

230971

MCCARTHY, SWEENEY & HARKAWAY, P.C.

SUITE 700

1825 K STREET, N.W.

WASHINGTON, D.C. 20006

(202) 775-5560

FAX (202)-775-5574

JOHN M. CUTLER, JR.
jcutler@mshpc.com
(202) 775-2505

www.mshpc.com

September 15, 2011

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

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Re: Docket No. 42124
State of Montana v. BNSF Railway Company

Dear Ms. Brown:

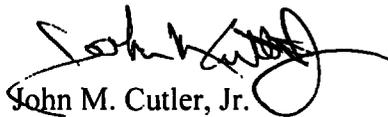
Yesterday, Complainant The State of Montana timely filed, under seal, the Highly Confidential version of its Rebuttal Statement of Facts and Argument in the above-referenced proceeding. Unfortunately, a copier malfunction prevented us from also being able to file the Public Version last night.

Enclosed for filing are an original and 10 copies of the Public Version of Montana's Rebuttal Statement.

Copies of both versions, Highly Confidential and Public, were served on counsel for Defendant BNSF yesterday.

Montana regrets the brief delay in filing the Public Version. If leave of the Board is required for this filing, such leave is requested.

Respectfully submitted,



John M. Cutler, Jr.
Attorney for the
State of Montana

cc: Counsel for BNSF

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PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

RECEIVED
SEP 15 2011
MANAGEMENT
STB

Docket No. 42124

STATE OF MONTANA, COMPLAINANT
v.
BNSF RAILWAY COMPANY, DEFENDANT

ENTERED
Office of Proceedings
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Public Record

REBUTTAL STATEMENT OF FACTS AND ARGUMENT
OF STATE OF MONTANA

Steve Bullock
Montana Attorney General
Chuck Munson
Assistant Attorney General
Montana Department of Justice
215 North Sanders
Helena, MT 59620
(406) 444-2026

John M. Cutler, Jr.
Andrew P. Goldstein
McCarthy, Sweeney & Harkaway, PC
Suite 700
1825 K Street, N.W.
Washington, DC 20006
(202) 775-5560

Attorneys for State of Montana

Dated: September 14, 2011

I. INTRODUCTION

Complainant the State of Montana (“Montana” or “The State”) hereby submits its Rebuttal Evidence and Arguments to the Reply filed August 15, 2011 by Defendant BNSF Railway Company (“BNSF”).

In its Reply, BNSF offers a remarkable rationale for its 2009 decision imposing a 48-car shipment size limit on grain elevators in Montana which were built or expanded to handle 52 cars or more. Such elevators may ship no more than 48 cars, at the cost of loss of regulatory recourse and exposure to unchallengeable rate increases, because BNSF wanted to disabuse the elevators and farm producers of the impression, which was correct under the Board’s URCS rules, that BNSF grain rates might be unreasonably high. BNSF Reply Argument at 17, 33 and 40-41.

Conspicuously absent from BNSF’s Reply is any claim that replacing its former 52-car rates or 48-109 car rates (which were applicable to shipments of 50 cars or more) with a 48-car shipment size limit was necessary for other reasons. The 48-car limit was not operationally necessary or even desirable. It was not imposed by destination export grain elevators in the Pacific Northwest (“PNW”), or adopted in response to other grain market requirements, elevator or farm producer preferences, car supply constraints, USDA programs, or competitive pressures from UP or CP, which also transport wheat to the PNW in 50 car lots.

BNSF attempts to support its 48-car shipment size limit in other ways, but these are largely irrelevant, erroneous or both. For example, BNSF argues that shuttle trains are more efficient and that more and more grain will move via shuttles. Assuming this is true, it does not follow that an artificial shipment size limit for mid-size elevators is reasonable.

BNSF also argues that its rate levels are reasonable and offers as “evidence” the absence of rate challenges since McCarty Farms. Whether its rate levels are or are not reasonable or lawful is not an issue for this proceeding. The experience of McCarty Farms, in which wheat shippers over the course of 17 years established BNSF market dominance, but were never able to obtain relief under then-applicable standards, would lead many shippers to question the effectiveness of ICC and STB rail rate regulation.

That said, it is offensive to see BNSF contend that mid-sized elevators in Montana, along with the farm producers they serve, are content with the grain rates they pay, after BNSF (1) used its shipment size limit to engineer a significant reduction in R/VC percentages to below the STB jurisdictional threshold, and (2) mounted a public relations campaign, based on the reduced R/VC percentages, whose message was that criticism of BNSF grain rates is groundless.

BNSF takes issue with Montana’s contention that these initiatives were deceptive. Practices that are unreasonable do not become reasonable merely because engaged in openly, and BNSF’s arguments are unavailing. Though the railroad may have made no secret of its decision to reduce shipment sizes, there is little or no evidence of candor as to the goal of driving down R/VC percentages.

BNSF blames URCS for its actions, and more specifically, the 50-car or more cutoff for application of the “make whole” adjustment, which allocates additional URCS costs to smaller trains and which BNSF decided it could manipulate because it regards the URCS Rules as “_____.” It is not reasonable for railroads, particularly if they are market dominant, to decide for themselves that STB rules draw costing lines in the wrong places, and that they can therefore force large numbers of shippers and large volumes of a state’s most important product over the line to a status that immunizes rail rates from regulatory scrutiny.

As BNSF acknowledges, the STB intends to initiate an URCS update proceeding in the near future. BNSF would be within its rights to argue in that proceeding that certain trains consisting of 50 cars or more should also bear more costs. Montana and other shippers could make other arguments, e.g., that costs allocated to shuttle trains, which BNSF would reallocate, are excessive. However, what is not permissible is for BNSF to decide unilaterally that it will manipulate shipment sizes in advance of any change in URCS rules, in order to deregulate its service from mid-size Montana grain elevators.

II. ARGUMENT

A. BNSF's Reply Largely Confirms Montana's Assertions

In its Opening Statement, Montana showed that BNSF controls virtually all grain transportation from Montana origins and that it encouraged construction of mid-sized elevators in Montana in the 1980s. BNSF does not dispute these assertions. Reply at 6-7.

BNSF also does not (and cannot) dispute Montana's assertion that, for many years, BNSF rate tariffs provided rates for shipments by mid-size elevators of roughly 50-60 cars, or that BNSF eliminated such rates in 2009. The changes made in that year left only single car rates, 24-car rates, shuttle rates covering shipments of 110 cars or more, and mid-sized elevator rates for which the shipment size is 48 cars, no more and no less. Reply at 12.

Montana argued that the outcome was a significant reduction in R/VC percentages for 48-car trains. Rates to the PNW from many origins that had been jurisdictional and therefore subject to challenge as potentially unlawful were, as a result of BNSF's shipment size limit, made non-jurisdictional and therefore subject to unchallengeable rate increases. The point is conceded, though BNSF quibbles about the rationale and extent of the changes, as discussed below.

B. BNSF's Counterarguments are Unavailing

In its Reply, BNSF offers a small number of counterarguments coupled with an overabundance of exhibits, all of which are unpersuasive. These Arguments can be characterized as follows:

1. No one was harmed
2. URCS is defective
3. Other railroads have similar tariffs
4. There was no deception
5. BNSF tries to work with grain shippers

Montana will rebut these arguments in turn.

1. The "Absence of Harm" Argument

BNSF argues (Reply at 2 and 25-33) that Montana's case in chief is defective because no harm to mid-sized elevators has been proved. In essence, BNSF criticizes Montana for alleging harm to mid-size elevators on behalf of those elevators, rather than including verified statements by elevator firms or their customers in support of claims of harm.

There is no legal deficiency in the State's decision to represent elevators and producers in this proceeding. To the contrary, representational standing is explicitly provided for in 49 U.S.C.

§ 11701(b), which states in relevant part:

A person, including a governmental authority, may file with the Board a complaint about a violation of this part by a rail carrier providing transportation or service subject to the jurisdiction of the Board under this part.

* * *

[T]he Board may not dismiss a complaint made against a rail carrier ... because of the absence of direct damage to the complainant.

The provision, which is not even mentioned in BNSF's Reply, is particularly important in a case like this one, involving the most captive state in the country, and grain shippers and farm producers who are utterly dependent on BNSF for their survival. Identifying individual elevators that were harmed, or asking such elevators to identify themselves publicly, would merely expose them to "carrots and sticks" by BNSF intended to encourage their silence. In addition, the harm alleged is not individualized but is structural and applicable to many mid-sized elevators, and is self-evident rather than obscure. Cases like this are well suited for parens patriae standing.

The ability of arguably captive shippers to challenge potentially excessive rail rates, like the ability of victims of monopolization to seek relief under the antitrust laws, is obviously beneficial. Without it, captive shippers would be entirely at the mercy of market dominant railroads, and the fact that railroads sometimes choose not to abuse their market power changes nothing. It is a safe bet that some decisions not to abuse market power are made precisely because of the possibility of a shipper or governmental complaint to a regulatory agency or a court.

Most captive shippers never file a rail rate case. But some captive shippers do, and some of those rate challenges are successful. Those successful challenges help restrain rates not just for successful complainants but also for similarly situated shippers who choose alternatives to litigation.

In this regard, and in others, regulatory recourse does not need to be exercised to be valuable. As the Board has often been told, rate litigation is a last resort for the largest and wealthiest captive shippers, and even more so for smaller, less wealthy shippers. Shippers always prefer negotiation to litigation. But negotiation without the possibility of litigation is negotiation where

only one party – the shipper – has an incentive to compromise.¹ Negotiating is far more likely to be productive where both parties have incentives to compromise.

Here, the shipment size limit makes a rate challenge subject to a simple motion to dismiss for failure to satisfy the STB jurisdictional threshold. As a consequence, mid-size elevators are injured in at least three ways. First, they lose the ability to file a rate case as to existing rates. Second, they lose the ability to file a rate case as to rate increases. Third, they are deprived of the ability to use the possibility of a rate case as leverage in negotiations with BNSF over rates and charges. Similar harm is suffered by farm producers who need mid-sized elevators.²

BNSF cites Philadelphia Belt Line R.R. Co. v. Conrail Corp., Docket No. 32082 (unpublished decision served July 2, 1996) for the proposition that a showing of harm is a prerequisite to successful prosecution of a complaint. Philadelphia Belt Line, however, involved a request for trackage rights (which the Board characterized as an “extraordinary remedy”) in order to “reconnect” a Belt Line that the complainant “does not operate and never has operated.” No representational standing was claimed, and the Board said the complaint “expresses nothing

¹ These are, of course, the negotiations major railroads prefer. See, for example, the Board’s decision in Rate Guidelines – Non-Coal Proceedings, 1 S.T.B. 1004, 1018-19 (1996). The Board there discussed the Railroad’s proposal for Shipper-Specific Market Pricing, under which captive shippers unable to afford Full-SAC rate cases might obtain relief if they could show the railroad how to reduce its cost of service or could show that the railroad could move more freight at higher profits by lowering its rates. The Board correctly dismissed this approach as structured “to allow (indeed assist) a carrier to charge whatever the market will bear.”

² Montana recognizes that farm producers, who pay rail rates only indirectly, face certain barriers not faced by elevators, which do pay rail rates and can deduct those costs from amounts payable to farm producers. Producers are nevertheless adversely affected by higher unchallengeable rates imposed on mid-sized elevators. Moreover, a rate challenge by or on behalf of farm producers could be brought under 49 U.S.C. § 10701(b), even if reparations might not be available. In addition, BNSF’s shipment size limit reduces the recourse Montana farm producers would otherwise enjoy under the mediation/arbitration program negotiated by BNSF and the Montana Grain Growers Association. See Montana’s Opening Statement at 14-15 and Fauth Opening V.S., Appendix GWF-3, Exhibit 1, Section 9.

more than a mere desire for something that would be convenient or desirable.” Decision at 7. and went on to ask why the less intrusive remedy of switching would not suffice. Decision at 8.

This case is hardly analogous. The right of captive shippers to challenge rail rates as excessive is not an extraordinary remedy, but is central to the fundamental policy changes reflected in the Staggers Rail Act, and BNSF’s own evidence confirms the reduction in R/VC percentages that forecloses any chance at relief that might be sought by Montana, or by Montana shippers and producers with few other options. That this case involves the STB’s unreasonable practice jurisdiction is not surprising, inasmuch as BNSF has successfully minimized its exposure to a rate case through the challenged shipment size limit.

BNSF accuses Montana of inaccuracies in calculating R/VC reductions caused by the 48-car shipment size limit. However, BNSF’s own witness confirms that rates formerly producing R/VCs above 180% now produce R/VCs below 180%, as a result of the challenged BNSF tariff change. See Reply Argument at 30, citing BNSF Witness Fisher’s calculations as producing R/VC percentages “averaging 175%.” See also the attached Rebuttal Verified Statement of Montana Witness Fauth for other errors in BNSF’s cost evidence.

While it is true that some 48-car rates produce R/VCs slightly above 180% as calculated by Witness Fauth and as calculated by BNSF Witness Fisher, it does not follow that shippers from such locations were unharmed by BNSF’s shipment size limit. Rates producing R/VC percentages considerably in excess of 180% are more likely to support a rate challenge and rate relief than rates barely over 180%. This is especially true under the Simplified SAC and Three Benchmark tests that mid-sized grain elevators would be likely to use. Reducing the R/VC percentage of a grain rate from 250% or more to 190% therefore injures shippers, for whom a rate case no longer has practical feasibility.

BNSF contends that its tariff change was followed by rate reductions rather than rate increases. Here again, BNSF is being disingenuous. While there was one rate reduction of 1.6% in January 2011, this reduction was more than offset by rate increases in August 2008, August 2009, January 2010, August 2010 and March 2011 totaling 25.6%. See the Rebuttal V.S. of Montana Witness Whiteside, Complainant's Exhibit 3, filed herewith, at page 4, and Whiteside Appendix F, attached thereto.

Not only were mid-size elevator rates raised, but the increases were unchallengeable, due to the reduced R/VC percentages resulting from the 48-car shipment size limit. See Complainant's Exhibit 4, Fauth Rebuttal V.S. at 3-5 and GWF Rebuttal Table 2. And BNSF simply ignores the loss of negotiating leverage that accompanies loss of access to regulatory remedies.

In its own defense, BNSF contends, after acknowledging average R/VCs of 175%:

In other words, BNSF did not set new rate at levels consistently below the jurisdictional threshold. Therefore, the premise of Montana's "evasion of regulation argument does not hold."

Reply Argument at 30, emphasis added.

Of course, as argued above, rates with R/VCs only slightly above 180% are often unchallengeable as a practical matter. And BNSF certainly knows that rates at and below BNSF Witness Fisher's average of 175% are unchallengeable and subject to unchallengeable rate increases.

More significant is BNSF's contention that regulation is not being evaded if most rates become non-jurisdictional but a few do not, i.e., so long as BNSF leaves a few rates above the STB's jurisdictional threshold. This amounts to claiming that the Board should approve BNSF's manipulation of shipment size limits to deregulate its own rates so long as the result is not 100% successful.

The Board must keep in mind the fundamental asymmetry of its jurisdictional threshold. It is not a dividing line between railroad wins and shipper wins. Rather, where rates are non-jurisdictional, railroads always win, and where rates are jurisdictional, railroads still win most of the time, because relatively few rates that could be challenged are challenged, and because some challenges are unsuccessful.

Accordingly, in deciding whether it has or should have jurisdiction, the Board is well advised to err on the side of finding jurisdiction, since there will be no cost to railroads unless their rates are not just jurisdictional but also unreasonable.

Of course, BNSF denies that it is evading regulation, even if its own cost consultant shows that, for many if not most Montana shippers, that is the direct result of the 48-car shipment size limit. BNSF's explanation is that correcting "shipper misperceptions," rather than evading regulation, was the goal. See Reply at 17, 33 and 40, and _____

_____.

BNSF cites no authority, and there is none, for the proposition that it should have a free hand to manipulate shipment sizes by restricting them to below elevator capacity when shippers allegedly have "misperceptions." There is all the more reason to prevent railroads from manipulating shipment sizes when the shipper perceptions the railroad finds objectionable are correct.

The reason Montana grain shippers think BNSF rail rates are high is because they are high, as found by the GAO,³ Christensen Associates,⁴ the 2009 Report to the Attorney General,⁵

³ See, e.g., Report GAO-06-98T, at p. 17 ("39 percent of grain originating in Montana and 20 percent of coal in West Virginia traveled over 300 percent R/VC in 2004").

⁴ See, e.g., Study of Competition in U.S. Freight Railroad Industry and Analysis of Proposals that Might Enhance Competition ("Christensen Report"), Volume 1, page 5-11 ("For example, Montana wheat shippers are at a disadvantage because they pay higher transportation costs than Nebraska wheat shippers.").

the USDA,⁶ etc. Such analyses aside, shippers are aware of how their rate levels compare with those paid by their competitors, both in their own and in other States, as are farm producers, for whom the market value of crops is net of transportation costs.

In its Reply at page 42 and again at page 44-45, BNSF cites 49 U.S.C. § 10701(c), as well as BNSF v. STB, 403 F. 3rd 771, 773 (DC Cir. 2005), and Alcoa v. ICC, 761 F. 2nd 746 (D.C. Cir. 1985) in support of the proposition that it can set “any rate for transportation.” Those authorities, however, establish only that railroads are authorized to choose what rate levels to set, subject to STB reasonableness review. Montana is not challenging any rate level. Indeed, BNSF’s 48-car rates were initially the same as the 52-car rates they replaced. The statutory requirement of reasonable practices in Section 10702 of the Act is not superseded by Section 10701. Nor was STB unreasonableness practice jurisdiction at issue in BNSF v. STB, Alcoa v. ICC or in Burlington Northern R. Co. – Abandonment – in Daniels and Valley Counties, MT, 7 I.C.C. 2nd 308 (1990), relied on by BNSF.

Moreover, the rate reasonableness review acknowledged as an exception to railroad rate-setting discretion in the foregoing decisions has been nullified in this instance by the device of implementing a shipment size limit designed to transform BNSF’s jurisdictional rates into non-jurisdictional rates with no reduction in rate levels. Alcoa and similar decisions are simply inapposite.

⁵ Railroad Rates and Services Provided to Montana Shippers, available on the Montana Attorney General’s website at www.doj.mt.gov/news/releases2009/20090226railroadreport.pdf.

⁶ See the Department of Agriculture’s April 2010 Study of Rural Transportation Issues, Chapter 6, Rail Transportation and its Importance to Agriculture, at p. 227. The Study also noted (Preface at ix). “The closure of many rail branch lines and a shift to “shuttle train” service by railroads has resulted in the closure of many country grain elevators, resulting in movements of grain for longer distances on rural roads to shuttle train terminals.”

For decisions that are relevant to this proceeding, see Dairyland Power Cooperative v. UP, Docket No. 42105, decision served July 29, 2008, and the “Radioactive Materials” cases discussed in Montana’s September 13, 2010 Reply in Opposition to BNSF Motion to Dismiss, at pp. 7-10, and particularly Trainload Rates on Radioactive Materials, 362 I.C.C. 756, 763 (1980), aff’d sub nom. Consolidated Rail Corp. v. I.C.C., 646 F. 2nd 642 (D.C. Cir.), cert. denied 454 U.S. 1047 (1981), where the ICC stated: “[W]e must find, based on the evidence at hand, that the special train requirement is wasteful transportation and an unreasonable practice in violation of section 10701(a) of the Act.”

See also Insulating Materials, Between Points in Official Territory, 364 I.C.C. 599 (1981), aff’d sub nom. National Insulation Transportation Committee v. I.C.C., 683 F. 2nd 533 (D.C. Cir. 1982). In that case, shippers of insulating materials challenged the decision by Conrail to eliminate its rates for 12,000 and 16,000 pound minimum weights, leaving in place only 24,000 pound rates. Though the latter rates were lower per pound, shippers were forced to pay more because they could not load more than 19,000 pounds in railcars. The Commission rejected Conrail’s tariff change as an unreasonable practice.⁷

In any event, the claim that BNSF cared only about misperceptions or misimpressions, and not about the possibility that its rates might be challenged before the STB, lacks credibility. BNSF did not reduce the levels of rates charged to mid-sized elevators in Montana. (As has been seen, it raised those grain rates.) Nor did BNSF mount a campaign to persuade elevators and farm producers that BNSF grain rates were being raised only due to unavoidable cost increases, and only minimally.

⁷ The ICC went on to reject shipper requests for refunds because neither market dominance nor unreasonable rate levels had been shown. Here, while shipper captivity is highly likely, BNSF rate levels are not, and cannot be, challenged.

Rather, BNSF took aim at its R/VC percentages, using its 48-car shipment size limit to bring to bear the URCS make-whole adjustment for trains of less than 50 cars. The ploy worked. R/VC percentages fell significantly, and Montana shippers lost the recourse to regulatory remedies that Congress provided for them. The Board has not hesitated to find railroad practices unreasonable even when they do not eliminate shipper recourse. The case for relief is even stronger where, as here, the Board's central rate authority is vitiated.

BNSF claims that its focus was shipper perceptions, but it also claims that shippers care only about rate levels, not R/VC percentages. See Reply at 37: "It is actual rate levels and not R/VC ratios that influence how much grain moves to market from any given elevator origin and how much the producer realizes for selling grain to the elevator." The internal inconsistency of this argument is that without jurisdictional R/VC percentages, shippers can do nothing about high rate levels. Moreover, the clear goal of BNSF was not just to reduce R/VC percentages. It was to reduce R/VCs to levels so low as to reduce or eliminate any incentive for a shipper challenge, either through a rate case at the STB or through a producer claim under BNSF's mediation/arbitration program.

During the oral argument on BNSF's motion to dismiss in this case, BNSF Attorney Weicher acknowledged "the URCS rationale" was part of BNSF's reason for its shipment size limit, but he went on to add "[a]nd to protect from under [sic.] regulatory challenges." Oral Argument Transcript at 11.⁸ Mr. Weicher's statements are more credible than the story told in BNSF's Reply.

Depriving Montana's mid-size elevators and their producer customers of regulatory recourse, and of the accompanying negotiating leverage, causes more than enough harm to warrant

⁸ There is no support in the Transcript for the claim that correcting shipper misperceptions was BNSF's goal.

relief, but BNSF's claim that there was no loss of efficiency at affected elevators is also unsustainable.

The main argument BNSF makes in this regard is that, despite the loss of rates for shipments of 50 cars or more, mid-size elevators remain able to ship wheat in trains exceeding 48 cars. See Reply at 26, where BNSF claims (highlighted by indentation and a bullet point) that 52-car elevators continue to be able to ship "all the cars they need to ship, including blocks of 52 or more cars."

BNSF goes on to clarify (*id.*) that on "several occasions since February 2009, 52-car elevators have shipped in blocks exceeding 48 cars," and that "there have been several shipments consisting of a 49+ car block from a mid-sized elevator in 2009 or 2010."

BNSF Witness Fisher's V.S. adds little detail, but a review of his workpapers reveals

_____. See Fauth Rebuttal V.S. at 22. Not only does this record fall far short of indicating that mid-sized elevators are free to ship "all the cars they need to ship," but it ignores the question of how many 52-car elevators attempted to ship more than 48 cars. If few such requests were made, it is highly likely that the reason is the lack of any rates supporting such train sizes. Indeed, _____

Notably, this email is ignored in BNSF's Reply _____
_____. Nor is there any rebuttal of Montana's points about the difficulty of combining 48 cars and single cars in order to reach train sizes that match the capacity of mid-sized elevators. See, e.g., the Opening V.S. of Montana Witness Whiteside at 10-11. BNSF appears to have abandoned the argument that mid-size elevators in Montana can make do by ordering 48 cars as one lot plus 4 or more single cars.⁹

For the foregoing reasons, the Board must reject BNSF's argument that no unreasonable practice finding is possible because the 48-car shipment size limit causes no harm to mid-sized Montana elevators or to the farm producers who rely on those elevators. However, the harm alleged in this proceeding is not limited to those elevators and farmers.

BNSF is asserting the right to use shipment size limits that have no other justification, and waste available elevator shipping capacity, for one reason. It wants to obtain a result that is foreclosed under current URCS rules: application of the make-whole adjustment to mid-sized elevators that were designed to ship 50 cars or more, and that have a long history of shipping 50 cars or more.

⁹ BNSF also ignores the possibility, discussed by Mr. Fauth in his Opening and in his Rebuttal V.S. (at 14) that the BNSF acquisition premium may exacerbate the problems facing Montana's mid-size elevators.

There is nothing unique to Montana, or to grain shipments, or even to BNSF, about the tariff change at issue in this proceeding. The Board is being asked by BNSF to find that it is not unreasonable or unlawful for a railroad to achieve indirectly, through such manipulation of services, outcomes that cannot be achieved directly under laws and regulations developed by Congress and the ICC and STB.

No doubt such a finding in this proceeding would be extremely valuable to BNSF and other railroads, which could use this and similar techniques to evade other rules and legal requirements, effectively deregulating their own rates and nullifying the intent of Congress in preserving rate regulation for shippers paying high rates who have no transportation alternatives.

The harm caused by BNSF's novel use of a shipment size limit to reduce the competitive effectiveness of mid-sized Montana grain elevators, though significant for those elevators, is therefore not limited to these elevators, or to the farm producers they serve or to Montana agribusiness and associated businesses. If BNSF's tactic is allowed, other shippers and states can expect to lose their ability to challenge unreasonable rail rates, and the effectiveness of the Board's regulatory system will be weakened. The courts of appeals have recognized the Board's authority to "protect the integrity of its jurisdiction,"¹⁰ as has the Board itself. See the Board's Decision served October 30, 2006 in Ex Parte No. 657 (Sub-No. 1), Major Issues in Rail Rate Cases, aff'd sub nom. BNSF v. STB, 526 F. 3rd 770 (D.C. Cir. 2008), where the Board said (Decision at 16): We firmly believe that we must remove the 'gaming' temptation or possibility to protect the integrity of the rate dispute resolution process." BNSF's claim that its tariff change cannot be unreasonable because it produces no harm is specious.

¹⁰ E.g., Amoskeag Co. v. ICC, 590 F. 2nd 388, 393 (1st Cir. 1979).

2. Alleged Defects in URCS

Assuming the Board rejects BNSF's "no harm" argument, BNSF has a fall-back argument: URCS made them do it.

BNSF explains at some length its view that the cut-off of 50 cars or more for application of the make-whole adjustment under current URCS rules is set in the wrong place. BNSF believes that, while shipments from mid-sized elevators might have warranted treatment as unit trains twenty years ago, shipments of 50-60 cars should be treated more like single car and trainload shipments for costing purposes today.

Consistent with its belief that URCS does not allocate enough costs to the shipments of 52 cars or more formerly allowed under its tariffs, or even to shipments of 48-109 cars formerly permitted, BNSF changed its tariff to require mid-sized elevators to ship no more than 48 cars, unless they could assemble 110 cars at a time.

Montana recognizes that the shuttle service BNSF introduced in 2001 may be even more efficient than the 50-60 car shipments BNSF encouraged in Montana in the 1980s. The parties could use this proceeding to argue about how URCS could be improved. BNSF could argue for application of the make-whole adjustment to trains of less than 110 cars, and Montana could argue that costs for shuttle trains of 110 cars or more are overstated, producing a make-whole adjustment that exaggerates costing for smaller trains and single cars. Montana could also argue that URCS should recognize the fact that railroads, including BNSF, can and do combine smaller trains, including 52-car trains, into longer combination trains that capture much if not all of the efficiency of shuttles.

However, Montana does not believe that this proceeding is the appropriate vehicle for resolution of those and other disputes about how URCS should be updated.¹¹ BNSF apparently agrees that URCS update issues are best addressed in a rulemaking proceeding which will generate comments by many stakeholders, not just BNSF and Montana.

The question then becomes whether it is reasonable for BNSF to use its shipment size limit now, prior to any change in URCS rules, to produce cost allocations to its rates for mid-sized elevators that accord with BNSF's views regarding where the URCS make-whole adjustment cut-off, currently set at 50 cars or more, should be set in the future. The answer is no. It is gaming of URCS costing for a railroad to adopt an artificial tariff restriction that has no other purpose than to bypass current URCS rules in order to insulate high rail rates from any possibility of challenge.

Montana has never denied BNSF's right to seek a higher make-whole adjustment cut-off in a rulemaking. However, it is difficult to think of a more unreasonable, or more dangerous, proposition than that railroads may adopt, and may continue to engage in, practices challenged as undermining existing regulations, so long as they plan to argue at some future date in some future proceeding that the Board should approve those practices.

Under this extraordinary conception of federal law, regulations adopted by regulatory agencies in implementing their governing statutes would no longer have the force of law. Rather, railroad compliance would be optional so long as the railroad believed in good faith (or for self-serving reasons) that the rules produced erroneous results.

¹¹ A review of the Board's May 27, 2010 Report to Congress Regarding the Uniform Rail Costing System suggests that, while the Board may plan to revisit the make-whole adjustment as part of an URCS update, the changes are not necessarily limited to whether to change the current 50-car cut-off, but might involve consideration of an allocation procedure that no longer operates on an all-or-nothing basis, but spreads costs out more gradually, using more inflection points. See Report at 19.

BNSF's arguments that its current practices should be sustained, though the URCS update proceeding has not begun, much less resulted in rule changes supporting BNSF, are unacceptable.

3. UP and CP Do Not Have Similar Shipment Size Limits

BNSF argues, Reply at 34-35, that Union Pacific and Canadian Pacific, which compete for grain shipments to the PNW in the West (though not extensively in Montana), have tariff provisions similar to the shipment size limit Montana challenges. Of course, a practice does not become reasonable merely because more than one railroad engages in it. If that were the rule, railroad parallelism could nullify the statutory requirement that railroads "shall establish reasonable ... practices." 49 U.S.C. § 10702.

CP has 25 to 100 car rates for mid-sized shipments, permitting 50 cars to be shipped. Thus, there is no CP requirement that elevators capable of loading 50-92 or 50-100 cars must load only 48 cars, in order to drive down R/VC percentages.¹² See Whiteside Rebuttal V.S. at 2.

BNSF speaks of the need to preserve spreads as among shuttle elevators, mid-sized elevators, and smaller elevators. But these spreads were preserved by BNSF's 48-109 car rates. The 48 car shipment size limit was the product of BNSF concerns about R/VC percentages, not spreads.

¹² Interestingly, BNSF itself allows 52-car shipments of barley from Montana origins to the PNW. See Tariff BNSF 4022M, Book 2, Item 22401, Columns 3 and 4, effective September 1, 2011, Appendix E to Whiteside Rebuttal V.S..

4. BNSF Was Not Open About its Goals

Just as otherwise unreasonable practices do not become reasonable when adopted by more than one railroad, otherwise unreasonable practices do not become reasonable when adopted and implemented openly rather than covertly. BNSF's contentions that it engaged in no deception would therefore be insufficient even if undisputed. However, BNSF's evidence for its contentions is unpersuasive.

Montana does not suggest that BNSF's adoption of its 48-car shipment size limit was secret. Obviously, the tariff change was apparent to all. What was not apparent to all was the impact of this change on R/VCs generated by BNSF's 48-car rates.

As BNSF points out, rate levels did not change, at least at first, after adoption of the 48-car shipment size cap, and as BNSF repeatedly argues, rate levels are all that many shippers and farm producers notice. See, e.g., Reply at 37 and _____.

BNSF cites

Similarly, BNSF Witness Summers attaches, as Exhibit 12 to his V.S.,

It makes sense that, as part of its public relations campaign about the allegedly erroneous nature of criticism of BNSF rate levels, BNSF would have explained how to use URCS to develop R/VCs for 48-car shipments. As Montana Witness Fauth has shown and as BNSF has confirmed, URCS costing of 48-car shipments produces low R/VCs. What does not make sense is that BNSF would have undermined its own PR campaign by explaining that those low R/VCs were the direct result of its decision to impose a 48-car shipment size limit, leading to application of the make-whole adjustment.

5. The Rise of Shuttles Does Not Justify Limiting Mid-Sized Elevators to 48 Cars

A theme running through BNSF's Reply is that times change, that shuttle elevators and shuttle service are the wave of the future, and that BNSF and its shipper customers must change with the times. BNSF may have encouraged the construction of 52-car elevators in the 1980s, but it insists that it never promised to maintain rate differentials that would allow mid-sized elevators to survive. That said, BNSF adds that it has sought to work with mid-size Montana grain elevators and their producer customers.

Montana recognizes that the future of its mid-sized elevators is not guaranteed, and that farm producers may favor shuttles over mid-sized elevators to the extent shuttles are reasonably accessible, have adequate capacity, and enjoy transportation cost savings that they share with farmers. These considerations supported the rise of mid-sized elevators in the 1980s.

Not only is Montana not anti-shuttle, but Montana is not anti-BNSF. The State is far better off with rail service than without it, and if history and geography have combined to permit BNSF to control over 90% of Montana's rail freight, it must nevertheless be acknowledged that many BNSF services and rates do not give rise to legal challenges.

However, this case is not about whether BNSF is or is not a good corporate citizen, in general. Assuming for the sake of argument that it is, and that shuttle elevators are the wave of the future, how does that justify BNSF's decision to impose a 48-car shipment size limit on mid-sized elevators, and to stop making available more than 48 cars to such elevators? And assuming BNSF wants those elevators to survive, either as adjuncts or "feeders" to shuttle elevators or for the benefit of pulse crops and other agricultural commodities besides wheat, how is that goal furthered by tariff rules that reduce elevator flow-throughs below full capacity, and deregulate mid-sized elevator rail rates?

For all its bulk, BNSF's Reply fails to provide any justification for its shipment size limit other than BNSF's belief that current URCS rules are incorrect and should therefore be evaded, and its desire to insulate its mid-sized elevator grain rates from regulatory scrutiny.

Since neither of these rationales serves a legitimate interest of BNSF, and since BNSF's tariff change harms Montana's mid-sized elevators and their farmer customers, BNSF's 48-car shipment size limit is an unreasonable practice.

III. CONCLUSION

For the reasons set forth herein and in Montana's Opening Statement, the Board should order BNSF to eliminate its 48-car shipment size limit, restore its previous 48-109 car rates and take other steps necessary to provide service to mid-sized Montana elevators that seek to ship wheat in shipments of 50 cars or more.

Respectfully submitted,



John M. Cutler, Jr.
Andrew P. Goldstein
McCarthy, Sweeney & Harkaway, PC
Suite 700
1825 K Street, N.W.
Washington, DC 20006
(202) 775-5560

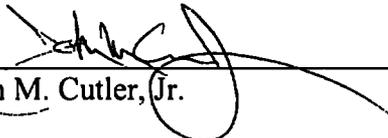
Attorneys for State of Montana

Steve Bullock
Montana Attorney General
Chuck Munson
Assistant Attorney General
Montana Department of Justice
215 North Sanders
Helena, MT 59620
(406) 444-2026

Dated: September 14, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have, this 14th day of September, 2011, caused copies of this document to be served on counsel for Defendant BNSF Railway Company by messenger delivery.



John M. Cutler, Jr.

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. 42124

THE STATE OF MONTANA

v.

BNSF RAILWAY COMPANY, ET AL.

REBUTTAL VERIFIED STATEMENT OF
TERRY WHITESIDE

My name is Terry Whiteside. I am Principal of Whiteside and Associates, Suite 301, 3203 Third Avenue North, Billings, MT 59101 ("W&A"). W&A and its predecessors have provided analyses and transportation advice to various interests involved in the marketing of grains from Montana to surrounding states and for export. I previously submitted testimony in this proceeding on behalf of the Complainant, the State of Montana (Montana), which was included as Complainant's Exhibit No. 1 in Montana's Opening Statement filed July 1, 2011.

I am submitting this Rebuttal Verified Statement as part of the Rebuttal Evidence and Arguments to the Reply filed August 15, 2011 by Defendant BNSF Railway Company (“BNSF”).

UP, CP and Even BNSF Allow Shippers to Tender Shipments of 50 Cars or More

BNSF in its reply statement argues that Union Pacific and Canadian Pacific, which compete for grain shipments to the PNW in the west, do not have tariff provisions similar to the shipment size limit Montana challenges. These characterizations about UP and CP are inaccurate. The UP and CP do permit shippers to tender shipments of 50 cars or more and they do this in the normal mileage blocks in their tariffs.

UP publishes rates from Silver Bow, Montana to the PNW in 1-92 car shipment lots. Within this range, 50 or 52 or 60 or 75 car shipments may be made. See the UP Price Inquiry System response, citing UP 4052-A, Item 6011-AK on wheat from MT, ID, UT and OR to PNW, and UP tariff page, copies of which are attached as Appendix C.

CP has similar rate structures where 50 car shipments can be made on wheat shipments from Canada to the U.S. CP has 50 car blocks. See the pages from CPRS 4445-B, effective 8-01-2011, on Wheat from Alberta and Saskatchewan to PNW, attached as Appendix D, and there are many more examples. In addition, under the CP tariff attached to BNSF’s Reply, shippers can combine two 25-car shipments to make up a 50-car train, thus avoiding adverse impacts from the make-whole adjustment on R/VC percentages that apply under BNSF tariffs. BNSF tariffs formerly permitted two 26-car trains to be combined, but BNSF now restricts those smaller elevators to 24-car shipment sizes.

Notably, BNSF itself allows 50 car shipments in its barley tariffs from Montana to the PNW. See Tariff BN 4022M, Book 2, Item 22401, effective 9/1/11, attached as Appendix E, covering barley (Columns 3 and 4) in shipments of 25-110 cars. Clearly, the BNSF claim that 50 car shipment lot sizes are not otherwise available is inaccurate. Thus under neither the BNSF (on barley), CP or UP railroad tariffs (on wheat) is there a railroad imposed requirement that a mid-size shipper must load 48 cars. Only BNSF's Montana wheat shippers are subject to this size limitation.

**BNSF Inaccurately States That It Was Open About the Reasons
For Changing The Montana Rate Structure
From 52 to 48-Car Limits**

At a Domestic Policy Committee meeting (on February 8, 2009) of the National Association of Wheat Growers ("NAWG") attended by Mr. Fauth and myself, Mr. Kaufman agreed that changing to 48 car shipments would lower R/VC ratios. However, BNSF did not initially inform the audience that its move to 48 car limited shipments would lower R/VC's – it was only after inquiry by Mr. Fauth that Mr. Kaufman admitted that a 48 car restriction would result in lower R/VC ratios below 180%.

The purpose of the discussion on February 9 was for the Montana Grain Growers Association ("MGGA") to present the Alternative Dispute Resolution (ADR) process that MGGA had negotiated with BNSF, and to demonstrate the Montana R/VC analysis which was developed in support of the ADR.

During this meeting, the 48-car versus 52-car issue came up. BNSF's Kevin Kaufman acknowledged that he was aware of the 50-car URCS default value for the make-whole adjustment, and the resulting costing differences between 48-car and 52-car shipments, after a question from Mr. Fauth. Mr. Fauth and I had been invited to the meet-

ing by the NAWG leadership to review the R/VC analysis of Montana rate structures. Indeed, during the exchange, Mr. Kaufman admitted that BNSF made the change from 52 to 48 cars because of this URCS issue. When it was pointed out to Mr. Kaufman that 52-car shipments could continue to move under BNSF's 48-car minimum rates because the tariffs allowed 48-109 car shipments, Mr. Kaufman indicated that BNSF was in the process of changing operations to allow only 48-car shipments. Indeed, at about the same time as the NAWG meeting, BNSF changed its rate publications from "48-car minimum" rates to "48-car" rates. As a result, shipments ranging from 49 to 109 cars, including the shipments of 50 cars or more that had been made for many years from Montana's 52-car wheat elevators, were prevented from moving under BNSF's non-shuttle rates.

BNSF Rate Increases Since Introduction of 48 Car Rates Have Totaled Over 25%, Offset By Only One Reduction of 1.6%

BNSF contends that its tariff change was followed by rate reductions rather than rate increases. Here again, BNSF is being disingenuous. There was one minor rate reduction of 1.6% in January 2011 applicable to Montana wheat shipments. However, this reduction was more than offset by **five rate increases totaling 25.6%** in between August 2008 and March 2011 (using Great Falls, MT as a representative origin). See BNSF 4022-L, Item 43415 Rev 0, August 2008, BNSF 4022-M, Item 43401 Rev 0, August 2009, BNSF 4022-M, Item 43402 Rev 3, January 2010, BNSF 4022-M, Item 43403 Rev 1, August 2010, BNSF 4022-M, Item 43404 Rev 1, March 2011. Copies of the relevant tariff pages are attached hereto as Appendix F.

It is clear to me that BNSF is taking, and will take, advantage of the "make whole" adjustment to increase its variable costs so that rates become non-jurisdictional

without actually being lowered, allowing BNSF then to raise rates free from maximum rate oversight by the Board.

I work with farm producers and grain elevators of all sizes across Montana, and I know that there is concern in the State about BNSF wheat rates, which were seen as high even before the recent increases. There is also concern about future rate increases and about the viability of the mid-sized elevators that were built in the 1980s and 1990s at BNSF's urging, as indicated in the July 2010 letter from Montana Farmers Union to Montana Attorney General Bullock, attached as Appendix G.

BNSF claims that the absence of rate cases since McCarty Farms indicates that its rate levels are fine, and that shippers and producers do not care about losing the ability to seek relief before the STB. This claim is false. Mid-size elevators are understandably reluctant to commence litigation against a railroad with BNSF's control over the market. This is one reason McCarty Farms was brought as a class action. However, high wheat rates have prompted extensive criticism of BNSF and extensive discussion of legal and regulatory remedies. As BNSF admits, it was well aware of, and wanted to neutralize, shipper discontent over rail rates. Unfortunately, instead of reducing those rates or taking fewer rate increases, BNSF came up with a way to reduce R/VCs to below 180%, and increased the frequency and size of its rate increases.

BNSF's tutorials on URCS have confused some shippers, who know their rates are high and rising but think a rate challenge cannot succeed because of low R/VCs. Other shippers understand BNSF's gaming but also know that addressing BNSF's shipment size limit is a prerequisite to any possible rate challenge, either by an elevator or by the State on behalf of one or more mid-size elevators. Shippers also cannot credibly

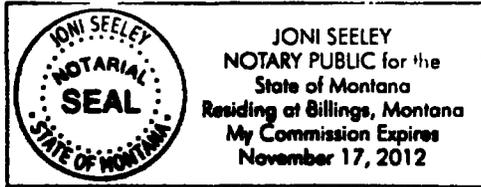
threaten a rate challenge in attempting to negotiate with BNSF. Meanwhile, grain rates continue to increase, and the viability of these elevators for wheat, rotational crops and marketing for producers continues to be jeopardized.

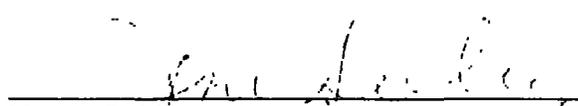
VERIFICATION

The foregoing statement is true and accurate to the best of my belief and knowledge.


Terry C. Whiteside

Subscribed and sworn to before me this 9 day of September 2011.




Notary Public

My commission expires: 11-17-12

 <p>UP 4052-A</p>	<p>Item: 6011-AK Itm Desc: HD, MI, U, I, OR to Portland Group</p>	
<p>CHANGE KEY: A-Add, C-Change, D-Decrease, I-Increase, and X-Expire</p>		
<p>For billing purposes use the following rate authority: UP 4052-A-6011-AK</p>		
STCC GROUP	STCC	DESCRIPTION
UP 4052 STCC GROUP	0115 0117	Rvc Wheat Exc Buckwheat Sec 0119
<p>Prices are subject to fuel surcharges</p> <p>GENERAL RULE ITEM 401 (Effective Date: 06/01/2005, Original Issue Date: 01/18/1997) Customers are required to determine line station capacity prior to shipping and are required to comply with any and all line restrictions. Refer to Rule Item 400 of this tariff for a list of standard axle only shipping stations. Shipments in excess of line capacity will be considered overloaded and will be charged the applicable overload fee. See UP 6004 Item 8000 regarding overload shipments.</p>		
<p>GENERAL APPLICATION RULES FOR ITEM 6011-AK</p>		
<p>1. Mileage allowance payment on private equipment will not apply.</p> <p>Applies in VAR Car Type covered hopper cars.</p> <p>Switching charges at both origin and destination will be absorbed up to \$130.00.</p>		
<p>APPLICATION AND RATES</p>		
COLUMN	RATE APPLICATION RULES	
1	<p>Rates are in U.S. dollars Per Car</p> <p>Applies to cars whose total allowable weight on rail is 1 pounds but not more than 285,999 pounds.</p>	
2	<p>Rates are in U.S. dollars Per Car</p> <p>Applies to cars whose total allowable weight on rail is 286,000 pounds but not more than 999,999 pounds.</p>	
3	<p>Rates are in U.S. dollars Per Car</p> <p>Applies to cars whose total allowable weight on rail is 1 pounds but not more than 285,999 pounds.</p> <p>Applies to minimum tender per shipment is 92 Cars and maximum not greater than 153 Cars.</p>	
4	<p>Rates are in U.S. dollars Per Car</p> <p>Applies to cars whose total allowable weight on rail is 286,000 pounds but not more than 999,999 pounds.</p>	
<p>Created: 05/02/01 Printed: 05/02/01</p> <p style="text-align: center;">UP 4052-A</p> <p style="text-align: right;">Page 1 of 3 Item: 6011-AK Copyright © 2005</p>		

Price Inquiry System

Customer Applications Account on the Web Bill of Lading Bulk Train Planner Car Order Chargeable
 Events Dimensional Clearance Diversions Equipment Placement and Release Intermodal Gate
 Reservation Intermodal Flips Intermodal Storage UPRR View Notifications Change Notifications Pending
 Waybill Inquiry Pool Inquiry Prices & Price Documents Private Empty Car Storage Repetitive Inquiry Reporting a
 Dirty Car Reports & Business Assistant Secured Trace Service Issues Steelroads Web Site Train Inquiry UMLER
 Inquiry Waybill History Inquiry Weight Inquiry

Price Inquiry
 Price Document Inquiry

- Multi Lane Search
- Single Lane Search

Price And Fuel Disclaimers

- Returned Prices And Fuel Surcharge rates are as of Sep 08, 2011
- Printed rate documents (tariffs/circulars/contracts/quotes) supersede results shown here. Rates are subject to conditions shown with each rate price.
- [Terms & Conditions](#)
- [Fuel Surcharge Programs](#)
- [Price Inquiry Disclaimers](#)

Result # 1

[Refine Search](#)

[Request a](#)

Commodity (STCC): 01137 - Wheat Exc. Buckwheat See 01139
 Origin: Silver Bow, MT Destination: Portland, OR
 Origin Carrier: UP Destination Carrier: UP

Shipment Qty: 50

Published Prices

Route	Price (excluding surcharges)	Fuel Surcharge	Equipment Type	Price Application	Shipment Quantity	Price Document
Covered Hopper						
UP	\$3,935 per car	\$0.37 per mile	Covered Hopper	None	None	UP_4052 (6011-AK)
UP	\$4,281 per car	\$0.37 per mile	Covered Hopper	None	None	UP_4052 (6011-AK)

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- Need help? Please contact your UP Business Manager for questions on pricing. If you are new to rail, please call a UP representative at 800-877-0513.
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P. O. BOX 961051	EXPIRES: DEC 31, 2008	PAGE: 5
FORT WORTH, TX 76161-0051	(E)	REVISION: 0
BNSF-4022-L		ITEM: 43415

ORIGIN RATES

ORIGIN STATIONS		RATES - DOLLARS PER CAR					NOTES	ROUTE
	ST	COL 1	COL 2	COL 3	COL 4	COL 5		
BIG TIMBER	MT	2589	2822	.	.	.		0001
BILLINGS	MT	2928	3192	.	.	.		0001
CARTER	MT	2927	3190	.	.	.		0001
CHOTEAU	MT	2881	3140	.	.	.		0001
COLLINS	MT	2881	3140	.	.	.		0001
CONRAD	MT	2881	3140	.	.	.		0001
CUT BANK	MT	2780	3030	.	.	.		0001
DUTTON	MT	2881	3140	.	.	.		0001
FT BENTON	MT	2971	3238	.	.	.		0001
GILDFORD	MT	3035	3308	.	.	.		0001
GLASGOW	MT	3472	3784	.	.	.		0001
GLENDIVE	MT	3552	3872	.	.	.		0001
GREAT FALLS	MT	2881	3140	.	.	.		0001
GROVE	MT	2971	3238	.	.	.		0001
HARDIN	MT	3068	3344	.	.	.		0001
HARLEM	MT	3184	3471	.	.	.		0001
HARRISON	MT	2471	.	.	.	.		0001
HAVRE	MT	3096	3375	.	.	.		0001
JOPLIN	MT	2990	3259	.	.	.		0001
KALISPELL	MT	1839	.	.	.	.		0001
KASA POINT	MT	3564	3885	.	.	.		0001
KERSHAW	MT	2971	3238	.	.	.		0001
LAUREL	MT	2824	3078	.	.	.		0001
LOUISVILLE	MT	2482	2705	.	.	.		0001
LUDINGTON	MT	3680	.	.	.	.		0001
MACON	MT	3575	3897	.	.	.		0001
MANHATTAN	MT	2508	2734	.	.	.		0001
MEDICINE LAKE	MT	3691	.	.	.	.		0001
MERC	MT	3691	4023	.	.	.		0001
MERIWETHER	MT	2737	2983	.	.	.		0001
MILES CITY	MT	3385	3690	.	.	.		0001
MOCCASIN	MT	2971	3238	.	.	.		0001
MOCCASIN CM	MT	2971	.	.	.	.		0001
MOORE	MT	2971	3238	.	.	.		0001
PLAINS	MT	2116	2306	.	.	.		0001
POLSON	MT	2116	2306	.	.	.		0001
POMPEYS PILLAR	MT	2953	3219	.	.	.		0001
POPLAR	MT	3603	3927	.	.	.		0001
RONAN	MT	2116	2306	.	.	.		0001
RUDYARD	MT	3011	3282	.	.	.		0001
SHELBY	MT	2881	3140	.	.	.		0001
SIDNEY	MT	3651		0001
STANLEY	MT	2482		0001
SWEET GRASS	MT	2960	3226	.	.	.		0001

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BNSF-4022-M	START: AUG 01, 2009	ITEM: 43401

ORIGIN RATES

ORIGIN STATIONS		RATES - DOLLARS PER CAR					C	NOTES	ROUTE
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BIG TIMBER	MT	2719	2964	.	.	.			0001
BILLINGS	MT	3058	3334	.	.	.			0001
CARTER	MT	3057	3332	.	.	.			0001
CHOTEAU	MT	3011	3282	.	.	.			0001
COLLINS	MT	3011	3282	.	.	.			0001
CONRAD	MT	3011	3282	.	.	.			0001
CUT BANK	MT	2910	3172	.	.	.			0001
DUTTON	MT	3011	3282	.	.	.			0001
FT BENTON	MT	3101	3380	.	.	.			0001
GILDFORD	MT	3165	3450	.	.	.			0001
GLASGOW	MT	3602	3926	.	.	.			0001
GLENDIVE	MT	3682	4014	.	.	.			0001
GREAT FALLS	MT	3011	3282	.	.	.			0001
GROVE	MT	3101	3380	.	.	.			0001
HARDIN	MT	3198	3486	.	.	.			0001
HARLEM	MT	3314	3613	.	.	.			0001
HARRISON	MT	2601	.	.	.	.			0001
HAVRE	MT	3226	3517	.	.	.			0001
JOPLIN	MT	3120	3401	.	.	.			0001
KALISPELL	MT	1969	.	.	.	.			0001
KASA POINT	MT	3694	4027	.	.	.			0001
KERSHAW	MT	3101	3380	.	.	.			0001
LAUREL	MT	2954	3220	.	.	.			0001
LOUISVILLE	MT	2612	2847	.	.	.			0001
LUDINGTON	MT	3810	.	.	.	.			0001
MACON	MT	3705	4039	.	.	.			0001
MANHATTAN	MT	2638	2876	.	.	.			0001
MEDICINE LAKE	MT	3821	.	.	.	.			0001
MERC	MT	3821	4165	.	.	.			0001
MERIWETHER	MT	2867	3125	.	.	.			0001
MILES CITY	MT	3515	3832	.	.	.			0001
MOCCASIN	MT	3101	3380	.	.	.			0001
MOCCASIN CM	MT	3101	.	.	.	.			0001
MOORE	MT	3101	3380	.	.	.			0001
PLAINS	MT	2246	2448	.	.	.			0001
POLSON	MT	2246	2448	.	.	.			0001
POMPEYS PILLAR	MT	3083	3361	.	.	.			0001
POPLAR	MT	3733	4069	.	.	.			0001
RONAN	MT	2246	2448	.	.	.			0001
RUDYARD	MT	3141	3424	.	.	.			0001
SHELBY	MT	3011	3282	.	.	.			0001
SIDNEY	MT	3781			0001
STANLEY	MT	2612			0001
SWEET GRASS	MT	3090	3368	.	.	.			0001

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| BNSF RAILWAY COMPANY          | ISSUED:   DEC 08, 2009 BOOK:   4 |
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| FORT WORTH, TX 76161-0051   | (E)                               REVISION: 3 |
| BNSF-4022-M                  | START: JAN 01, 2010 ITEM:     43402 |
  
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ORIGIN RATES

ORIGIN STATIONS	ST	RATES - DOLLARS PER CAR					COL 5	C	NOTES	ROUTE
		COL 1	COL 2	COL 3	COL 4					
BIG TIMBER	MT	2849	3105	.	.	.			0001	
BILLINGS	MT	3188	3475	.	.	.			0001	
CARTER	MT	3187	3474	.	.	.			0001	
CHOTEAU	MT	3141	3424	.	.	.			0001	
COLLINS	MT	3141	3424	.	.	.			0001	
CONRAD	MT	3141	3424	.	.	.			0001	
CUT BANK	MT	3040	3314	.	.	.			0001	
DUTTON	MT	3141	3424	.	.	.			0001	
FT BENTON	MT	3231	3522	.	.	.			0001	
GILDFORD	MT	3165	3450	.	.	.			0001	
GLASGOW	MT	3602	3926	.	.	.			0001	
GLENDIVE	MT	3812	4155	.	.	.			0001	
GREAT FALLS	MT	3141	3424	.	.	.			0001	
GROVE	MT	3231	3522	.	.	.			0001	
HARDIN	MT	3328	3628	.	.	.			0001	
HARLEM	MT	3314	3612	.	.	.			0001	
HARRISON	MT	2731	.	.	.	.			0001
HAVRE	MT	3226	3516	.	.	.			0001	
JOPLIN	MT	3250	3543	.	.	.			0001	
KALISPELL	MT	2099	.	.	.	.			0001
KASA POINT	MT	3694	4026	.	.	.			0001	
KERSHAW	MT	3231	3522	.	.	.			0001	
LAUREL	MT	3084	3362	.	.	.			0001	
LOUISVILLE	MT	2742	2989	.	.	.			0001	
LUDINGTON	MT	3940	.	.	.	.			0001
MACON	MT	3705	4038	.	.	.			0001	
MANHATTAN	MT	2768	3017	.	.	.			0001	
MEDICINE LAKE	MT	3951	.	.	.	.			0001
MERC	MT	3821	4165	.	.	.			0001	
MERIWETHER	MT	2997	3267	.	.	.			0001	
MILES CITY	MT	3645	3973	.	.	.			0001	
MOCCASIN	MT	3231	3522	.	.	.		0001	0001	
MOCCASIN CM	MT	3231	.	.	.	.		0002	0001
MOORE	MT	3231	3522	.	.	.			0001	
PLAINS	MT	2376	2590	.	.	.			0001	
POLSON	MT	2376	2590	.	.	.			0001	
POMPEYS PILLAR	MT	3213	3502	.	.	.			0001	
POPLAR	MT	3733	4069	.	.	.			0001	
RONAN	MT	2376	2590	.	.	.			0001	
RUDYARD	MT	3141	3424	.	.	.			0001	
SHELBY	MT	3141	3424	.	.	.			0001	
SIDNEY	MT	3911			0001	
STANLEY	MT	2742			0001	
SWEET GRASS	MT	3220	3510	.	.	.			0001	

|NRVSN087-086 | MORE =>

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| BNSF RAILWAY COMPANY          | ISSUED:    MAY 20, 2010 BOOK:    4 |
| AG PRODUCTS UNIT             | EFFECTIVE: AUG 01, 2010 SECTION: C |
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| FORT WORTH, TX 76161-0051   | (R)(E)                                REVISION: 1 |
| BNSF-4022-M                  | START:    AUG 01, 2010 ITEM:     43403 |
    
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ORIGIN RATES

ORIGIN STATIONS		RATES - DOLLARS PER CAR						NOTES	ROUTE
	ST	COL 1	COL 2	COL 3	COL 4	COL 5	C		
BIG TIMBER	MT	2999	3269	.	.	.		0102 | 0001	
BILLINGS	MT	3338	3638	.	.	.		0102 | 0001	
CARTER	MT	3337	3637	.	.	.		0102 | 0001	
CHOTEAU	MT	3291	3587	.	.	.		0102 | 0001	
COLLINS	MT	3291	3587	.	.	.		0102 | 0001	
CONRAD	MT	3291	3587	.	.	.		0102 | 0001	
CUT BANK	MT	3190	3477	.	.	.		0102 | 0001	
DUTTON	MT	3291	3587	.	.	.		0102 | 0001	
FT BENTON	MT	3381	3685	.	.	.		0102 | 0001	
GILDFORD	MT	3315	3613	.	.	.		0102 | 0001	
GLASGOW	MT	3752	4090	.	.	.		0102 | 0001	
GLENDIVE	MT	3962	4319	.	.	.		0102 | 0001	
GREAT FALLS	MT	3291	3587	.	.	.		0102 | 0001	
GROVE	MT	3353	3655	.	.	.	R	0102 | 0001	
HARDIN	MT	3478	3791	.	.	.		0102 | 0001	
HARLEM	MT	3464	3776	.	.	.		0102 | 0001	
HARRISON	MT	2881	.	.	.	.		0102 | 0001
HAVRE	MT	3376	3680	.	.	.		0102 | 0001	
JOPLIN	MT	3400	3706	.	.	.		0102 | 0001	
KALISPELL	MT	2249	.	.	.	.		0102 | 0001
KASA POINT	MT	3844	4190	.	.	.		0102 | 0001	
KERSHAW	MT	3381	3685	.	.	.		0102 | 0001	
LAUREL	MT	3234	3525	.	.	.		0102 | 0001	
LOUISVILLE	MT	2892	3152	.	.	.		0102 | 0001	
LUDINGTON	MT	4090	.	.	.	.		0102 | 0001
MACON	MT	3855	4202	.	.	.		0102 | 0001	
MANHATTAN	MT	2918	3181	.	.	.		0102 | 0001	
MEDICINE LAKE	MT	4101	.	.	.	.		0102 | 0001
MERC	MT	3971	4328	.	.	.		0102 | 0001	
MERIWETHER	MT	3147	3430	.	.	.		0102 | 0001	
MILES CITY	MT	3795	4137	.	.	.		0102 | 0001	
MOCCASIN	MT	3353	3655	.	.	.	R	0001 | 0001	
MOCCASIN CM	MT	3353	.	.	.	.	R	0002 | 0001
MOORE	MT	3381	3685	.	.	.		0102 | 0001	
PLAINS	MT	2526	2753	.	.	.		0102 | 0001	
POLSON	MT	2526	2753	.	.	.		0102 | 0001	
POMPEYS PILLAR	MT	3363	3666	.	.	.		0102 | 0001	
POPLAR	MT	3883	4232	.	.	.		0102 | 0001	
RONAN	MT	2526	2753	.	.	.		0102 | 0001	
RUDYARD	MT	3291	3587	.	.	.		0102 | 0001	
SHELBY	MT	3291	3587	.	.	.		0102 | 0001	
SIDNEY	MT	4061		0102 0001	
STANLEY	MT	2892		0102 0001	
SWEET GRASS	MT	3370	3673	.	.	.		0102 0001	

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| FORT WORTH, TX 76161-0051   | (R) (E)                REVISION:   1 |
| BNSF-4022-M                 |                               ITEM:  43404 |
  
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ORIGIN RATES

ORIGIN STATIONS	ST	RATES - DOLLARS PER CAR					COL 5	NOTES	ROUTE
		COL 1	COL 2	COL 3	COL 4				
**MONTANA *									
BAKER	MT	4352	4707	.	.	.	0102	0001	
BELGRADE	MT	3151	3410	.	.	.	0102	0001	
BIG SANDY	MT	3744	4055	.	.	.	0102	0001	
BIG TIMBER	MT	3244	3509	.	.	.	0102	0001	
BILLINGS	MT	3609	3905	.	.	.	0102	0001	
CARTER	MT	3572	3867	.	.	.	0102	0001	
CHOTEAU	MT	3520	3811	.	.	.	0102	0001	
COLLINS	MT	3505	3796	.	.	.	0102	0001	
CONRAD	MT	3497	3788	.	.	.	0102	0001	
CUT BANK	MT	3379	3661	.	.	.	0102	0001	
DUTTON	MT	3507	3798	.	.	.	0102	0001	
FT BENTON	MT	3621	3920	.	.	.	0102	0001	
GILDFORD	MT	3535	3828	.	.	.	0102	0001	
GLASGOW	MT	4027	4360	.	.	.	0102	0001	
GLENDIVE	MT	4302	4654	.	.	.	0102	0001	
GREAT FALLS	MT	3517	3808	.	.	.	0102	0001	
GROVE	MT	3607	3904	.	.	.	0102	0001	
HARDIN	MT	3767	4075	.	.	.	0102	0001	
HARLEM	MT	3704	4011	.	.	.	0102	0001	
HARRISON	MT	3110	3364	.	.	.	0102	0001	
HAVRE	MT	3605	3904	.	.	.	0102	0001	
JOPLIN	MT	3614	3915	.	.	.	0102	0001	
KALISPELL	MT	2405	2603	.	.	.	0102	0001	
KASA POINT	MT	4135	4476	.	.	.	0102	0001	
KERSHAW	MT	3620	3919	.	.	.	0102	0001	
LAUREL	MT	3500	3786	.	.	.	0102	0001	
LOUISVILLE	MT	3092	3347	.	.	.	0102	0001	
LUDINGTON	MT	4410	4773	.	.	.	0102	0001	
MACON	MT	4147	4489	.	.	.	0102	0001	
MANHATTAN	MT	3139	3397	.	.	.	0102	0001	
MEDICINE LAKE	MT	4423	4787	.	.	.	0102	0001	
MERC	MT	4299	4652	.	.	.	0102	0001	
MERIWETHER	MT	3330	3608	.	.	.	0102	0001	
MILES CITY	MT	4112	4449	.	.	.	0102	0001	
MOCCASIN	MT	3607	3904	.	.	.	0001	0001	
MOCCASIN CM	MT	3607	3904	.	.	.	0002	0001	
MOCRE	MT	3641	3940	.	.	.	0102	0001	
PLAINS	MT	2652	2874	.	.	.	0102	0001	
POLSON	MT	2673	2895	.	.	.	0102	0001	
POMPEYS PILLAR	MT	3644	3942	.	.	.	0102	0001	
POPLAR	MT	4180	4525	.	.	.	0102	0001	
RONAN	MT	2669	2891	.	.	.	0102	0001	
RUDYARD	MT	3503	3799	.	.	.	0102	0001	

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| MORE =>



300 RIVER DRIVE NORTH
PO BOX 2447
GREAT FALLS, MT 59403
408-452-8408

July 23, 2010

Steve Bullock
Montana Attorney General
Montana Department of Justice
215 North Sanders
Helena, MT 59620

Dear Mr. Bullock:

The Montana Farmers Union would like to thank you for your work to address rail transportation issues within our state and the legal action you recently filed with the Surface Transportation Board against Burlington Northern Santa Fe.

The introduction of the 48-car shipments coupled with the ever increasing rate spread between 48 car and shuttle (110 car) shipments is putting great economic pressure on the less-than-shuttle loader's ability to compete with shuttle loading facilities favored by the BNSF. These rate spreads between less-than-shuttle and shuttle rates have never been higher than they are today and with each successive round of increases the rate spreads continue to worsen.

We agree with you that, very likely, the switch to 48 car maximum train size was instituted by BNSF to take advantage of STB costing rules and not for gains in efficiency or economics. Under the STB costing rules, by moving from 52 car to 48 car, this has the effect under the Revenue to Variable cost calculations, which are utilized in all adjudicatory rate challenges at the STB, of artificially reducing the (R/VCs) for these rates, with no reduction in rate levels. The fact is that virtually all of the 48 car trains are married together with other 48 car trains for movement to the PNW markets. You point out correctly that the effect of movement to 48 car trains size eliminates the ability of Montana shippers to challenge rates under STB rules and regulations or any other mechanism.

We believe that Montana farm producers need the less-than-shuttle facilities to market our grain, market our alternative and rotational crops and provide outlets where we can obtain many of our farm supplies such as fertilizer, seed, etc. Restoring the 52 car rates would allow the ability of these less-than-shuttle facilities to better compete in the market place and also place the 52 car rates in a challenge zone that would allow for shippers/producers access to the regulatory/reasonable rate standards.

Montana Farmers Union remains convinced that a federal legislative solution for STB reform is the best answer for the long term, and we will continue to work with Congress toward that end. In the meantime, however, your research and vigilant legal work is appreciated as it has the potential to favorably impact all Montana agriculture families.

Best regards,

A handwritten signature in cursive script, appearing to read "Alan Merrill".

Alan Merrill
President

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**STB DOCKET NO. 42124
THE STATE OF MONTANA
V.
BNSF RAILWAY COMPANY**

**REBUTTAL VERIFIED STATEMENT
OF
GERALD W. FAUTH III**

My name is Gerald W. Fauth III. I am President of G. W. Fauth & Associates, Inc., an economic consulting firm with offices at 116 South Royal Street, Alexandria, Virginia 22314. I previously submitted testimony in this proceeding on behalf of the complainant, the State of Montana (Montana), which was included as Complainant's Exhibit No. 2 in its opening statement dated July 1, 2011.

I have been asked by Montana to submit these rebuttal comments in response to the Reply Evidence and Argument submitted by BNSF Railway Company (BNSF) in this proceeding on August 15, 2011. These reply comments primarily focus on the verified statements submitted by: Benton V. Fisher, Senior Managing Director of FTI Consulting; Kevin D. Kaufman, BNSF's Vice President of Agricultural Products; Mark A. Summers, BNSF's Director of Wheat Marketing; and Scot Stoa, BNSF's Director of Unit Train Operations.

This proceeding involves certain changes which BNSF has made to its transportation terms and operations associated with railroad movements of wheat from Montana to export terminals and other destinations in the Pacific Northwest (PNW) States of Oregon and Washington.¹ The core issue in this proceeding concerns changes that BNSF made in 2008 and 2009 to its rate publications and operations under which it moved away from the historical “52-car minimum” wheat rates and operations and switched to “48-car” rates and operations. The Montana wheat traffic at issue and specific details regarding BNSF’s change from 52 to 48-car shipments are described in more detail in my opening statement.

BNSF’s 48-car shipment restriction obviously decreased the efficiency of BNSF’s train operations and underutilizes the existing track capacity of the impacted Montana grain elevators. However, the 48-car restriction allowed BNSF to take advantage (unreasonable advantage in Montana’s view) of the Surface Transportation Board’s (STB) Uniform Rail Costing System (URCS) and the recently adopted “Unadjusted” URCS costing procedures. These STB policies, including the URCS “make whole” adjustment, which applies to shipments of less than 50 cars, assign higher URCS variable costs to 48-car shipments as compared to 52-car shipments, and this boost in variable costs leads to reduced revenue-to-variable cost (R/VC) percentages for 48-car rates even if the rate levels do not change.

Prior to BNSF’s 48-car restriction, the freight charges associated with the issue 52-car minimum wheat shipments from Montana to the PNW generated R/VC percentages averaging ___% based on BNSF’s own calculations, greatly exceeding the STB’s jurisdictional threshold (180%) and exceeding the R/VC percentages associated with BNSF’s efficient 110-car shuttle

¹ The PNW destinations included in most of the issue BNSF rate publications include: Portland and Rivergate, Oregon and Frederickson, Kalama, Seattle, Tacoma and Vancouver, Washington.

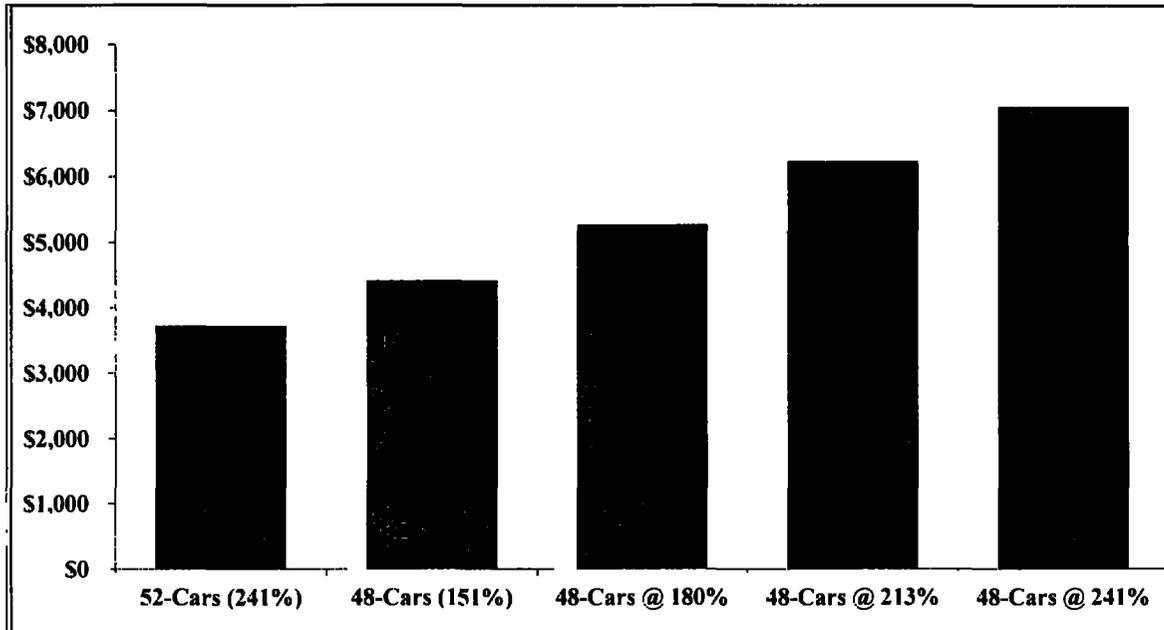
movements (___%).² BNSF's 48-car shipment size limit significantly and artificially lowered the R/VC percentages of the issue Montana wheat traffic to as low as ___%. This change meant that rates formerly subject to challenge as unreasonably high became immune from challenge, and BNSF also gained ample room for additional and significant rate increases in the near future.³ As indicated in the following chart, BNSF can substantially increase the current freight charges (which have already been increased an average of \$_____ to \$_____ per car), and still avoid STB jurisdiction so long as the rate increases do not exceed \$_____ per car. BNSF could raise its rates by \$_____ per car without exceeding the ___% average R/VC percentage for these shipments prior to implementation of the 48-car restriction:

² Fisher VS. page 50, Figure 6.

³ Fisher VS. page 45, Figure 5.

GWF Rebuttal Figure 1

Previous, Current and Potential BNSF Freight Charges Per Car For The Issue 52/48-Car Wheat Shipments From Montana to the PNW⁴



BNSF's Analyses Confirm That The 48-Car Restriction Significantly Increased URCS Costs and Decreased R/VC Percentages

BNSF does not deny the fact that the switch from 52-car to 48-car shipments increases the allocated URCS costs and significantly reduces the R/VC percentages and it presents evidence which demonstrates the impact. For example, Witness Fisher's Figure 3 shows that the average variable cost allocated to a 52-car shipment is \$_____ per car compared to \$_____ per car for a 48-car shipment (a difference of \$____ per car) and his Figures 4 and 5 shows that the R/VC percentages dropped from an average of ____% to __%, which is below the STB's jurisdictional threshold of 180%.

⁴ See GWF Rebuttal Table 2.

Witness Fisher’s URCS and R/VC calculations differ from those included in my opening verified statement and he takes issue with some of my calculations (which will be addressed in more detail herein). However, the basic facts and results are the same – the switch from 52 to 48- car shipments significantly increased the allocated URCS costs under the STB’s unadjusted URCS approach and thus significantly reduced the R/VC ratios associated with the issue traffic.

**BNSF Maintains That Rates Are
Based on “Market Conditions” and
Not R/VC Ratios – Except Here**

BNSF’s maintains that it sets rates “based on market conditions” and that “BNSF’s rates are not cost-plus rates, nor are they based on the R/VC ratios for the movement.”⁵ BNSF states that the “actual rate levels – not R/VC ratios” are important.⁶ Although BNSF asserts that market conditions and rate levels, and not R/VC ratios, are important in its rate-making, BNSF admits that it adopted its 48-car restriction because of the R/VC levels.

BNSF maintains that it made the change because “others have focused from time to time” on R/VC ratios and because the 52-car rates “appeared to yield *disproportionately high* R/VC ratios.” (emphasis added) BNSF admits that it made the switch from 52 to 48-car shipments in order to “_____” and to “_____.”⁷

BNSF _____ asserts (V.S. at 5-6) _____

_____. I attended that meeting at NAWG’s invitation, along with Mr. Terry Whiteside. It appeared to us that one of BNSF’s goals at the meeting was to demonstrate that _____

⁵ BNSF Reply, page 10.

⁶ *Ibid.*

⁷ Kaufman VS, page 5

R/VCS for BNSF's 48-car wheat shipments were lower than 180%. BNSF supported a presentation made by Montana Grain Growers Association (MGGGA), which involved plugging 48-car Montana wheat rates into URCS and producing lower R/VC ratios.

Witness Kaufman indicates that “_____”
_____” He also states that “_____”
_____.”⁸ As I recall, BNSF did not make a formal presentation at the meeting and was not “_____.” I fully addressed and explained the 52 versus 48 car URCS and R/VC issue in my presentation, which was followed by a presentation by the MGGGA that was supported by BNSF, but merely included R/VC results based on 48-car shipments.

At that time, BNSF had previously (April 2008) changed its rates to 48-car minimum (48 to 109 cars) rates. In the group discussion which followed my presentation, I pointed out to Mr. Kaufman that URCS is not based on the tariff minimum (i.e., 48 cars), but the actual number of cars per waybill and that 52-cars could and did still move under the 48-car minimum rates. Mr. Kaufman stated that he was aware of the 50-car URCS issue and that BNSF was working on the issue (i.e., in the process of replacing its 48-109 car rates, which would have been applicable to 52-car shipments, with rates that applied only to 48-car shipments).⁹

⁸ Kaufman VS, pages 5 and 6.

⁹ The NAWG meeting was held in Washington DC on Sunday, February 8, 2009. Only three days prior to the meeting, on February 5, 2009, BNSF issued BNSF-4022-L Item 43416, which became effective February 25, 2009 and changed the language from 48-car minimum shipments to “TENDER PER SHIPMENT IS 48 CARS.” The rates did not change. I was not aware that BNSF had made this technical change prior to the meeting, but BNSF evidently was aware that this issue would come up at the NAWG meeting.

In other words, BNSF never looks at R/VC ratios, except in this case. BNSF realized that the 52-car R/VC percentages were so high (an average of ___% according to Witness Fisher), as to permit rate challenges to existing rates as well as rate increases. BNSF's 48-car restriction lowered the R/VC percentages below 180 percent, which allowed BNSF to increase rates and provided ample room to increase rates even more without fear of STB intervention.

**BNSF Uses 110-Car Shuttles
As an URCS Cost Benchmark But Ignores
Unadjusted URCS Cost Overstatements For Shuttles**

BNSF's rationale and basic premise appears to be that, since the URCS costs allocated to 52-car shipments are similar to the costs allocated to 110-car shuttle shipments, the costs allocated to 52-car shipments must be wrong because the 110-car shuttle movements are "*hyper-efficient*."¹⁰ For example, Witness Fisher's Figure 3 shows that the variable cost of a 52-car shipment is \$_____ per car compared to \$_____ per car for a 110-car shuttle – a difference of only \$___ per car. BNSF states that it knew that 52-car shipments did not have the "_____" as 110-car shuttle trains.¹¹ BNSF maintains 52-car shipments exhibit "_____"¹² By switching to 48-car shipments, The URCS cost calculated by Witness Fisher would increase from \$_____ to \$_____ per car.

BNSF's basic premise is wrong and misplaced. BNSF uses the unadjusted URCS costs allocated to efficient 110-car shuttle trains as the cost benchmark, i.e., the URCS costs allocated to 52-car shipments must be wrong because the URCS costs are similar to those allocated to efficient 110-car shuttle trains (e.g. \$_____ vs. \$_____ per car). In 2007, the STB adopted an

¹⁰ BNSF Reply, page 3. (emphasis added)

¹¹ Kaufman VS, page 5.

¹² *Ibid.*

“unadjusted” URCS approach, which essentially eliminated movement-specific adjustments.¹³

Such movement-specific adjustments would undoubtedly show that the URCS costs (\$_____ per car at present) allocated to BNSF’s 110-car shuttle movements under the STB’s unadjusted URCS approach are significantly overstated if the shuttles are, as alleged by BNSF, truly “hyper-efficient.”

BNSF cites the numerous efficiencies associated with its 110-car shuttle trains but ignores the fact the STB’s unadjusted URCS approach fails to adequately reflect these cost efficiencies, instead relying on system average costs. For example, _____

_____. Using such studies, movement-specific adjustments could easily be applied to more accurately reflect the true costs associated with 110-car shuttles if the Board allowed such adjustments.

BNSF was concerned about the “high R/VC ratios” associated with 52-car shipments, but not because the URCS costs and R/VC percentages were out of line with 110-car shuttles nor because they represented an “_____.”¹⁴ BNSF obviously recognized that the high R/VC percentages for 52-car shipments would preclude it from significantly increasing rates on this traffic. By switching to 48-car shipments to take advantage of the make-whole adjustment and STB’s “unadjusted” URCS approach, BNSF was able to significantly lower the R/VC percentages and subsequently increase the rate levels while avoiding the risk of a STB complaint.

¹³ See STB Ex Parte No. 646 (Sub-No.1). *Simplified Standards For Rail Rate Cases*, served September 5, 2007. URCS was originally designed with the ability to make movement-specific adjustments, but the STB’s 2007 “unadjusted” URCS approach precludes such adjustments.

¹⁴ Summers VS. page 13.

**BNSF's Rate Comparisons Are
Erroneous and Misleading**

BNSF presents a series of rate comparisons in an attempt to justify its rate increases on 52/48 car shipments. For example, Witness Fisher's Table 11 indicates that the rate increases for 52/48-car shipments (___%) were "_____ (___%), 24-car rates (___%), and 110-car shuttle trains (___%).¹⁵ He also maintains that the _____

16

BNSF's rate comparisons are erroneous and misleading.

First, BNSF asserts that the 52-car R/VC percentages were "disproportionately high." It is clear and logical to assume that, without imposing the 48-car restriction, BNSF would not have been able to increase the mid-size elevator rates at the same level as single-car, multiple (24-26 cars) and 110-car shipments. The resulting "disproportionately high" 52-car R/VC percentages would be even higher, and would make BNSF look worse in its customers' eyes.

Witness Fisher's rate increase analyses are skewed _____
_____. I believe that April 2008 is the proper baseline. BNSF began its changes to 48-car shipments in April 2008 with the issuance of BNSF Item 43413, effective on April 17, 2008, which changed from 52-car minimum rates to 48-car minimum rates. Although 52-car shipments were initially still allowed in 2008 under BNSF's 48-car minimum rates, the 2008 Waybill Sample indicates that BNSF moved _____
_____. On February 5, 2009, BNSF revised its rate publications to restrict shipments to 48-cars.

¹⁵ See Fisher VS, page 51.

¹⁶ Ibid., pages 52 through 54.

Therefore, rather than _____, the proper baseline should be April 2008. The initial change to 48-car rates was made with no public announcements and the rates remained the same as for 52 cars. On January 1, 2009, BNSF imposed its initial rate increases on the 48-car rates, while the rates on 110-car shuttles remained constant. The following table is a restatement of Witness Fisher's Table 11 which uses April 2008 as the baseline:

GWF Rebuttal Table 1

**Restatement of Witness Fisher's Table 11
2008-2011 Rate Increases For BNSF Export
Wheat Shipments From Montana to the PNW**

As indicated, if Witness Fisher had used the proper baseline (i.e., April 2008 rather than _____), he would have shown that the mid-size elevator freight charges increased by 18% compared to only 13% for 110-car shuttles.¹⁷

In any event, the comparisons of BNSF's rate increases with rate increase by CP and UP on wheat shipments to the PNW is totally irrelevant. BNSF dominates Montana's railroad wheat market. The STB's 2009 Waybill Sample indicates that BNSF originated ___% of Montana railroad wheat tonnage and [REDACTED] of the Montana wheat shipments to the PNW. As a result, the vast majority of Montana wheat shippers do not have access to CP and UP rates from Montana to the PNW. Indeed, only _____ moved to the PNW.

As a result, the rate comparisons and charts presented by Witness Fisher are beside the point. The fact is that the issue mid-size elevator rates have significantly increased (e.g., ___%), which is at a faster rate than BNSF 110-car shuttle rates (e.g., ___%) and at a faster rate than both the STB's Rail Cost Adjustment Factor (RCAF)-Unadjusted or RCAF-Adjusted indices which increased by only 15% and 10%, respectively, from the First Quarter 2008 to the Third Quarter 2011.¹⁸

BNSF's rate increases on wheat shipments from mid-size Montana elevators to the PNW may have been held in check by Montana's actions, including the filing of this STB complaint case. If BNSF is successful in this proceeding and allowed to continue to restrict shipments to

¹⁷ Witness Fisher's Table 11 also suffers from several other problems. For example, he compares freight charges for only _____, . My analysis indicates that the twenty-five (25) 52-car Montana origins and distances to Rivergate ranging from 735 miles to 1,242 miles and have a weighted average distance of 1,002 miles based on the 2010 carloads to the PNW. Moreover, two of the four 52/48-car origins selected by Witness Fisher (Kershaw and Moccasin), which represent 50% of his simple average, move under identical freight rates (the fuel surcharges differ only slightly).

¹⁸ See: <http://www.aar.org/~media/aar/RailCostIndexes/RCAF-History-2011-Q3.ashx>, dated June 20, 2011

case. If BNSF is successful in this proceeding and allowed to continue to restrict shipments to 48-cars, there is little doubt that the issue rates will increase even further and at a much faster rate.

For example, Witness Fisher shows that, despite the rate increases, _____
_____ (see Fisher Figure 4) to
_____ (see Fisher Figure 5). In the following table, I have used his
weighted average revenue and cost calculations in order to demonstrate that this R/VC reduction
provides BNSF with ample room to significantly increase these rate levels:

GWF Rebuttal Table 2

**Example of Potential 52/48-Car Rate Increases
Resulting From BNSF's 48-Car Restriction**

19				
20				

As can be seen, at the pre-existing 52-Car R/VC level of ___%, BNSF faced a potential risk of a rate reasonableness challenge, even without the rate increases it subsequently published. As a result of the 48-car restriction, BNSF has increased rates by _____% and will be able to increase rates without challenge by _____% (Col. 4, L.4) if the 48-car rates are set at 180%, and as much as _____% (Col. 4, L.8) if the rates are set at the previous 52-car R/VC level of ___%.

¹⁹ Developed from Witness Fisher's workpapers provided to Montana.

²⁰

In my opening statement, I noted that the issue 52/48-car R/VC percentages will be impacted in the near future by Berkshire Hathaway's recent acquisition of BNSF. In a recent STB filing, it was estimated that the acquisition premium based on a book value approach was \$7.625 billion.²¹ I estimate that BNSF's current R/VC percentages on Montana 48-car wheat shipments could drop by approximately 10%.²² Therefore, unless the STB prevents this write-up, the acquisition premium will impact and inflate the BNSF's 2010 URCS (which should be released by the STB soon) and future URCS calculations, further reducing the R/VC percentages and allowing BNSF even more room to increase rates from the 52-car origins. The possibility that BNSF could be allowed to "book" this acquisition premium makes it all the more important for the Board to reject BNSF's gaming of URCS costing through its 48-car restriction.

Issue Traffic Differences

In my opening verified statement, I included a Table 1, which provided a summary of the annual wheat carloads by origin moving to the PNW from 2006 to 2010 based on BNSF 100% traffic tape data supplied to Montana. I indicated that the PNW wheat market share from 52-car origins has declined from ___% in 2007 to ___ in 2010. Witness Fisher maintains that, although my calculations "accurately set forth the total number of wheat carloads that shipped from each Montana elevator to the PNW," they are "misleading" due to my "inclusion of Montana wheat

²¹ See WCTL filing in STB Finance Docket No. 35506, dated May 2, 2011.

²² Under STB's URCS program, road property investment is currently considered 50% variable and equipment investment is considered 100% variable. The inflated BNSF investments as a result of the Berkshire transaction will increase BNSF's URCS costs. BNSF will be entitled to a return on inflated investment base equal to the pre-tax current cost of capital rate of 15.15% which is used in the STB's 2009 URCS calculations (as opposed to the 10.43% after tax level used in STB's revenue adequacy determinations). Berkshire also expects an annual increase in depreciation expense, which is a major URCS cost component. Thus, BNSF's 2010 URCS and future URCS costs will further increase.

destined for domestic or contract customers."²³ The following table shows my traffic count and Witness Fisher's restatement of the traffic count:

GWF Rebuttal Table 3

PNW Wheat from Mid-Sized 52-Car Origins

²³ Fisher VS, page 8.

Although it is true that the majority of the issue wheat traffic from Montana's 52-car facilities to the PNW moves under BNSF's export rates which are impacted by BNSF's 48-car restriction, Witness Fisher ignores the fact that traffic moving from these 52-car origins under BNSF's domestic rates are also impacted by BNSF's change.

For example, BNSF-4022-M, Item 43405, effective August 1, 2011 lists the current export rates from Montana's 52-car origins whereas BNSF-4022-M, Item 43505, effective August 1, 2011, lists the current domestic rates from the same origins and to the same destinations. Both of these BNSF export and domestic rate publications are subject to the same 48-car restriction, which is ignored by Witness Fisher.

While this traffic may not have been directly impacted by BNSF's 48-car restriction, this traffic could potentially be impacted by BNSF's restriction since the 52-car origins would have incentive to move shipments under the lower 52/48-car rates. With BNSF's actual and potential rate increases on mid-size elevator shipments, the 48-car rate levels are and will likely be closer to the 24-car rate levels, which may, in fact, result in an increase in 24-car shipments and further reducing the efficiencies associated with wheat traffic from the 52-car origins even more.

In reality, it is the 52-car origins with little or no 52-car shipments (which were excluded from Witness Fisher's studies), which have been and will be impacted the most. The fact that little or no traffic moves from many of the remaining 52-car origins could be viewed as a good indication that the current BNSF rate levels are already too high to move the traffic and further rate increases could spell doom for these origins.

In my opening verified statement, I stated that there is no question that, over the last decade, Montana shuttle facilities have increased in number and gained traffic, while the mid-

sized 52-car facilities in Montana have lost traffic to nearby shuttle facilities, which have access to lower 110-car shuttle rates. This fact is reflected in my traffic summaries. This decline in traffic or diversion from the 52-car origins (which have higher rates), and growth in traffic from 110-car shuttle facilities (which have access to lower rates) is mostly the result of the economics and can be expected. Certainly, no one has asked BNSF to stop building or allowing new 110-car shuttle facilities or stop moving 110-car shipments.

Whether the issue traffic from the 52-car origins has dropped from ___% to ___% or from ___% to ___%, either way the data shows that the PNW wheat traffic from the 52-car origins has significantly declined since 2006.

As a result of BNSF's actions, the R/VC percentages for the 52/48-car shipments have been forced way down (e.g., from ___% to ___% based on Witness Fisher's calculations), which has already allowed BNSF to increase rates from the 52-car origins at a faster rate than the 110-car shuttle rates (e.g., ___% versus ___%) and, more importantly, will allow BNSF, if it prevails in this proceeding, to continue increasing these rates.

R/VC Differences

Witness Fisher's R/VC calculations differ from my calculations in several respects. As previously indicated, Witness Fisher used a baseline of January 2009 rather than April 2008 which impacted his R/VC calculations. There are also minor differences in the indexing, milcages and lading weights used in our analyses.²⁴ Witness Fisher also only developed current R/VC percentage for less than half (12 of the 25) 52-car origins.

²⁴ Witness Fisher also correctly points out an error in my current fuel surcharge calculations as a result of BNSF's rebasing of its fuel surcharges effective March 1, 2011, which was not reflected in my original analysis. I have corrected this error in my restatement.

These revenue and cost differences obviously impact the resulting R/VC percentages, but the basic results are the same. As Witness Fisher and I have both demonstrated, as a result of BNSF's 48-car restriction and despite an increase in the freight charges, the resulting R/VC percentages dropped, which will enable BNSF to significantly increase the issue rates without the fear of STB intervention.

In any event, I have revised my calculations to reflect the April 2008 baseline. I have accepted Witness Fisher's indexing procedure and his average lading weight (_____). However, I have not used Witness Fisher's miles in my restatement, which he maintains are "_____" miles. Rather, I have used BNSF's published tariff miles, which are the only publically available miles and should represent BNSF's shortest actual system distances to Rivergate, Oregon.²⁵ In most cases, the mileage differences are insignificant and, _____
_____. For example, the weighted average miles of the shipments to Rivergate reflected in Witness Fisher's workpapers is ___ compared to only ___ tariff miles using the same weighting factors.

This revised analysis is attached hereto as Appendix GWF-7 and summarized in the following table:

²⁵ The shortest actual system miles between points have always been used by the STB and ICC in railroad movement costing and ratemaking. In addition, BNSF's tariff miles are also the only miles available for 10 origins movements to Rivergate which are not reflected in Witness Fisher's workpapers.

GWF Rebuttal Table 4

Summary of Impact on R/VC Percentages and Freight Charges As a Result of BNSF's 48-Car Restriction

		BNSF R/VC Percentages & Increased Revenue Before & After BNSF's 48 Car Restriction From Montana's 52-Car Origins to Rivergate, OR					R/VC % Assuming BNSF Retained 52-Car Rates
<u>Ln.</u>	<u>Montana 52-Car Origin</u>	<u>April 08 52-Car R/VC</u>	<u>April 08 48-Car R/VC</u>	<u>April 08 R/VC Reduction</u>	<u>Increased Revenue Per Car</u>	<u>July 2011 48-Car R/VC</u>	<u>July 11 52-Car R/VC</u>
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
1	Big Sandy	213%	154%	59%	\$659.55	171%	239%
2	Conrad	219%	159%	60%	\$642.85	177%	248%
3	Cut Bank	224%	163%	61%	\$634.25	182%	255%
4	Dutton	213%	154%	59%	\$648.35	172%	241%
5	Fairfield	218%	158%	60%	\$512.75	169%	237%
6	Ft. Benton	204%	148%	56%	\$660.50	165%	230%
7	Gildford	220%	159%	61%	\$508.10	171%	240%
8	Glasgow	214%	155%	59%	\$538.00	165%	231%
9	Glendive	188%	136%	52%	\$712.50	150%	210%
10	Great Falls	206%	149%	57%	\$653.25	167%	234%
11	Hardin	185%	134%	51%	\$686.25	150%	210%
12	Havre	218%	158%	60%	\$512.75	169%	237%
13	Kershaw	204%	148%	56%	\$660.25	165%	231%
14	Ludington	202%	147%	55%	\$701.10	160%	224%
15	Merc	200%	145%	55%	\$565.50	154%	215%
16	Meriwether	226%	164%	62%	\$631.25	184%	257%
17	Miles City	189%	137%	52%	\$700.75	152%	212%
18	Moccasin	196%	142%	54%	\$638.05	158%	221%
19	Plentywood	199%	145%	54%	\$565.20	154%	215%
20	Poplar	210%	152%	58%	\$549.50	162%	226%
21	Rudyard	221%	160%	61%	\$506.90	172%	241%
22	Sidney	200%	145%	55%	\$700.75	158%	222%
23	Tiber	223%	161%	62%	\$644.65	180%	251%
24	Valier	216%	157%	59%	\$645.75	175%	245%
25	Wolf Point	211%	153%	58%	\$544.80	163%	228%
26	Low	185%	134%	51%	\$506.90	150%	210%
27	High	226%	164%	62%	\$712.50	184%	257%
28	Average	207%	150%	57%	\$616.94	164%	230%

_____ in his development of weighted average R/VC percentages. I have not developed weighted averages. As previously indicated, all the remaining 52-car origins are potentially impacted by BNSF's 48-car restrictions. As can be seen, the R/VC ranges are fairly consistent and tight (e.g., the current R/VC range is ___% to ___%),²⁶ Therefore, the developed simple averages, which are reflected in Table 4, should be fairly close to any developed weighted average.

As can be seen, as a result of BNSF's 48-car restriction, the R/VC percentages dropped from an average of 207%, which was above 180% (Col. 2) to well-below 180% (150% average, Col. 3), which represented an average drop in the R/VC percentage by 57% (Col. 4). BNSF was then able to significantly increase its revenues by an average which exceeded \$600 per car. Despite the increased freight charges, the current R/VC average is now only 164% and ranges from 150% to 184%, which would effectively prevent a rate challenge and provide BNSF with ample room to further increase rates.

Cost Differences Between 52/48-Car and 110-Car Shipments

In my opening verified statement, I pointed out that the R/VC percentages associated with 48-car shipments are likely understated as a result of the STB's "unadjusted" URCS approach. There are numerous economies associated with the BNSF's wheat movements from Montana's 52-car facilities to the PNW, which are not adequately reflected by the application of the STB's "unadjusted" URCS approach.

²⁶ The R/VC consistent and tight ranges also appear to indicate that BNSF does, indeed, play close attention to the R/VC percentages associated with the issue traffic.

As an example, I showed that shipments from the 52-car origins moved in large trains with weights that are significantly larger (up to [REDACTED] gross tons) than BNSF's URCS system average for way and through trains (1,965 and 5,677 gross tons, respectively). _____

The problem with this analysis is that these cost differences cannot be adequately reflected by the use of the STB's unadjusted URCS approach, which overstates the costs and profitability of both 110-car shuttle and mid-size elevator movements. Whatever the true and accurate cost differences between 110-car shuttle and 48-car movements may be, these differences cannot be used to justify BNSF's 48-car shipment size limitation, which is clearly an attempt to artificially increase the costs associated with the issue traffic by bringing the make-whole adjustment to bear.

49+ Car Plus Shipments
Post BNSF 48-Car Restriction

BNSF states that, based on a study by Witness Fisher, " _____

_____ " (BNSF Reply, page 26)

BNSF's statement is based on a study developed by Witness Fisher in which he "identified ___ instances where more than 48 cars ~~were~~ shipped from a mid-sized elevator after BNSF's early 2009 rate change."²⁷ Attached hereto as Appendix GWF-8 is a restatement of Witness Fisher's study. His study indicates that there were _____ cars shipped during these "_____."

However, the data shows that, rather than being handled in only ___ waybills (which would have been allowed before BNSF's 48-car restriction) these _____ instances required ___ separate waybills. BNSF did not supply Montana with the rate information associated with these records, but it appears that only ___ of these ___ waybills included 48 cars and apparently moved under the lower 48-car rates. Most shipments apparently moved under the higher 24-car minimum or single car rates.

These shipments may (or may not) have moved as 49+ car "blocks" for BNSF's operating convenience and may (or may not) have moved under the same rates, but, because they moved under ___ separate waybills, they would be considered as ___ shipments of 48 cars or less and not _____ under the unadjusted URCS and Waybill Sample costing procedures, which are based on the number of cars per waybill. BNSF has, in my view, failed completely to demonstrate that 52-car elevators, when given no mid-size rate option other than 48 cars, can operate as efficiently as if 52 car rates were still available.

²⁷ Fisher VS, page 13.

Summary

It is clear that BNSF's 48-car restriction, if approved by the Board, will allow BNSF to further increase the issue rates from Montana's mid-size elevator origins, which will further erode the already limited remaining wheat traffic from these facilities and likely adversely impact the economic viability of these facilities, resulting in further closings and further loss of reasonably accessible rail capacity for mid-size shipments of wheat and other agricultural commodities.

S:\mcd\Fauth Rebuttal Verified Statement (Final) Public Version

VERIFICATION

The foregoing statement is true and accurate to the best of my belief and knowledge.



Gerald W. Fauth, III

Subscribed and sworn to before me this 13 day of September 2011.



Notary Public

My commission expires: 07-31-13

Howard Spratt
NOTARY PUBLIC
Commonwealth of Virginia
Reg. # 362921
My Commission Expires 7/31/2013

**IMPACT OF BNSF'S 48-CAR RESTRICTION ON
THE R/V/C PERCENTAGES ASSOCIATED WITH MONTANA
WHEAT MOVEMENTS FROM 52-CAR ORIGINS TO THE PNW (RIVERGATE, OR) "**

**WITNESS FISHER'S STUDY OF 27 INSTANCES WHERE
MORE THAN 48 CARS WERE SHIPPED FROM MID-SIZED ELEVATORS**
