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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 665

RAIL TRANSPORTATION OF GRAIN

BNSF REPLY TO
SUPPLEMENTAL COMMENTS OF
MONTANA WHEAT & BARLEY COMMITTEE, ET AL.

BNSF Railway Company ("BNSF") respectfully seeks leave to file this Reply to the Supplemental Comments of Montana Wheat & Barley Committee, et al. ("MWBC").[1] MWBC filed its comments in response to the Board's November 7, 2006 Order holding the official record for this proceeding open until January 12, 2007 in order to allow supplemental comments and information. MWBC's Supplemental Comments were filed on the last day, January 12, 2007. These comments are extensive and include the results of a recently conducted 2006 rail grain transportation survey that purportedly underlies MWBC's demand for significant further Board action. BNSF realizes that the Board's November 7, 2006 Order did not provide for replies to supplemental comments, but in the interest of developing a more complete record that will provide additional guidance and assistance to the Board in this proceeding, BNSF

[1] These comments were filed on behalf of a number of state and national grain associations and commissions including: Montana Wheat & Barley Committee, Colorado Wheat Administrative Committee, Idaho Barley Commission, Idaho Wheat Commission, Idaho Grain Producers Association, Montana Grain Growers Association, Nebraska Wheat Growers Association, Oklahoma Wheat Commission, South Dakota Wheat Commission, South Dakota Wheat Inc., Texas Wheat Producers Association, Washington Wheat Commission, National Association of Wheat Growers, National Barley Growers Association, and The Honorable Brian Schweitzer, Governor, State of Montana ("MWBC et al.").

respectfully requests the Board to allow submission of this reply to the new issues raised in the MWBC's supplemental comments filed at the close of the record.

I. INTRODUCTION

On October 11, 2006, the Board served notice that on November 2, 2006, it would conduct a public hearing on the subject of transportation of grain by rail in this proceeding, Ex Parte No. 665, *Rail Transportation of Grain.* Written comments by interested parties were due on October 30, 2006. BNSF participated in that hearing, as did MWBC. In its written comments submitted on October 30, 2006, MWBC noted that it was conducting "several studies and surveys" in response to a recently published GAO study. It further noted that the results of a survey to be taken "at various grower group listening and convention settings from [that date] until mid-December" would not be available until after that time and asked the Board to hold the record open or plan another hearing at a later date. On November 7, 2006, the Board announced that the official record for this proceeding would remain open until January 12, 2007 to allow for the filing of supplemental comments or information.

On January 12, 2007, MWBC submitted a 44-page supplemental comment that included the results of a survey conducted by the Montana Rail Service Competition Council (MRSCC), which purports to show "trends" of "reduced service and reliability, service disruptions, increasing captivity and increasing rates, charges and cost shifting" with respect to the transportation of grain in the State of Montana. MWBC Supp. Comments at 7. In its supplemental comments, MWBC alleges that the results of the MRSCC survey confirm the need for Board action and MWBC therefore calls on the Board to "expand this proceeding or initiate a new proceeding to consider and implement remedial action." *Id.* at 6. Specifically, MWBC urges the Board to (1) "investigate the impact of the BNSF shuttle rate structure on state highway expenditures, agricultural competition, and commodity prices in the State of Montana" (MWBC Supp. Comments at 39); (2) "utilize its authority under 49 U.S.C. Section 721(b)(1) and other provisions of the Act to require railroads to report not less than once annually on the location, nature of, and expenditure for what the carriers choose to characterize as 'infrastructure' improvements and investments" (*id.* at 42); and (3) "open an investigation, develop relevant facts, and report on the railroad business practices that are transferring wealth from the public sector to the private sector, eliminating competition, controlling movements and markets and creating an economic burden on farm producers and state governments" (*id.* at 43-44).

In this Reply and through the accompanying Verified Statement of John E. Davis, General Director for BNSF Agricultural Products Business Unit, BNSF addresses the evidence submitted by MWBC and demonstrates that there is no factual or legal ground for the relief sought by MWBC.

II. MWBC'S SUPPLEMENTAL EVIDENCE IS INSUFFICIENT TO WARRANT THE RELIEF SOUGHT

The gist of MWBC's supplemental comments is that the carriers, and especially BNSF, pressured Montana grain shippers and elevator operators into using 110-car shuttle service, that doing so led to higher rates for grain shippers, greater service disruptions, a shifting of costs to state and county governments for road repairs and a lessening of competition between grain elevators, which eventually will mean lower prices to farmers. MWBC Supp. Comments at 7-8. MWBC alleges that the initiation of 110-car shuttle service in Montana was for the benefit of the railroads and large elevators for whom such service is more efficient, but that the benefits may be "illusory at least for the farmer" (*id.* at 34) and there are "decidedly negative impacts on other important segments of the various state economies." *Id.* at 31. According to MWBC, the shift to shuttle service has led to an increase in the average length of the truck haul to an elevator, thereby shifting costs to the state and the farmer. MWBC contends that the MRSCC 2006 Rail Grain Transportation Survey and Study ("2006 Survey") confirms these allegations and "develops a factual predicate to quantify the effect the railroad shift from 26 and 52 car loading facilities to 110 car shuttle facilities has had on trucking of grain from farms to ever more distant elevators." *Id.* at 7.

The 2006 Survey concludes that "70%" of an unspecified number of "respondents"[2] experienced increases in hauling distances, and that the data from "all respondents" shows an average haul of 37.19 miles today compared to 17.35 miles ten years ago and 9.69 miles 20 years ago. MWBC Supp. Comments at 16. However, nothing in the supplemental comments discloses how many Montana producers were included in the survey or what percentage actually responded. Moreover, the survey results reported in these comments provide very little in the way of data that supports or quantifies the alleged negative impacts of shuttle service. As BNSF witness John E. Davis, General Director for BNSF Agricultural Products Business Unit, points out in his verified statement attached to this pleading, the development of shuttle service in Montana was the result of a desire by Montana shippers and farmers for improved economics, similar to those received in other states – including TX, OK, KS, NE, IA, SD, MN, ND and Canada -- where shuttle service was already well established. Verified Statement of John E. Davis ("Davis V.S.") at 2. Indeed, far from being the result of pressure by BNSF on elevator operators to the detriment of the farmers as MWBC contends, the movement in Montana was initiated by farmer cooperatives. "Seven of the first nine shuttle elevators in Montana were

[2] Although the commenters claim to represent some 100,000 U.S. grain producers, there is nothing in their supplemental comments that indicates the number of Montana grain producers, the size of the sample used in the 2006 Montana Rail Grain Transportation Survey, or the number of respondents.

farmer-owned cooperatives or cooperative joint venture projects. Today, 7 of the 11 shuttle stations are owned or controlled by farmer cooperatives or cooperative joint ventures." *Id.*

Mr. Davis further shows that shuttle elevators do not necessarily lead to increased trucking and highway maintenance and in fact, in some instances lead to a reduction of truck traffic. For example, as a direct result of the Mountain View Coop building a shuttle station at Collins, Montana, long haul trucking has been significantly reduced. Today more than 2,500 rail cars annually move through Collins. According to the Coop's General Manager, if this facility had not been built, "much of this wheat would likely be moving by long haul trucks to Lewiston, Idaho and Silver Bow, Montana." Davis V.S. at 3. Furthermore, in locations where the length of haul by truck has increased for producers, the truck costs are more than offset by lower shuttle rates. As shown in Appendix 2 to Mr. Davis' verified statement, with the current $300/railcar spread between the 110-car shuttle service and 52-car service, the choice to unload at a shuttle facility approximately 45 miles farther than a 52-car station would still result in a net savings for the producer.

MWBC also alleges in its supplemental comments that the 2006 Survey rebuts claims by Class I railroads that grain rates have been declining. MWBC claims that " . . . the study shows that while a downward trend in rates per ton-mile might be occurring, the cost to the grain producers and the States are simultaneously rising because [of] clear transfers of costs and burdens, from the private railroad sector to the public sector and the farm producers." MWBC Supp. Comments at 18. However, these statements are purely conclusory as there is no evidence in the survey that points to "clear transfers of costs" and MWBC concedes that no quantification of such costs has at this point even been attempted. *Id.* at 17. MWBC further argues that declining rates per ton-mile are meaningless, as, among other things, grain shippers do not pay rates based on ton-miles. *Id.* at 30. But MWBC's objection to the use of rates per ton-mile does not support claims of rising rates. BNSF witness Davis explains that on a rate per bushel basis, Montana export wheat rates have indeed declined over the past eight years for single car, 52-car and shuttle movements. Davis V.S., Appendix 1.

Finally, MWBC claims that the 2006 Survey identifies a trend of "inconsistent and unreliable service" (MWBC Supp. Comments at 24) because "over 78% of its respondents" reported experiencing "elevator plugging" during the harvest. This alleged claim of widespread poor service is belied, however, by BNSF's actual experience. Mr. Davis testifies that service for the entire State of Montana in 2006 "has been excellent." He notes that "In 2006 past due orders for BNSF hoppers were minimal from August through the fall months. BNSF ended the year with only 206 total past due orders in Montana – a reduction of 91% from the total at the end of 2005." Davis V.S. at 3-4.[3]

While the 2006 Survey indicates that there are some Montana grain producers who remain disgruntled with the shift to shuttle service, the survey does not provide credible data that support allegations of widespread negative impacts of the shuttle program or that identify and quantify the alleged transfer of costs to the State or the farmers. MWBC's supplemental comments do not provide evidence that the further Board actions urged by MWBC are warranted.

[3] Mr. Davis also points out that the perception of delayed car placement at a particular location may be the result of an individual elevator's equipment request dates. For example, if an elevator requests cars for specific dates based on an anticipated harvest start of early August, a harvest beginning in July could lead to hoppers not being delivered to that elevator for the actual start of harvest. If other regional elevators correctly projected their equipment request dates to an early harvest start and thus received their equipment in time for the early harvest, this could lead to a misperception of delay in BNSF servicing the individual elevator that did not anticipate an early harvest. Davis V.S. at 3-4.

III. THERE IS NO LEGAL BASIS FOR THE RELIEF SOUGHT

At the end of its pleading, MWBC makes three specific requests for expansive Board action for which there is no legal basis.

The first request is that "The Board should investigate the impact of the BNSF shuttle rate structure on state highway expenditures, agricultural competition, and commodity prices in the State of Montana." It is well-settled that the Board has no authority over carrier rate making practices outside the ambit of Chapter 107 of Part IV of Title 49 of the United States Code. *See e.g., Burlington Northern Railroad Company – Abandonment – In Daniels and Valley Counties, MT,* 7 I.C.C.2d 243, 1990 ICC LEXIS 419, *17 (1990). These commenters have not alleged that BNSF's shuttle rates are unreasonably high under 49 U.S.C. § 10701 or that the rate structure constitutes an unreasonable practice under 49 U.S.C. § 10702. The Board has no authority to investigate the rates of a rail carrier on its own initiative. It may only begin a proceeding in response to a specific complaint filed under 49 U.S.C. § 11701, and must evaluate such a claim through application of the appropriate rate reasonableness standards under 49 U.S.C. § 10704. In the absence of such a claim, the Board has nothing to investigate. The Board does not have authority or jurisdiction to inquire into state highway expenditures, agricultural competition or commodity prices in Montana.

A similar effort to challenge BNSF's Montana grain rate structure was rejected by the Board's predecessor in the context of an abandonment of a line segment by a BNSF predecessor. In the BNRR abandonment case cited above, the ICC reversed an ALJ decision denying the abandonment of a line segment that was no longer profitable once a new 52-car elevator began operating in its vicinity. The ALJ found that BN had violated its common carrier obligation because it could have provided service that was profitable "by making available to shippers rail rates that were reasonably related to the 52-car rate from Scobey." 1990 ICC LEXIS 419,**15.*

The ICC reversed that finding on the ground that it imposed an additional obligation on BN that would "impermissibly constrain BN's ratemaking freedom and managerial discretion." *Id. at *16.* The ICC stated that "In effect, the thrust of the initial decision is not simply to deny abandonment but also to ensure that BN provides a lower rate" which was improper as there was no finding of an unreasonable rate under section 10701(a). *Id. at *16-17.*

The second request for relief made by MWBC is that "the Board utilize its authority under 49 U.S.C. § 721(b)(1) and other provisions of the Act to require railroads to report not less than once annually on the location, nature of, and expenditure for what the carriers choose to characterize as 'infrastructure' improvements and investments." MWBC Supp. Comments at 41-42. The commenters have offered no good reason as to why the information should be collected. The Board does not have authority to dictate to rail carriers how to allocate their capital investments. Such business decisions are left to the railroad's managerial discretion. Therefore, it would be an unnecessary burden for both the railroads and the Board's staff to generate and revew this report. Moreover, the commenters' request is unwarranted and appears to require unnecessary characterizations of capacity improvement, particularly as BNSF already publicly discloses information about capital expenditures and there is no particular basis for more information than what has already been made available.

Third, MWBC petitions the Board "to open an investigation, develop relevant facts, and report on the railroad business practices that are transferring wealth from the public sector to the private sector, eliminating competition, controlling movements and markets and creating an economic burden on farm producers and state governments." MWBC Supp. Comments at 43-44. This request is so vague and unfocused as to be impossible to implement. The Supplemental Comments do not provide a sufficient factual basis to conclude that any investigation is warranted, nor do the commenters indicate what relief the Board could provide. In the absence of more specifics, an open-ended investigation would be wasteful and inefficient.

IV. CONCLUSION

For the reasons stated above, the requests for additional investigation by the Board as set out in the Supplemental Comments of the MWBC parties should be denied.

Respectfully submitted,

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February 13, 2007

CERTIFICATE OF SERVICE

I, Carolyn Doozan Clayton, hereby certify that on February 13, 2007, I caused a copy of BNSF Railway Company's Reply to the Supplemental Comments of Montana Wheat & Barley Committee, et al. be served by first-class mail or a more expeditious method of delivery upon all persons who have filed a notice of intent to participate in STB Ex Parte No. 665.

Carolyn D. Clayton

Carolyn Doozan Clayton

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 665

RAIL TRANSPORTATION OF GRAIN

VERIFIED STATEMENT
OF
JOHN E. DAVIS

My name is John E. Davis. My business address is 2650 Lou Menk Drive, Fort Worth, TX. I have worked in grain marketing for BNSF Railway Company Agricultural Products Business Unit since May of 1988. I have served in my current role as General Director for wheat and flour marketing since 1995. My background prior to joining BNSF included 5 years as a grain merchandiser and 10 years as a rail grain, barge grain and barge freight broker. I was actively involved in negotiations with various grain companies in Montana during the period of shuttle station development from 2000 to present.

A shuttle station is a single grain elevator with the capacity to receive an entire 110-car train at one time and load it within 15 hours. Development of shuttle facilities in Montana was a result of a desire by Montana shippers and farmers for improved economics, similar to those received by other shuttle shippers. BNSF applied the same marketing and negotiating methods with respect to proposed Montana shuttle facilities that it applied to those in other states.

Shuttle development had taken place in all major Midwest and Southwest grain shipping states (TX/OK/KS/NE/IA/SD/MN/ND) and Canada before shippers in Montana decided to develop shuttle facilities in 2001. Farmer-owned cooperative boards, both local and regional, made the decision to develop shuttle elevators in Montana. Seven of the first nine shuttle elevators in Montana were farmer-owned cooperatives or cooperative joint venture projects. Today, 7 of the 11 shuttle stations are owned or controlled by farmer cooperatives or cooperative joint ventures.

Farmers wanted to increase competitiveness in world markets and were willing to take the necessary steps to become more efficient. BNSF committed to share efficiency gains with producers through lower rates and efficiency payments. A review of our export tariff items shows, for example, a Montana station, Macon, shipping a 52-car train in February 2001, is today shipping a 110-car shuttle train at a 15 cent per bushel lower rate and receives an additional 3 cents per bushel in incentives for 15 hour loading. Indeed, Montana export wheat rates on a per bushel basis have declined over the past eight years. See JED Appendix-1 to this statement.

Producers have expressed concern that in some areas of Montana, there is limited ready access to shuttle facilities and their benefits. One area that has been cited is Chouteau County. In 2004, BNSF committed to maintain shuttle capable operating conditions for shuttle stations on the branch line east of Great Falls, provided a shuttle elevator was built or upgraded on the line. Columbia Grain recently announced its intention to upgrade the elevator at Carter to shuttle capability this summer.

In some locations, there has been an increased truck length of haul for producers. These truck costs are more than offset by lower shuttle rates for most producers throughout the state. Based on current trucking and rail rates, the choice to unload at a shuttle facility approximately 45 miles farther than a 52-car station, results in a net savings for the producer. See JED Appendix-2. However, if a producer chooses not to deliver to a shuttle facility, 52-car stations also remain active in numerous locations such as Great Falls, Carter, Kershaw, Fort Benton, Geraldine, Wolf Point, Glasgow, Conrad, Plentywood, Denton and Moore.

Not all shuttle elevators have led to increased trucking and higher highway maintenance costs. As a direct result of Mountain View Coop building a shuttle station at Collins, Montana, long haul trucking has been significantly reduced. As Bruce Clark, General Manager of Mountain View Coop, told me in a conversation we had on January 30, 2007, "at today's increased production levels, we are moving more than 2,500 rail cars annually through Collins. If we had not built this shuttle elevator much of this wheat would likely be moving by long haul trucks to Lewiston, Idaho and Silver Bow, Montana." According to Mr. Clark, "Prior to building Collins, most of our wheat did truck to Lewiston and Silver Bow." The savings to the state of Montana on highway maintenance has to be substantial.

Service for Montana has been excellent. Any perception of delayed car placement at an isolated location can occur as a result of an individual elevator's equipment request dates. BNSF attempts to fill similar outstanding requests in chronological order. If an elevator manager requested cars for specific dates corresponding to an anticipated harvest start of early August, a harvest beginning in July could lead to hoppers not being delivered for the actual start of harvest. If other regional elevators correctly projected their equipment needs anticipating an early harvest, this could lead to a misperception of delay in BNSF servicing the individual elevator that did not anticipate an early harvest. Elevators also typically request equipment based on historical average volume. The 2006 Montana Hard Red Wheat crop production exceeded average. Country elevator managers do not know exactly how much will be marketed at harvest or how much will be held in farm bins. In 2006 past due orders for BNSF hoppers were minimal from August through the fall months. BNSF ended the year with only 206 total past due orders in Montana-- a reduction of 91% from the total at the end of 2005.

I declare under penalty of perjury that the foregoing is true and correct.

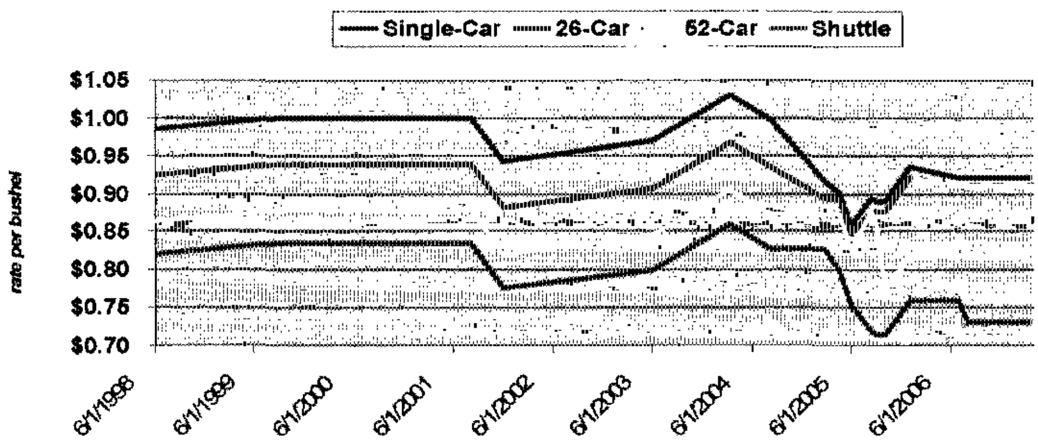
Executed on February 5, 2007

John E. Davis

John E. Davis

EP 665
JED APPENDIX-1

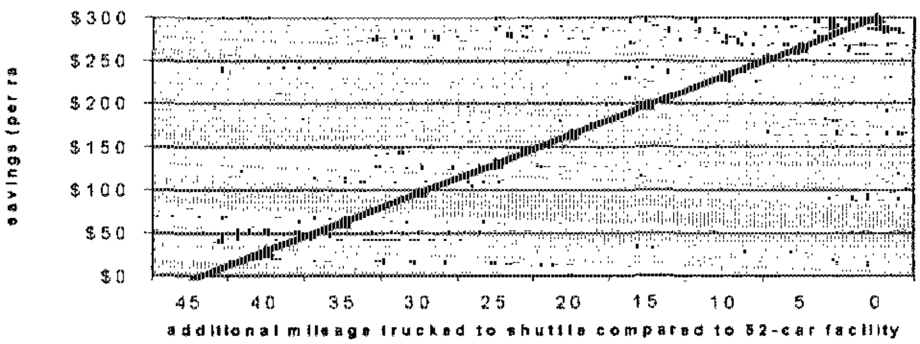
Appendix: MT Wheat Rates Have Declined



* Origin wheat rail rates from Great Falls/Collins to PNW.

EP 665
JED APPENDIX-2

Appendix: Farmer Savings @ $300/railcar spread



- ***Farmer savings defined as $300 rate spread minus: ($2.55/mi. truck costs * 3 trucks per rail car).***
- ***Commenters have not established that the 2006 Montana Rail Grain Transportation Survey represents a valid statistical sample. However, taking the survey's average increased length of haul (20 miles in last ten years) at face-value, this graph shows farmers benefiting from this longer haul.***