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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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DOCKET NO. EP 724 (Sub-No. 4)

UNITED STATES RAIL SERVICE ISSUES –  
PERFORMANCE DATA RERPORTING

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OPENING COMMENTS OF

ALLIANCE FOR RAIL COMPETITION  
MONTANA WHEAT & BARLEY COMMITTEE  
COLORADO WHEAT ADMINISTRATIVE COMMITTEE  
IDAHO BARLEY COMMISSION  
IDAHO GRAIN PRODUCERS ASSOCIATION  
IDAHO WHEAT COMMISSION  
MONTANA FARMERS UNION  
NORTH DAKOTA GRAIN DEALERS ASSOCIATION  
NEBRASKA WHEAT BOARD  
OKLAHOMA WHEAT COMMISSION  
OREGON WHEAT COMMISSION  
SOUTH DAKOTA WHEAT COMMISSION  
TEXAS WHEAT PRODUCERS BOARDUSA  
DRY PEA AND LENTIL COUNCIL (USADPLC)  
U.S. PEA AND LENTIL TRADE ASSOCIATION (USPLTA)  
WASHINGTON GRAIN COMMISSION  
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March 2, 2015

Alliance for Rail Competition (“ARC”) and the other rail shipper interests identified on the cover of these Comments (collectively, “ARC, et al.”) commend the STB for its efforts to address US rail service issues in recent months. ARC, et al. are convinced that that the severe problems experienced by rail shippers since 2013 would have been far worse if the STB had followed recommendations of BNSF and CP and had taken no action.

ARC, et al. include among their members shippers of coal and grain in unit trains and shuttle trains of 50 cars or more. There remains more work to do before rail service is adequate for such shippers, particularly in a tier of States in the West, from Minnesota to Washington. However, the service data reported to date, which the Board proposes to continue and regularize, has shown a welcome spotlight on problems that were otherwise known in broad outlines but not in the necessary detail.

However, ARC, et al. also represent captive and other rail dependent shippers whose shipments move in volumes of 49 cars or less. These include shipments of fertilizer, propane, sand used for fracking (including synthetic sand), oil, pipe, and pulse crops (beans, peas, lentils and the like). These shipments may move in single-car shipments or in multiple car shipments of less than 50 cars. While

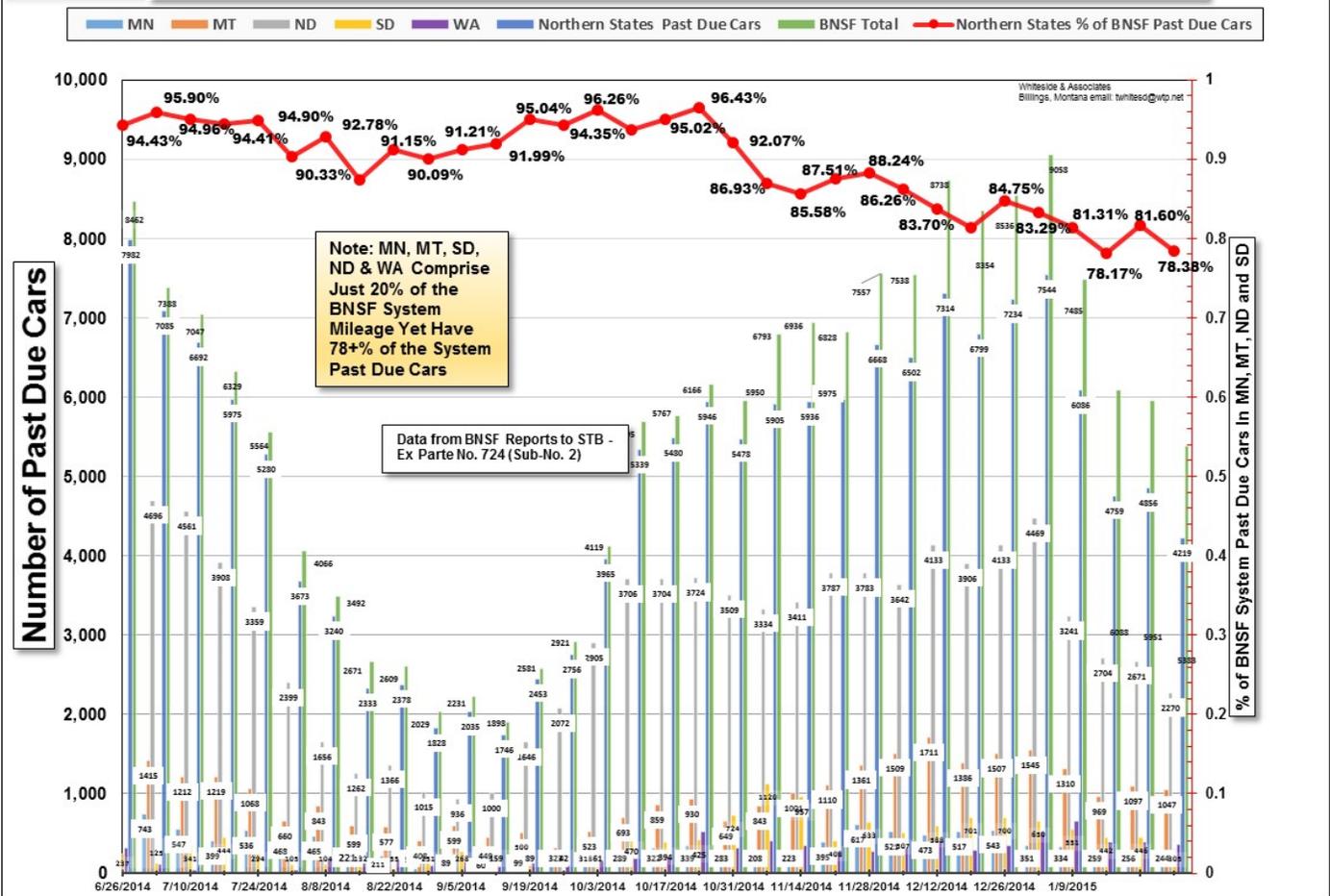
reports of inadequate service, and resulting adverse impacts, have been plentiful, details are lacking because of the Board's focus in its reporting requirements on shipments of 50 cars or more.

ARC, et al. generally support the proposals for weekly reporting by Class I railroads of the data called for in the Board's Decision served December 30, 2014 in this proceeding. However, additional reporting is needed as to service problems involving shippers that are not able to ship in unit or shuttle train volumes of 50 cars or more.

In addition, while better reporting is a necessary part of addressing current service disruptions, data reporting is not, by itself, a sufficient regulatory response. Without the reports provided to date by the Class I railroads, we would not have the detailed information necessary to produce Table I, below, identifying not just the numbers of backordered cars on BNSF, but also their locations.

Table 1

**SD, MN, MT, ND & WA Backordered Cars Comprise 78.38% of BNSF System B/O**



While the number of backordered cars on the BNSF system may have fallen, Table I shows that five States – Montana, Washington, North Dakota, South Dakota, and Minnesota – continue to suffer. In fact, though these States represent only 20% of BNSF’s system mileage, shippers there account for over 78% of backordered cars. These data suggest that BNSF has elected to respond less vigorously to service problems affecting these States – among the most captive in

the US – than to problems affecting shippers in other States where competition is more effective and poor service is more likely to mean lost business.

The BNSF has just announced some of the largest freight rate increases in wheat freight rates in recent history –from \$300 to over \$760 per car (10¢ to over 20.5¢ per bushel – 9% up to 11.5+% respectively). This comes after 2 years of sub-standard service wherein the farm producers bore massive secondary market costs and a punishing basis because the railroad’s car supply was so erratic.

Because many of the shipper interests represented by ARC, et al. are in the five most affected States, we would like to see BNSF do more to address these backordered car issues, as well as other service issues. And if BNSF’s efforts continue to be inadequate in the States in question, further action by the STB, including but not limited to requests for more explanation by BNSF of its plans for corrective action, may be needed.

As the Board stated in its December 30, 2014 decision:

The permanent collection of performance data on a weekly basis would allow continuity of the current reporting and improve the Board’s ability to identify and help resolve future regional or national service disruptions more quickly, should they occur.

Decision at 3, emphasis added.

Regulatory action to help resolve regional service disruptions may be beyond the scope of this proceeding, whose focus is “Performance Data Reporting”. However, reporting is a critical first step in identifying the scope of service disruptions. Without that step of data reporting, shippers and the Board will be handicapped, if not stymied, in efforts to develop appropriate responses.

For these reasons, ARC, et al. support the reporting the Board proposes to require for rail shipments of 50 cars or more, but the Board also needs to require additional reporting. Specifically, the Board should not, and cannot lawfully, assume that widespread and continuing rail service disruptions affect only “unit train” shipments.

If, as ARC, et al. believe and as Table I suggests, railroads like BNSF tend to work harder to address service problems affecting their most lucrative and/or least captive customers (with due regard for operational and network flow considerations), it is highly likely that smaller captive rail shippers will be low on the railroads’ priority lists.

Not only is it theoretically likely that smaller captive customers are being injured by current rail service disruptions, and by BNSF’s regional backordered car problems, but ARC, et al. have heard from such smaller shippers about their problems. These include sales opportunities lost, service requests delayed or

ignored, fertilizer and other input needs not met, and ripple effects as consignees are forced to look for other sources for goods that should have received timely rail service.

Simply stated, it appears that shuttle train shipments of wheat and unit train shipments of other commodities, at least in the West in recent months, have received a higher priority than shipments of 49 cars or less. However, without data reporting as to such smaller shipments, it is difficult to know how severe any service differentials may be. This lack of data makes it hard for shipper representatives to suggest remedial action. And it makes it hard for the Board to stay informed of problems and of progress, if any. More transparency is needed.

Nothing in the Act or in Board precedent renders smaller shipments and shippers unimportant. On the contrary, given Class I railroads' use of higher rates, poor service or both to discourage smaller shippers, it is particularly important for the Board to inform itself of such shippers' rail service problems.

As we have advised the Board in the past, the changing face of the agricultural commodity mix will require, now and in the future, rail service meeting smaller shipment priorities, reflecting current and projected production by farmers and other agricultural producers. The railroads must focus on a more diverse product mix going forward.

See generally the decision served April 26, 2013 in Docket No. 42124, State of Montana v. BNSF Railway Co., concerning tariff changes by BNSF challenged as to wheat shipments of 48 cars or less. Though the Board declined to find an unreasonable practice, it pointed out that “At the very heart of the common carrier obligation is the belief that railroads are in a position of unique public trust, and are therefore held to higher standards of responsibility than other private enterprises.” Decision at 5, quoting GS Roofing Prods. Co. v. STB, 143 F.3d 387, 393 (8<sup>th</sup> Cir. 1998).

See also the Board’s decision in State of Montana at page 1, note 2, where the Board warned against “functional” denials of service, defined as “circumstances in which the railroad purports to provide the service, but for whatever reason the service provided falls short of the railroad’s common carrier obligation (e.g., because of unreasonable delay in providing the total number of cars requested by the shipper)”. Also relevant here is the court’s decision in National Grain and Feed Ass’n v. United States, 5 F.3d 306 (8<sup>th</sup> Cir. 1993):

Evidence in the record suggests that non-COT shippers endure unreasonable delays in receiving car service during shortages. That these shippers might feasibly switch to premium tariff COT service is not the relevant inquiry; rather the Commission must determine if the COT program so affects the service for conventional shippers as to prevent or frustrate its ability to meet its common carrier obligations through that conventional service.

Put another way, the fact that a shipper is smaller and less able to afford premium prices does not make the railroad common carrier obligation inapplicable. At some point, unlawful functional denials of service to smaller shippers occur, and without better data, it is difficult or impossible to assess the extent to which this is taking place.

It is important to emphasize that ARC, et al. are not calling on the Board to remedy rail service problems being experienced as to smaller shipments. Rather, we are asking that the Board not turn a blind eye to those problems by excluding shipments of 49 cars or less from reporting requirements for Class I railroads. Consideration of remedies can await the availability of more data. However, that wait may turn out to be permanent if the Class Is are not required to provide any performance data as to any shipments in volumes of less than 49 cars.

What should be reported, beyond the unit train data the Board has proposed to require? ARC, et al. believe that, at a minimum, some additional reporting should be required as to shipments of less than 49 cars. Given modern computers and data processing, it may be that the easiest solution for Class I railroads is to report on all rail shipments. We are not in a position to assess the cost of such additional reporting, but it should not be too expensive, assuming the reports do not require special studies or the collection of data the railroads currently do not collect.

Conversely, assuming the railroads already collect data as to shipments of less than 49 cars that is identical to or similar to data being reported as to unit trains, reporting that data to the Board and customers is not too much to ask.

The Board has expressed a desire to minimize burdens on the Class I railroads. Decision at 3. ARC, et al. do not seek imposition of undue burdens, but small burdens should not be objectionable. It must be remembered that railroad service problems during the last 18 months or so have resulted in substantial burdens being imposed on many shippers, including many shippers represented by ARC, et al.

The railroads may nevertheless object to expanding their reports to cover all shipments, and to reporting on non-unit train shipments the same way they report on unit train shipments. Any such objections should be scrutinized carefully, since railroads may have motives other than burden concerns for concealing service problems for shipments of 49 cars or less.

In addition, if identical reporting for all shipments genuinely appears impracticable, there are many “middle ground” reporting arrangements between identical reporting for all shipments and no reporting for any shipments of 49 cars or less. For example, reports on service quality for smaller shipments might be

made monthly rather than weekly. This would still provide valuable data as to conditions and trends, and could highlight where more corrective action is needed.

Another possibility would be to require reporting to include shipments of 49 cars or less in regions where service problems have been particularly acute, e.g., States west of the Mississippi, including Minnesota, much of which is west of the river. And if there are commodities that have not been affected or for which rail service is rare, the reporting requirements might exclude such commodities.

Finally, we would not be having this proceeding if Class I railroads had not misjudged demand for their services as the US recovers from a long economic slump. No one expects that railroad forecasting, investment and allocation of resources will always be perfect, but the recent service disruptions have been extraordinary, and cannot credibly be blamed on snow in the winter of 2013-14.

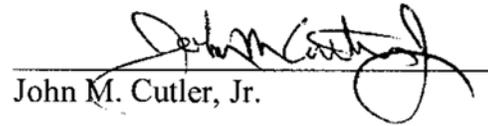
Railroads bear primary responsibility for recent service problems and the resulting harm to shippers. It is reasonable to ask the Class Is to report data showing their progress in returning to adequate service levels consistent with their statutory common carrier obligation, and such reporting must not exclude shipments of less than 50 cars.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this 2nd day of March, 2015, caused copies of the foregoing document to be served by first-class mail or by electronic means on all parties of record.

A handwritten signature in cursive script that reads "Terry C Whiteside". The signature is written in black ink on a light-colored background. Below the signature is a solid horizontal line.

Terry Whiteside