Report as show-

The AAR has argued, and the Commission found, that rail capacity constraints may exist in the future. See Final Report at 4-14, where the Commission concluded that, by 2035, 54% of freight rail corridor mileage will be below or near capacity, 15% will be at capacity, and 30% will be above capacity. It is important to note, however, that these figures assume no new capacity is added in the next 28 years.

In fact, as the Railroads frequently point out, they have a commendable record of capital investment. The Final Report finds that an average total investment of \$5.3 billion per year "is expected to be adequate to accommodate projected freight rail demand in 2035 to a point at which 98 percent of primary rail corridors operate at a level below their theoretical capacity." Id. At page 4-14.

To be sure, there are well-known instances of railroads failing to meet service demands from grain shippers, coal shippers, and other shippers. However, in view of the findings of the Final Report of the National Surface Transportation Policy and Revenue Study Commission, the Board should not be too quick to accept Railroad claims of urgent capacity and congestion problems warranting wholesale rationing of service or unimpeded pricing freedom (which amounts to the power to ration service as the Railroads wish).

Governor Schweitzer and these Agricultural Interests are aware that the Board concluded, in the January 14, 2008 Decision in Ex Parte No. 665, Rail Transportation of Grain, that grain shipper service and rate concerns warrant attention. See also the separate Comment of Board Member Buttrey. We are also aware of the Board's decision to commission a study of rail competition and capacity issues by Christensen Associates.

ing that "infrastructure capacity for all modes is now maximized" Report at 57. However, the Report's factual findings contradict this characterization.

partly as a result of Ex Parte No. 665 and partly as a result of GAO studies raising similar concerns.

Under the circumstances, the Board must not assume too readily that excision of any part of the common carrier obligation is needed or desirable.

II. BEFORE GRANTING THE RAILROADS RELIEF FROM THEIR COMMON CARRIER OBLIGATION, OTHER SERVICE OBLIGATIONS OR REASONABLE RATE REQUIREMENTS, THE BOARD SHOULD CONSIDER WHETHER LESS DISRUPTIVE CAPACITY ENHANCEMENTS ARE POSSIBLE

For the reasons set forth above, the Board needs to satisfy itself as to the extent and severity of capacity concerns before considering providing major Railroads further relief from their statutory obligations, including Section 11101(a). The common carrier obligation is not identical in all circumstances, and varying levels of capacity strains may well affect reasonable and lawful common carrier performance.

In addition, the Board should consider whether management decisions have contributed to capacity concerns. For example, it has been widely reported that some railroads have experienced service problems because they reduced their workforces below needed levels. *To the extent that this is true, railroads should increase their workforces before demarketing freight in violation of their common carrier obligation.*

Allowing Railroads a free hand to "demarket" where their own mismanagement has led to service problems does nothing to encourage better management, and amounts to blaming the victims.

Similarly, it is widely reported that railroads can increase capacity substantially if they increase the speed of trains by as little as 1 mile per hour. Assuming this can be done safely, it is preferable to allowing railroads to provide poor service or no service

whenever that choice is more advantageous financially than providing better (or any) service. Positive Train Control can also increase the capacity of existing rail systems, and those systems can also be expanded through more basic approaches, such as constructing additional track and making improvements at choke points and bottlenecks.

The Railroads may argue that they should also be able to pursue efficiency gains by declining, as they see fit, to provide service based on the shipper, the rate, the region, the commodity, or the time in question. There are a number of problems with this approach, beginning with the fact that in 49 U.S.C. § 11101(a), Congress provided that railroads shall provide transportation or service upon reasonable request.

Based on this clear statement of Congressional purpose, making service optional at the discretion of the railroads should not be the default position of the STB. It should not be assumed that what Railroads consider to be in their own best interest is necessarily in the public interest, particularly if the Railroads define their own best interest as their economic interest.

There is, of course, case law defining the common carrier obligation. In B. J. Alan Co. v. UPS, 5 I.C.C. 2d 700 (1989), aff'd 897 F.2d 561 (D.C. Cir. 1990), the ICC observed that “the obligation to serve, of necessity, can and does change to reflect the commercial realities of the transportation marketplace and the attending scheme of regulation.” 5 I.C.C. 2d at 713.

The Railroads are likely to assert some such principle in support of further relaxation of their common carrier obligation. The Board should resist such arguments, for a number of reasons.

First, the Railroads' rationale for greater freedom to demarket is likely to be alleged capacity constraints. As detailed above, it is far from clear that such constraints are real, let alone as stringent as the Railroads claim them to be. Moreover, many capacity limits may be due to the Railroads' own decisions to lay off workers, stop supplying cars, fail to maximize efficiency, etc.

Capacity constraints that are self-inflicted by railroads cannot justify allowing wholesale marketing or rationing by price, and any moves by the Board in that direction could exacerbate service problems. It is not inconceivable that shortages could be artificially generated to support higher rates and more ruthless selectivity as to recipients of service

As the attached Statement of Terry Whiteside shows, railroads have not hesitated to turn down service requests, or condition service upon shipper acquiescence to highly burdensome and costly terms. And while the Railroads' high level of capital investment is commendable, it is not clear how much of that investment is for expanded capacity, as opposed to maintenance of existing capacity. In fact, were the Board to inquire, we are confident that it would learn that most of the funds reported by railroads as infrastructure investments are in reality normalized maintenance rather than additions to capacity. It is also not clear that these investments, which are funded disproportionately by captive shippers, will benefit those shippers.⁵

⁵ In his separate Statement of Supplemental views accompanying the Report of the National Surface Transportation Policy and Revenue Study Commission, BNSF CEO Matthew Rose said "it is essential to recognize that any freight fee is the shipper's money – private funding – which should be invested in ways that result in increased freight velocity, capacity and additional reliability, which are private and public benefits" Final Report, page 58. However, the reference to "freight velocity" appears to indicate a greater interest in merchandise freight than grain

Second, B. J. Alan involved trucking, and one of the reasons for the ICC's relaxation of the trucking industry common carrier obligation in that case was the proliferation of competing carriers following deregulation, which in turn led the Commission to rely less on trucking companies' licenses as the measure of their holding out. 5 I.C.C. 2d at 712.

In the railroad industry, in contrast, there is less competition among Class I railroads than ever before, and competition from short line railroads is limited due to paper barriers and the reliance of smaller railroads on the Class I's. These concerns are particularly acute in Montana, where some 95% of rail freight is controlled by BNSF. These factors militate against relaxing the common carrier obligation of railroads.

Third, in National Grain and Feed Ass'n. v. United States, 5 F.3d 306 (8th Cir., 1993), the court of appeals reversed the Commission's determination that BNSF's COT program did not infringe its common carrier obligation. The court rejected the argument that ordinary customers are not entitled to an equitable supply of cars so long as the railroad arranges to offer better service for higher charges under premium tariff programs. 5 F.3d at 311.

The Board should therefore consider whether the common carrier obligation needs to be strengthened, not weakened.

III. THE RAILROADS DO NOT NEED ADDITIONAL FREEDOM TO REFUSE OR REDUCE SERVICE

Railroads that want to turn down service requests already have numerous ways of doing so, their common carrier obligation notwithstanding. They do not need more.

One of the tools Railroads can use (although not necessarily lawfully) is their pricing freedom. Rather than saying no to a shipper, they can say yes, but make the price

of the requested service prohibitively high. The March 24, 2008 issue of Transport Topics, in an article entitled "Truckers Gain Hazmat Business as Railroads Spurn Toxic Gases," reported rail rate increases of almost 400% on certain hazardous materials:

The cost of shipping anhydrous ammonia by rail to central Indiana from Tampa, for example has gone to \$275 a ton from \$75 a ton. Whittington said. From Savannah, GA, truck rates used to be twice as high as rail-but-now rail is twice as much.

See also the attached Whiteside Statement.

Absent market dominance, railroads can generally charge anything they like for their services. Unfortunately, ineffective rail rate regulation provides almost as much pricing freedom for market dominant railroads. For most shippers of agricultural commodities, SAC is too expensive, Simplified SAC is also too expensive (in part because all freight on the incumbent must be costed), not really "simplified," and hardly "expedited," as commanded by statute. For shippers not shipping exclusively on high-density main lines, relief is precluded because of the segment cross-subsidy test under either version of SAC. It remains to be seen whether Three Benchmark can work, but relief is limited to \$200,000 per year. Even large numbers of Three Benchmark cases will not undermine the Railroads' ability to invest in infrastructure expansion.

Rate litigation aside, railroads have the power to deregulate their own rates by forcing shippers to sign contracts. All that is needed is for railroads to offer the Hobson's choice of a 25% rate increase under a contract, or a 50% rate increase without one. The railroads clearly do not fear rate litigation under the second of these "options."

Railroads can and do control demand through their car supply decisions. They have declined to provide much of the nation's car fleet – 100% of tank cars, two-thirds of

covered hoppers used for grain, and tens of thousands of coal cars and gondolas are now supplied by shippers. We are no longer talking about not building churches for Easter Sunday; average demand for major car types cannot be met by the Railroads' own fleets, even though this was the standard of the ICC, found permissible as far as it went, in NGFA, supra. 5 F.3d at 311. Since the shippers best able to shoulder these burdens tend to be the largest shippers, Railroads can effectively reduce service to smaller shippers.

Similarly, the costs of constructing or rehabilitating tracks, switch connections, transloading and other facilities have been shifted, at the Railroads' insistence, to their customers. In many instances, it is not enough for shippers to pay these costs. Railroads may also demand that shippers assume all liability associated with construction, maintenance and operation of these facilities, including liability for the railroad's own negligence or misconduct.

And, of course, there are situations in which Railroads simply say no to service requests. Referenced in the Statement of Mr. Whiteside is a July 2004 letter to customers from UP's Executive Vice President, Marketing and Sales, stating that UP had decided to limit carloadings, freight car inventories and regulate the volume of selected agricultural commodities. The reason for these measures was said to be a surge in demand and a shortage of employees. Railroads can also refuse requests for switch connections at shipper facilities.

As the Board's Notice in this proceeding indicates, there have also been situations in which Railroads impose embargoes, sometimes for such extended periods that the embargo is effectively an abandonment. See, e.g., the Board's recent decision in Finance

Docket No. 35130, Central Oregon & Pacific Railroad, Inc. – Coos Bay Line, served April 11, 2008.

Under the circumstances, the Board should not worry that the railroads need additional authority, in the form of a relaxation of the common carrier obligation, to deal with imbalances between supply and demand for rail service. On the contrary, the Board should be asking whether the Railroads have too much discretion to interpret 49 U.S.C. § 11101 and related statutory provisions subject to too little oversight by the Board and too little recourse for shippers.

**IV. THE STATUTE, NOT THE RAILROADS, SHOULD DETERMINE
WHAT THE COMMON CARRIER OBLIGATION REQUIRES**

The Railroads can be expected to argue that, in many instances, their decisions to eliminate or reduce service are driven by the need to increase the efficiency of their operations, allegedly for the benefit of all their customers. In some instances, these arguments may have merit.

However, the Board will also hear in this proceeding of instances in which Railroad decisions appear to be overreaching or abusive, and appear motivated by the desire to limit competition, maximize revenues, or penalize shippers who failed to do or say what the Railroads wanted. There is clearly an important role for the Board to play in such situations.

Even where efficiency is claimed to be the reason for service denials or reductions, and even where greater efficiency in fact results from such actions, shipper recourse to the Board is important. Increased efficiency for Railroads may come at an unacceptable cost for other interested parties and the nation as a whole.

Governor Schweitzer and these Agricultural Interests have testified in prior proceedings about adverse impacts on grain producers and states caused by railroad decisions to serve a smaller number of larger elevators. No doubt this simplifies operations for BNSF, but others have had to assume additional costs and burdens.

Should the Railroads have a free hand to adopt similar policies as to other industries? It might be more efficient for the railroads if the nation's need for electricity were met by fewer, larger coal-fired generating stations located where they can be most economically served with unit trains of coal. However, the law limits the ability of regulated electric utilities to deny service to smaller and more isolated customers in their service areas. Similarly, the Railroads must not be allowed to decide unilaterally, based on their own self-interest, to force consolidation of electric generation.

It is simply not appropriate for the Railroads to decide where manufacturers must obtain their raw materials, or where they should market their finished goods. These decisions should be made by shippers, based on the quality, price and suitability of vendors and customers for their products. Left to their own devices, the Railroads could have the power to distort the larger economy in ways that disserve the public interest.

The decision of the Court of Appeals for the 8th Circuit in NGFA, supra, provides a useful framework for thinking about these issues. As the court there found, two questions must be asked about car supply: first, is it adequate in the aggregate, i.e., to meet average demand, and second, are available cars being allocated fairly among those who need cars? 5 F.3d at 311. Similarly, the Board should ask whether the overall supply of rail service is meeting the overall need, and it should also ask whether available capacity is being allocated fairly among those who need it.

The Railroads are likely to argue that the common carrier obligation should be interpreted in such a way as to allow them to decide on the correct answer to both of these questions. They may also argue that, if service must be rationed, it makes sense to ration based on their economic and operational considerations. They are also likely to suggest that the Board should not interfere with their decision because of the danger that Board "micromanagement" is more likely to exacerbate service problems than to solve them.

The problem with these arguments is that they render the statutory common carrier obligation a nullity, along with the Board's jurisdiction over meaningful enforcement of that obligation. In effect, the Railroads would be able to provide as much or as little service as they choose, when they choose, at rates they choose and on conditions they choose. The requirement of reasonableness will mean whatever the Railroads think it means.

On the other hand, the Board obviously does not have the resources or expertise to stand at the shoulder of Railroad-managers, overseeing every decision they make. And the risk of paralysis might be even greater if committees of shippers with competing priorities were to tackle such an assignment.

There is nevertheless middle ground between too much regulation and too little. The common carrier obligation should not be absolute, but neither should it be meaningless. The following principles should guide the Board in this area.

First, the Board should use its good offices to gather information about the Railroads' ability to meet overall demand, and demand in key geographic regions and as to key commodities. Of particular concern should be regions like Montana, North Dakota

and other areas of past and present concern, and commodities like agricultural commodities and coal.

This proceeding, and such initiatives as the Board's recent letters asking Railroads for information about their plans to address peak service needs, are helpful in this regard. In addition, the Board should look more deeply into the facts behind claims by the Railroads of capacity constraints, to determine whether these claims are accurate or merely self-serving.

Second, the Board should resist any calls by the Railroads for broad relief from the common carrier obligation. Where capacity constraints are nonexistent or self-inflicted, no relief is needed or warranted.

Third, the Board should remain available as an "umpire" when there are disputes over the reasonableness of Railroad interpretations of their common carrier obligation. This can mean entertaining complaints and requests for investigation. It can also mean continuing to offer help through the Office of Compliance and Consumer Assistance.

Under all of these approaches, however, the Board must permit shippers to obtain appropriate information, though discovery or through more informal means, of the facts underlying the Railroads' positions. Recourse to the Board is meaningless if all shipper challenges can be trumped by Railroad claims that providing requested service is inconsistent with maximizing overall system efficiency. Such claims may sometimes be true, but there must be ways to test them.

At some future date, it may become necessary for Railroads to turn down service requests on other than an infrequent or isolated basis. The Railroads may be planning to seek guidance as to such situations now, in this proceeding. For reasons set forth above,

Governor Schweitzer and these Agricultural Interests believe that the time is not ripe for what amounts to approval of Railroad requests to be told when they may decide that requests for service are unreasonable, i.e., for “safe harbors” in which the common carrier obligation will not apply.

Such discretion is not needed, and has too many potential disadvantages, to be provided when only 1% of primary rail corridors are over capacity. And operational efficiency gains, infusions of new capital from shippers and investors, or initiatives like the investment tax credit called for by Railroads on Capitol Hill could result in adequate capacity, and a strong common carrier obligation, for years or decades to come.

To the extent that rationing is to be addressed, however, the Board should clarify that economic concerns, operational concerns, and Railroad self-interest cannot be the only considerations applicable to interpretation of the common carrier obligation. The public interest in rail transportation, including food for the nation and the world, coal for power plants, chemicals for manufacturing, and the safe transportation of hazardous materials, should also be considered, as should the fact that some shippers are better able than others to find alternatives to rail service, if it is truly in short supply.

V. CONCLUSION

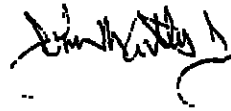
For the foregoing reasons, the Board should resist calls to weaken the Railroads’ common carrier obligation. Not only should it clarify that the obligation to serve remains an important responsibility of the nation’s rail system, with public interest implications that are not necessarily the same as the Railroads’ economic interest, but the common carrier obligation should be strengthened to limit further restructuring of the rail system and the economy driven by major Railroads’ economic interests. The Board should take

the initiative by investigating service complaints, and should issue show cause orders when violations of the common carrier obligation are found.

Respectfully submitted.



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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**EX PARTE NO. 677
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**STATEMENT
OF
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My name is Terry Whiteside and for the past thirty years I have been involved in the rail and freight transportation industry. I am registered practitioner and have been Principal in Whiteside & Associates, a transportation and marketing consulting firm located in Billings, MT for the past 20 years. I also serve as Chairman of the Alliance for Rail Competition. Our clients at Whiteside & Associates cover a broad range of industries including agriculture, processing, mining, lumber, ports, manufacturing and finished goods.

I have worked as both a carrier and shipper representative and I have, for the past 30 years, assisted shippers in obtaining needed transportation service including rail

I have had extensive experience with shipper and carrier rate and service negotiations. I have surveyed Montana and other state grain shippers in preparing evidence filed in many proceedings before this Board, including Ex Parte No. 665, Rail Transportation of Grain, and numerous other proceedings.

In recent years, especially the last decade, we continually hear from shippers of numerous reductions in rail service by major railroads notwithstanding their common carrier obligation. These concerns center around eight major points.

- 1. Service Limitations are being imposed based on an allegedly constrained capacity environment: Limits on service for existing or new business based on alleged capacity constraints or operational efficiency should be studied by this Board as this practice could lead to unfairly penalizing smaller shippers, captive shippers and new shippers. The Board should be skeptical of railroad industry claims that capacity constraints are driving these denials of service.**
- 2. Under the statute, a common carrier must treat all customers fairly in allocation of equipment and power, and revenue burdens on captive traffic must be reasonable**

- 3 Rates and charges for service in areas of rail captivity continue to be at elevated levels compared to other rates and charges for service in areas with rail competition, and high rates are used as a device to deny access to rail transportation.**
- 4. Rail car allocation systems used to be based upon 'fairness', but as the railroads have become market dominant in the market place, they have set up car allocation systems which reduce the supply of tariff cars and have allocated cars, with Board blessing, based upon operational efficiency, volume requirements or other incentives.**
- 5. Dominant rail carriers are forcing shippers to negotiate transportation contracts by refusing to publish tariffs or provide service under tariff. These tactics amount to self-deregulation by railroads as to rates and service.**
- 6. Railroads provide temporary incentives to certain rail shippers to load at mainline points away from branchline points in order to drive rail traffic off the branchline, setting branchlines up for future abandonments.**
- 7 The railroads have been closing selected facilities where they do not want to continue service, such as intermodal facilities. Whole states that used to have multiple facilities for loading intermodal or lumber reloads or trans-loading facilities have been forced to close facilities by the railroads refusing to provide service to such locations, thereby eliminating intermodal service to the state. This practice should be examined by the Board, which should clarify the railroads' obligation to service smaller agricultural and intermodal facilities**
- 8. When rail carriers charge "what the market will bear," they affect the delivered market price of the commodity they are transporting. This has led to rail carriers demarketing certain shippers while promoting others and limiting their access to their markets. Much of this demarketing occurred long before alleged capacity constraints that railroads suggest are in place today. The key issue the Board needs to focus on is that the common carrier obligation should minimize the ability of rail carriers to distort markets for the commodities they are hauling. Indeed, the common carrier obliga-**

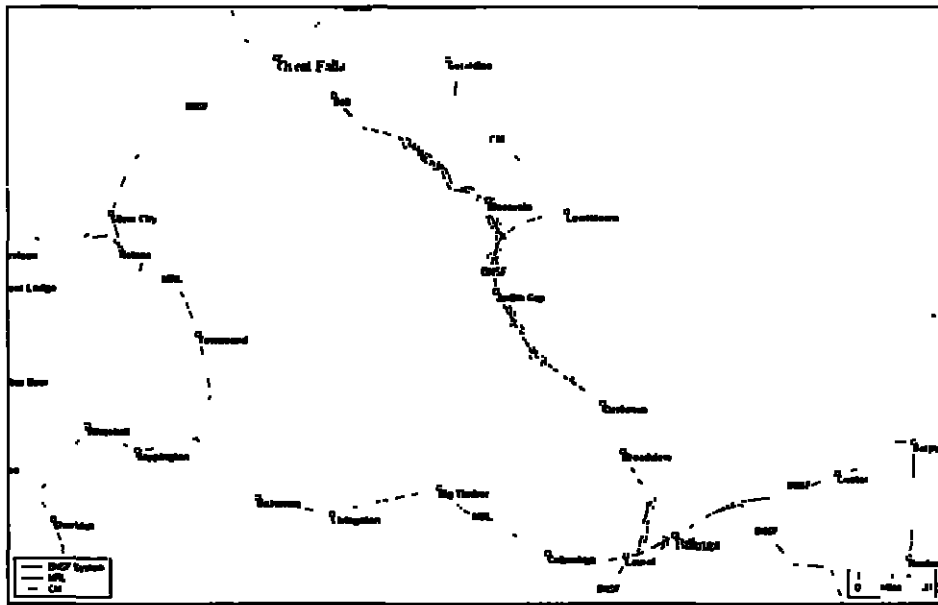
tion should limit the railroads' demarketing, and the Board needs to set the bar so that railroads do not pick winners and losers in the marketplace.

In this Statement, I will discuss some of those shipper experiences. As in most of these STB proceedings, many shippers are reluctant to come forward for fear of retaliation or retribution of the rail carrier, but since I have witnessed virtually all of the examples I will give with this Statement, I know the examples to be factual.

Limited service for existing or new business – Railroads' reliance on capacity constraints or operational efficiency should be examined by this Board. There is evidence that the railroads are exaggerating capacity constraints to provide cover for higher rates and more refusals to serve. This practice could lead to unfairly penalizing the smaller shipper or new shippers in violation of the railroads' common carrier obligation.

In late 2006 and into 2007, a Montana company called Montana Seed tried to purchase an elevator in Broadview, MT in anticipation of developing a state of the art ethanol plant in Montana.

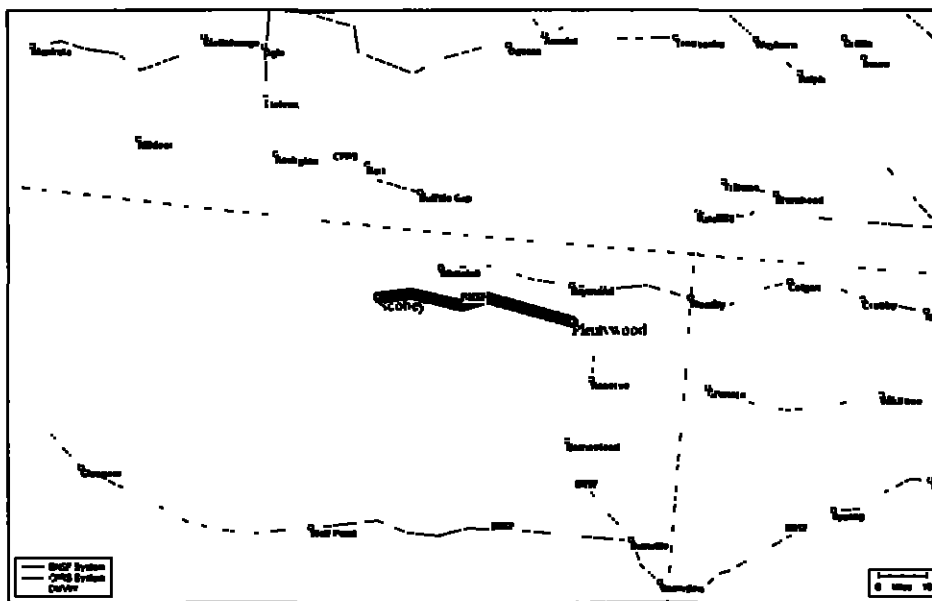
1. Broadview is a station on the Billings to Great Falls sub-mainline, 30 miles northwest of Billings, and the station has been in operation and rail-served for at least 50 years.



- i. Service trains between Billings and Great Falls go through Broadview regularly. Service on this line is provided to the following towns: Broadview, Judith Gap, Moore, Moccasin, Stanford, and Belt, Montana.
- ii. Montana Seed wanted to ship corn inbound and establish a new ethanol plant at Broadview.
- iii. At the time the elevator in question was being utilized for storage.
- iv. There are occasional but regular movements of corn used for feed into Broadview by some farmers.
- v. In response to Montana Seed's request for service, BNSF said there is no local train working the area, thus a passing merchandise train would have to spot and pull cars – something the railroad does not "like to do"
- vi. Would BNSF be willing to grant Montana Rail Link access to bring a train up from Billings (30 miles on BNSF)? In January 2007, BNSF said no.
- vii. BNSF indicated that it would be unable to provide service to Broadview to drop off corn loaded cars unless Montana Seed was willing to pay for new train service from Billings.

Railroads provide incentives to certain rail shippers to load at adjacent mainline points away from branchline points in order to drive rail traffic off the branchline, setting it up for future abandonment.

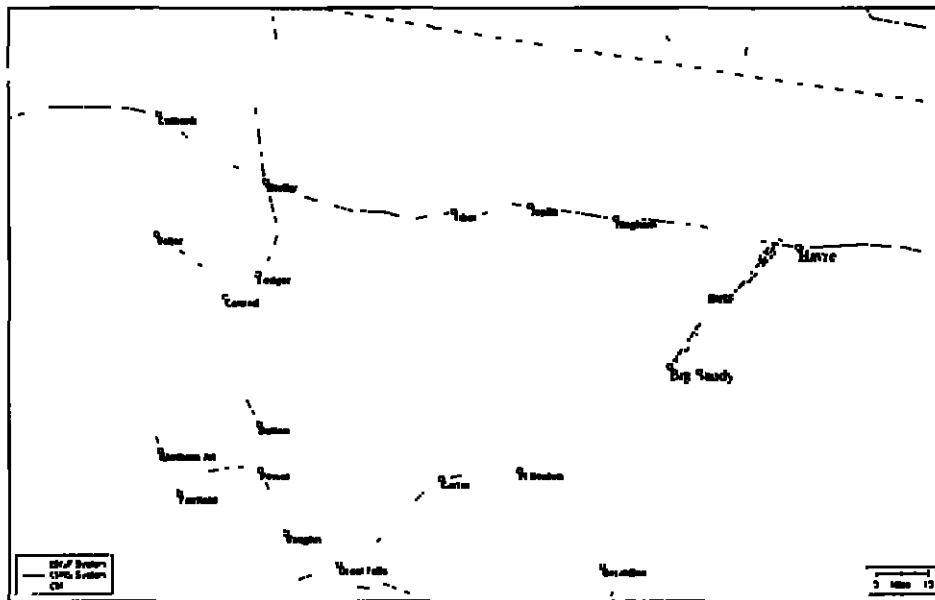
Carriers may provide economic incentives to drive traffic from branchlines to mainlines in order to abandon branchlines. For example, in Scobey, MT (located in NE Montana on then BNSF line west of Plentywood, MT), the BNSF evidently had an economic incentive to drive off traffic:



1. The railroad wanted to abandon the line between Scobey and Plentywood, MT
 - i. The railroad approached a local elevator owned by a common owner on the BNSF mainline about 70 miles away (known as the HiLine and part of the former Great Northern mainline). The railroad offered an economic incentive not to continue to ship from Scobey but rather to truck grain from the Scobey area to the mainline.

- ii. The result of this action was to curtail all movement on the line segment in question, thereby setting the line up for abandonment.
- iii. When the news of the agreement got out (it showed up on some of the settlement statements farmers in the Scobey area were getting and in local media), BNSF denied it initially and then subsequently sold the entire branchline (which included this line segment at one end) to WATCO - a shortline – thereby making the abandonment the shortline's issue.

This is far from the only example of a railroad providing economic incentives to drive traffic off branchlines to mainlines in order to setup an abandonment in the future



- i. BNSF wanted to abandon the line between Big Sandy and Havre, MT (approximately 30 miles).
- ii. It has been widely reported that the railroad offered the local elevator, owned by a common owner on the mainline about 40 miles away, an economic incentive not to continue to ship from Big Sandy but rather to truck grain from the Big Sandy

area to the mainline point at Havre, MT (formerly GN mainline).

- iii. The result of this action was to curtail all movement on the line segment in question (Big Sandy to Havre), thereby setting the line up for abandonment
- iv. BNSF has now put over 25 miles of surplus cars on the line, blocking it from service
- v The local elevator managers were told not to discuss their knowledge of the incentive agreement.
- vi BNSF has not been able to keep local companies from ordering fertilizer, but the railroad has provided substituted truck service for rail service from Havre, MT.

Railroads force shippers to negotiate transportation contracts by refusing to publish tariffs or provide common carrier service.

An international agricultural processor chose to locate on a Class I in the western U S.

- i. This processor was told he would have to negotiate a transportation contract to move agricultural processed product from his new plant to his other plants.
- ii. In the opening negotiations, the Class I quoted contract rates higher than rates published in the tariff and service worse than other local industries were getting
- iii. When the agricultural processor complained that the rates were higher than in the tariff, the railroad representatives asked the processor to provide proof of that.
- iv. Upon proof being given, the railroad cancelled all tariffs out of the proposed location, and told the processor that it would now have no choice but to negotiate a transportation contract.

The railroads have been closing selected facilities where they do not want to continue to service, such as intermodal facilities. Whole states that used to have multiple facilities for loading intermodal or lumber reloads or transloading facilities have been forced to close facilities by the railroads refusing to provide service to such locations, thereby eliminating service to the state. This consolidation is being forced upon shippers resulting in higher transportation costs to the shippers, but lower costs to the railroad. This practice should be investigated by the Board, which should clarify the railroads' obligation to serve smaller agricultural shippers, captive shippers and intermodal facilities.

Intermodal locations have been closed throughout the U S., leaving whole states without access to intermodal transfer capabilities

- i The Class I's impose requirements for ever increasing minimum lifts per location
- ii. Class I's tell shippers to truck to the nearest intermodal facilities – up to 600 miles one way in some locations – the distance from Washington DC to Atlanta, GA.
- iii. Whole states now have no intermodal facilities even though foreign buyers call for them.
- iv. Some agricultural shippers have resorted to trucking to Canada, as Canadian rails are providing the needed services.
- v. Many crops, including rotational and pulse crops, are being priced out of the market by increased transportation costs forced upon them by the railroads.

Railroads continue to pick and chose the commodities they want to handle and the ones they do not, such as anhydrous ammonia used for fertilizer.

This Board will hear from the TFI and chemical shippers about this situation.

A quick description of the problems:

- i. Anhydrous ammonia shippers continue to hear from railroads that the railroads do not want to handle their product
- ii. All of the railroads' actions right now are tilted towards driving-off the business to trucks.
 1. The railroads require new and extremely heavy cars, limiting economical transportation of ammonia.
 2. The railroads are shifting liability to the shippers even though the track record is very good and the only accidents that have happened have been caused by railroads – either operational or infrastructure related.
 3. Rates and charges are raised, moving traffic off line (to trucks if moved at all).
 4. Rejecting movement of the ammonia product in favor of less nitrogen dense products will drive up delivered nitrogen costs by over 100%.

Rail carriers now appear to believe it is their right to set or affect the market price of commodities they are transporting. This has led to rail carriers demarketing certain shippers while promoting others and controlling access to markets.

Much of this demarketing occurred long before alleged capacity constraints that railroads claim are affecting service today. The common carrier obligation does not give rail carriers the right to set prices for the commodities they are hauling and the capacity constraints claimed by the railroads have been exaggerated. No doubt there have been isolated episodes in which demand for service exceeded the railroads' ability (or willingness) to serve. But overall capacity appears adequate at present and likely to remain so. Indeed, the common carrier obligation should limit the railroads' demarketing of shippers on their system and

this Board needs to set the bar so that railroads are not capable of picking winners and losers in the marketplace.

For example, California corn producers in a study in cooperation with USDA two years ago showed the railroad was pushing Iowa and Nebraska corn into the California market with rates below full rail costs. The effect on California corn products was that they could not compete in their traditional feed markets just 100 miles away from their farms. The railroad push into the market also displaced the Idaho barley markets from the California milk shed industry – a market they had enjoyed for 50 years. The railroad in question served both the Idaho markets and the Iowa, Nebraska and California markets after the completion of its last major merger. The railroad priced the Idaho barley shipments high enough to eliminate the traditional movements into the California and continues these market distorting actions to this day.

In a 2004 letter to customers, Jack Koraleski, UP Executive Vice President – Marketing and Sales, announced the railroad's unilateral decision to limit car-loadings and reduce the overall inventory of railcars due to the UP's failure to have enough workers to handle growth in demand. The UP also said it was creating an allocation system to protect terminals from overload, capping the number of incremental train starts, and regulating the volume of selected agricultural commodities.

The Board should also recall the service "meltdowns" following the UP/SP merger and the acquisition of Conrail by NS and CSX. The Board cannot simply assume that railroads will do what's right by their shipper customers with respect to service.

The Board will hear many stories from shippers about the railroad service affecting shippers' ability to compete in markets for which rail access is needed.

The mission of the Board should be to allow competition where it exists, and to protect shippers where it does not exist.

As the railroads have continued to have more control over the market through a federally granted franchise, they are entering into transportation contracts and rationing car supply in auctions, while requiring shippers to consolidate into ever larger units – all actions that benefit the railroad industry. Operational and railroad economics are now clouding the response to reasonable requests for commitments for common carrier service.

When carriers of goods take on the transportation function, they are not private companies like other companies. They knowingly take on the responsibility of fulfilling their common carrier obligations in the marketplace. Public interest considerations apply. This is particularly true of monopoly railroads, like BNSF in Montana and UP in Idaho.

Car allocation programs, limiting capacity, operational desires to serve larger and larger facilities, and influencing pricing of the commodity in the market place all violate the obligation of responding to reasonable requests for common carrier service.

It is clear to rail customers, whether captive or not, that common carrier obligations and the responsibilities that go with them have been trampled on and ignored by railroads as the railroads continue to exert management decisions where they have increasing market power.

This Board should be pro-active in finding and seeking out areas and examples of the carriers not living up to their common carrier obligations. Relying solely on shipper complaints is unrealistic when shippers' businesses can be destroyed by market dominant railroads.

Shippers need the right to route their own traffic and most importantly the right to redress against common carrier infractions without fear of the railroads taking re-

taliatory action. The Board must become much stronger in the rail customer arena and formulate rules that protect rail customers and prohibit predatory pricing and practices, avoid undue concentrations of market power, and prohibit unlawful discrimination, as called for in the Rail Transportation Policy, 49 U.S.C Section 10101.

When railroads exert their market power to limit transportation choices in the market place by denying reasonable requests for common carrier service, they are breaking the law. Simply passing along complaints by the rail customers to the railroads for answers, as the Board's Office of Compliance and Consumer Assistance too often does, serves little purpose. Common carrier obligations by transportation carriers are fundamental tenets of our transportation system and have been for hundreds of years

If the Board finds after consideration and evaluation that it does not have the full authority to enforce the common carrier obligation, it should go back to Congress, which has invited the Board to seek additional authority, and request the additional authority it needs to "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."



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