2009 HOUSE TRANSPORTATION

HCR 3034

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HCR 3034

House Transportation Committee

☐ Check here for Conference Committee

Hearing Date: 02/13/09

Recorder Job Number: 9493

Committee Clerk Signature Jeanette Cook

Minutes:

Representative Ben Vig, District 23, introduced HCR 3034 with an amendment which urges Congress to move forward on enacting federal legislation to create protections for railroad shippers. He feels that North Dakota is held captive by major railroad companies. When producers want to take their products to market they are not given competitive rates and on occasion are held at a stand- still with late trains. Even though 2007 was a successful year for many farmers, but rail cars were often late and sometimes base prices went up. North Dakota could not do much about these problems because of the captive shipper status. The amendment updates the bill and brings forward the Antitrust Enforcement Act of 2009. He asked for a Do Pass on HCR 3034.

Chairman Ruby: What regulations do you expect to be implemented if they are encouraged to comply with this resolution?

Representative Ben Vig: The Surface Transportation Board is supposed to be regulating railroads across the country. Since we are at a captive shipper status in North Dakota, it seems that sometimes the railroad can take control of the Surface Transportation Board and the Congress has its Antitrust Enforcement Act in place, so that they can have more regulation over the railroads and maybe even the Surface Transportation Board. We would like Congress to have more oversight.

Roger Johnson, North Dakota Agriculture Commissioner, felt that this is a very large issue for the agricultural industry, but it is for other industries as well. He provided written testimony in support of HCR 3034. See attachment #1.

Representative Vigesaa: In the amendments it looks to remove "the Railroad Competition and Service Improvement Act of 2007" and insert "the railroad Antitrust Enforcement Act of 2009". Can you explain the difference between those two acts?

Roger Johnson: I have not seen this before. I presume that the new act that is being introduced this year is being renamed. It is probably modeled after the 2007 act which was not passed, so as it was reintroduced, it was probably renamed.

Chris VanDeventer spoke on behalf of Basin Electric Power Cooperative in support of HCR 3034. See attachment # 2a. He also addressed Representative Vigesaa question. He explained that there are actually two bills in Congress. One is the Railroad Competition and Surface Improvement Act of 2007 which was introduced last session and not acted upon. The second one is the Railroad Antitrust Enforcement Act which has been reintroduced in the House and Senate this year. Both bill address similar but different issues. The Railroad Competition and Surface Improvement Act of 2007 addresses the Surface Transportation Board by trying to reform the way they handle their rate regulations. The Railroad Antitrust Enforcement Act addresses an oversight. When the Staggers Act was passed in 1980, the railroads were largely deregulated and only limited regulation was left in place over captive shippers. The railroads also kept a very broad Antitrust Exemption that hardly any industry in the US has. Basin Electric is basically interested in the Surface Transportation Board reform.

Chris VanDeventer also referred to a current case that Basin Electric filed with a rate complaint with the Surface Transportation Board in 2004. See attachment #2b. This illustrates the type of problem that Basin Electric has with the STB with rate increases.

Representative Delmore: Would you say that you are one of the bigger shippers?

Chris VanDeventer: I would say that we are the middle of the road. We have a hundred seventy mile line that we ship from the northern parts of Wyoming to the plant. We ship about 25,000 tons of coal per hour, which is about three trains a day.

Representative Delmore: Your contract expired in 2004 and your rates doubled. Can you explain a little bit of that 575% increase and how you tried to work with the railroads or the Surface Transportation Board? Can you briefly tell me how you addressed this?

Chris VanDeventer: We had a long term contract for about twenty years with Burlington Northern. The contract expired in 2004. Prior to the expiration, we went in to negotiate with the railroads on extending their contract. The railroads did not negotiate, and we did not get a contract. We were put on a non-contract tariff. Under contracted tariffs it's negotiated between the railroad and the shipper. The Surface Transportation Board has no authority over contracts. We went on a public tariff that anybody can be charged. Then it doubled from what we were paying to what we are paying now. That 575% is the variable cost issue. Variable cost is defined as what it cost the railroad to actually ship the coal. It is a base cost. The variable cost is basically what the Surface Transportation Board uses to determine if a rate is able to be regulated. Below 180% you cannot file a case. If the railroad is charging less than 180% of their variable cost; you cannot go before the Surface Transportation Board. If they are above that, you have a regulatory avenue to pursue. There is a chart that shows where our rates fall compared to other rates that BNSF is charging. See attachment #2c. Base on the 180% threshold, we are well above that.

Representative Schmidt: Who is the Surface Transportation Board?

Chris VanDeventer: The Surface Transportation Board is a regulatory body. It is an independent agency as part of the Department of Transportation. The Interstate Commerce Commission was replaced by the Surface Transportation Board in the mid 1990's. It is a three member commission appointed by the President and confirmed by the Senate.

Representative Schmidt: Could we get the names?

Chris VanDeventer: The chairman is Chairman Nottingham. One member is Commissioner Mulvey and the other is Commissioner Butry, whose term expired in 2008 but will stay on by statute until the President appoints a replacement.

Woody Barth, North Dakota Farmer's Union, spoke in support of HCR 3034.

Woody Barth: NFU believes that the rail industry needs to be fairly regulated to insure that rural areas will not be denied adequate service and protect us from excessive rates in North Dakota. In line ten and eleven of the bill it states "a deterioration in service quality". We don't believe that this is an issue in North Dakota. For the past couple of years we have met to talk with BNSF about rail issues. We believe service is adequate, especially as it pertains to unit train shipping and shipping of bulk commodities out of North Dakota.

One of the issues that I have been asked to address is export and ag commodities are very strong right now. We can compete worldwide, but we pay too much for freight here in North Dakota. North Dakota Farmer's Union is affiliated with the North Dakota Pride Cooperative. The struggle that we both have is loading the containers that are loaded with bag products. There is trouble getting empty containers into North Dakota, so we now have to ship some of those products to Minneapolis.

Representative Delmore: We have heard several times from the Farmer's Union and elevator managers about the shortage of cars. Has that improved significantly?

Woody Barth: There has been great improvement in that area. There has been much better communication, and BNSF has put a person in North Dakota to work with ag people.

Representative Frantsvog: The previous testimony took issue with the Surface Transportation Board. It seems that the resolution takes issue with the railroad. Which one is it in your opinion?

Woody Barth: We think we need to work within the Surface Transportation Board to make sure that the captive shippers we have in North Dakota are treated fairly. We have had some concerns with them, but the communication has been great. We need to work to make sure that we have adequate access to rails here as do areas where there is competition.

Representative Frantsvog: So, should this resolution be changed so that the issue is with the Surface Transportation Board rather than the railroad?

Woody Barth: I think the major concern we would have is with the Surface Transportation Board. That is up to you.

There was no further support for HB 3034.

John Long, BNSF's Ombudsman for North Dakota, spoke in opposition to HCR 3034. See attachment # 3.

Representative Delmore: In your opinion is the Surface Transportation Board doing their job?

Jon Long: I believe they are, but there is always room for improvement.

Representative Thorpe: Relating back to the testimony on the coal trains, could you explain the rate difference from 2004 when the contract ran out to the rates today?

Jon Long: I will defer that question, since I work primarily for agriculture.

Representative Griffin: Can you tell the committee what would be some of the specific acts that would take place should this resolution pass in Congress?

Jon Long: I will defer that to Mr. Sweeney.

Representative Schmidt: In the past we have used Berthhold to ship wheat. If you loaded a $70,000 grain car to capacity at Berthhold and shipped to Minneapolis, what is the railroads revenue off of that car?

Jon Long: I would have to refer to our tariffs. I could look that up for you; it is public record.

Representative Schmidt: It would help us analyze this.

Brian Sweeney, legislative council for BNSF Railway Company, spoke in opposition to HCR3034. See attachments #4 and #5.

Chairman Ruby: Can you tell us the difference between the two acts?

Brian Sweeney: One is the antitrust, going after the handful of exemptions that the railway has. The other is aimed at overhauling the Surface Transportation Board and changing its role and the ·gulations there. The Surface Transportation Board has jurisdiction over railroad issues pertaining to service and rates. There are three areas that the railway has antitrust exemptions. There are exemptions for rates, equipment sharing and mergers. Those three areas are instead are regulated by the Surface Transportation Board. We are under all other aspects of the antitrust law. The last version of the legislation would get rid of the exemptions and put us under the Department of Justice. But there would also be the existing body of regulation with the STB, so there would be two books of rules that we would have to operate under. It is not treating us the same a everyone else with two sets of rules. It is incorrect that only baseball and railroads have antitrust exemptions. A number of industries have federal antitrust exemptions: insurance, ocean carriers, newspapers, utilities, labor unions. The real issue is that people aren't satisfied with the amount of regulation that we have. There was a study done by the Surface Transportation Board said that this (resolution) was unworkable. Another thing that it (resolution) would do is require arbitration any time there is a dispute.

The STB study shows no evidence of market abuse. The Government Accountability Office said deregulation has been successful for the railroad and the customers, and there is no need to change the fundamental relationship between them.

In the Basin Electric case there was a twenty year contract; in the life of that contract the rate went down. The contract expired, attempts were made to negotiate, and were not successful. So, the rate was doubled then because it went up to the tariff rate. It was double what they were paying in 2003, it was 50% higher than what they were paying in 1984. Adjusted for inflation, it was about the same as they were paying n 1984. The STB ruled on it. They noted that Basin still has a pretty low rate compared to other utilities in the area. It has been refiled, and we are waiting to get the results of that.

This resolution seems to overlook a lot of what has happened in the last couple of years. Has the STB leaned one way or the other? In the last couple of years the STB did rule 50% of the time for the shippers in the major cases. They implemented new rules for small to medium sized shippers. The STB put out a ruling regarding fuel surcharges that favored the customers. They have also lowered the rates for filing a large shipper case and adjusted the benchmark for determining whether a railroad's rate falls into certain categories of protection. If a railroad is revenue adequate, then the railroad has a higher burden.

Representative Thorpe: On the Basin coal hauling contact, did the tonnage capacity increase significantly from the late 80's to the present?

Brian Sweeney: As it pertains to the Basin Electric situation, I don't know. In general, yes, coal traffic is more efficient in terms of the tons per car that we are hauling now. We have added more cars onto the trains. The fundamentals of the story are that their (Basin's) rate had gone down before it went up. So, there was what appeared to be a large jump in 2004, but considering that the rate had gone down prior to that, it is a very different story.

Representative Thorpe: When you say that the rate went down, are you referring to the inflationary factor?

Brian Sweeney: No, the rate actually went down. Adjusted for inflation, it went down a lot more.

Representative Potter: You said that your antitrust division is busier than ever before. Can you tell us why that is?

Brian Sweeney: Contrary to what some people think, we can and do get sued under antitrust law. We have a couple of large cases going on right now about fuel surcharges.

Mr. Sweeney repeated the three areas that the railroads are exempt.

Jay Elkin, a farmer and rancher from Taylor, North Dakota and a member of the board of the North Dakota Grain Growers Association, spoke in opposition to HCR 3034. See attachment #6.

Harlin Klein, a producer and rancher near Elgin and the Chairman of the Board for the Southwest Grain Elevators, spoke in opposition to HCR 3034.

Harlin Klein: We are totally dependent upon rail transportation to get our products to where they need to be. Trucking would not work. I have been selected to be on the Ag Procducer Rail Business Council which was developed when many problems developed in North Dakota's ag sector over transportation issues. It became very ugly. At that point the rail industry brought Mr. Long into North Dakota, so that we had somewhere to go if there was an issue. That program has developed communications, between the rail industry and ag producers to help understand what is going on out here. Purpose of the council was to give BNSF personnel connections with people, so they understand what is going on. We provide them information such as what this year's acreage is going to be. In April through June we will be handling calls about production and what we will need for supplies. The railroad is constantly trying to gather information from us that will help them line themselves up to service the needs of the producers in this area. We had issues a few years ago, but that has changed. Service has stepped up, if a train is late, we know why. There have been some issues with the bad winter, but it all comes down to communications.

In the grain sector the freight rate is made up of two things: the tariff rate and the fuel surcharge. The thing that has changed in the past few years is the fuel surcharge. We all know how much fuel prices have increased. As the fuel economy has come back down, the rates are adjusting again. The fuel surcharge has been very volatile.

We would urge the committee to oppose the resolution. We feel that it is unnecessary because the rail industry has become much more understanding and more communicative. This has solved many of the issues we have had in the past.

Dan Wogsland, Executive Director of North Dakota Grain Growers Association, gave testimony opposing HCR 3034. See attachment #7 and #8.

Representative Griffin: Does this chart just show the tariff rate and not the total rate?

Dan Wogsland: That is correct, and I think it is a good indicator of what has happened with rates.

Randy Marsh provided written testimony in opposition to HCR 3034 on behalf of **Canadian Pacific.** See attachment #9.

There was no further testimony on HCR 3034.

The hearing was closed on HCR 3034.

Representative Weiler asked that the committee take up HCR 3034.

Representative Vigesaa moved a Do Not Pass on HCR 3034.

Representative Weisz seconded the motion.

A roll call vote was taken. **Aye 10 Nay 3 Absent 1** (Chairman Ruby)

The motion passed.

Representative Weisz will carry the HCR 3034.

Date: 2-13-09

Roll Call Vote #:

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 3034

House TRANSPORTATION Committee

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Legislative Council Amendment Number

Action Taken ☐ Do pass ☒ Don't Pass ☐ Amended

Motion Made By Vigesaa Seconded By Weisz

Representatives	Yes	No	Representatives	Yes	No
Representative Ruby - Chairman	A		Representative Delmore	✓	
Rep. Weiler – Vice Chairman	✓		Representative Griffin		✓
Representative Frantsvog	✓		Representative Gruchalla		✓
Representative Heller	✓		Representative Potter	✓	
Representative R. Kelsch	✓		Representative Schmidt		✓
Representative Sukut	✓		Representative Thorpe	✓	
Representative Vigesaa	✓				
Representative Weisz	✓				

Total Yes 10 No 3

Absent 1

Bill Carrier Weisz

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HCR 3034: Transportation Committee (Rep. Ruby, Chairman) recommends **DO NOT PASS** (10 YEAS, 3 NAYS, 1 ABSENT AND NOT VOTING). HCR 3034 was placed on the Eleventh order on the calendar.

2009 TESTIMONY

HCR 3034

Attachment #1

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Equal Opportunity in Employment and Services

Testimony of Roger Johnson
Agriculture Commissioner
HCR 3034
House Transportation Committee
Fort Totten Room
February 13, 2009

Chairman Ruby and members of the House Transportation Committee, I am North Dakota Agriculture Commissioner Roger Johnson. I am here to support HCR 3034 which urges Congress and the President to enact federal legislation to create protections for railroad shippers, particularly those in areas without effective rail-to-rail competition.

HCR 3034 points out the fact that consolidation in the rail industry has led to unreasonable and unrestrained market power over "captive rail shippers." Despite recent efforts of Congress and repeated pleas to the Surface Transportation Board to take corrective actions, it appears that the rail industry continues to operate in a manner that begs for additional federal legislative intervention.

In 2006, I testified before the U.S. Senate Committee on Commerce, Science & Transportation on rail car shortages and unreasonable fuel surcharges. On April 24, 2008, I also testified in front of the Surface Transportation Board (STB) as President of the National Association of State Departments of Agriculture (copy attached). Although some of the information contained in the attached testimony is becoming outdated, I believe the major issues and trends continue to remain, for the most part, unresolved.

Chairman Ruby and Committee Members, I urge a do pass on HCR 3034 and would be pleased to take any questions you might have.

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President Roger Johnson, North Dakota Department of Agriculture

Statement of
Roger Johnson, President
National Association of State Departments of Agriculture (NASDA)
Before the
Surface Transportation Board (STB)
U.S. Department of Transportation
395 E Street, SW
Washington D.C.
Thursday, April 24, 2008

Chairman Nottingham and members of the Surface Transportation Board (Board), I am North Dakota Agriculture Commissioner Roger Johnson. I also serve as the President of the National Association of State Departments of Agriculture (NASDA). Thank you for the opportunity to participate in this hearing. Adequate and fair rail service is important to the entire economy of the country and agriculture is a major sector of the economy that is highly reliant on the rail system.

As a national organization, the members of NASDA have individual and regional priorities on many issues. However, the organization is united on the issue of equitable and reliable rail service.

Markets and Rail Transportation Challenges for the Agricultural Sector

Farmers and ranchers face unique challenges in the global market, and require a dependable and affordable means of transportation for their product. Weather, market conditions, and mergers have impacted the rail transportation industry causing grain car shortages, especially in the upper Midwestern States. Farmers and ranchers already operate on exceedingly low profit margins–this paired with dramatic fluctuations in world economies places them in a financially precarious environment that Congress has taken a special interest in addressing. Many farmers and ranchers are captive rail customers without logical or affordable alternative modes of transportation. Agricultural shippers in some parts of the U.S. are paying the highest rail freight rates for, arguably, the most sporadic and unreliable service. Agricultural producers need a clearly defined means for securing reliable service at a reasonable rate.

NASDA's standing policy urges all railroads to charge reasonable rates, offer fair and consistent rate spreads and service to all shippers, and treat all shippers equitably. The state agriculture departments believe that Congress and the Federal government should substantially increase oversight of railroads, including rates and services, where competition is not present. Our members have adopted the following recommendations:

- Congress should require rail carriers, upon request, to quote a rate between any two points on the system where traffic originates, terminates or may reasonably be interchanged without regard to whether the rate is for only part of the total movement.

- Small, captive agricultural shippers, upon request, should be provided with a simple benchmark test for rate and service cases.

- Railroads need to offer co-loading of trains, and to have reasonable loading policies that hold both shippers and railroads responsible for moving equipment promptly.

- Monthly rail shipper survey information should be published.

- The Surface Transportation Board's National Grain Car Council should implement a mechanism that permits shippers to seek nonperformance arbitration.

The Railroad Revitalization and Regulatory Reform Act 1976 and the Staggers Rail Act of 1980 deregulated the rail industry and successfully accomplished the intent of restoring the industry to financial stability. However, in the ensuing years, the industry has undergone major consolidation. The resulting trends in the freight rail service industry are particularly disconcerting for the agriculture industry.

The reduction in the number of corporate entities since the Staggers Act has been matched by a decrease in the physical infrastructure of the railroads. In 1970, the Class I railroads operated about 206,000 route-miles of track. Today, abandonment and spin-offs to smaller railroads (which the Staggers Act authorized) have reduced this figure by 32 percent to about 140,810 miles. The contraction of the industry has been matched by a revival of its fortunes.[1]

Many of the track lines being abandoned are in the most rural areas where, ironically, they are most needed to move agricultural commodities.

General rates, rates for grain, rates for captive shippers, fuel surcharges and line abandonment are seriously impacting the agriculture industry. At the same time the following chart indicates the steady increase in the net income of railroads. The aggregate net income of seven Class I railroads has more than doubled in ten years.

Railroads' Net Income (in $ millions)

	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996
BNSF	2,139	1,776	1,032	1,063	1,042	1,138	1,397	1,470	1,409	1,138	1,061
CSX	1,108	816	531	368	528	456	360	362	609	694	611
UP	1,819	1,279	929	1,422	1,521	1,397	1,319	1,306	399	883	1,009
NS	1,752	1,608	1,273	899	912	843	586	441	681	858	788
KCS	124	67	79	52	57	65	61	57	78	27	66
CN	525	447	309	220	136	67	55	86	-14	5	-22
CP	92	82	11	54	52	55	60	40	49	91	183
Total	7,559	6,075	4,164	4,078	4,248	3,610	3,838	3,762	3,211	3,696	3696

Source: Association of American Railroads, Railroad Facts, 1996-2006

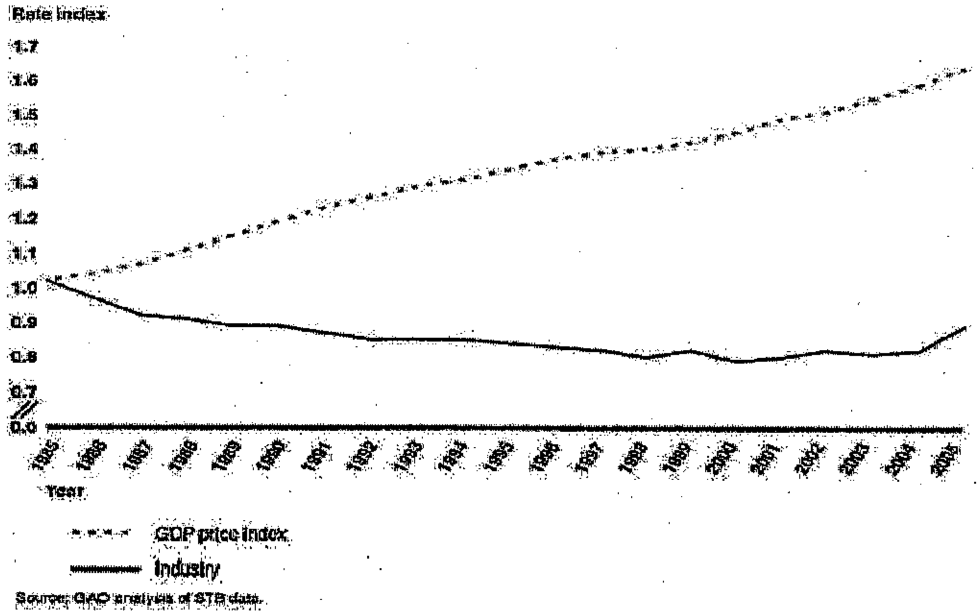
GENERAL RATES

In 2005, industry rail rates increased 7 percent over their 2004 levels, the largest annual increase over the past 20 years, outpacing the rate of inflation for only the second time in 20 years.[2]

[1] U.S. House of Representatives Committee on Transportation and Infrastructure: Summary of Subject Matter (September 21, 2007)

[2] GAO, *Freight Railroads: Updated Information on Rates and Other Industry Trends*, GAO-07-291R

Figure 1: Trends in Industry Rail Rates, 1985-2005

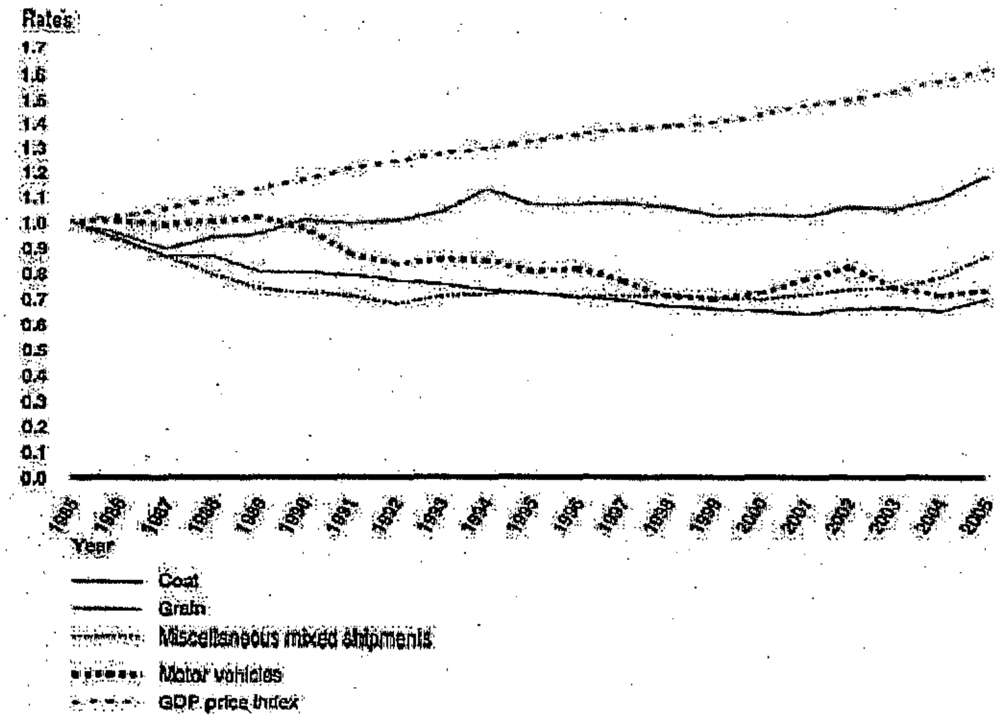


General and overall rate increases to adjust for inflationary pressures are to be expected. In fact, the long-term general rate trends have been below the inflation rate. No one wants to see the rail industry go broke. However, when compared to the net income trends, it appears that either the long-term rate trend is excessive or the industry has been improving its bottom line by shedding infrastructure, increasing differential pricing rates, and increasing "miscellaneous revenue."

GRAIN RATES

Of particular concern for the agriculture industry is the trend in rate increases for grain. The trend for grain rates is also below the inflation rate but significantly higher than other rail commodities. This further suggests that agricultural commodities bear the lion's share of captive shipping rates.

Figure 2: Rate Changes for Coal, Grain, Miscellaneous Mixed Shipments, and Motor Vehicles, 1985-2005



Source: GAO analysis of STB data.

CAPTIVE RATES

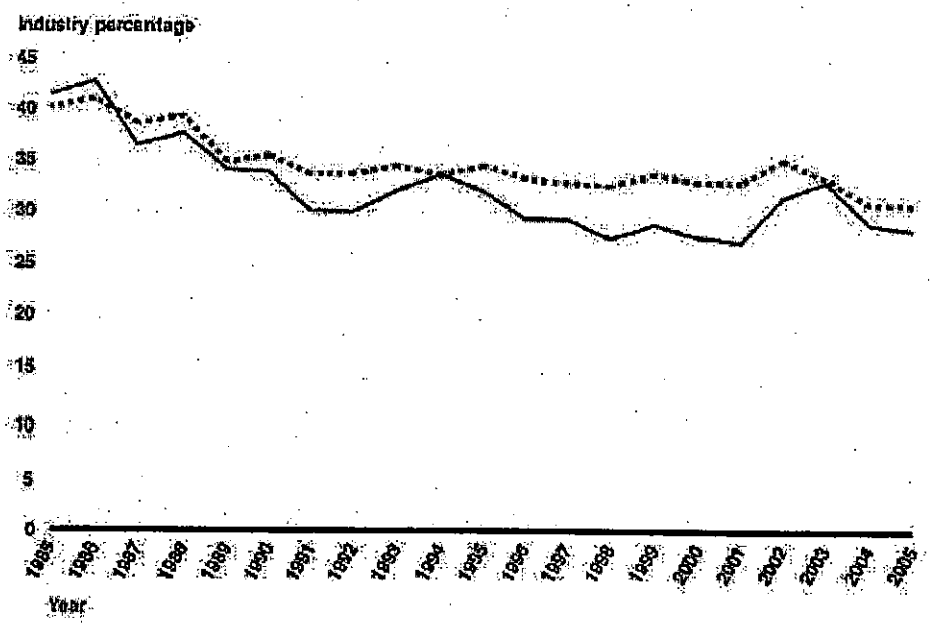
Captive shippers have been and continue to be victimized by extremely high rates. This is clearly evident in my home state of North Dakota and surrounding states. The geographic location of the upper plains states makes us highly dependent on the rail system.

The long distances to the ports make truck shipping inefficient and cost prohibitive, we are without river barge alternatives, and most of our country elevators are situated on a single rail line.

This makes us captive not only to the rail system but, in most cases, to a single rail provider. Add the seasonal shipping demands of agricultural production to this captivity and it is easy to understand that agricultural commodities are at the mercy of potential, if not apparent, monopolistic practices by the rail industry.

While the GAO reports that the amount of captive traffic traveling at rates greater than 180 percent of the variable cost of transporting a shipment and the revenue generated from that traffic have both declined since 1985, the tonnage from traffic traveling at rates substantially over the threshold for rate relief has increased. Total industry tonnage has increased significantly (from 1.37 billion tons in 1985 to 2.14 billion tons in 2004), and the tonnage traveling at rates greater than 300 percent of the variable cost of transporting the shipment has more than doubled—from about 53 million tons in 1985 to over 130 million tons in 2004.[1]

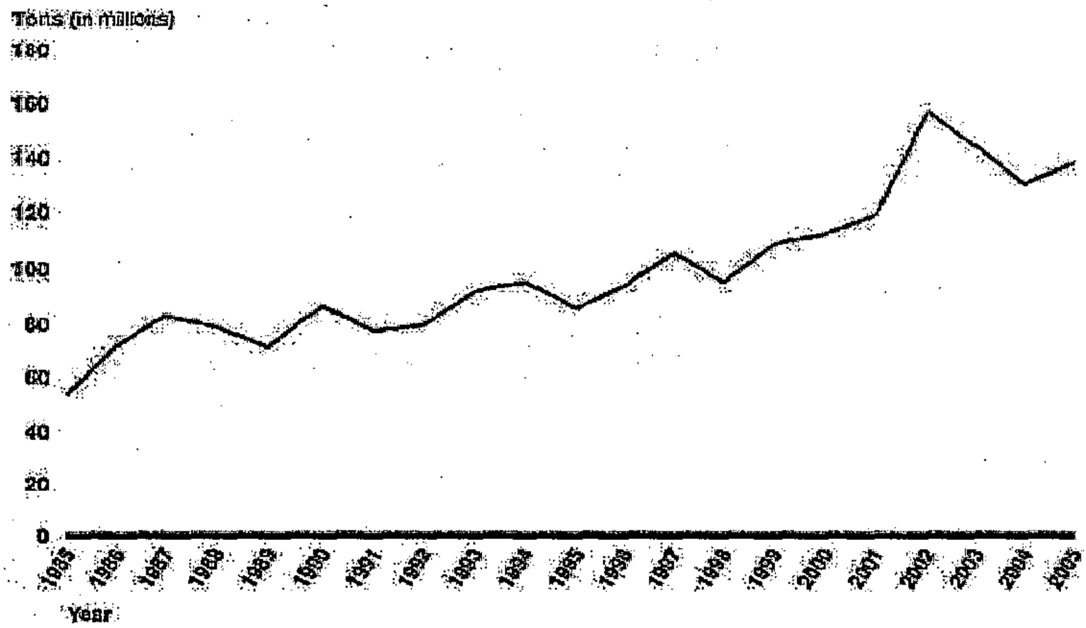
Figure 5: Tonnage and Revenue Generated from Traffic Traveling at Rates Equal to or Greater than 180 Percent R/VC, 1985-2005



Source: GAO analysis of STB data.

[1] U.S. House of Representatives Committee on Transportation and Infrastructure: Summary of Subject Matter (September 21, 2007)

Figure 6: Tonnage Traveling at Rates over 300 Percent R/VC, 1985-2005



Source: GAO analysis of STB data.

Assuming that rates over 180 percent and 300 percent of variable costs are charged largely to captive shippers, the GAO analysis clearly suggests an ongoing trend of shifting rates and rate burden to the higher end and presumably the most captive shippers. The Staggers Act provides for shippers to seek relief from unreasonable rates once the rate reaches the 180 percent of variable cost threshold. However, the relief processes have proven too cumbersome and expensive for most shippers, particularly smaller entities.

While the STB reports it has taken a number of actions to improve the rate relief process and assess competition, the GAO reported in 2006 that further actions are needed to address competition and captivity concerns. The Staggers Act and the ICC Termination Act encouraged competition as the preferred method to protect shippers from unreasonable rates and granted the STB broad legislative authority to monitor the performance of the railroad industry. **However, the GAO reports that these processes have proven to be largely inaccessible because the standard process remains expensive, time consuming, and complex, and the simplified process has not been used.** (emphasis added)

. . . Since 2001, 11 CMP cases have been filed with the Board. All but one is a coal rate dispute. Of the 11, three have been settled and dismissed, one was withdrawn, and one is still pending. Of the six in which final decisions were issued (all using the SAC constraint), all were shipper losses. Further, the STB reports that the average processing time is 2.8 years, with the fastest case taking 1.8 years for a decision to be reached and the longest being over four years.[1]

Mr. Chairman and Board members, how long is this going to be tolerated? It is completely unacceptable to witness this mounting evidence of captive shipping rate abuse with little to no regulatory action. It is also unacceptable to continue relying on ineffectual relief procedures and expect a different outcome. Where competition is non-existent, regulatory oversight must be implemented.

FUEL SURCHARGES

We commend the Board for its actions to curb unreasonable fuel surcharges. The Board's rules finalized January 26, 2007 are a step in the right direction. I commented in support of the proposed rules in August, 2006. As we understand, the Board has also proposed rules for the reporting of revenues raised from fuel surcharges charged by the railroads. Based on GAO findings, we urge the Board to implement reporting rules that are comprehensive and enforceable.

In 2005, the amount of industry revenue reported as miscellaneous nearly tripled over 2004 levels, rising from about $633 million to over $1.7 billion (see fig. 4). This miscellaneous revenue includes some fuel surcharges and other charges for providing rail service. In 2004, miscellaneous revenue accounted for 1.5 percent of freight railroad revenue reported, while in 2005 this percentage had risen to 3.7 percent. Also, in 2005, 20 percent of all tonnage moved in the United States generated miscellaneous revenue.[2]

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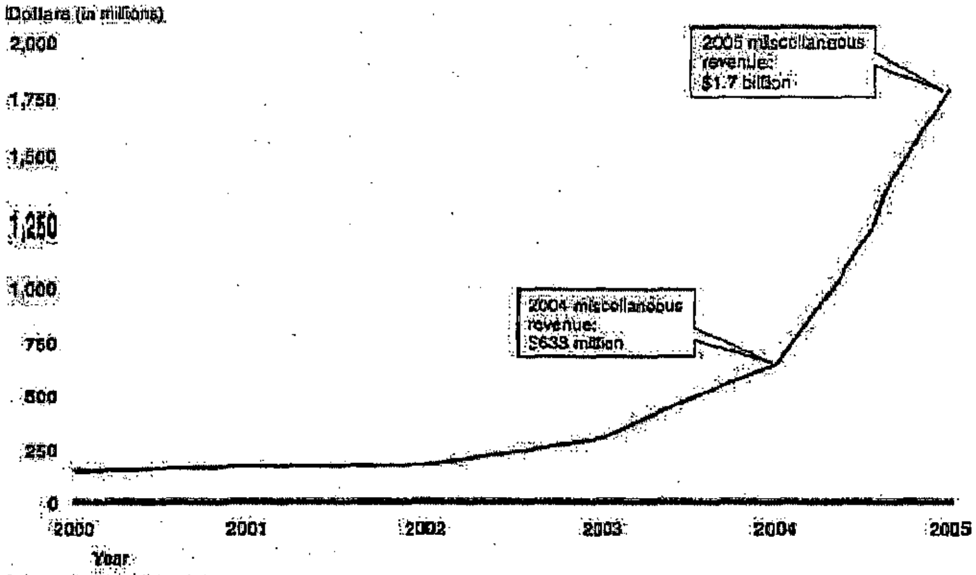
[1] U.S. House of Representatives Committee on Transportation and Infrastructure: Summary of Subject Matter (September 21, 2007)

[2] GAO, *Freight Railroads: Updated Information on Rates and Other Industry Trends*, GAO-07-291R

Figure 4: Miscellaneous Revenue Tracked in Carload Waybill Sample, 2000-2005



Source: GAO analysis of STB data.

The railroads may consider "miscellaneous revenue" as too trivial to warrant detailed reporting breakdowns. However, $1.7 billion is not trivial to the shippers paying it. It is essential that the methods of calculating and applying fuel surcharges be equitable and transparent. Fuel surcharges must only be allowed for the implied purpose of recapturing excess fuel costs—not as an additional profit center.

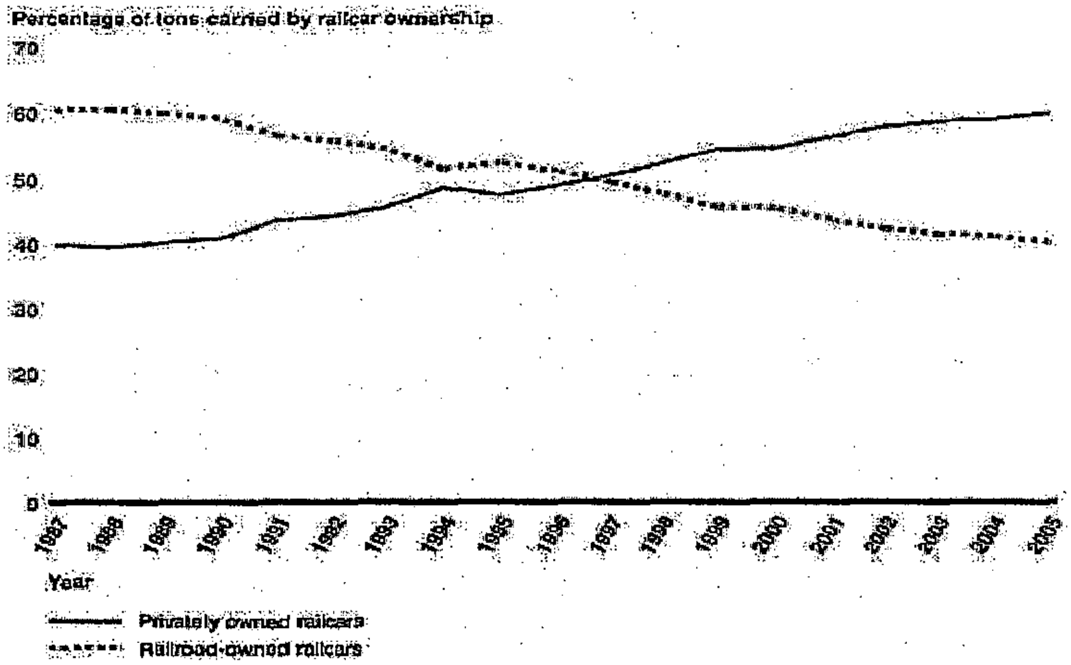
COST SHIFTS

Rail line abandonment and suspect differential rates and fuel surcharges have clearly contributed to the rail industry's bottom line at the expense of shippers. At the same time, the industry has been shifting the railcar ownership burden to shippers as well.

In 2005, freight railroad companies continued a 20-year trend of shifting other costs to shippers. With the addition of the 2005 data, our analysis shows a 20 percent shift in railcar ownership (measured in tons carried) since 1987. In 1987, railcars owned by freight railroad companies moved 60 percent of tons carried. In 2005, they moved 40 percent of tons carried, meaning that freight railroad company railcars no longer carry the majority of tonnage (see fig. 3). [1]

[1] GAO, *Freight Railroads: Updated Information on Rates and Other Industry Trends*, GAO-07-291R

Figure 3: Tonnage Carried by Railcar Ownership, 1987-2005



Source: GAO analysis of STB data.

This is another example of the industry shedding assets and shifting its responsibilities to shippers. Those impacted the most are again the smaller and captive shipper entities. Shipper-owned cars may be appropriate and feasible for some shippers. However, the rail industry must own adequate rail cars and provide them at a reasonable charge to shippers for which personal ownership is not feasible.

The industry's allocation/availability of cars is already inadequate. As a result, rail cars are shifted around, out of and into different ordering programs. One of the industry's "solutions" has been to put already overpriced cars up for bid to shippers.

In North Dakota for example, in the summer of 2005, BNSF suspended nearly all ordering of railcars through its Certificate of Transportation (COT) program for upcoming harvest months. During one week in August, BNSF minimally opened the bidding and offered 75 single car COT orders for October placement. There were 858 bids, 11 bids for every car, and those who "won" the bids paid close to $400 per car over the tariff. That same day there were 668 bids for 45 grain cars for November placement, with winning bids paying $419 over tariff.

This is about 12 cents per bushel - a significant amount of money when grain is usually produced and handled on a thin profit margin. Depending on location of the bidding grain elevator, this is a 15-25 percent increase in the normal tariff rate. No business voluntarily bids up a key expense component, but in this case the railroad is the only game in town. Bids went much higher in later fall months. By restricting the allocation of car supply, BNSF has been able to reap higher and higher profits as shippers desperately scramble to book transportation. BNSF takes these bookings and bids as signals that the market will bear even higher rates. But this is not a market; by definition it is a monopoly and should be governed as such.

INTERMODAL SHIPPING

Mr. Chairman and Board members, please be assured that rail service problems are not limited to bulk commodity rail car service. Captive intermodal shippers of agricultural commodities and food products are receiving equally abusive rate and service treatment.

Due in large part to the worldwide demand for identity-preserved commodities, the demand for container shipping of agricultural products is dramatically increasing. Adequate availability of containers is reliant on containerized imports. Unfortunately, high rail rates deter further inland rail shipping of the containerized imports. Often, the containers are unloaded at coastal ports for domestic distribution, further exacerbating serious container shortages in the Midwest.

Attached to this testimony is a January 29, 2008 letter to U.S. Senator Dorgan from a North Dakota intermodal shipper (Attachment A). The letter provides a first-hand example of what is occurring with intermodal shipping in one region; the Red River Valley of North Dakota and Minnesota. The following excerpt from the letter details a regional situation of captive shipper practices by the rail industry.

. . . Shippers from this Region and/or a representing forwarder negotiate directly with steamship lines to provide freight rates to ship products from intermodal terminals to foreign destinations (Ports). These rates are inclusive of both rail and ocean moves. Consequently, shippers do not negotiate directly with the railroads to move line containers from an inland terminal (Dilworth) to an ocean Port. In addition to Dilworth, shippers from this Region obtain rates from either Minneapolis or Winnipeg, but make the final decision based on what is the most economical for their move. Unfortunately, even though Dilworth is our nearby terminal, it is no longer economically feasible to source containers here due to unusually high freight rates provided by the steamship lines. The specific reason freight rates have soared for container movements out of Dilworth is because the BNSF railroad has increased the costs to the steamship lines for not only moving empty containers into Dilworth from the terminals in Chicago, but also the extremely high difference in cost for a move from Dilworth to the west coast compared to a move from Chicago or Minneapolis to the west coast. And, the interesting and ironic fact is that, up until very recently, there have been a minimum of 200 empty containers going directly through Dilworth on any given day, yet the railroad was and continues to assess the steamship lines a much higher cost to make exchanges and moves from Dilworth.

The letter also describes efforts in the state of North Dakota to address rail service and rate issues. Apparently, the railroad was long on lip service and short on good faith action.

As you are likely aware, the State of North Dakota, in cooperation with the cities of both Minot and Fargo entered into a contractual agreement with a national firm, namely Wilbur Smith, to mitigate these costs in favor of the feasibility for a new co-load concept that would improve statewide access and service to container equipment, but more importantly improve freight rates from this Region. **This co-load idea was actually suggested by BNSF**. Prior to the contract signing in late January 2007, these 3 entities also informed and discussed this strategy with the leaders in Bismarck.

Everyone was in agreement that this effort was necessary and may indeed resolve our dilemma. Unfortunately, Wilbur Smith was not successful. **BNSF has even clearly informed Wilbur Smith that the BNSF would not permit new intermodal service to divert business from currently operating hopper car services and would use price as a mechanism to prevent this.** (emphasis added) [1]

As a result of this letter and Senator Dorgan's intervention, the author reports that a BNSF executive contacted him stating that BNSF was publicly announcing a rate equalization that should provide some relief for their situation.

[1] SB&B Letter to Senator Dorgan; January 29, 2008

The announcement was indeed made. However, the rate equalization announcement pertained to bulk grains but not bagged identity-preserved commodities in containers. I urge you to read the letter in its entirety and you will easily understand shippers' frustration with industry practices.

These practices are contrary to the statutory requirement that carriers must provide service upon reasonable request (49 U.S.C 11101), and also the requirement in Section 11121 that railroads "shall furnish safe and adequate car service and establish, observe, and enforce reasonable rules and practices on car service."

SUMMARY

Chairman Nottingham and Board members, you have no doubt noticed that I have relied heavily on GAO findings in my testimony. There is good reason for doing so; the GAO has clearly identified the reasons we are here today.

Obviously, we would prefer that the industry take their "common carrier obligations" seriously by doing the right things. However, the record over the last twenty-plus years suggests that has not happened.

SUPPLEMENTARY INFORMATION: The common carrier obligation refers to the statutory duty of railroads to provide "transportation or service on reasonable request." 49 U.S.C. 11101(a). A railroad may not refuse to provide service merely because to do so would be inconvenient or unprofitable.[1]

The issues of rates and service cannot be separated when contemplating the common carrier obligation. To provide service at prohibitive rates is merely manipulation short of service refusal.

Concentration in the freight rail industry has led to virtually unfettered monopolistic practices by the carriers. The question is: What is going to be done to bring this industry under control for the public good?

[1] STB Notice: STB Ex Parte No. 677; February 22, 2008

As the regulatory agency charged with oversight of the rail industry, the burden is on the Board to take bold actions in response to the misguided direction of the industry. This will require major and comprehensive reforms. Anything less will allow the continuation of unfair and harmful industry practices and service to shippers. Actions must be decisive and prompt to prevent rail service from continued deterioration.

It has been noted by some that the Board does not have sufficient human or financial resources to adequately perform the enormous task of addressing these problems. If that is the case, we urge the Board to make a plea to Congress for the additional resources required.

Change must occur and if all else fails, we are quite certain that Congress will, and should, step in to legislatively regulate the industry. As you are likely aware, there is already pending legislation in the House and Senate to address some of the rail competition and service concerns. NASDA approved support for the legislation at its February, 2008 meeting. A copy of the letter sent to the Committee Chairs and bill sponsors in both chambers is attached.

Chairman Nottingham and Board members, this concludes my remarks. Thank you for the opportunity to appear. I would be happy to take any questions.

SB&B FOODS, INC.

January 29, 2008

The Honorable Byron Dorgan
657 2nd Ave. N., Room 306
Fargo, ND 58102

Dear Senator Dorgan,

Thank you for instructing your staff to take time last week to visit about our intermodal issues. We are grateful for your leadership and desperately need your help.

The demand for identity preserved commodities shipped by container from North Dakota and NW Minnesota continues to escalate. Unfortunately, for shippers and ultimately producers from this region, we can no longer compete with other suppliers and producers from the Minneapolis and Chicago regions. Please allow me to summarize the issue.

Since the early 1990's consumers and food manufacturers mostly in developed countries, began particularly to request specific varieties of soybeans from this Region that had certain food quality characteristics and that could be packaged and shipped by container to protect the purity and identity. Hence the term, "identity preserved or IP" quickly became common language in both the food and production industries. Today, not only has the demand for food grade soybeans exploded, but buyers from all countries are now sourcing IP supplies of every other crop grown in North Dakota and Minnesota.

As recent as early 2005, shippers from this Region had continued to ship containers from the terminal in Dilworth, Minnesota utilizing freight rates that were competitive. However and unfortunately, our rates have increased dramatically in the past two years. I will try to explain. Shippers from this Region and/or a representing forwarder negotiate directly with steamship lines to provide freight rates to ship products from intermodal terminals to foreign destinations (Ports). These rates are inclusive of both rail and ocean moves. Consequently, shippers do not negotiate directly with the railroads to move line containers from an inland terminal (Dilworth) to an ocean Port. In addition to Dilworth, shippers from this Region obtain rates from either Minneapolis or Winnipeg, but make the final decision based on what is the most economical for their move. Unfortunately, even though Dilworth is our nearby terminal, it is no longer economically feasible to source containers here due to unusually high freight rates provided by the steamship lines. The specific reason freight rates have soared for container movements out of Dilworth is because the BNSF railroad has increased the costs to the steamship lines for not only moving empty containers into Dilworth from the terminals in Chicago, but also the extremely high difference in cost for a move from Dilworth to the west coast compared to a move from Chicago or Minneapolis to the west coast. And, the interesting and ironic fact is that, up until very recently, there have been a minimum of 200 empty containers going directly through Dilworth on any given day, yet the railroad was and continues to assess the steamship lines a much higher cost to make exchanges and moves from Dilworth.

As mentioned, prior to 2005 our freight rates from Dilworth to foreign destinations were competitive and consistent with Minneapolis and Chicago origins. Today, the origin rates from Minneapolis and Chicago have certainly increased, but the rates from Dilworth origin have skyrocketed. All shippers from our Region are now trucking empty containers from Minneapolis to our own cleaning facilities for loading much, much cheaper than sourcing empty containers from Dilworth. Steamship lines have made it very clear to us that they can no longer provide competitive rates from Dilworth simply because of the high costs the railroad is assessing them now for the Dilworth location. Obviously, if freight rates were increasing equally industry wide, we would not raise this issue. But, frankly we are becoming less and less competitive, our margins have shrunk to critical levels and we are not able to get the railroad to address our concerns or reduce their fees to the steamship lines. All of this in addition to the fact that the Minneapolis terminal is now suffering availability and infrastructure problems which now is creating container shortages for both North Dakota and Minnesota shippers. Regional shippers are also now being forced to consider alternatives such as possibly having to truck containers from and back to Chicago. Our Region is at serious risk of significantly reducing or even losing our ability to service Asian markets with value-added agricultural products due to BNSF operation and rate policies.

As you are likely aware, the State of North Dakota, in cooperation with the cities of both Minot and Fargo entered into a contractual agreement with a national firm, namely Wilbur Smith, to mitigate these costs in favor of the feasibility for a new co-load concept that would improve statewide access and service to container equipment, but more importantly improve freight rates from this Region. This co-load idea was actually suggested by BNSF. Prior to the contract signing in late January 2007, these 3 entities also informed and discussed this strategy with the leaders in Bismarck. Everyone was in agreement that this effort was necessary and may indeed resolve our dilemma. Unfortunately, Wilbur Smith was not successful. BNSF has even clearly informed Wilbur Smith that the BNSF would not permit new intermodal service to divert business from currently operating hopper car services and would use price as a mechanism to prevent this. Senator, there has obviously been an intent by the BNSF to affect the change of agriculture and food industry trends.

The demand and growth in the shipment of commodities by container is real. Dynamics of production agriculture are changing, and in many ways this Region has become a leader because of the diversified production that can be supplied. In addition, producers here bring a value-added attitude and willingness to meet these demands while at the same time, being rewarded for their extra efforts. But now, many of us are struggling to match competitor pricing and are at risk of losing markets that so many have worked so hard to build, simply because of the increased freight costs.

We will certainly appreciate your immediate attention and would be happy to discuss this more personally if your time allows. We look forward to your comments.

Very sincerely yours,

Robert B. Sinner, President
SB&B Foods, Inc.

February 26, 2008

The Honorable Frank R. Lautenberg, Chairman
Senate Commerce, Science and Transportation Subcommittee
On Surface Transportation and Merchant Marine Infrastructure, Safety and Security
324 Hart Senate Office Building
Washington, D.C. 20510-3003

Dear Chairman Lautenberg:

As an organization representing agricultural producers and industries nationwide, we are writing to express our strong support for the Rail Competition and Service Improvement Act of 2007.
S. 953 was introduced in the 110th Congress by Senators Dorgan and Rockefeller with 12 co-sponsors. A companion bill, H.R. 2125, was introduced in the House with 53 co-sponsors. This indicates the non-partisan nature of, as well as national interest in, this proposed legislation.

Rail transportation remains a critical component to the agriculture industry as it moves commodities to domestic and international markets from the producers in rural America. We, the elected and appointed members of the National Association of State Departments of Agriculture, continue to support a safe, efficient, and economical rail infrastructure system. However, lack of competition among the railroads has resulted in unreasonably high rates and unreliable service for agriculture producers. Today, with the massive concentration in the rail industries in the 1980's and 1990's, entire states, whole regions and even complete industries have become captive to a single railroad.

S. 953 is critically important to ensure that rail customers have access to competitive rail service and that those rail customers in areas without competition retain access to reliable rail service and are protected from unreasonable railroad rates and practices. The legislation also includes provisions such as final offer arbitration, which is especially important to agriculture because grain producers and marketers have no ability to pass costs on to customers in the form of higher prices when transportation costs are raised arbitrarily.

This legislation is supported by the Alliance for Rail Competition which includes the Agricultural Ocean Transportation Industry, the American Chemistry Council, American Public Power Association, Consumers United for Rail Equity, the Edison Electric Institute, National Association of Wheat Growers, National Barley Growers Association, National Petroleum Refiners Association, National Rural Electric Cooperative Association, Paper and Forest Industry Transportation Committee and the United Transportation Union.

The Senate Commerce Committee held productive hearings on this legislation last fall. The bill has significant bipartisan co-sponsorship from members representing agriculture constituencies. We want to lend our strong support to your continued efforts to bring fairness to the marketplace and to ensure agriculture access to safe, reliable and competitive railroad service in this ever increasingly competitive global marketplace.

Sincerely,

Roger Johnson
NASDA President
Commissioner, North Dakota Department of Agriculture

The National Association of State Departments of Agriculture NASDA

The National Association of State Departments of Agriculture (NASDA)
1156 15th Street, N.W., Suite 1020
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202-296-9680 e-mail nasda@nasda.org
http://www.nasda.org/
President Roger Johnson, North Dakota Department of Agriculture

Attachment #2a

Testimony of Basin Electric Power Cooperative on HCR 3034 before the House Transportation Committee 61st Legislative Assembly

February 13, 2009

Mr. Chairman, members of the committee, Basin Electric Power Cooperative supports House Concurrent Resolution 3034, which urges passage of federal legislation to improve the federal Surface Transportation Board and how it handles railroad rate regulations affecting captive rail customers.

Basin Electric is a generation and transmission cooperative serving more than 2.6 million consumers in 9 states. Basin Electric is also a member of Consumers United for Rail Equity (CURE), an organization representing 3,500 electric, utility, chemical, manufacturing and forest and paper companies and their customers. As a member of CURE, Basin Electric supports legislation to improve the Surface Transportation Board's rate regulation procedures as well as legislation to remove the current railroad exemptions from the nation's antitrust laws.

First, it should be noted that Basin Electric supports a robust and viable railroad industry. The economic well-being and continued success of the railroads is important to North Dakota, especially utilities and agricultural producers. Basin Electric also does not support railroad "re-regulation," as many in the rail industry erroneously claim this legislation would accomplish. Rather we support "fair regulation," which the Railroad Competition and Service Improvement Act would accomplish. Fairness is sorely lacking in the current regulatory environment. We believe the Surface Transportation Board has failed to effectively uphold its responsibility to protect rail customers from railroad monopoly power under the Staggers Rail Act of 1980, and it is time for reform. I have attached a document provided by CURE that addresses many of the misleading claims made by the railroad industry against this legislation.

Basin Electric is directly impacted by this broken regulatory process. Basin Electric operates the 1,650 megawatt Laramie River Station, a coal-based power plant in Wheatland, Wyoming. The plant is jointly owned by Basin Electric and 5 other public power utilities, and is captive to the Burlington Northern Santa Fe railroad for all coal deliveries. In 2004, a long-term contract with Burlington Northern for coal shipments expired, and the railroad more than doubled the rates we have to pay to ship coal to the plant. Basin Electric and its fuel supplier, Western Fuels Association, filed a petition with the Surface Transportation Board challenging those new rates as unreasonable. As the attached summary shows, the rates we are being charged for coal deliveries amounts to a 575% increase above the railroads own costs of delivering the coal, or more than $1 billion in increased costs to our ratepayers over the next 20 years. Assuming that number remains constant, North Dakota electric consumers served by Basin Electric and the other plant owners would see their rates increase by more than $5 million per year. Provided for your information is a detailed timeline of events related to our case, as well as a graph comparing the rates being charged to the Laramie River Station to other rates being charged by Burlington Northern Santa Fe elsewhere on its system.

What the Surface Transportation Board is asked to determine when reviewing rate complaints like ours is whether the rate is reasonable. In a decision issued in September 2007, the answer from the agency was "yes." However, after we had filed all of the required information in our case, and were on our way to a decision, the Surface Transportation Board changed the rules. This "prejudiced" our case enough that in 2008 we were asked to resubmit key portions of our case that were affected by the new rules. To date, we have spent more than $6.5 million dollars, and throughout this time, we, and our ratepayers, have paid this outrageous rate that we are contesting.

Passing new legislation at the federal level will not help Basin Electric's current case, but it will help level the playing field for captive rail customers who challenge unreasonable rates in the future. Basin Electric supports a "Do Pass" vote on this resolution. I would be happy to answer any questions you might have. Thank for your time.

HCR 3034
Attachment 2b

BASIN ELECTRIC
POWER COOPERATIVE

1717 EAST INTERSTATE AVENUE
BISMARCK, NORTH DAKOTA 58503-0564
PHONE 701-223-0441
FAX: 701/224-5336

Summary of Rail Issues
Missouri Basin Power Project

Basin Electric Power Cooperative: Bismarck, ND
Tri-State Generation and Transmission Association: Denver, CO
Missouri River Energy Services: Sioux Falls, SD
Lincoln Electric System: Lincoln, NE
Heartland Consumers Power District: Madison, SD
Wyoming Municipal Power Agency: Lusk, WY

Laramie River Station
1. The Laramie River Station in Wheatland, Wyoming, is owned by 6 public power utilities in the region.
2. Basin Electric Power Cooperative owns 42.25% of the output of the facility and operates the plant on behalf of the other 5 participants
3. Collectively, the project is known as the Missouri Basin Power Project

Laramie River – Rate Case
1. Contract expired in 2004. BNSF imposed public tariff at more than double the rate
2. Filed a petition with the Surface Transportation Board for relief
3. STB suspended case in early 2006 – rules changed
4. STB denied relief in September 2007 – rates 575% above direct cost of moving coal are "reasonable"?
5. STB said rule change "prejudiced" our case, after assurances it wouldn't affect us
6. STB denied MBPP Feb. 2008. Will allow us to resubmit evidence at additional expense
7. $6.5 million spent to date

Laramie River – Lime Deliveries
1. Lime (calcium oxide) needed for environmental controls; delivered from Basin Electric subsidiary in Frannie, WY
2. Direct service to LRS via BNSF terminated in 2002. Cars are shipped to Cheyenne, 70 miles south of LRS, to wait for a window to be shipped back north to LRS.
3. Cycle times to LRS are 20-30 days. Cycle times to plants in North Dakota, 110 miles farther, are just 15 days.
4. During 2006, lime had to be shipped to LRS via truck to maintain deliveries

Summary
1. Rates are higher – Service is slower – No competition – No recourse for Captive Consumers
2. BNSF reports record freight revenues (and record profits) in all its business groups for every quarter in 2005 and 2006.
3. STB enforcement is broken and favors railroad monopoly control over service and rates that are fair and reasonable for customers.
4. Support legislation to reform the STB reform and apply antitrust laws to the railroads.

Timeline of LRS rate case

February 13, 2009

1984 through 2004: Contract period for coal shipments to the Laramie River Station (LRS) between BNSF Railway (BNSF) and Western Fuels Association (WFA) and Basin Electric Power Cooperative (Basin).

Day 1

10/19/2004: Following months of unsuccessful negotiations for reasonable contract rates with BNSF, WFA/Basin file a Stand-Alone (SAC) rate case with the STB challenging newly established BNSF common carrier rates.
10/19/2004 ~ 9/30/2005: Discovery conducted and Opening, Reply, and Rebuttal evidentiary filings made in SAC case.

Day 413

12/6/2005: Final briefs filed in WFA/Basin SAC case.

Day 496

2/27/2006: STB suspends LRS rate case pending completion of new SAC rulemaking (Major Issues in Rail Rate Cases).
5/1/05 ~ 6/30/06: WFA/Basin submit three rounds of comments on rulemaking.
5/15/06 ~ 7/14/2006: WFA submit 1st and 2nd Supplemental Evidence filings in SAC case as requested by STB in a decision served 3/17/2006.

Day 687

9/6/2006: Original statutory deadline passes (prior to suspension) for a decision in WFA/Basin SAC case.

Day 741

10/30/2006: STB finalizes Major Issues rulemaking and establishes new Average Total Cost (ATC) method for SAC cases. STB rejects WFA/Basin's complaint that application of ATC and other portions of its new rules retroactively to its case is prejudicial and arbitrary and capricious.

Day 750

11/8/06: STB issues decision in WFA/Basin SAC case ordering the filing of Supplemental evidence in conformance with its new SAC rulemaking decision.
11/8/06 ~ 1/16/07: Additional discovery conducted by WFA/Basin in response to STB's 11/8/06 decision.
2/22/07 ~ 4/9/07: Parties engage in Opening, Reply, and Rebuttal Second Supplemental Evidence filings in response to STB's 11/8/06 decision.

Day 1056

9/10/2007: STB issues final decision denying WFA/Basin any rate reasonableness relief under the SAC test. However, STB finally acknowledges the change to ATC "could have prejudiced" WFA/Basin, and provides WFA/Basin "an opportunity to modify its SAC presentation in light of the new revenue allocation methodology."

Day 1098

10/22/2007: WFA/Basin petition the STB to reconsider and reverse their 9/10/2007 decision. WFA/Basin also inform the STB they will file supplemental evidence and propose a procedural schedule.

Timeline of LRS rate case

February 13, 2009

Day 1228

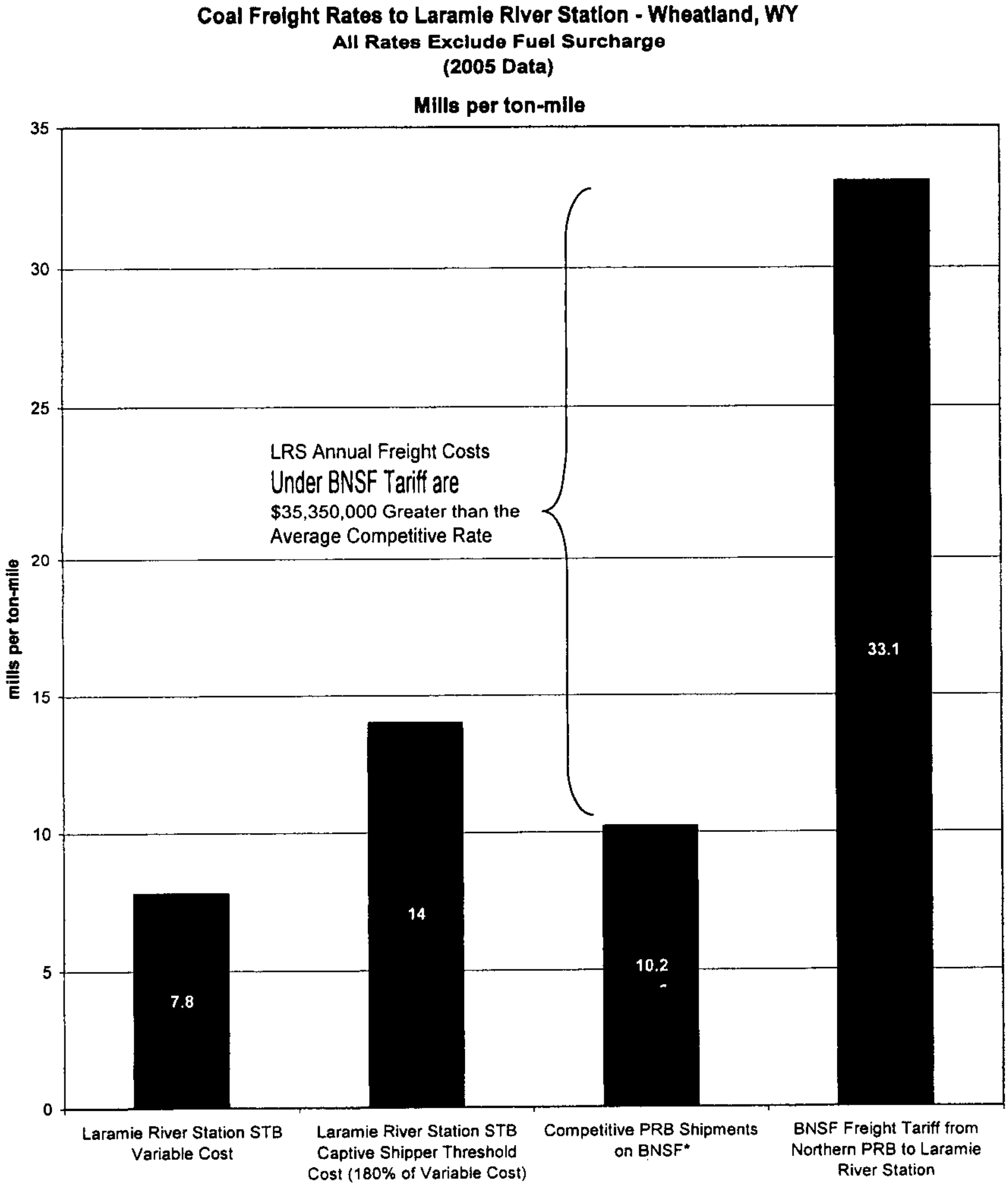
2/29/2008: STB denies WFA/BNSF and BNSF petitions for rehearing. Procedural schedule established for submitting supplemental SAC evidence.
3/3/2008: WFA/Basin file emergency petition for clarification of 2/29/2008 decision.
3/12/2008: STB rules on petition confirming WFA/Basin's ability to submit supplemental evidence
5/13/2008: WFA/Basin to file opening supplemental SAC evidence with STB.
7/14/2008: BNSF to file its reply and supplemental SAC evidence with STB.

Day 1396

8/15/2008: WFA/Basin filed rebuttal supplemental SAC evidence with STB.

Final Decision: Day ????

Attachment #2C



* *New Price Structures for Coal Transportation: Evidence and Implications.* "Copyright ©2005. Electric Power Research Institute, Inc., Product #1010257. Selected information used and printed with permission. Fuel cost escalation after 2003 and fuel surcharges are excluded from the cost estimates. Estimates assume railcars are provided by the shipper."

-LES Source: Chart prepared by Lincoln Electric System. May 2006

Rail Customer News & Information From CURE

rail report

CURE

SPECIAL BULLETIN

October 27, 2008

Rail Lobbyist Not Hindered by Facts in Rail Reform Debate

It's no surprise that the railroads and their lobbyists will say and do just about anything to protect their monopoly stranglehold on captive shippers. After all, it's this secret tax on consumers that results in millions of additional dollars pouring into corporate rail coffers every year. It is surprising that they can do it with a straight face. Maybe that's why Association of American Railroads President Ed Hamberger recently chose the format of radio to spin his latest message that captive railroad shippers really don't exist, much less have a problem - on the radio we can't see him smiling.

Hamberger appeared on AgriTalk, a nationally syndicated radio program, on October 13th. Also interviewed during that program were CURE Chairman Glenn English and Executive Vice President of the American Coalition for Ethanol Brian Jennings. Below are a few of the comments from Hamberger that show just how far off the tracks the railroad lobbyists have gone as they try to sell their "rail world" view as opposed to the "real world" in which rail shippers exist.

Rail World Statement: Selectively referencing a 2006 Government Accountability Office (GAO) Study: "Rail rates in this country have gone down since 1980, almost 10 percent on average."

Real World Facts: This statement is as relevant to a captive rail customer as the fact that gasoline in Venezuela sells for a heavily subsidized 14 cents per gallon. We don't care about the price of Venezuelan gasoline, because we can't get it. And captive shippers can't get these lower rates that Hamberger touts. This statement is offered simply to change the subject away from captive shipper rates.

The GAO study Hamberger referenced stated that rail rates had decreased overall since 1980, but it also pointed out that captive rates have gone up. The railroads don't make available their data on how much captive rail rates have increased. So, Mr. Hamberger, can you tell us, how much captive rail rates on fertilizer, on coal and on agriculture products have increased since 1980? And how much have they increased in the last 5 years?

Rail World Statement: Misrepresenting the 2006 GAO study: The number of rail customers "whose rates have gone up has gone down" since 1980.

Real World Facts: The 2006 GAO report said that captive rail customers are a smaller percentage of the overall traffic at the end of 2005 than they were in 1980. The GAO report did not say that "the number of rail customers whose rates have gone up has gone down". STB Commissioner Frank Mulvey, in testimony before the House Transportation and Infrastructure Committee in September, 2007, clarified this matter. Mulvey clarified that the percentage of rail traffic that is captive declined since 1980 "as a percentage of overall rail traffic" due to the enormous growth in container traffic since 1980 - traffic that did not exist in 1980. Mulvey specifically stated that the number of captive rail customers has not gone down.

Rail World Statement: "We don't have an exemption from the antitrust laws."

Real World Facts: The railroads are exempt from antitrust laws for any activity subject to STB jurisdiction. Because most railroad activities are subject to STB review, the railroads enjoy a very broad antitrust exemption. The Department of Justice agrees. In a 2004 letter to the Chairman of the House Judiciary Committee, the Department of Justice identified two railroad methods of denying rail customers access to competition as highly likely to violate the nation's antitrust laws - if the antitrust laws covered these practices that have been approved by the STB. Unfortunately, the antitrust law doesn't apply because the STB approved the anticompetitive practices.

When both the Senate Judiciary Committee and the House Judiciary Committee were presented with this issue in the current Congress, both committees, by bipartisan voice vote with no objections, reported legislation to the full Senate and House that repeals this broad railroad exemption from the nation's antitrust laws.

Ironically, Mr. Hamberger is right that the antitrust laws do apply to many rail activities outside the jurisdiction of the STB. The antitrust suit against the railroads on fuel surcharges that is pending in federal court in Washington, D.C. covers only those rail movements that are not jurisdictional to the STB.

Rail World Statement:
"The Surface Transportation Board is doing its job. Of the last 15 large coal rate cases that have come before the board, eight of them were decided against the railroad industry."

Real World Facts: Of the 15 rate cases brought to the STB between 2000 and 2008, the rail customer received meaningful relief in only 1 case. To prevail in these cases, the rail customer bears all burdens of proof, must pay the challenged rate until relief is ordered by the STB, must pay a filing fee of about $150,000, and must pay lawyers, economists and consultants up to $7 million to prosecute the case over two to three years. It's no surprise that some shippers choose not to bring their case to the STB, knowing the huge investment of resources needed and the 1 in 15 chance of achieving a meaningful victory.

Rail World Statement:
"A customer that doesn't have the volume to justify going through an entire large rate case can bring a small rate case. DuPont won three out of four of the cases they brought."

Real World Facts: In 1995, noting that no agriculture shipper had brought a rate complaint to the STB since about 1982 (and they lost), Congress directed the STB to develop rules for a "small shipment" rate case challenge. After several false starts, the STB completed its latest attempt at these rules in late 2006. In 2007, DuPont, one of the largest chemical companies in the country, brought four cases under one option under the new rules that limits relief to $1 million over 5 years ($200,000 per year) in each case. DuPont prevailed in three of the four cases. The relief: the STB said that the railroad could not charge DuPont for these captive shipments 4 times what it cost the railroad to move DuPont's freight; the railroad could charge DuPont only 3.5 times what it cost them to deliver the freight.

No agriculture rate case has yet been filed under these small shipment rules. So, no agriculture rate case has been brought to the STB or the ICC in the last 25 years. Is that because no captive agriculture rate has been excessive in 25 years or because the STB has failed to provide appropriate remedies for agriculture, despite the directive of Congress in both 1980 and 1995?

In this political season, we can all recognize that these misrepresentations by the top railroad lobbyist are "spin." Unfortunately, while the railroads and their lobbyists spin away to protect their monopoly power, American agriculture and American consumers are being forced to pay unjustifiably high rail rates that are adversely impacting their pocketbooks.

The CURE website offers additional updates on the railroads' organized efforts to prevent rail reform. In addition, consumers can get the real world facts on rail reform and learn more about how this legislation can benefit their bottom line.

Consumers United for Rail Equity (CURE) represents a wide variety of rail customers including public utilities, rural electric co-ops, agriculture groups, as well as chemical, ethanol, cement, forest and paper companies, and other manufacturers.

For more information about CURE visit: www.railcure.org

[redacted]

Attachment #3

Testimony of Jon Long in Opposition to House Concurrent Resolution 3034
House Transportation Committee, February 13, 2009

Good Morning Chairman Ruby and members of the committee. My name is Jon Long. I am BNSF's Ombudsman for North Dakota. Since mid 2004, my job has been to trouble shoot problems for North Dakota producers, promote communication and make sure that our service meets our customers' expectations.

Over the past four years, we have made tremendous inroads to better understand the needs of the North Dakota producers. Additionally, I believe that North Dakota producers have also benefitted from our transparent, honest and regular communications about rail service, rates and operations. I want to take this opportunity to thank the producers of North Dakota for their willingness to engage in these conversations—to tell us what we're doing right and what we need to do to improve.

I'd like to start my testimony by making a comment about service. In addition to many others who will speak to you today, I can also assure you that over the last three years our service has steadily improved and today it is widely praised. This has occurred because of the combined efforts of our operations and commercial teams to do everything that we can to work with the people of North Dakota to match our service with their needs. Between 2003 and 2007, BNSF hauled ever-increasing volumes of grain out of North Dakota with very few problems. In fact, in 2007 we loaded a record 171,000 carloads of grain and grain products in North Dakota, a 26 percent increase over the year before.

I know that you understand that our success has not just been about our team's customer service. Our success is also about the fact that BNSF has reinvested enormous sums to increase its capacity for hauling grain. In the past 10 years we have spent more than $1 billion just to acquire grain cars, which cost about $70,000 each. (And, by the way, about 11,000 of those cars are currently in storage, which also illustrates the capital risk that we take to be prepared to haul North Dakota grain to market.) In addition there have been huge locomotive investments at about $2 million dollars each and other investments in other railroad infrastructure that have amounted to billions of dollars.

BNSF is the nation's leading railroad in handling shipments of grain and grain products; and we are committed to serving our agricultural customers with the best service possible because we know that our success is tied to the success of North Dakota's producers. To that end, we have been aggressively working with the producers and shippers in your state to improve our communication and make sure that we are meeting their needs. I travel constantly to make sure that any issues and/or misunderstandings and/or service failings are quickly resolved. That's why we have an ombudsman!

A prime example of our outreach efforts is evidenced by the creation of the Ag Rail Business Council, which was formed about a year ago and whose membership is largely producers from throughout our territory. North Dakota producers, Dan Wogsland and Harlan Klein, are members of this Council. It is a unique collaboration between a railroad and its producer stakeholders to bring producer representatives from every commodity and geography together with key railroad personal to mediate disputes, engage in mutual education and develop common solutions. It is producer run and producer controlled.

I also lead regular town halls which we call Small Shipper Forums, at least four times a year, to make sure that we are meeting the needs of our small shippers. The forums are open meetings and provide an opportunity for small shippers to bring their concerns and ideas to our attention. I would like to commend our customers who take part in these different forums and thank them for their help in shaping our service.

We also use new technology to keep our customers abreast of what's happening. For example, we have frequent podcasts from Kevin Kaufman Vice President of grain marketing, giving the latest updates on what is happening within the marketplace and the railroad so that our customers can stay informed.

I'd like to end with a very important point: While I am not personally responsible for setting rates, I can tell you that BNSF's grain rates for its North Dakota customers have remained flat for many years. Adjusted for inflation, they have gone down. In fact, there are many locations in North Dakota where the bushel price to ship grain to the West Coast is almost exactly what it was in 1981. Had those rates kept pace with inflation, they would be more than double what they are.

We are proud of our efforts to work with our customers to provide them with valuable service at competitive rates. Thank you for the opportunity today to testify. I will be happy to answer any questions you may have.

Attachment #4

Testimony of Brian Sweeney, BNSF Railway Company, in opposition to HCR 3034
House Transportation Committee, February 13, 2009

Good morning Chairman Ruby and members of the Committee. My name is Brian Sweeney; I am legislative counsel for BNSF Railway Company. I am here to urge you vote against House Concurrent Resolution 3034.

I don't want to take a lot of time refuting all of the "whereas" in this resolution. As the handout I have given you shows, none of them stands up to scrutiny. In fact, the whole argument in favor of railroad reregulation really doesn't have any supporting evidence. It's largely some anecdotes that don't stand up to the facts.

What I'd like to focus on is how well the current regulatory structure has been working for North Dakota shippers and how that would change for the worse if the federal government does what this resolution asks.

First, a little history. Heavy federal regulation has been tried before and failed miserably. It failed the railroads and it failed our customers. Regulation was killing the railroads. About 25 percent of the industry was in bankruptcy in the 1970s. Conrail was formed by the federal government out of 13 bankrupt railroads in the Northeast. Here in the Midwest, the Rock Island went under. And deregulation came to late to help save the Milwaukee Road, which used to serve part of North Dakota.

As I said, rate and service regulations also hurt our customers. Because returns were so low, railroads had to cut back on maintenance and capital spending. They invested in other, more profitable companies. Our infrastructure was crumbling and we weren't buying a lot of new equipment.

Those involved in grain transportation in the late 1970s and early 1980s can tell you how terrible service was not just in North Dakota, but everyplace else. There were chronic delays in getting cars to ship grain. And they lasted for months. Trains were backed up from the west coast ports to the Rocky Mountains. Any service delays North Dakota has seen in recent years pale in comparison to what was happening then. We just didn't have the capacity, the infrastructure or the ability to meet our customers' needs.

But that has changed dramatically since deregulation went into effect. Railroads have reinvested – far more so than any other industry. Most years we spend about 18 percent of what we take in on replacing track, cars, locomotives, buildings and other equipment we need to serve customers. This year alone, BNSF plans to spend $2.7 billion.

As was noted earlier, we spent more than a billion dollars over 10 years just on grain cars. Another billion dollars plus was spent on locomotives. Each year we spend between $30 million and $40 million on capital dollars on our track in North Dakota alone. And that doesn't include routine maintenance dollars. We have also spent heavily to build double track and new sidings, so that we can increase our capacity between North Dakota and the grain markets.

We also have improved service by listening to our customers, learning more about the markets and what is needed. I remember in the early 1980s our head of sales told me that in the old days, selling railroad service was easy because everything was so regulated you didn't have to think. All of a sudden our marketing and sales people had to understand what our customers needed and how to do it.

Today, we communicate with our customers regularly in an effort to better understand their needs, the marketplace and how to respond. And that's not because of a new federal regulation. Just the opposite: it's because the current environment requires us to respond to the marketplace.

And amazingly enough, while all this has happened, our rates have gone down. Grain rates for North Dakota have been flat for some time. Had they just kept pace with inflation, they would be far higher than they are now. And we're not the only ones saying that. A study by the Government Accountability Office two years examined the years 1985 to 2004. It found that during that time rail rates went down across when adjusted for inflation. That was for both captive and non-captive shippers. Some rates were down even if inflation wasn't taken into account.

The bottom line is that today, railroads haul more freight, we haul it better and we haul it cheaper than in the bad old days of heavy federal regulation. This resolution would take us backwards, not forward. Please vote to not pass. Thank you.

Attachment #5

Oppose HC Resolution 3034 (Railroad Reregulation)

HCR 3034 advocates federal action that would damage the transportation network in North Dakota. It would dry up funding for track, railcars and locomotives and result in declining service for North Dakota shippers. The resolution is based on a number of false assertions. Following is a list of those assertions and the facts:

Assertion 1: Lack of effective competition and regulatory protection has led to an increase in captive shippers, rising rail rates and deterioration in service quality.

Facts: A 2006 study by the U.S. Government Accountability Office found just the opposite. The GAO studied the rail industry for the years 1985-2004 and found that:

- The number of captive shippers has gone down, not up
- Between 1985 and 2000 rail rates were down across the board, when adjusted for inflation (including rates for captive shippers). In fact, many rates were down even without inflation being taken into account. Rates began to inch up in 2001, but in 2004 they remained below 1985 levels.
- Service has improved, not deteriorated, and the current regulatory structure has been a success for both the rail industry and its customers.

Assertion 2: Rail rate increases in the energy sector could quadruple the rates paid by electricity consumers.

Facts: No such rate increase has taken place. The GAO study showed that even without adjusting for inflation, rates for hauling coal were lower in 2004 than in 1985, even though they had risen in the last two years of the study. BNSF railway was paid 30 percent less on average for hauling a ton of coal one mile in 2007 than in 1984. In the meantime, the average cost of electricity rose 46 percent.

Assertion 3: Agreements between major railroads and short line railroads prevent the short line from moving freight to any other railroad and the federal legislation introduced two years ago would address that.

Facts: This issue was largely addressed in 2007 by the U.S. Surface Transportation Board, which regulates the rail industry. The STB announced it will no longer routinely approve such arrangements, but review them on a case-by-case basis. The STB also moved to provide other parties greater access to the terms of those agreements. Not all existing short lines have such restrictions. Generally, when the short line was sold or leased by the major railroad, the short line owner had the option of paying the major railroad a higher price in exchange for the ability to interchange with other carriers. This proposal would change one contract terms without any offset.

Assertion 4: Shippers would benefit from elimination of "bottleneck" situations, in which a single railroad takes a shipment from origin to destination, rather than splitting the haul with another railroad, resulting in high rates for shippers.

Facts: A 2008 study commissioned by STB rejected this idea as unworkable. The study, conducted by Christenson Associates and completed last fall, found no evidence of market abuse and specifically recommended against much of what is advocated in this resolution, including this specific proposal.

The Christenson study found that rail profits are not excessive, pointing out that they are similar to those of utilities. It found that the rate increases that had taken place reflected changes in railroad costs. Further, it said that rate reductions for one group of shippers would require a rate increase for others, or else railroads would likely have to curtail capital reinvestment. Today, railroads spend about 40 percent of every dollar taken in on either maintenance of or capital reinvestment in cars, locomotives, track, bridges, etc. In recent years.

Assertion 5: STB practices and policies have failed to provide meaningful relief to shippers.

Facts: The STB has taken a number of steps in recent years that provide significant benefits for shippers. They include:

- Ruling for shippers in about half of large rate cases.
- Providing new, streamline process for small and medium-sized shippers to seek rate relief. A complaint seeking relief of up to $1 million can be filed for $350 and a decision issued within eight months of filing. A complaint seeking up to $5 million in relief will be decided within 17 months of filing. The first shipper to file cases under these rules was DuPont, which is larger than any U.S. railroad. DuPont won on six of the seven rates it challenged.
- Lowering the filing fee for a complaint under the coal rate guidelines from $178,200 to $350, and lowering the fee for a formal complaint under the Simplified-Stand-Alone Cost methodology from $10,600 to $350.
- Siding with shippers on the issue of fuel surcharges. The STB ruled that the rest of the industry should adopt a method of calculating fuel surcharges similar to the one BNSF had already implemented.
- Changing the way railroad profitability is measured. This measure is a key in evaluating in whether rail rates are reasonable.

HCR 3034 advocates destructive federal action that would ultimately hurt North Dakota industries. It is based on false premises and should be rejected.

BNSF Railway Company

Attachment #6

Testimony of Jay Elkin
Before the House Transportation Committee
February 13, 2009
Testimony on HCR 3034

Mr. Chairman, members of the House Transportation Committee, my name is Jay Elkin; I farm and ranch near Taylor, North Dakota. I am also currently a board member of the North Dakota Grain Growers Association.

I am here today in opposition to House Concurrent Resolution No. 3034.

Mr. Chairman, members of the committee, the relationship between rail and producers has been improving over the last several years. Through the efforts of individual producers, ag organizations and BNSF Railway, a cooperative effort has developed that serves both well. I have attended numerous meetings as part of this effort with the railroad in North Dakota, Montana, and the NAWG board meeting. Grain rates are lower and service is great at my local elevator, (Southwest Grain, Taylor).

Since the passage of the Staggers Act, BNSF wheat rates today in North Dakota are only nominally above what they were in 1981. Producers in North Dakota have seen a significant drop in wheat rates on BNSF, both east-bound and west-bound, since 2004 alone.

Approaching the issue of wheat rates for purposes of comparison, the United States Department of Agriculture (USDA) tracks the cost on 15 major farm related inputs each year. Since 1981, 13 of the 15 categories have increased more than the BNSF rail rate.

Rates must be sufficient to justify further investment in agricultural products. Not only does this ensure that railroads remain viable, but it is necessary for my continued success, as an ag producer, in the domestic and export markets. Neither the railroad nor the farmer wins if the farmer cannot get his production to market. And everyone loses if railroads cannot maintain their financial health.

Rail service for grain has improved substantially in North Dakota for shuttle and non-shuttle alike. The elevator where I deliver my grain has told me that BNSF car supply is not only adequate but there's a surplus.

Mr. Chairman, members of the committee, from my perspective, the railroad is reaching out to us and our trade associations. Instead of calling for action to be taken against the railroad industry, agricultural trade groups should be working with the railroads on new marketing opportunities and increasing railroad capacity to ensure our product gets to market. That is what many of my fellow North Dakota producers have done and we have seen the results – lower rates and improved service.

Mr. Chairman, members of the committee, as a farmer I respectfully ask that you oppose HCR 3034. Thank you.

Attachment #7

NORTH DAKOTA

GRAIN GROWERS

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Working for you, the producer!

Testimony of Dan Wogsland
Executive Director
North Dakota Grain Growers Association
Testimony on HCR 3034
House Transportation Committee
February 12, 2009

Mr. Chairman, members of the House Transportation Committee, for the record my name is Dan Wogsland, Executive Director of the North Dakota Grain Growers Association. I am also a producer representative on the BNSF Rail Advisory Council.

I appear before you today to oppose HCR 3034.

Rail issues are nothing new to the North Dakota landscape. Since the settlement of North Dakota our state's interdependence on rail service has been critical to our way of life. North Dakota is an export state, we lead the nation in the production of 14 different agricultural commodities and it's no secret that our 640,000 population cannot consume our production. Therefore, shipping our commodities is a way of life and the most economical and efficient method of transporting these commodities to market is by rail.

To be sure, the relationship between producers and shippers has not always been peaceful co-existence. Rate issues, service issues, reliability issues have been a concern and while issues matter, of more importance are addressing issues for the good of all. Producers need railroads, railroads need producers, and the better understanding we can foster the better off the entire agriculture industry will be. Being at loggerheads has yielded nothing but headaches and has not served to provide transportation solutions that will benefit agriculture. This message has been sent, and it has been received.

The North Dakota Grain Growers Association is committed to fostering better understanding and better cooperation between producers and railroads. The only way to accomplish this is to be at the table. That is why our Association has taken great efforts to participate at every level to ensure producers are at the table in rail issue discussions. We've participated in rail rate discussions conducted by the PSC. We've participated in rail meetings called by the Governor. We've been participants in BNSF Rail Summits and we are now at the table along with the North Dakota Wheat Commission in participating on the BNSF Rail Advisory Council.

Thanks to North Dakota's ag industry involvement, rail issues are light years away from the old days of stalemate and stagnation. Service today is better than ever before. Rail providers like BNSF have provided for an ombudsman program for North Dakota producers and shippers that give us a voice in rail concerns. Top rail executives have made themselves available to discuss rail issues with customers. A model arbitration program recently instituted in Montana, something North Dakota and the rest of the nation is looking at, give producers a grievance procedure in rail disputes. Additionally, the BNSF has instituted a system-wide Rail Advisory Council which is designed to bring about constructive discussions between railroad officials and customers in order to foster a better understand between the two.

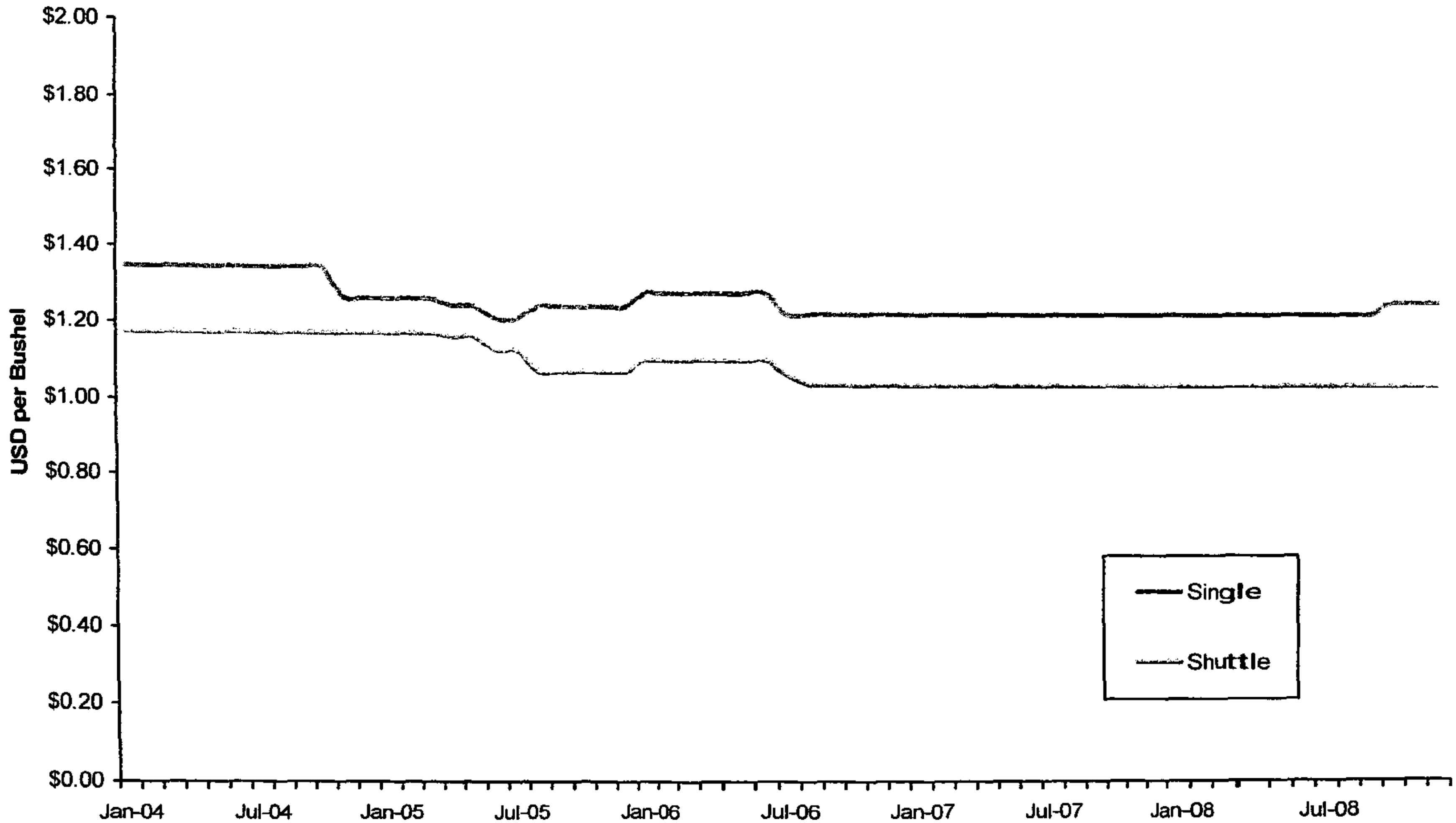
More work needs to be done, more strides need to be made, but it is a proven fact that the "carrot" approach to rail issues today has far and away been more effective than the "stick" approach of the past.

Therefore, Mr. Chairman, members of the House Transportation Committee, the North Dakota Grain Growers respectfully request your unfavorable recommendation of HCR 3034; such action will help to further rail discussions for the betterment of all.

Thank you!

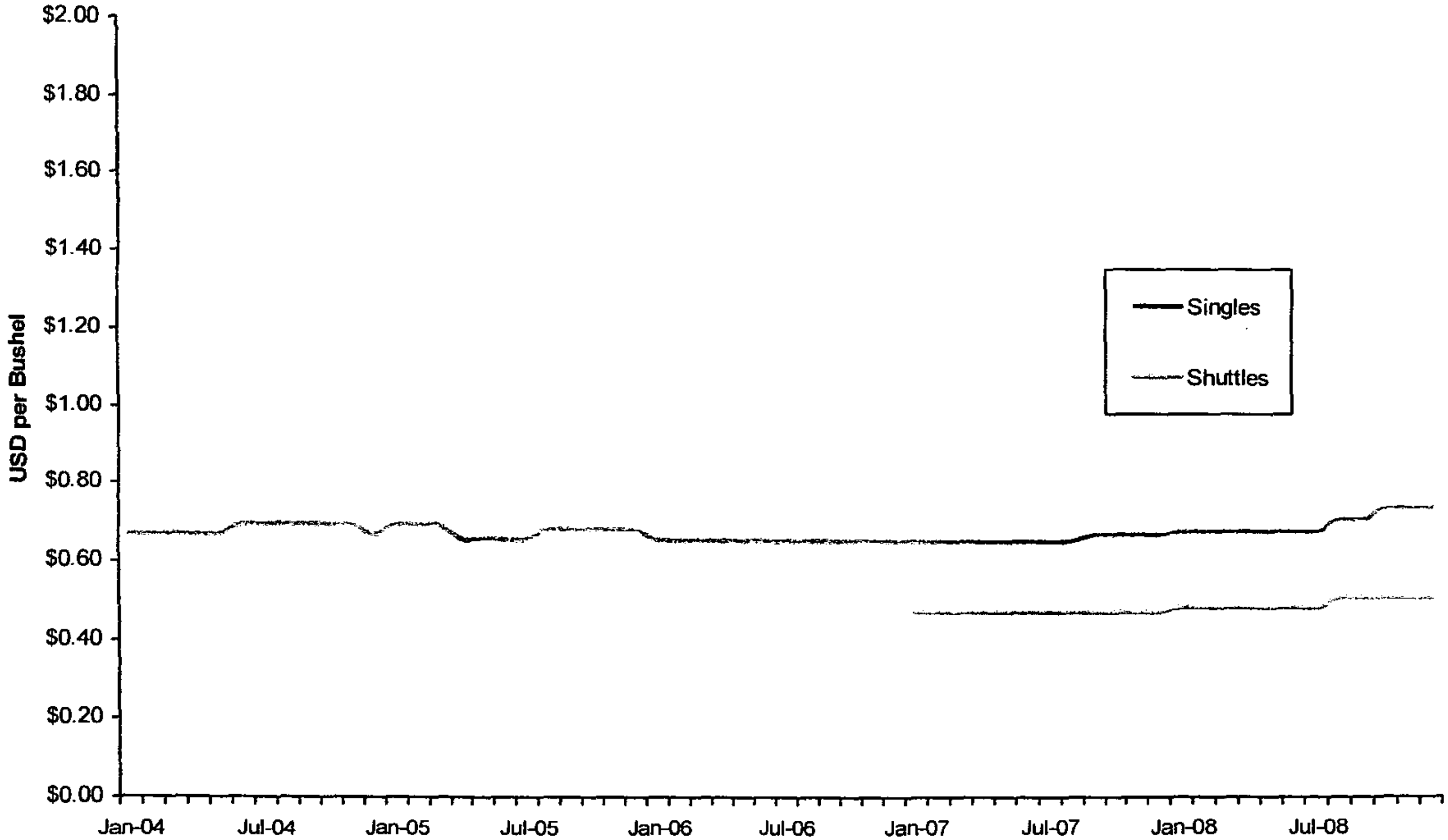
Wheat Rate per Bushel

North Dakota origin to Pacific Northwest



Wheat Rate per Bushel

North Dakota origin to Chicago



BNSF RAILWAY

Attachment #9

CANADIAN PACIFIC

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February 9, 2009

Representative Dan Ruby
Chairman
House Transportation Committee
4620 46th Avenue NW
Minot, North Dakota
58703-8711

Dear Chairman Ruby:

On behalf of Canadian Pacific I respectfully offer the following comments to the House Transportation Committee in its consideration of House Concurrent Resolution No. 3034. Unfortunately, we are unable to attend the hearing in person on February 13, 2009, but we nevertheless felt it essential that we express our deep concerns that the North Dakota legislature not adopt this position.

The U.S. economy, including North Dakota, cannot prosper in an increasingly-competitive global marketplace if freight railroads are not fully allowed to do their part in meeting the growing transportation needs of this marketplace. In addition, governments everywhere would like to see even more freight traffic migrate to rail from truck for numerous public reasons like reducing highway costs to taxpayers and improving public safety and the environment. Recognizing that it is essential that private sector railroads operate in a regulatory environment that allows them to afford adequate rail capacity is critical in meeting all these goals. Without sufficient capacity, and resources to build it, the vital public benefits of freight railroading will just not happen.

In stark contrast to other transportation modes which are provided their infrastructure to compete against railroads at public cost, freight railroads must construct, maintain, and, most importantly, finance almost all their infrastructure. Consequently, to maintain their existing networks *and* enhance capacity where needed, railroads must earn returns consistent with long-term financial sustainability. As the Congressional Budget Office recently noted, "As demand increases, the railroads' ability to generate profits from which to finance new investments will be critical. Profits are key to increasing capacity because they provide both the incentives and the means to make new investments."

These are complex and important issues requiring fully informed public policy. If Congress were to follow the positioning of HCR No. 3034 this would take railroads *away* from the financial sustainability the economy will need them to have. And North Dakota would have to live with the negative legacy of this decision, and feel the detrimental impact of it, as much as any other state.

History shows that excessive rail regulation does not work. By the 1970s, decades of government over-regulation had brought U.S. freight railroads to the brink of ruin.

Bankruptcies were everywhere, rates were rising, safety was deteriorating, and track conditions were getting worse because railroads could not generate sufficient returns to pay for needed upkeep. Congress recognized this urgent need and passed the Staggers Rail Act of 1980, which substantially deregulated the rail industry.

Since the passage of Staggers, the evidence is clear that rail deregulation works. Since Staggers, rail traffic is up 95 percent, productivity is up 163 percent, the train accident rate is down nearly 60 percent, and average rail rates are down 54 percent in inflation-adjusted terms — saving shippers untold billions of dollars each year. From 1980 through 2007, U.S. freight railroads have reinvested some $420 billion of private capital back into their networks. In the words of the World Bank's Railways Adviser, "Because of a market-based approach involving minimal government intervention, today's U.S. freight railroads add up to a network that, comparing the total cost to shippers and taxpayers, gives the world's most cost-effective rail freight service."

Reduced net earnings for railroads would impact on spending on infrastructure and equipment. Physical plant would deteriorate and capacity would not be added. Service would become slower, less responsive, and less reliable. Highway's would get more congested, and beaten up by heavy trucks, while the air we breath would degrade more as freight moved from rail to truck.

In the last few years, railroads have been carrying more freight than ever before, and their earnings have improved as well. But those earnings need to be put into context. Although railroads have financially done better of late, this improved performance is still below average returns on investment when compared to other industries. As noted above, railroads have used this period to reinvest record amounts back into their networks, more so than any other private sector industry.

Railroads *are* subject to most antitrust laws, including those that prohibit agreements among railroads to set rates, allocate markets, or unreasonably restrain trade. The few narrow antitrust exemptions available to railroads cover areas (such as equipment pooling agreements) that are subject to Surface Transportation Board jurisdiction.

It is clear from the facts, the current system of rail regulation works. It allows shippers to pay the lowest possible rate consistent with a privately-owned rail system. It would be foolhardy to destroy the best freight rail system the world has ever seen in order to move toward a discredited system that failed in the past and would fail again in the future. We do not believe it is good public policy for North Dakota to promote a return to the failed policy of the past, as House Concurrent Resolution No. 3034 promotes.

We appreciate your consideration of these comments in your review of House Concurrent Resolution No. 3034.

Sincerely,

Randy Marsh

Randy Marsh
Canadian Pacific

Representative VIG amendment

Page 1, Line 21 After Whereas, remove 'the Railroad Competition and Service Improvement Act of 2007' and insert 'the Railroad Antitrust Enforcement Act of 2009'

Page 2, Line 4 After Whereas, remove 'the Railroad Competition and Service Improvement Act of 2007' and insert 'the Railroad Antitrust Enforcement Act of 2009'