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BEFORE THE  
SURFACE TRANSPORTATION BOARD

DOCKET NO. 42124

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Public Record

STATE OF MONTANA, COMPLAINANT

v.

BNSF RAILWAY COMPANY, DEFENDANT

REPLY OF STATE OF MONTANA IN OPPOSITION TO BNSF  
MOTION TO DISMISS OR HOLD IN ABEYANCE

I. INTRODUCTION

By motion filed August 23, 2010, BNSF Railway Company ("BNSF") has moved to dismiss the Complaint of the State of Montana ("Montana" or "the State"), or requests in the alternative that the Board hold the proceeding in abeyance "pending the Board's forthcoming review of its Uniform Rail Costing System ("URCS")." Motion at 1. The Board should deny the Motion.

As the Board has repeatedly held (though BNSF fails to acknowledge), such motions by defendants are disfavored. The Board stated in North America Freight Car Ass'n. v. BNSF, STB Docket No. 42060 (Sub-No. 1):

Granting a motion to dismiss requires that all factors be viewed in the light most favorable to complainant. Thus, motions to dismiss prior to the submission of evidence are generally denied, to insure that participants have a full and fair opportunity to meet their burden of proof. National Grain & Feed Ass'n. v. Burlington N. R.R., Docket No. 40169, slip op. 4 (ICC served June 1, 1990).

Decision served August 13, 2004, at 9. See also Western Fuels Service Corp. v. BNSF, Docket No. 41987, decision served July 28, 1997 at 7, and Dairyland Power Cooperative v. UP, Docket No. 42105, decision served July 29, 2008 at 5.

BNSF bases its motion to dismiss on 49 USC § 11701(b), which permits the Board to dismiss a complaint that “does not state reasonable grounds for investigation and action”. Motion at 2. BNSF alleges that there are “no reasonable grounds for investigation and action” because under 49 USC § 10701(c) a rail carrier “may establish any rate for transportation and other service provided by the rail carrier.” *Id.*

BNSF bases much of its argument on its assertion that the relief Montana calls for is the publication of “new” 52-car rates, and implies that this is actually a rate case masquerading as an unreasonable practice case. It is not until page 17 of its Motion that BNSF correctly characterizes one of Montana’s concerns:

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 on 52-car shipments.

Montana’s Complaint calls on the STB to order BNSF to cease and desist from this manipulation, which does not necessitate any change in the level of the current per-car grain rates subject to the 48-car limit. One way for BNSF to cure the problem would be by simply restoring the 52-110 car applicability that its own rates formerly offered.

BNSF claims that such relief would involve "micro-managing" BNSF's rates, and claims further that the STB has no legal authority to find BNSF's practice unreasonable, even if it is found to involve "gaming."

What BNSF sees as freedom from micro-managing would in fact allow BNSF and all other railroads to immunize their high rates on grain and all other commodities moving in shipments of less than 50 cars from the reasonable rate jurisdiction of the Board, even if such shippers have no transportation alternatives to service by a single railroad. Railroads could accomplish this result, unilaterally deregulating large segments of their own monopolies, through the simple device of reducing train sizes below the cut-off for the URCS make-whole adjustment. Whether the possibility of such a significant change in the regulatory landscape is or is not lawful should be decided based on a full record, not mere pleadings.

This is, of course, not the first effort by a railroad to immunize its rates or services from regulatory scrutiny. Since the Staggers Act, railroads have sought to limit the scope of ICC and STB regulation, arguing for the most generous definition of revenue adequacy, the narrowest definition of market dominance, the greatest obstacles to shipper relief, etc. In Ex Parte No. 676, Rail Transportation Contracts under 49 U.S.C. 10709, the railroads called for self-effectuating contracts, i.e., service that would be deemed contractual whenever a shipper made a shipment pursuant to specified rail carrier tariffs. All such shipments would thereby become non-jurisdictional, and recourse to remedies under the Interstate Commerce Act would be lost. Similarly, the acquisition premium issue as to Berkshire Hathaway, if not handled properly, could render significant volumes of qualitatively captive BNSF freight non-jurisdictional. Railroads have shifted costs to

shippers, and have imposed charges whose reasonableness is difficult to challenge under currently available procedures, which provide little guidance concerning when charges are unreasonably high. And what Montana sees as gaming with respect to the URCS make-whole adjustment has the potential to deregulate much of the nation's rail service to captive shippers that is not provided in unit trains.<sup>1</sup>

Montana has a clear and valid interest in opposing *de facto* deregulation as to commodities that are central to the economy of the State, and the Board has a legitimate reason to take steps to prevent not just BNSF but other railroads from employing the same strategy to bring about *de facto* deregulation as to other traffic.

Ultimately, the question presented by BNSF's motion is whether statutory limits on the Board's ability to regulate rail rate levels are applicable to a case in which the focus of the challenge is non-rate features—specifically, shipment size limits. Notwithstanding BNSF's attempts to obfuscate the nature of this case and exaggerate the legal standards, the answer is clearly no.

## II. STATEMENT OF FACTS

The fundamental facts are not complex. As stated in the Complaint, prior to approximately 1980, BNSF published wheat rates from Montana (among other origins) to Pacific Northwest ("PNW") ports applicable in single-car and 26-car units. In the early 1980s, BNSF added rates applicable in 52-car units, that were lower than the 26-car unit rates, in order to encourage elevators to construct new 52-car loading facilities. Ten years later, BNSF gradually began to introduce 110-car shuttle trains. Complaint at ¶ 9.

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<sup>1</sup> In Ex Parte No. 657 (Sub-No. 1), Major Issues in Rail Rate Cases, (STB served October 30, 2006), aff'd sub nom. BNSF v. STB, 526 F.3<sup>rd</sup> 770 (D.C. Cir. 2008), the Board recognized the threat to the integrity of its processes that can be posed by gaming, and the railroads' incentive to engage in gaming. Slip op. at 16.

Transportation of grain in 52-car blocks was at one point the most efficient grain operation that BNSF provided. Currently, according to BNSF, transportation of shuttle trains of 110-cars is the most efficient grain operation that BNSF has. Motion at 6. BNSF makes no claim that its 48-car trains are more efficient than the 52-car and larger trains they replaced, and Montana has argued that BNSF's shipment size limit reduces operational efficiency for elevators and their customers. Complaint ¶ 14.

It is undisputed that after introduction of shuttle service, "BNSF continued to publish rates that applied to shipments of wheat in 52-110 cars." BNSF Amended Answer, paragraph 8. BNSF subsequently changed the shipment size range for those rates to 48-110 cars (*id.*) and adopted its 48-car limit in February 2009. Complaint, Appendix B.

Montana has alleged that "BNSF adopted its 48-car shipment size limit with knowledge of and the intent to affect R/VC percentages produced by rates applicable to shipments from 52-car elevators." Complaint ¶ 32. In its Amended Answer at ¶ 32, BNSF "admits that it was knowledgeable that the change from 52-car rates to 48-car rates had an impact on the URCS costs associated with the 52-car and 48-car movements."

Montana will provide evidence showing that BNSF intended to render its wheat rates from mid-sized elevators non-jurisdictional based on the URCS costing impact.<sup>2</sup> A senior agricultural marketing official for BNSF publicly acknowledged as much.

Moreover, BNSF provides no explanation other than gaming of URCS costing for its decision to adopt the 48-car shipment size limit Montana challenges as an unreasonable practice. There is no claim, let alone demonstration, of any operational rationale for requiring the 52-car elevators built in Montana at BNSF's urging to load fewer cars than

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<sup>2</sup> In *Dairyland*, *supra*, the Board rejected Union Pacific's motion to dismiss based in part on the complainant's representation that "it plans to present substantial evidence" in support of its position. Slip. op. at 4.

they were designed to handle, or for artificially reducing the efficiency of elevator and rail services. BNSF does not contend that export facilities at the PNW destination for these shipments were unable or unwilling to continue accepting 52-car shipments, as they do from other rail carriers.

The facts, when fully available to the Board, will demonstrate that BNSF replaced 52-car rates with 48-car rates for the purpose of weakening or foreclosing the ability of affected shippers to attack BNSF's mid-size elevator rates as unreasonably high, positioning BNSF to publish unchallengeable increases in those rates, jeopardizing the viability of services by those elevators and reducing their efficiency.

### III. REPLY TO ARGUMENT

#### A. Montana Has Stated Reasonable Grounds For Investigation

According to BNSF, the STB cannot order relief from gaming of URCS costing even assuming (as the Board must on a motion to dismiss) that it is taking place. In support of this extraordinary argument, BNSF cites decisions that do not apply, and ignores decisions that do.

BNSF contends that it has the right to "establish any rate for transportation or other service provided by the rail carrier," citing Burlington Northern and Santa Fe Railway Co. v. Surface Transportation Board, 403 F.3<sup>rd</sup> 771, 773 (D.C. Cir. 2005) and Aluminum Co. of America v. Interstate Commerce Commission, 761 F.2<sup>nd</sup> 746, 750 (D.C. Cir. 1958). Neither case supports dismissal of Montana's Complaint.

Both of the cited cases involve rate-setting claims where rate levels were ultimately at issue. Montana's Complaint presents no such dispute. Montana does not challenge or seek a specific rate level in this proceeding. As BNSF concedes, the Complaint

challenges, among other things, BNSF's "gaming" of the URCS costing rules to produce "artificially inflated costs" resulting in "de facto deregulation." Reply at 18.

A decision on which BNSF relies heavily is Burlington Northern Railroad v. STB, 75 F.3<sup>rd</sup> 685 (D.C. Cir. 1996). That case is cited for the proposition that the Board cannot order a carrier to establish a rate to facilitate a rate case (Motion at 3 and 11-12).

The decision is inapposite. It does not involve an unreasonable practice challenge, instead "posing a question at the cusp of the contract and common carrier forms of service," which is not an issue here. See 75 F.3<sup>rd</sup> at 687. Specifically, the issue before the court was not whether the Board could order publication of a rate subject to rate (not practice) reasonableness challenge, but when it could do so. The Board obviously has the power to order rates published under 49 U.S.C. § 11101(b) and (d).

As the court explained, the question presented was:

[W]hether the Commission has statutory authority to impose upon a rail carrier a current obligation to file a tariff specifying a rate for traffic – such as WTU's as of the date of the August decision – that would not be ready to move until months or years down the road.

75 F.3<sup>rd</sup> at 692, emphasis in original.

The decision therefore does not stand for the proposition that the Board is powerless to consider whether features other than rate levels in existing tariffs constitute unreasonable practices, or to order relief from unreasonable practices involving tariffs.

There are ICC and appellate court decisions that, unlike the foregoing case, do involve issues analogous to those raised by Montana's complaint.<sup>3</sup> *See, e.g.*, the "Radio-

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<sup>3</sup> It should be noted, however, that the former Interstate Commerce Act contained a provision, former 49 U.S.C. § 10707a(h), which prohibited the use of the ICC's unreasonable practice jurisdiction to limit otherwise allowed rate levels. That provision was eliminated in the ICCTA, and the current statute contains no similar prohibition.

active Materials” cases, including Radioactive Materials, Special Train Service, Nationwide, 359 ICC 70 (1978); U.S. Energy Research and Development Administration v. Akron C. & Y. R. Co., et al., 359 ICC 639 (1978), aff’d sub nom. Akron, C. & Y. R. Co. v. ICC, 611 F.2d 1162 (6th Cir. 1979), cert. denied, 449 U.S. 830 (1980); and Trainload Rates on Radioactive Materials, 362 ICC 756 (1980), aff’d sub nom. Consolidated Rail Corp. v. ICC, 646 F.2d 642 (D.C. Cir. 1981), cert. denied, 454 U.S. 1047 (1981).

The first of these cases involved the ICC’s rejection of the railroads’ practice of “flagging out”, or eliminating from their tariffs, any rates for the transportation of radioactive materials. The railroads would transport such materials only in contracts which limited rail carrier liability. The ICC Administrative Law Judge’s initial decision found this refusal to provide rail service to be an unreasonable practice in violation of the Act, and noted (359 ICC at 92):

Neither party has the right to impose a wasteful or expensive service for which the consumer must ultimately pay. The interest of the public is to be considered as well as that of shippers and carriers. The Commission has also recognized that wasteful transportation requirements violate the requirement of reasonableness imposed by the act.

The Sixth Circuit rejected the railroads’ challenges, holding that “the Commission had the statutory authority to order the eastern railroads to publish tariffs for the rail transportation of spent nuclear fuel and low-level reactor wastes.” That is, the court affirmed a power in the ICC that BNSF now argues the STB does not have.

The last of the Radioactive Materials cases cited above confirms and clarifies the point. After the railroads learned that they could not simply refuse to transport radioac-

tive materials, they came up with an alternative plan, under which they would publish tariffs on spent nuclear fuel requiring the use of "special trains."<sup>4</sup>

There, as here, the railroads argued that, under the Act, no regulatory remedy was available. They argued that the ICC could not use its unreasonable practice jurisdiction to order the publication of tariffs with the special train requirement removed.

The ICC rejected these arguments. See 362 ICC at 763:

[W]e are not prepared to allow respondents to require a service which is several times as costly as regular service without (any) commensurate safety benefits. Atchison, Topeka and Santa Fe R.R. Co. v. U.S., 232 US 199, 217 (1914); Oklahoma Grain via Wichita to Memphis, 248 ICC 767, 772 (1942). Thus, we (must) find that, based on the evidence at hand, the special train requirement is wasteful transportation and an unreasonable practice in violation of section 10701(a) of the Act.

The D.C. Circuit affirmed, rejecting the railroads' argument that "the Commission lacks authority to second-guess the railroads' 'rational judgment' on an 'operational' issue."

There was a later case in the Radioactive Materials line of cases, Union Pacific Railroad Co. v. ICC, 867 F.2d 646 (D.C. Cir. 1989), the only such case cited in BNSF's Motion. However, as BNSF states (Motion at 9), the court there reversed the Commission because it had improperly evaluated the level of rates as an unreasonable practice. The court also reversed the Commission's finding of market dominance for utility shipments of spent nuclear fuel, which were not expected to move by rail for many years, but remanded as to government shipments. Here, not only does Montana not challenge the

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<sup>4</sup> These were trains consisting of a single cask car with radioactive materials in casks approved as safe by the Nuclear Regulatory Commission and DOT, combined with empty buffer cars on either side of the cask cars. Though the railroads claimed to be concerned only about safety, the special train rates were found to produce R/VC percentages approximating 3000%.

BNSF rate levels, but BNSF maintained its per car rate levels when it imposed its 48-car limit in place of its formerly applicable 52-car and 52-110 car rates.<sup>5</sup> In any event, the court in Union Pacific concluded that the proper means of challenging the western railroads' actions was an ICC rate case. The BNSF practices challenged by Montana foreclose that option.

In some respects, the ICC went further in the Radioactive Materials cases than Montana plans to ask the Board to go. The Commission ordered the railroads to publish new rate levels on radioactive materials, and Montana merely seeks to challenge the reasonableness of shipment size limits in BNSF's existing grain rate tariffs. The fact that the courts approved the ICC's actions, including the agency's requirement that new rates be published for radioactive materials that eliminated service conditions found to be unreasonable practices, demonstrates that BNSF's legal argument is untenable.

BNSF's theory is premised on the incorrect assumption that an unreasonable practice cannot be a "prohibition" within the meaning of Section 10701(c). Dairyland refutes that assumption, and so do the Board's decisions served August 3, 2006 and January 25, 2007 in Ex Parte No. 661, Rail Fuel Surcharges. In its 2007 decision, the Board described a fuel surcharge as "a separately identified component of the total rate," slip op. at 1, and the Board concluded that the railroads' method of "computing rail fuel surcharges as a percentage of a base rate is an unreasonable practice." Thus, a claim of un-

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<sup>5</sup> As the Board noted recently, the court in Union Pacific also found that "the so-called 'practice' is manifested exclusively in the level of rates that customers are charged." See STB Docket No. 38302S, United States Department of Energy, et al. v. Baltimore & O. R. Co., decision served August 2, 2005 at 2. In this respect, Union Pacific is unlike the other Radioactive Materials cases, which also addressed whether railroad practices were wasteful and therefore not in the public interest. In this proceeding, Montana is not challenging the level of BNSF rates at all, let alone exclusively.

reasonable practices may be maintained with respect to the conditions under which rates are offered.<sup>6</sup>

BNSF refers to Burlington Northern Railroad Co. – Abandonment – in Daniels and Valley Counties, MT, 7 I.C.C. 2<sup>nd</sup> 308 (1990) as “[t]he case that most closely resembles this one.” Motion at 10. In the Daniels case, an administrative law judge had concluded that an underlying cause of the abandonment was the railroad’s failure to establish rates at a *competitive level*, which could have been used by shippers on the line to maintain or increase their traffic. This case has nothing to do with abandonment. The Board held that the abandonment standards in the statute and case law did not permit claims that shipments were foregone because of unreasonably high rates, or any consideration of unreasonable rate issues. 7 I.C.C. 2<sup>nd</sup> at 318.

Here again, BNSF seeks to shield an unreasonable practice based on limits on unreasonable rate remedies under the Act. Montana does not dispute that quantitative and qualitative market dominance must be shown in the course of challenging rate levels as unlawful under the Act, and that railroads are allowed to decide in the first instance what those levels will be, subject to possible examination by the Board.

However, in this proceeding, Montana challenges BNSF practices, not its wheat rate levels. Moreover, if the Board were to accept BNSF’s contention that challenges to practices involving tariffs must meet statutory prerequisites for STB rate cases, little would be left of the Board’s unreasonable practice jurisdiction.

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<sup>6</sup> The Board also routinely considers the reasonableness of collecting demurrage charges under its Section 10702 unreasonable practice jurisdiction. See, e.g., Docket No. NOR 42102, Railroad Salvage & Restoration, Inc. – Petition for Declaratory Order, decision served July 20, 2010 at 4.

**B. BNSF's Ripeness Arguments are Unavailing**

BNSF argues that the Complaint is not ripe for resolution because "Montana has not identified even one Montana shipper that has supposedly been foreclosed from challenging BNSF's 48-car rates." BNSF argues that Montana must "[identify] itself as a shipper that seeks to challenge the reasonableness of BNSF's 48-car rates" or identify a 52-car elevator in Montana that intends to do so. Motion at 13. Accordingly, argues BNSF, 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. Motion at 13-14.

The Complaint cannot be dismissed because Montana has failed to allege or demonstrate that it has been injured by BNSF's actions and therefore must produce an actual victim. Section 11701(b) contradicts BNSF's position. It provides that:

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

BNSF's actions are not just ripe, but are overripe for action. Montana will show that BNSF is utilizing its new-found zone of regulatory freedom arising from the manipulation of shipment sizes to artificially inflate URCS variable costs under the make-whole adjustment so as to immunize a series of rate increases from regulatory challenge. Montana's evidence will include examples of current R/VC percentages that are non-jurisdictional solely as a result of BNSF's shipment size limitation.

Moreover, what BNSF is doing – restructuring shipment sizes to take advantage of the URCS make-whole adjustment – is a practice which, if not curtailed by the Board, is capable of repetition by BNSF and other carriers. In a case relied upon by BNSF in its

Motion, the court held that where issues are “capable of repetition, yet evading review” there is a reviewable controversy. Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911); Burlington Northern Railroad Company v. STB, 75 F.3<sup>rd</sup> 685, supra. There should be little doubt that if BNSF’s move from 52-car and larger units to 48-car units – which Montana contends was done with the intent of reducing R/VC percentages without reducing rates or experiencing actual cost increases – provides ample opportunity for repetition of the same improper tactic by BNSF and other carriers.

BNSF argues that the State failed to identify one or more 52-car elevators that would have filed a rate case but for the 48-car limit, and questions whether such elevators are captive (Motion at 14 and 7, fn. 8). Montana is not obligated to identify prospective complainants at all, let alone in its Complaint in a proceeding that is not a rate case.

In any event, even if no rate cases are filed, Montana shippers will be less vulnerable in negotiations with BNSF if their recourse to regulatory protections is restored. If rate cases are filed, they should succeed or fail on their own merits, and not be foreclosed by BNSF gaming of URCS costing. However, for BNSF to suggest that it lacks market dominance in Montana, where it controls some 95% of rail shipments, is stunning. If BNSF lacks market power, why have reports by GAO and Christensen Associates, among others, found that rail rates on Montana wheat shipments are among the highest in the nation?<sup>7</sup>

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<sup>7</sup> Report GAO-07-94 at pp. 34-35; Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals that Might Enhance Competition (Christensen Report), Figure ES-3 and pages 11-22. Similar findings were developed in a Report prepared for the Montana Attorney General, available on the Attorney General’s website, and BNSF grain rates have continued to increase.

BNSF seizes on dicta in a November, 1991 decision in McCarty Farms in suggesting that the export wheat market in general is competitive.<sup>8</sup> Not mentioned by BNSF is that the ICC found reparations and interest totaling over \$16 million to be due for the period through July 1991. Moreover, the Commission cited, as authority for the point on which BNSF relies, Grain Car Supply – Conference of Interested Parties, 7 I.C.C. 2d 694 (1991). In that decision, the Commission found that “Montana grain shippers selling export grain through the Pacific Northwest are captive.” See 7 I.C.C. 2d at 723, n. 97. BNSF’s attempt to rely on a 1991 McCarty Farms decision to prove anything about conditions today is a red herring.

BNSF attempts to support its ripeness argument by attaching a press release by Montana Grain Growers Association, in which MGGA questioned whether BNSF might retaliate against the Complaint in this proceeding by eliminating 48-car rates.<sup>9</sup> It is not clear how this concern is relevant to the ripeness of the issues presented. However, the Board should be aware that Montana Farmers Union, which is as large as MGGA if not larger, has written a letter, attached, supporting the Complaint in this proceeding.

Just as the power to tax involves the power to destroy,<sup>10</sup> so BNSF’s power to increase rates significantly on otherwise captive customers with no recourse to STB remedies raises questions as to the viability of affected elevators. See Complaint, Paragraphs 26-29. Loss of those elevators, many of which were built at BNSF’s urging, could adversely affect not just elevator operators but also their customers, and local communities.

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<sup>8</sup> McCarty Farms, Inc., et al. v. Burlington Northern, Inc., ICC Docket No. 37809, decision served November 26, 1991, 1991 WL 246202 (I.C.C.).

<sup>9</sup> BNSF has a mediation/arbitration agreement with MGGA that reportedly permits some producers to challenge grain rates. As Montana understands that agreement, BNSF’s shipment size limits will also mean many producers who might formerly have sought mediation or arbitration can no longer do so.

<sup>10</sup> McCulloch v. Maryland, 17 U.S. 327, 431 (1819).

Also at issue is the efficiency of 52-car elevators being subjected to 48-car shipment limits. If mid-sized elevators close, more Montana wheat will have to be trucked longer distances to larger elevators. This may be BNSF's long-term goal, but it could subject the State to increased costs for highway maintenance and increased highway fuel consumption and air pollution from truck shipments between farms and shuttle elevators.<sup>11</sup>

BNSF cites, in support of its ripeness argument, cases that are distinguishable from this one. In Bessemer and Lake Erie,<sup>12</sup> the strike giving rise to concerns had been settled, and in National Bus Traffic Ass'n.,<sup>13</sup> the objectionable tariff change had not yet been filed. Here, BNSF's shift from 52-110-car rates to a 48-car limit is in effect, and that shift will be shown by the evidence to be filed to have reduced R/VC percentages from above 180% to below 180%.

For BNSF to contend that the Board should ignore Montana's complaint until such time as a grain shipper with non-jurisdictional rates attempts to challenge those rates makes no sense. BNSF's demand that rate cases must be brought by individual elevators would serve only its private interest, not the public interest, because the ability of small elevators to take on a major railroad using a stacked deck is limited. Even if an elevator were to sue and win, relief would presumably apply only to that elevator.

Here, the immediate issue is BNSF's stacking of the deck, to the detriment of numerous Montana citizens, businesses and interests. Such structural issues are best resolved in a proceeding like this one, challenging what BNSF has done as an unreasonable

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<sup>11</sup> Concerns of this type are not new, as shown by Comments filed by a group of parties, including Montana Governor Schweitzer, Montana Wheat & Barley Committee and Montana Grain Growers Association in Ex Parte No 665, Rail Transportation of Grain, on January 12, 2007.

<sup>12</sup> Bessemer and Lake Erie Railroad Co. – Petition for Declaratory Order – Interchange Facilities and Trackage Rights, ICC Docket No. 40220, 1990 WL 288377 (I.C.C.).

<sup>13</sup> National Bus Traffic Ass'n., Inc. – Petition for Declaratory Order – Cremated Human Remains, ICC Docket No. C-30141, 1989 WL 238239 (I.C.C.).

practice, rather than in piecemeal litigation by parties whose resources cannot begin to match BNSF's.

**IV. BNSF's MOTION TO HOLD THE CASE IN ABEYANCE  
MUST BE DENIED**

BNSF's arguments for this proceeding to be held in abeyance, like its ripeness arguments, amount to a request for more time during which it would be allowed to engage in practices Montana believes to be unreasonable and unlawful.

BNSF cites the Board's recent report to Congress expressing interest in initiating a proceeding to review URCS costing, including the make-whole adjustment implicated in this proceeding. However, there is no such proceeding at present, and that report expresses the view that the Board will need Congressional funding on the order of \$625,000 before it can initiate such a proceeding. Not only is the funding not available now, but once it becomes available, the Board anticipates a rulemaking timetable of approximately 2 years.

In short, if Congress were to provide an additional \$625,000 to the Board for an URCS update today, and the Board were to issue its Notice of Proposed Rulemaking on URCS tomorrow, the final rules would not be issued before the fall of 2012 (with appellate review likely). Assuming the funding is not forthcoming until next year's budget, and assuming that the Board is unable to issue an NPR immediately upon receipt of funding, it could be 2013 or 2014 before the URCS rules are updated. If Congressional gridlock or deficit reduction efforts continue, the funding might not be provided for years.

It is not hard to understand why BNSF would want to be able to engage in gaming of the current rules for several more years, free from any challenge or STB scrutiny. Indeed, if the URCS update proceeding leaves any questions raised by Montana's Com-

plaint unanswered, Montana might still need to challenge BNSF practices in order to obtain relief from unlawful conduct by the railroad. Corrective action would then be delayed even longer.

BNSF argues that waiting is appropriate because of the possibility that 52-car trains should be treated, for URCS costing purposes, like trains of less than 50 cars (i.e., with a make-whole adjustment added), rather than like trains of 50 cars or more, which is the line of demarcation for application of the make-whole adjustment in the Board's current rules. Motion at 19.

The problem with this argument is that Montana believes, and intends to show, that BNSF adopted its 48-car limit in order to exploit the effect on R/VCs for its grain rates of the make-whole adjustment. This is gaming as alleged in Montana's Complaint.

No sound legal or policy rationale exists for allowing BNSF to continue to manipulate the Board's URCS costing rules to deregulate its own rates, and position itself for rate increases, for several more years.<sup>14</sup> Such an outcome would deprive Montana of the benefit of the application of URCS costing that is consistent with the 50-car or more cut-off for the make-whole adjustment adopted in the applicable rules.

It would also encourage railroads to engage in other forms of gaming. When called to account, they could always argue that Board should initiate a rulemaking proceeding to consider whether the railroad's manipulation is sound, and allow the manipulation to continue in the meantime. BNSF published 52-110 car rates for almost 30 years and offers no innocent rationale for the change it adopted in 2009.

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<sup>14</sup> The ICC decisions cited by BNSF (Motion at 19-20, n. 17) were not issued in circumstances remotely resembling the situation Montana faces.

Until the URCS rules are modified in the proceeding the Board plans to initiate, the current rules are binding on railroads, shippers and the Board. E.g., Service v. Dulles, 354 U.S. 363 (1957). Those rules must be observed without evasive maneuvers of the kind adopted by BNSF. BNSF is, of course, free to argue in the URCS modernization proceeding for its preferred application of the make-whole adjustment, under which more shipments from mid-sized elevators would be assigned higher costs. Montana is equally free to argue against such a change.

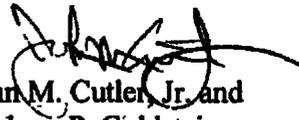
However, what is not permissible is for BNSF to assume, today, that shipments from mid-sized elevators should all be subject to the make-whole adjustment, with many such shipments thereby rendered non-jurisdictional, and to adopt a unilateral shipment size limit designed to effectuate that outcome.

BNSF is clearly attempting to do indirectly what it could not lawfully do directly. The Board not only can but should use its unreasonable practice jurisdiction to take corrective action. At a minimum, it should not deprive Montana of the right to be heard on these issues based on BNSF's Motion to Dismiss or Hold in Abeyance.

**V. CONCLUSION**

The STB's unreasonable practice jurisdiction can and should be invoked to prevent railroads from attempting to use or create loopholes to avoid being called to account for abuses of market power. For the forgoing reasons, the Board should deny BNSF's Motion and should adopt an expedited procedural schedule in this proceeding.

Respectfully submitted,



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Dated: September 13, 2010

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 13<sup>th</sup> day of September, 2010, caused copies of the foregoing document to be served by electronic transmission and by messenger delivery on counsel for Defendant as follows:

Samuel M. Sipe, Jr.  
Linda S. Stein  
Steptoe & Johnson, LLP  
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Washington, DC 20036

  
\_\_\_\_\_  
John M. Cutler, Jr.

S:\mcd\Reply of State of Montana



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PO BOX 2447  
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406-452-6406

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.

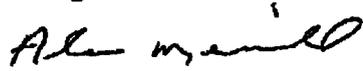
The introduction of the 48-car shipments coupled with the ever increasing rate spread between 48 car and shuttle (110 car) shipments is putting great economic pressure on the less-than-shuttle loader's ability to compete with shuttle loading facilities favored by the BNSF. These rate spreads between 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 that reads "Alan Merrill".

Alan Merrill  
President