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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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STATE OF MONTANA)
)
Complainant,)
)
v.)
)
BNSF RAILWAY COMPANY)
)
Defendant.)
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Docket No. 42124

ENTERED
Office of Public Hearings
AUG 28 2011
Part of
Public Record

**MOTION OF BNSF RAILWAY COMPANY TO DISMISS
OR HOLD IN ABEYANCE**

Pursuant to 49 U.S.C. § 11701(b) and 49 C.F.R. § 1111.5, Defendant BNSF Railway Company ("BNSF") hereby requests that the Board dismiss the complaint filed by the State of Montana ("Montana") in the captioned proceeding. Alternatively, BNSF requests that the Board hold this proceeding in abeyance pending the Board's forthcoming review of its Uniform Rail Costing System ("URCS"), which will include review of the URCS make-whole adjustment.

Montana alleges that BNSF acted unreasonably in replacing a common carrier price authority containing per-car transportation rates applicable to movements of wheat in 52-car blocks with a price authority applicable to movements of wheat in 48-car blocks.¹ Montana asks

¹ The allegations in Montana's complaint are inconsistent with Appendix A to the complaint which Montana relies on to support its allegations. Paragraph 8 of Montana's Complaint incorrectly describes the replaced price authority attached as Appendix A as establishing rates "based on 52-109 cars," but Appendix A actually states that the "price applies if minimum tender per shipment is 48 cars and maximum not greater than 110 cars." The 52-car rates that Montana refers to were set out in a prior price authority which expired on April 16, 2008. Appendix A is an interim price authority that became effective on April 17, 2008.

that the Board “enter an order requiring BNSF to cease and desist from its unreasonable practices and accept 52-car shipments at 52-car rates from elevators capable of loading such shipments. . . .” Complaint at pp. 9-10.

Montana’s complaint “does not state reasonable grounds for investigation and action,” and it should therefore be dismissed pursuant to 49 U.S.C. § 11701(b). The unreasonable practice alleged here is BNSF’s establishment of rates applicable to 48-car blocks of wheat in lieu of maintaining rates applicable to 52-car blocks of wheat. Montana has not articulated a legal theory under which the rate publication at issue could be found to be an unreasonable practice. With limited exceptions, BNSF has the statutory right to establish any rate that it chooses in the first instance. 49 U.S.C. § 10701(c) (a rail carrier “may establish any rate for transportation or other service provided by the rail carrier”). As to the exceptions, Montana does not allege that the 48-car rates established by BNSF are unreasonably high. In fact, it specifically disavows any such allegation. Complaint at ¶ 35 (“Montana does not, in this Complaint, challenge the reasonableness of the levels of BNSF’s 48-car grain rates.”) Nor does Montana allege that BNSF has violated its common carrier obligation by substituting the 48-car rates for 52-car rates. Montana thus has no basis for claiming that BNSF’s rate setting violates ICCTA. The mere invocation of the phrase “unreasonable practice” does not state a claim for a violation of the Act -- it cannot be an unreasonable practice for a carrier to establish a rate that it has a statutory right to establish.

The deficiency in Montana’s unreasonable practice claim is underscored by the fact that Montana has requested relief that the Board is not authorized to grant. Montana wants the Board

Effective February 25, 2009, BNSF published a price authority that applied to shipments of Montana wheat “if tender per shipment is 48 cars.” See BNSF Rate Book 4022-L, item 43416, revision 3.

to order BNSF to establish 52-car wheat rates because it speculates that such rates would yield higher revenue to variable cost (“R/VC”) ratios than the 48-car rates and would thereby facilitate a rate case against BNSF. But the D.C. Circuit has ruled that the agency may not order a carrier to establish a rate for the purpose of facilitating a rate reasonableness challenge. *Burlington Northern Railroad Co. v. Surface Transportation Board*, 75 F.3d 685 (D.C. Cir. 1996). Moreover, the Board’s predecessor ruled in an earlier case regarding Burlington Northern Railroad Company’s Montana grain rate structure that the agency could not require the carrier to re-establish a 26-car multi-origin rate that had been canceled because such a requirement would “impermissibly constrain [Burlington Northern’s] ratemaking freedom and managerial discretion.” *Burlington Northern Railroad Co. – Abandonment – in Daniels and Valley Counties, MT*, 7 I.C.C. 2d 308, 316 (1990).

A separate ground for concluding that Montana’s complaint “does not state reasonable grounds for investigation and action” and dismissing the complaint is that Montana has failed to identify any actual controversy between BNSF and any other party that is ripe for resolution by the Board at this time. To the best of BNSF’s knowledge, the State of Montana does not ship wheat in 48-car blocks or 52-car blocks or in any amount. While Montana presumably believes itself to be acting on behalf of unidentified 52-car grain elevators that are vaguely referred to in the complaint, it does not specifically claim that role in its complaint.² More importantly, Montana does not identify any person or entity (including any 52-car grain elevator, or any agricultural processor or producer) that claims to have been injured by BNSF’s establishment of 48-car rates, nor does it identify any injury that has occurred. The closest Montana comes to

² In its Fee Waiver Request filed on July 8, 2010 along with the complaint, Montana states that it “is filing on behalf of the public interest in the State in reasonable practices by Defendant BNSF Railway Company. . . . The State does not appear before the Board in a proprietary role.” Fee Waiver Request at 2.

addressing the subject of either controversy or injury is to suggest, hypothetically, that one or more grain elevators might at some future time want to challenge the reasonableness of BNSF's 48-car rates if they yielded R/VC ratios that were high enough to trigger Board jurisdiction. Complaint at ¶¶ 18, 19.³ Such speculation does not establish the existence of a controversy, nor is it credible that one would exist, given that no rate complaints were brought against BNSF's 52-car grain rates while they remained in effect and supposedly yielded R/VC ratios above 180 percent of variable costs. The wholly speculative nature of Montana's musings about possible rate challenges underscores the fact that there is no actual controversy for the Board to resolve here. It would be a waste of the Board's and the party's resources to litigate Montana's hypothetical question.

The Board's predecessor has dismissed complaints for lack of ripeness on multiple occasions, and the Board clearly has authority to do so. *See* discussion at pp. 14 to 16, *infra*. Importantly, dismissal of Montana's complaint on grounds that there is no actual controversy to resolve at this time would not prejudice any entity whose interests Montana claims to be protecting here. If there is an entity that has an actual dispute with BNSF regarding the level of BNSF's 48-car wheat rates or regarding BNSF's fulfillment of its common carrier obligation to transport Montana wheat, dismissal of Montana's complaint would not preclude that entity from bringing its own independent complaint.

As an alternative to outright dismissal, the Board could address the premature and speculative nature of Montana's complaint by holding this proceeding in abeyance until the Board has undertaken its forthcoming review of URCS. According to Montana, it is the

³ Of course, a shipper seeking to challenge the reasonableness of BNSF's rates before the Board could only invoke the Board's rate reasonableness jurisdiction if there were "an absence of effective competition from other rail carriers or modes of transportation for the transportation to which [the] rate applies." 49 U.S.C. § 10707(a).

differential allocation of costs to 48-car shipments versus 52-car shipments via the URCS make-whole adjustment that somehow renders BNSF's establishment of 48-car rates unreasonable. Complaint at ¶¶ 15-19. Of course, BNSF is not responsible for the way that the URCS make-whole adjustment works, and the implicit suggestion that BNSF should not be permitted to take account of how the make-whole adjustment works is ludicrous. But since the URCS make-whole adjustment is at the heart of the problem Montana conjures up here and the Board is planning to evaluate that adjustment as part of its URCS review,⁴ it would be appropriate for the Board to hold this proceeding in abeyance until the Board has had an opportunity to study the make-whole adjustment and to determine whether any revision is needed.

STATEMENT OF FACTS

BNSF's motion to dismiss is focused on the legal insufficiency of Montana's allegations, *i.e.*, Montana's failure to state a claim and failure to identify a dispute that is ripe for resolution. This motion does not turn on factual proof, and there are no disputed issues of material fact that make it necessary for the Board to entertain evidentiary filings.

The undisputed facts sufficient to allow the Board to resolve this case at this threshold stage are summarized briefly below.

BNSF transports large quantities of wheat from Montana to Pacific Northwest ports for export. Complaint at ¶ 4. Since the early 1980's, BNSF (or its predecessor Burlington Northern Railroad Company ("BN")) has had rates in effect that facilitated the tendering of multiple-car

⁴ May 27, 2010 Surface Transportation Board Report to Congress Regarding the Uniform Rail Costing System Submitted Pursuant to Transportation and Housing and Urban Development, and Related Agencies Appropriations Bill, S. Rep. No. 111-69 (2009) at i, 14, 17-19, 21, 23 (hereafter "STB URCS Report").

blocks of grain as well as single car shipments.⁵ For many years, Burlington Northern had rates applicable to movements in single cars, 26-car blocks and 52-car blocks. *Id.* Eventually, to promote and reward more efficient operations BNSF established further reduced rates for 110-car shuttle trains.⁶ BNSF currently has in place rates for movements of wheat from Montana origins that apply to single car movements, shipments in 26 and 48-car blocks, and shipments in 110-car shuttle trains. Complaint at ¶ 9; Answer at ¶ 9.

URCS has long included a feature referred to as the “make-whole” adjustment that allocates relatively greater costs to blocks of less than 50 cars as opposed to blocks of 50 or more cars. Complaint at ¶¶ 15-16; Answer at ¶¶ 15, 16. The rationale is that operational efficiencies, *e.g.* reduced switching, are achieved in transporting larger blocks of cars and that these efficiencies are reflected in lower costs per car. STB URCS Report at 18. Transportation of grain in 52-car blocks was at one point the most efficient grain operation that BNSF provided. *See McCarty Farms Decision*, 3 I.C.C. 2d at 823 n.3. Currently transportation of shuttle trains of 110 cars is the most efficient grain operation that BNSF has. Complaint at ¶ 9; Answer at ¶ 9.

BNSF’s 48-car wheat rates do not require that any particular tender of cars be limited to 48 cars. For example, if a grain shipper that wishes to tender 52 cars for transportation, it can tender 48-cars at the 48-car rates and any number of additional cars at single car rates, or it can tender two 26-car blocks at the 26-car rates.

⁵ *McCarty Farms, et al. v. Burlington Northern Inc.*, 3 I.C.C. 2d 822, 823 n. 3 (1987) (hereafter “*McCarty Farms Decision*”).

⁶ Complaint at ¶ 8; BNSF Railway Company’s Answer (July 29, 2010) at ¶ 8 (hereafter “Answer”).

No party has filed a complaint challenging the reasonableness of any BNSF common carrier rate for the movement of Montana wheat since the termination of the *McCarty Farms* rate litigation in 1998.⁷

ARGUMENT

I. **Montana Has Not Stated Reasonable Grounds for Investigation Because BNSF's Rate Actions Are Authorized by the Governing Statute**

The statutory provision under which Montana is proceeding in this case provides that “[t]he Board may dismiss a complaint it determines does not state reasonable grounds for investigation and action.” 49 U.S.C. § 11701(b). That provision applies here and requires dismissal of Montana’s complaint.

Montana maintains that it is an unreasonable practice for BNSF to replace rates for transportation of wheat in 52-car blocks with rates for 48-car blocks. Montana argues that if BNSF had maintained the 52-car rates at the prior levels, shippers would have been able to challenge such rates as unreasonable because those rates would produce R/VC ratios that exceed 180% of URCS variable costs of the transportation.⁸ Montana requests that the Board order

⁷ *McCarty Farms, et al. v. Surface Transportation Board*, 158 F.3rd 1294 (D.C. Cir. 1998). In this decision, the D.C. Circuit court affirmed the STB’s decision that petitioners had failed to establish that BN’s rates to transport wheat from Montana to the Pacific Northwest were unreasonable and, thus, ended the challenge to those Montana rates.

⁸ Montana refers to the quantitative aspect of the Board’s market dominance standard, but ignores the qualitative dimension of the market dominance standard, *i.e.*, where there is an absence of effective competition for the transportation to which a rate applies. In 1987, the ICC found Burlington Northern to be market dominant over movements of Montana wheat to Pacific Northwest ports for export. *McCarty Farms Decision*, 3 I.C.C. 2d at 839. However, in a decision issued in November 1991, the ICC vacated its rate prescription on post 1986 movements of Montana wheat for export, stating that “it appears that the export grain market in general is competitive.” *McCarty Farms, Inc. et al. v. Burlington Northern Inc.* ICC Docket No. 37809, 1991 WL 246202 (I.C.C.) at *3 (decided Nov. 20, 1991). Thus, it is by no means clear that any Montana wheat shipper would be able to invoke Board jurisdiction to determine

BNSF to “accept 52-car shipments at 52-car rates from elevators capable of loading such shipments.” Complaint at pp. 9-10.

Montana’s claim fails because there is no legal basis for the Board to grant the relief that Montana demands. Under the governing statute, “a rail carrier providing transportation subject to the jurisdiction of the Board under this part may establish any rate for transportation or other service provided by the rail carrier.” 49 U.S.C. § 10701(c). *See also Burlington Northern and Santa Fe Railway Co. v. Surface Transportation Board*, 403 F.3d 771, 773 (D.C. Cir. 2005) (“Under the Act, a railroad ordinarily may establish any rate it chooses for the transportation it provides, provided it does not discriminate against connecting lines. *See* 49 U.S.C. § 10701(c)"); *Aluminum Co. of America v. Interstate Commerce Commission*, 761 F.2d 746, 750 (D.C. Cir. 1985) (“In the absence of market dominance, railroads may charge any rate that is not unreasonably low or otherwise forbidden by a provision of Title 49. *See* 49 U.S.C. § 10701a(a)”). BNSF has established rates for multi-car shipments of wheat that permit shippers to tender wheat in either 48- or 26-car blocks; BNSF has also established rates that apply to both shuttle train and single car service. Complaint at ¶ 9. These rates reflect BNSF’s exercise of its statutory rate-setting prerogative.

Sub-section 10701(c) sets forth limited exceptions to a carrier’s statutory rate setting prerogative. First, sub-section (c) incorporates sub-section (d), which provides that if the carrier is market dominant, the rate established “must be reasonable.” Second, the carrier’s rate-setting prerogative does not encompass “a rate prohibited by a provision of this part.” 49 U.S.C. § 10701(c). Neither exception applies here. First, Montana does not allege that BNSF’s 48-car rates are unreasonably high. *See* Complaint at ¶ 35. If the Board were to conclude

the reasonableness of Montana wheat rates even if the rates produced R/VC ratios in excess of 180 percent.

otherwise, *i.e.*, if it were to conclude that Montana is in fact seeking to challenge the level of BNSF's rates through an unreasonable practice claim, the Board would be required to dismiss Montana's complaint for failure to pursue its claims through the statutory rate reasonableness provision. *Union Pacific Railroad Co. v. I.C.C.*, 867 F.2d 646 (D.C. Cir. 1989) (ICC improperly evaluated level of rates as unreasonable practice); *Dairyland Power Cooperative v. Union Pacific Railroad Co.*, STB Docket No. 42105 (served July 29, 2008) (Board will not entertain unreasonable practice challenges that are premised on the level of railroad's rates).

Second, Montana does not allege that BNSF's 48-car rates are "prohibited by a provision of this part." There is no allegation here that BNSF has violated the common carrier provision of the statute by failing to provide transportation on reasonable request. Montana acknowledges that Montana grain elevators are able to ship their grain to destination under the 48-car rates that BNSF established. *See* Complaint at ¶ 4. Montana does not otherwise claim that the rates BNSF has established are prohibited by the statute. It points to nothing in the statute that "prohibits" BNSF from substituting 52-car rates for 48-car rates. Thus Montana does not and cannot bring its claim within the section 10701(c) exceptions to BNSF's rate-setting prerogative.

Montana apparently hopes that applying the label "unreasonable practice" to BNSF's rate setting is sufficient to call BNSF's rate setting prerogative into question. But section 10701(c) makes clear that a carrier's exercise of its statutory rate-setting prerogative is inherently reasonable. The Board is not free to substitute its judgment for the business decisions made by BNSF and has no authority to order BNSF to establish a different rate structure for Montana wheat shipments than the one BNSF has chosen. BNSF has chosen to put in place a tiered rate structure and has also determined what the respective tiers should be. For the Board to dictate

that BNSF must have additional tiers, or that BNSF must establish certain break-points between tiers would render BNSF's statutory right to establish "any rate" meaningless.

Prior decisions of the Board, its predecessor and reviewing courts make clear that it is beyond the Board's power to order the relief requested by Montana here. The case that most closely resembles this one is another case involving Montana grain rates in which the complaining parties mounted a collateral challenge to aspects of BN's Montana grain rate structure. In *Burlington Northern Railroad Co. – Abandonment – in Daniels and Valley Counties, MT*, 7 I.C.C. 2d 308 (1990), the Board's predecessor, the Interstate Commerce Commission ("ICC") determined that requiring BN to publish and maintain multiple-car rates similar to those demanded by Montana here was not within its statutory powers. In that proceeding, an ICC Administrative Law Judge ("ALJ") initially denied BN's application to abandon a 48.4 mile line segment that served single-car grain elevators in northeastern Montana. The ALJ reasoned that BN had breached its common carrier obligation by failing to keep in place 26-car multi-origin rates that permitted small grain elevators located on the line segment in question to consolidate grain cars into blocks of 26 cars and to compete with larger elevators that could take advantage of single-origin 26 or 52-car rates. According to the ALJ, BN had a common carrier obligation to furnish service for which there is a demand if it could do so profitably.

The ICC reversed the ALJ's denial of abandonment, stating that "[t]he ALJ's exposition of his views on how BN should price and market its services confirms that regulatory agencies should not attempt such analysis." *Id.* at 318. Of particular relevance here, the ICC rejected the ALJ's conclusion that BN had a common carrier obligation to make available to shippers on the segment proposed for abandonment rates that were "reasonably related" to rates from a 52-car

elevator on an adjacent line segment that would continue in operation. The ICC stated that in finding this common carrier obligation, the ALJ “imposed an additional obligation on the carrier that *would impermissibly constrain its ratemaking freedom and managerial discretion,*” 7 I.C.C. 2d at 316 (emphasis added), and that his decision “essentially forces a rate prescription on the carrier.” *Id.* at 317. The ICC noted that under the governing statute – similar to present day 49 U.S.C. § 10701(c) – “a carrier is free to set its rates unless a challenged rate is unreasonably high or below a reasonable minimum.” *Id.* at 316.⁹

Montana seeks to facilitate a maximum rate challenge in a future case that might be brought by an unidentified shipper. Montana asks the Board to require BNSF to restore 52-car wheat rates in lieu of the 48-car rates that it has elected to publish. But the Board lacks authority to grant such relief. In *Burlington Northern Railroad Co. v. Surface Transportation Board*, 75 F.3d 685 (D.C. Cir. 1996), the D.C. Circuit ruled that it was improper for the ICC to order BN to establish a rate simply to facilitate a rate-reasonableness challenge. The court held that under the statutory scheme then in place, “the Commission had extremely limited authority to compel rail carriers to serve at rates other than those of their own choosing before completion of a Commission proceeding assessing the rates,” 75 F.3d at 694, and noted that any similar action by the Board in the future under the current statute “would be on even weaker statutory ground than was the action taken here.” *Id.* at 693 n.7. Since that 1996 decision, the Board has not ordered carriers to publish particular rates except by prescribing maximum reasonable rates in rate cases or where the carrier did not have a rate in place to cover the requested transportation. In promulgating regulations governing a railroad’s response to a request for rates, the Board has recognized that “[t]he requirement that a carrier respond promptly to a request for new rates is

⁹ The current version of the statute no longer forbids rates below a reasonable maximum.

intended to apply in connection with shipments or services not already contemplated in the carrier's rate structure." *Disclosure, Publication, and Notice of Change of Rates and Other Service Terms for Rail Common Carriage*, 1 S.T.B. 153, 158 n.4 (1996).

Here Montana does not deny that BNSF has multiple rates in place for the transportation of Montana wheat. The complaint alleges that, in addition to the 48-car rate, BNSF also publishes shuttle train rates for trains with 110 cars, 26-car rates, and rates for single-car shipments. Complaint at ¶ 9. Thus, Montana's claim is that regardless of whatever other rates BNSF may have in place, it is also required to publish a 52-car rate, and should be ordered to do so by the Board.

The statute does not give the Board the power to micro-manage BNSF's rates in the manner demanded by Montana. As the Board has recognized, the carrier is given the right to establish "any rate" it chooses and to determine how it will satisfy its common carrier obligation to provide service. In *Texas Municipal Power Agency v. Burlington Northern & Santa Fe Railway*, 7 S.T.B. 803 (2004), for example, where the utility sought to require BNSF to provide unit train service in shipper-owned cars, the Board denied the request. Relying on a prior determination by the ICC, the Board affirmed that "how a railroad satisfies its common carrier obligation is left to the railroad to decide in the first instance. So long as the railroad offers service that satisfies its common carrier obligations (the critical inquiry), it need not provide the particular service that the shipper would prefer." 7 S.T.B. at 807. See also *Potomac Electric Power Co. v. Penn Central Transportation Co.*, 356 I.C.C. 815 (1977), *aff'd in relevant part*, 584 F.2d 1058 (D.C. Cir. 1978) (carrier that was providing trainload service in railroad-owned cars was not required to provide unit-train service in railroad-owned cars).

In sum, Montana asks the Board to exercise a rate setting authority that the Board does not possess. Rather than embarking on a costly and time consuming journey down a road that can only end in the dismissal of Montana's complaint, the Board should terminate this proceeding at its inception.

II. MONTANA'S COMPLAINT SHOULD BE DISMISSED BECAUSE IT DOES NOT SPECIFY A DISPUTE THAT IS RIPE FOR RESOLUTION

Montana claims that BNSF's decision to cease publishing rates for transportation of wheat in 52-car shipments and to replace them with 48-car rates "effectively prevents the possibility of a successful challenge [at the Board] to the wheat rates paid by 52-car elevators in Montana." Complaint at ¶ 18; *see also* Complaint at p. 1 ("BNSF rate levels that the State believes are unlawful but for the 48-car cap cannot be reviewed by the STB, and could be raised by BNSF without the possibility of challenge, unless the relief requested herein is granted.")

However, the concerns that Montana raises – the supposed inability of a Montana 52-car elevator to challenge BNSF's 48-car rates before the Board and the possibility that BNSF might raise its rates in the future – are entirely hypothetical and speculative. Montana has not identified itself as a shipper that seeks to challenge the reasonableness of BNSF's 48-car rates, nor has it identified any 52-car elevator in Montana – or any other Montana grain shipper – that seeks to challenge BNSF's rates for wheat transportation but has not done so due to BNSF's decision to publish 48-car rates rather than 52-car rates. The BNSF 48-car rates went into effect in February 2009 (Complaint at ¶ 10) – seventeen months before the complaint was filed – and, yet, Montana has not identified even one Montana shipper that has supposedly been foreclosed from challenging BNSF's 48-car rates before the Board in that time period. Notably, soon after Montana filed its complaint, the Montana Grain Growers Association -- an organization of grain producers who bear the cost of freight transportation -- issued a news release urging the Attorney

General of Montana to withdraw the complaint in this proceeding.¹⁰ Thus, Montana has not shown that there is any actual controversy relating to BNSF's 48-car rates that is ripe for review by the Board.

Equally revealing as to the speculative nature of Montana's claim is the fact that no Montana shipper has brought a rate reasonableness complaint directed at BNSF's 52-car wheat rates in recent memory, not even after the Board adopted revised standards for smaller rate cases in September 2007.¹¹ And no shipper has brought – or even expressed an interest in bringing – a rate reasonableness claim under the 48-car rates. Thus, the change to 48-car rates from 52-car rates has had no apparent effect on Montana wheat shippers' interest in or willingness to challenge BNSF's transportation rates at the STB. It is also entirely a matter of conjecture as to whether a Montana wheat shipper would be able to establish qualitative market dominance (*see* note 8 above), even if R/VC ratios on 52-car shipments were found to exceed the jurisdictional threshold as Montana speculates would be the case.

These undisputed facts require that the Board dismiss Montana's claim as speculative and unripe. Montana has not shown that any actual controversy exists regarding BNSF's 48-car rates and, consequently, its claim is not ripe for consideration by the Board. The Board should not waste its resources or require BNSF to expend resources on such a matter.

The Board's predecessor, the ICC, dismissed claims on the basis that they were not ripe under analogous circumstances; namely, when the claims were speculative and the complainant

¹⁰ News Release issued by Montana Grain Growers Association "MGGGA Urges Caution in Complaint of 48-Car Freight Incentives" (July 19, 2010), attached hereto as Exhibit 1.

¹¹ *Simplified Standards for Rail Rate Cases*, Ex Parte No. 646 (Sub-No. 1) (served Sept. 5, 2007). Shippers began challenging rates under the Board's Simplified Standards by August 2007 – eighteen months before BNSF ceased publishing 52-car rates for transportation of Montana wheat. *See, e.g. DuPont v. CSXT*, STB Docket Nos. 42099, 42100 and 42101 (filed Aug. 21, 2007).

failed to show that there was an actual controversy that required adjudication. For example, the ICC dismissed for lack of ripeness the request of petitioner, Bessemer and Lake Erie Railroad Company (“Bessemer”), for a declaratory order that “neither the threat of a secondary boycott nor an actual secondary boycott by a striking union excuses rail common carriers from providing reasonable interchange facilities”¹² In that case, the petitioner did not show that it (or any other entity) was being denied reasonable interchange facilities due to a secondary boycott – threatened or actual. Similarly, in this case, Montana has not shown that any Montana shipper desiring to challenge BNSF’s wheat transportation rates has been prevented from doing so as a result of BNSF’s decision to adopt 48-car rates. In dismissing the *Bessemer* case on ripeness grounds, the ICC explained:

However significant this issue may be to the rail industry, *it is not ripe for determination at this time*. Since the strike against Bessemer has been settled, and Bessemer has presumably regained access to the connections and trackage rights at issue, no actual controversy or uncertainty exists here. We may also fairly characterize as speculative any future harm to petitioner from a potential future secondary boycott following a potential future strike. Only if Bessemer and its unions cannot reach agreement over a particular matter in the future and a strike ensues, and if one or more of petitioner’s interchange partners refuses to honor its interchange and/or trackage rights commitments, only then might Bessemer and its customers be harmed.

Id. at * 3 (emphasis added).

In another analogous case, the ICC dismissed for lack of ripeness the National Bus Traffic Association’s (“NBTA”) request for an order declaring that it would not be unlawful for buses to prohibit the transportation of mirrors and cremated human remains because the

¹² *Bessemer and Lake Erie Railroad Company – Petition for Declaratory Order – Interchange Facilities and Trackage Rights*, ICC Docket No. 40220, 1990 WL 288377 (I.C.C) at 1 (decided July 10, 1990).

petitioner had not shown that anyone would object to a rule prohibiting such transportation and, thus, had not shown that any controversy actually existed.¹³ As the ICC explained:

NBTA has not shown that any controversy exists. Since the proposed additions to the prohibited articles tariff list have not yet been filed, *there is no way of knowing whether anyone would object to this action.* . . . Accordingly, because the petitions for declaratory order do not present a case or controversy, they are not ripe for declaratory order and should, therefore, be dismissed.

Id. at * 1 (emphasis added).¹⁴

Montana has not identified any Montana shipper that desires to challenge BNSF's 48-car rates at the Board or the 52-car rates that were previously in effect. Its claim does not establish that any controversy exists regarding BNSF's 48-car rates and is speculative. Consequently, under Board precedent, Montana's complaint should be dismissed for lack of ripeness.

¹³ *National Bus Traffic Association, Inc. – Petition for Declaratory Order – Cremated Human Remains*, ICC Docket No. C-30141, 1989 WL 238239 (I.C.C.) (decided March 22, 1989).

¹⁴ See also, *The Baltimore and Ohio Railroad Company, Metropolitan Southern Railroad Company and Washington and Western Maryland Railway Company – Abandonment and Discontinuance of Service – In Montgomery County, MD, and the District of Columbia*, ICC Docket No. AB-19 (Sub-No. 112) 1988 WL 224372 (I.C.C.) at * 2 (decided April 26, 1988) (ICC denies for lack of ripeness a party's request that the ICC determine that a county's "mass transit proposal" is inconsistent with the Trails Act since it is unclear that this issue will ever need to be decided. As the ICC explains, "the Trails Act will only come into play here if the financial assistance process does not result in a sale of the line and CSX agrees to negotiate a trails use agreement. Even if there ultimately are Trails Act negotiations with the county, the county may decide not to proceed with the mass transit proposal."); *USX Corporation, U.S. Steel Group – Petition for Declaratory Order*, ICC Docket No. MC-C-30205 at *2 (decided Nov. 5, 1992) (ICC dismisses for lack of ripeness petitioner's request that the ICC declare that single-state truck transportation of steel "blanks" and related scrap steel within Michigan is in interstate commerce because "there is no indication that an active controversy or sufficient uncertainty exists now or will exist." While the Michigan Public Service Commission ("MPSC") had issued a letter several years earlier indicating that such transportation might be intrastate commerce, "there is no indication that MPSC has taken any action to follow up on the opinion expressed in the letter. There is nothing in the record to indicate that MPSC has, based on Motor Carrier, now taken steps to actively challenge Petitioner's view that the transportation of blanks is in interstate commerce." The ICC's dismissal was without prejudice in the event the issue became ripe in the future.)

III. ALTERNATIVELY, THE BOARD SHOULD HOLD THIS PROCEEDING IN ABEYANCE PENDING A REVIEW OF URCS AND POSSIBLE MODIFICATION OF THE MAKE-WHOLE ADJUSTMENT

BNSF believes that the most efficient and straightforward way for the Board to deal with Montana's ill-founded complaint is to dismiss it outright. However, the Board has expressed reluctance to dismiss cases at the threshold stage in the past, and if the Board is disinclined to dismiss Montana's complaint here, there is an alternative course that will avoid the wasteful expenditure of resources that would otherwise result from allowing Montana to proceed. The alternative course is to hold this proceeding in abeyance pending the Board's upcoming review of URCS which will include a review of the make-whole adjustment.

It is clear from the complaint that the source of Montana's unhappiness here is the manner in which the URCS make-whole adjustment allocates costs to 48-car versus 52-car movements. According to Montana:

15. . . . URCS costing treats 48-car trains like 26-car and smaller units and subjects them to the "make-whole" adjustment, while shipments of 50 cars or more, including the 52-car trains formerly shipped by 52-car elevators and accepted by BNSF, are treated like unit trains that are not subject to a "make-whole" adjustment.

16. The make-whole adjustment allocates additional costs to shipments of one to forty-nine cars, offsetting savings from efficiencies of longer trainloads and unit trains, so that URCS will account for all system costs when the costs of the individual shipments are totaled under STB costing procedures. The URCS cut-off for application of the make-whole adjustment is shipments of 50 cars. . . .

Complaint at ¶¶ 15-16.

According to Montana, BNSF has exploited the foregoing aspect of the URCS make-whole adjustment by adopting 48-car rates, resulting in R/VC percentages on 48-car shipments that are significantly lower than R/VC percentages yielded by the same rates on 52-car shipments. *Id.* at ¶ 17. Montana asserts that "the artificially inflated costs assigned to the shipments under URCS produce a sharp drop in R/VC percentages, making the rates appear less

excessive and adversely affecting grain shippers' recourse to statutory protections against unlawful rates." *Id.* That is Montana's theory of the case – "artificially inflated costs" result in "de facto deregulation."

It bears emphasis that a perception of "artificially inflated costs" does not rise to the level of a valid claim of a violation of ICCTA. While Montana may perceive URCS costs on 48-car movements as "artificially inflated" vis-à-vis costs on 52-car movements, BNSF might perceive URCS costs on 52-car movements as "artificially depressed" as they are developed in the same manner as costs on more efficient 110-car shuttle trains. The gap in perception depends on which side of the make-whole adjustment line one stands on. That there is such a line stems from the way URCS is currently constructed and not from anything BNSF has done. The way URCS is constructed is not going to change in this proceeding.

However, the Board has recently indicated that it intends to reexamine URCS, including the make-whole adjustment, in the near future. In its May 27, 2010 Report to Congress regarding URCS, the Board stated that it "believes that it is time to consider moderate updates to URCS to ensure that the model continues to produce variable costs that are as accurate and reflective of the modern rail industry as practicable." STB URCS Report, Executive Summary at i. Among the basic URCS updates that it contemplates undertaking, the Board identified "revisiting what is known as the 'make-whole' adjustment to URCS (which incorporates certain efficiencies obtained when moving goods in higher-volume shipments)." *Id.* The Board's Report to Congress makes clear that the make-whole adjustment would be one of the topics addressed under any of the three URCS review scenarios contemplated by the Board – the Basic Option, the Moderate Option, or the Comprehensive Option. *Id.* at 17-19, 21, 23.

Since the issuance of the Board's Report to Congress, Congress has indicated its intention to appropriate the funds needed for the Board to undertake its review of URCS. This summer the House passed a bill (H.R. 5850) appropriating funds for the STB, including a recommended \$1,000,000 for the STB to study URCS¹⁵ and a Senate Committee on Appropriations recommended the appropriation of \$625,000 for the STB to conduct its proposed Moderate Option review of URCS.¹⁶

The Board's review and possible modification of the make-whole adjustment in the context of its broader review of URCS would address the central issue raised by Montana in its complaint – the perceived unfairness of the make-whole adjustment's current effect on costs of certain movements. If any changes in the make-whole adjustment are made, they could redefine the issues raised by Montana so as to require a new complaint, or they could eliminate altogether the rationale for Montana's complaint. The point is that the Board's review of URCS is very likely to address the make-whole adjustment which Montana views as central to its complaint. Especially because there is no dispute currently ripe for review, it makes no sense to embark upon costly litigation that could well be rendered moot in the relatively near term.

The Board has the discretion to hold proceedings in abeyance in the interests of efficient docket management and avoiding the unnecessary expenditure of resources.¹⁷ While we

¹⁵ House Departments of Transportation, Housing and Urban Development, and related Agencies Appropriation Bill, H. Rpt. 111-564 at 112 (July 26, 2010).

¹⁶ Senate Transportation and Housing and Urban Development, and related Agencies Appropriation Bill, Senate Report 111-000 at 131-132 (August 2010).

¹⁷ See, e.g. *1411 Corporation – Abandonment Exemption – In Lancaster County, PA*, STB Docket No. AB-581X at *2 (decided Aug. 3, 2001) (Board holds in abeyance procedural schedule for filing any request that Board establish terms and conditions for purchase price of rail line until Board rules on motion for an exemption from further offer of financial assistance proceedings to prevent the parties from expending “unnecessary resources in the event that the Board grants the motion for exemption . . .”); *Westinghouse Electric Corporation v. The Alton*

emphasize that in BNSF's view outright dismissal is the more appropriate course of action here, an order holding this case in abeyance pending the Board's forthcoming review of URCS would be an appropriate interim measure.

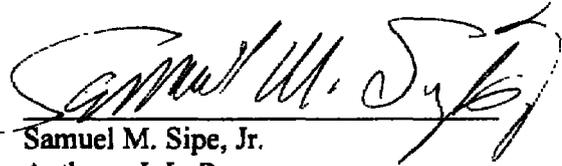
Conclusion

Montana's case is singularly ill-suited for adjudication before the Board. Montana has failed to articulate a viable legal theory and has failed to specify a controversy that is ripe for resolution. Pursuing the case would be a drain on the parties' and the agency's resources. Conversely, dismissing the case or holding it in abeyance would prejudice no one. In either instance, if a dispute between a Montana grain shipper and BNSF ripens to the point where adjudication is required, neither dismissal of Montana's complaint nor a decision to hold the proceeding in abeyance would prevent an aggrieved party from coming forward with its own

and Southern Railway Company, et al., ICC Docket No. 38188S at *1 (decided Jan. 25, 1988) (ICC holds rate reasonableness phase of case in abeyance "in the interests of the parties and administrative efficiency" pending a final decision in Ex Parte No. 347 (Sub-No. 1), *Coal Rate Guidelines – Nationwide*, the separate ICC proceeding evaluating guidelines for rate reasonableness cases); *Jasper Wyman & Son et al. – Petition for Declaratory Order – Certain Rates and Practices of Overland Express*, ICC Docket No. 40510 at *1 (decided May 22, 1991) (ICC holds in abeyance proceedings involving a party's mileage rates pending decision in separate ICC proceeding "[b]ecause significant time and resources of the Commission and the parties may be saved" as a result.).

complaint, if there were a valid legal basis for one. In the meantime, the Board should do what it can to discourage groundless litigation.

Respectfully submitted,



Richard E. Weicher
Jill K. Mulligan
BNSF RAILWAY COMPANY
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2353

Samuel M. Sipe, Jr.
Anthony J. LaRocca
Linda S. Stein
Frederick Horne
STEPTOE & JOHNSON LLP
1330 Connecticut Ave. N.W.
Washington, D.C. 20036
(202) 429-6486

ATTORNEYS FOR DEFENDANT

August 23, 2010

Certificate of Service

I hereby certify that on this 23rd day of August, 2010, I have served a copy of the foregoing Motion of BNSF Railway Company to Dismiss or Hold in Abeyance on the following by hand delivery:

John M. Cutler, Jr.
Andrew P. Goldstein
McCarthy, Sweeney & Harkaway, PC
Suite 700
1825 K Street, N.W.
Washington, D.C. 20006

Linda S. Stein

Linda S. Stein



**MONTANA
GRAIN
GROWERS
ASSOCIATION**

**PO Box 1165
Great Falls, MT 59403
ph 406.761.4596
fx 406.761.4606
email: mgga@mgga.org**

*For immediate release
July 19, 2010*

For additional information contact:
Lola Raska, (406) 761-4596
Keven Bradley, (406) 229-0702
Gordon Stoner, (406) 895-7967

MGGA Urges Caution in Complaint of 48-Car Freight Incentives

Great Falls – The Montana Grain Growers Association (MGGA) commented today on a complaint filed July 8, 2010, with the Surface Transportation Board (STB) by Montana Attorney General Steve Bullock. The complaint centers on the STB formula for calculating railroad profitability.

In 2009, BNSF Railway changed their incentive program for 52-car trains to instead apply to 48-car shipments. The State of Montana complaint seeks to force BNSF to return to the 52-car structure, so that the shipments will fall into the least-cost category for litigation purposes. The STB rules place shipments of 50 cars or more in this lowest-cost group.

Lola Raska, MGGA Executive Vice President, explained the issue. “When the STB computer program was written, 52-car trains were the height of rail efficiency, but 110-car shuttles have since taken over that position.” She went on to say, “The 52 and 48 car trains are now gathered from individual elevator locations and put together into longer trains for long hauls.”

MGGA is concerned that all ramifications have not been considered by the attorney general and that this STB filing could lead to BNSF dropping the 48-car incentive from its rate structure. The railroad is not required to offer reduced rate incentives for larger shipments.

“This action could put our smaller grain elevators in jeopardy,” said Kevin Bradley, MGGA President, “and is aimed at the wrong target. Efforts would be better spent on a reform and update of the STB’s costing program, which would better reflect today’s rail economics.”

The farm organization last week expressed their concern in a letter to the attorney general and asked that he withdraw the STB filing. Mr. Bullock’s office has not replied.

“The freight rate per bushel did not change when BNSF made the change from 52 to 48 cars,” said Gordon Stoner, who serves as elected vice-president of MGGA. “The railroad lost some efficiency, but producers have not noticed any change in operating procedure or freight cost due to this change in designation.”

"This complaint appears to be about eligibility for litigation," added Raska, "and we believe the potential reward is very small, while the risk to our producers and 48-car elevators is large."

MGGA has had good success in mediating Montana freight rate and service issues with BNSF Railway as a preferable alternative to lawsuits and formal complaints.

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