UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD
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ORAL ARGUMENT

IN THE MATTER OF: :

STATE OF MONTANA :

v. :

Docket No. NOR 42124

BNSF RAILWAY COMPANY :

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Tuesday,
November 30, 2010

Surface Transportation Board
Suite 120
395 E Street, S.W.
Washington, D.C.

The above-entitled matter came on for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

DANIEL R. ELLIOT Chairman
FRANCIS P. MULVEY Vice Chairman
CHARLES D. NOTTINGHAM Commissioner

Neal R. Gross & Co., Inc.
202-234-4433
APPEARANCES:

On Behalf of the State of Montana:

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On Behalf of BNSF Railway:

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CHAIRMAN ELLIOT: Good morning, everyone, welcome. Today we'll hear our oral arguments on the Motion to Dismiss filed by BNSF Railway Company in this case, State of Montana vs. BNSF Railway Company, Docket Number 42124.

In an effort to move things along, the Board members will not be making opening remarks this morning, but I wanted to cover a few procedural matters before we begin.

We asked each party to make a short statement of its argument, but counsel should be prepared to answer questions from the Board at any time during your allotted time.

I assure you that we have read all your pleadings, and there's no reason to repeat every argument.

We have filing time allotments for counsel. As a party filing the Motion to Dismiss, BNSF has been allotted a total of 20
minutes, with two counsel arguing jointly.

BNSF has requested 17 minutes on
opening and has asked to reserve three minutes
for rebuttal.

If you wish to make a change to
reserve rebuttal time, please advise us when
you begin your opening presentation.

The State of Montana has been
allotted a total of 20 minutes and has also
requested to have two counsel argue jointly.

Any party making a Power Point
presentation or using similar hard copy aids
using materials previously placed in the
record should have provided those materials
and hard copy in 8 1/2 by 11 size to opposing
counsel and the Board. We'll have any pages
used today in such presentations bound into
the transcript of the proceeding.

Speakers, please note that the
timing lights are in front of me. You will
see a yellow light when you have one minute
remaining, a red light when your time is
expired. The yellow one-minute light will be accompanied by a single chime, and the red light signifying that your time has expired will be accompanied by two chimes.

Please keep to the time you've been allotted. When you see the red light and hear the double chime, please finish your thought and take a seat.

In addition, just a reminder to everyone to please turn off your cell phones.

We will now proceed. Counsel for BNSF, please step up to the podium, introduce yourselves, indicate if you wish to change any time for rebuttal, and then begin.

MR. WEICHER: Good morning. Thank you, Mr. Chairman, Vice Chairman, and Commissioner.

My name is Richard Weicher from BNSF Railway. With me in sharing this opening time is Sam Sipe from Steptoe and Johnson.

I will initially address the general nature of our proceeding and our
Montana grain rates our position followed by Mr. Sipe on several legal issues.

Montana grain is a critical element of BNSF's agricultural product for business. We work closely with our shippers and customers both for export and domestic purposes to promote the most efficient practices in moving grain at all levels of the supply chain.

This is a critical joint working effort from our standpoint working with producers.

We have normally dialogued and worked with these customers including a recent reduction in 48 car rates going back into the 1980s when BNSF first established a tiered grain rate structure that originally included the lowest rates on 52-car blocks. But eventually with the advent of larger, more efficient elevators, we introduced the shuttle train concept, which included currently 110-car shuttle trains, 48-car blocks, 26-car
blocks, and rates on single cars.

We believe that the right to
determine - the right to determine the rate
levels and the varying car load blocks is
something which is granted to BNSF Railway by
statute.

We set the rates and determine the
break points based on our perception of market
demand and with the goal of earning a
sufficient return on our investment to
maintain the viability of our long-term
Montana grain operations as part of our
overall network.

The State of Montana's complaint in
this case challenging our decision to set
rates applicable to movements in 48-car lots
in lieu of 52-car lots is at odds with that
statutory rate-setting prerogative and is
counterproductive.

Mr. Sipe will explain our position
regarding several of the legal deficiencies in
Montana's unreasonable practice planning which
is the basis of this Motion to Dismiss.

VICE CHAIRMAN MULVEY: Is it your - BNSF's view that it would be just as reasonable if you chose to charge single-car rates for every car and offer no multi-car rates at all? Would that be your prerogative if you chose to do so?

MR. WEICHER: It would be our prerogative to set the rates. This agency's prerogative upon complaint is to determine if those were reasonable, whatever the rates were that we published.

VICE CHAIRMAN MULVEY: So you're saying there's no obligation to offer a 48-car rate.

MR. WEICHER: No obligation to offer a 48-car rate.

CHAIRMAN ELLIOTT: Can you tell me, and I'm just following up on that. I understand your point that it's your prerogative to make these changes under the statute, but can you tell me your reasoning
behind changing from 52 to 48. My understanding is that 52 was encouraged for quite awhile at these various elevators, and people built their facilities for the 52 and now they've been asked to use a 48-car rate. Can you tell me exactly why you made that change?

MR. WEICHER: We changed as part of the evolution in our structure. We also changed 26s to 24. We have the 100-car shuttle rates as part of our view of what approached the market best and there's no question about this, it also did fit in with the regulatory scheme that this Board established with URCS. We're not disputing that there is a difference between the way the Board evaluates just as we have the right to set a rate under 180 percent to make it presumptively reasonable, and under the Board's standards. That was part of this process a year and half, two years ago, when they were changed.
CHAIRMAN ELLIOT: So the URCS process itself, did that go into your thinking?

MR. WEICHER: It was part of the thinking and the rationale in the way the structure was organized.

CHAIRMAN ELLIOT: And then you also said it was a changing in your structure. I'm not quite following what you meant by that.

MR. WEICHER: We also changed 26s to 24s.

CHAIRMAN ELLIOT: Okay, so you changed it more to fit with the 48?

MR. WEICHER: Yes, I'm sorry.

CHAIRMAN ELLIOT: I'm still not quite hearing it. I just want to make sure I understand. What you're saying is the 52 to 48 was driven by the URCS and you decided to change the structure to and 24.

MR. WEICHER: 26 to 24.

CHAIRMAN ELLIOT: Right, so you've got these two changes. That changes your
whole structure. Was it all driven by URCS or was there something else out there?

MR. WEICHER: It was driven by an overall marketing decision. I can't say it was all driven by URCS.

CHAIRMAN ELLIOT: And what was the marketing basis for that?

MR. WEICHER: The way our Agricultural Department thought they would best approach the market and what would be good offerings, but we're certainly not denying that the URCS rationale was part of it. It was clearly a part of driving in terms of where these rates would be offered.

VICE CHAIRMAN MULVEY: You can use the word profit maximization. I mean that's basically what we're trying to do is to maximize profit which is what businesses are supposed to do. It's not a dirty word.

MR. WEICHER: And to protect from under regulatory challenges. There's nothing wrong with that. We could publish every rate
on the system at 250 percent, 150 percent, 180 percent, wherever it was under the rules that this Board sets, and we believe that's something we're supposed to do to try incent both movements in the free market.

CHAIRMAN ELLIOT: So hypothetically if the Board came out some kind of URCS order saying that even if you have a 48-car rate and then you throw in the four ones, if they all come from the same place, there's 52 cars that all come from the same elevator, 48 and four ones, would you still be doing that?

MR. WEICHER: Cars can be shipped that way, and this Board clearly has jurisdiction over the reasonableness of the 48-car rate and every single-car rate that is shipped on our railroad as well as 110-car shuttles and the 24-car units. That's quite clear, but from our standpoint, the Board's jurisdiction is over the reasonableness of the rates we publish, not what decisions we make on what rates to publish, what packages, what
volume discounts, how we structure those we think is within our statutory prerogative under the statute.

CHAIRMAN ELLIOT: I understand that. I'm just saying, would you still have this structure if the Board decided that we're still going to treat 52 as 52, so if we make any adjustments in URCS, it's still to be treated as 52 even if it's 48 and four ones?

MR. WEICHER: I really don't know the answer to that, because if the Board has an URCS proceeding which is announced several times, and it changes things such as the make-whole adjustment or the way URCS is done in any respect, we would review in any given area what made sense. We might not change anything. We might change something. It would depend what came out of that.

We take the rules that this agency promulgates as given in those areas. There is - to be very clear, we did nothing here to promote, unpromote, this URCS structure, this
make-whole. I testified here myself last February or March, and we said we're quite open if the review works.

In many areas, how intermodal is done, how these kind of adjustments are done, we're not against that, but those are the rules that this Agency has set, and therefore, if they changed, we could well adapt.

In addition, just as there was a recent 48-car reduction which had nothing to do with this proceeding, we could change things because of the market or the technology in elevators or the structure of elevators.

VICE CHAIRMAN MULVEY: This is not a rate case though. No one is challenging the rates in this case, but the switch from a 52 to a 48 plus four, one would presume would probably have some change in the rates. Have the rates to Montana grain shippers gone up as a result of the change from the 48 to the 52 to the 48 plus four?

MR. WEICHER: To the best of my
knowledge rates on 48s went down. I don't
know the comparison, Vice Chairman, the
precise one that you're doing. I can't do
that in my head.

VICE CHAIRMAN MULVEY: This is a
situation where it's not a rate case, it's a
practice case, and Montana is arguing that the
practice of encouraging all the elevator
operators to build up to handle 52 cars, and
then turning around and saying we're only
going to give you a 48-car rate when you were
offering a 52-car rate is an unfair practice.

Given the circumstances of this
case, can you understand where Montana might
be coming from? They're encouraged to do one
thing. They make the investment, and then the
rug is pulled out from under them by not
having the rate that was in place.

MR. WEICHER: Vice Chairman, no
shipper - it's interesting. We respect the
State of Montana, but we don't have a
complaint here against either the 48 or the
singles or the 24s or the 110s. It's not clear who Montana represents other than in some broad political spectrum. Of course it's the State of Montana, but we don't have a single complaint from a shipper.

We recently established our ADR process last year, so that's a matter or public record. Nobody's challenged any of these rate - this rate change and so forth.

Someone can always file a complaint if the charge of 48 plus four or the - 24 is 110 is too high, but we have the rate-setting prerogative, and that's perfectly legitimate.

I don't want to consume all of our time, but I'll be happy to turn it over to Mr. Sipe.

COMMISSIONER NOTTINGHAM: If I could just follow because I haven't had a chance to question you yet, and I'd like to, just for the benefit of our record here and for those who are observing this hearing, you might not be full-time practitioners expert in
the ways of URCS and the make-whole adjustment.

You've already said, and thank you for your forthrightness, that the URCS process and how it might be possibly used in the future hypothetical rate case and the make-whole adjustment overall considerations that went into the - you said not the only consideration, but they were part of the package of considerations that went into this change from the 52-car block to the 48.

Could you just walk us through what benefits would - you believe would derive to a railroad under the make-whole adjustment by keeping the car blocks below 50.

MR. WEICHER: Briefly, and I do not purport to be an expert in this and can be stand corrected by anyone in the room, but the way URCS works, the make-whole adjustment takes some general costs and puts them back in certain categories. There is a break point at 50 cars, I believe, in which general
unallocated costs - general costs left in the waybill sample are added to lots under 50 including single car lots and under 50 cars, so that when you look at a chart of the way URCS works, the cost levels and thereby the result - the cost levels go up and the resulting revenue-to-cost ratios go down. I hope I did that right.

That is a break point established by this Board years ago. I don't know precisely what studies it's on, but with all due respect, this Agency did that. Not us.

COMMISSIONER NOTTINGHAM: The general idea is if a railroad quotes a rate for less than 50 cars under our long-standing URCS process, the railroad would get the benefit of being able to charge a higher rate than a block of over 50 cars.

MR. WEICHER: The benefit is -

COMMISSIONER NOTTINGHAM: If it were challenged in the future rate.

MR. WEICHER: Yes, we believe that
the market decides what we can charge and what moves the grain, and we want the grain to move, but the break point results in a lower revenue-to-cost ratio under 50 cars because of the way URCS allocates costs.

I think I got it right that time - as opposed to the general allocation above 50 and 100 cars which will have a different RVC ratio because of lesser costs, less costs.

COMMISSIONER NOTTINGHAM: Thank you.

MR. WEICHER: Sorry.

COMMISSIONER NOTTINGHAM: Help me understand. What goes into - I mean it sounds to me, I've had the privilege of being able to visit Montana multiple times meeting with growers and producers and railroad folks and all kinds of folks.

My understanding from those visits and from past - the past proceeding we actually had on the grain market several years ago is that this 52-car rate and block, as the
Vice Chairman pointed out, and the Chairman as well, was a concept promoted pretty strongly by the BNSF Railroad, and it was somewhat controversial initially, less so perhaps in later years, but certainly substantial investments were made. So I've got to believe that the switch to 48 cars was not just an overnight decision by a summer intern law clerk at the railroad, that he gave some serious thought to this and it took some resources to communicate out to all of your customers that there is now no such thing as a 52-car rate, but there was a 48-car rate.

What I'm getting at is to walk you through kind of the time and thought and investment that goes into making that kind of change, and I'd like to get into a little discussion wondering what the benefits are. Because it seems like the only real specific reason you've given is the very reason that Montana has cited in their brief: that this was an effort to "game" the URCS costing model.
which is probably not against the law.

We have parties that game things all the time, but it's interesting to me because we do have authority to inquire into the business practices of the railroads, and we may be able to help you and help everyone as a result of this proceeding better understand how we would actually apply such a make-whole adjustment, but tell me if you could just respond to some of my questions.

MR. WEICHER: Well, briefly, the 52 to 48-car adjustment is more in the nature of a fine-tuning or evolution of a process. The most controversial thing over the prior years to my recollection is really the whole promotion of shuttles, which our company has been in that territory pioneering on, pushing, encouraging, working with shippers to site shuttle elevators.

The most controversial in some areas we've been in forums both politically and regulatory where the criticism is between
110-car trains and the single-car trains and
what does this do the country elevator.

This is somewhere in between. This
is an evolutionary fine-tuning that our
marketing department did based on its own
view.

Gaming is an unfair pejorative term
in the context of you can also view it as
being respectful of the Board's jurisdiction
and trying to fine tune to deal with the
jurisdiction to make rates presumptively
reasonable where we can using the very rules
the Board has put forward, but this whole
process has evolved over time and is regularly
adjusted by our Marketing Department to work
with what fits -

COMMISSIONER NOTTINGHAM: Mr.
Weicher, is it fair to say, though, that the
trend over many years on behalf of the BNSF
and other railroads is -- especially in the
agricultural sector -- has been to encourage
larger unit trains? 26's, 52's, 100's,
doesn't this go kind of against the general
grain, the general flow which again may not be
an illegality or anything. I'm just curious.

MR. WEICHER: It's within a
structure because we've also gone all the way
up to 110 now, so I mean we still have single
cars and we still have the 24s and the 48s.

There is a tuning within the
structure, but we probably do promote bigger
and bigger shuttle regional elevators that can
handle large capacities.

VICE CHAIRMAN MULVEY: Does this
change - from 52 to 48, is this across the
nation? Is this also true in the Dakotas and
Washington State and other places where you
carry grain, Minnesota for example?

MR. WEICHER: It was a general
regional change, but I'm not sure I know the
answer to that, just how far it went.

I will be happy to address more of
it. I'll give Mr. Sipe an opportunity to
address a couple of legal issues if that's acceptable.
CHAIRMAN ELLIOT: Sure. You have
ten seconds.

MR. SIPE: Good morning. I think
I will abandon my planned remarks.

I think the questions really put
the issues in sharp focus. They're good
questions, and Mr. Weicher answered them well.

I want to answer them with
particular reference to our legal theory here,
and our legal theory is that where you have a
statutory provision that says the carrier has
the right to establish any rate with certain
exceptions, you have to give that statutory
provision very substantial weight.

The exceptions are unless the rate
is unreasonably high. Everybody agrees that's
not this case here right now. It may be
lurking in the background somewhere, but it's
not before you to decide right now.

The other exception is unless the
rate-setting violates some other provision of
this part, and Montana says, well, we've said
it's unreasonable, therefore, arguably it violates another provision of this part. It can't be the case when you think about this analytically. It can't be the case that an empty vessel concept like unreasonableness trumps a specific statutory provision.

If you pour content into that empty vessel of unreasonableness, if you show how the establishment of this rate violates another provision or a policy of ICCTA, then you've stated a claim for unreasonableness, but Montana hasn't done that here. They've simply used labels. They take the word unreasonable. They say that states a claim. It can't be the case.

Suppose we change the color of the locomotives that we use to haul Montana grain. Montana comes roaring into the STB and says, outrageous. Those locomotives have been orange ever since BNSF merged. We want them back the way they used to be. Have they
stated a claim for violation of ICCTA? Does that violate a policy or a substantive provision of ICTA?

No, and I think Vice Chairman Mulvey's first question regarding the single-car rates and whether or not a decision by BNSF to assess nothing but single car rates could be challenged.

That points a finger at our legal issue. A challenge to nothing - a regime of nothing but single-car rates would be informed by the statutory common carrier obligation.

There have been cases that have addressed the need to establish unit train rates, and they focus on the common carrier obligation, another provision of the statute.

Here there is no allegation that we've done anything that violates the statute.

COMMISSIONER NOTTINGHAM: Mr. Sipe, if I could ask, couldn't your client, the BNSF, or Montana conversely have - if there was some question or concern about how this
Board would interpret the make-whole adjustment. Let's say a farmer wants to move 52 or 62 or 79 cars. It's harvest time. That's the number that the farmer has to load up, and they ask for a tariff rate for that number, isn't the railroad obligated to provide service and move that and charge a rate that relates to that movement, whatever that movement size is?

MR. SIPE: The railroad is not obligated to establish any rate that the shipper asks for. The railroad is obligated to provide service on reasonable request.

COMMISSIONER NOTTINGHAM: Right, but the railroad can't say "We don't move 77 cars ever. The only thing we're going to move for you is 48. Take it or leave it."

MR. SIPE: Well, the railroad can say you can tender cars in blocks of a 48 and a 26 and we can all do the math. Whatever you need to get to 77. There's a way of tendering traffic and waybilling it that it's going to
get it to move.

COMMISSIONER NOTTINGHAM: But on this make-whole adjustment and this assertion that there was some strategic -- I'll use a kinder word so strategic -- thinking about possible future rate cases that drove the decision or partially drove the decision to go from a 52-car block to a 48.

If there was confusion or concern about - or questions about how this Board would handle such a scenario, aren't there other ways to bring that question to the Board so there's a declaratory order petition rather than have to go to the trouble of an unreasonable practice?

MR. SIPE: There are other ways, Commissioner Nottingham, and we're not the ones who filed the case here. I mean we think this case frankly, I don't want to be harsh or insensitive, but we think this case is waste of your time.

There are a lot of important
matters pending before this Board. The issue of whether BNSF has the right to establish its own grain rate structure is simply not that big a deal.

If any of these shippers whom the State of Montana purports to be acting on behalf in some very loose, vague way, if any of these shippers has a problem. If any of them getting 48s now think the rates are too high, fine. File a complaint and tell the Board exactly what your problem is.

My problem is I'm paying a rate that's unreasonably high and your costing rules are acting as an arbitrary barrier to my getting jurisdiction over those rates, I want you to change that right now, STB. That would be a direct way to pursue the relief that the State of Montana claims to be interested in here.

Find a shipper who really has some skin in the game. We don't have any of those here. Find a shipper with a skin in the game
and ask him to bring a complaint and ask the Board for the relief they really want which is some adjustment to URCS.

Don't go saying BNSF is gaming the regulatory system because we do exactly what the statute says we can do. Suppose we with all calculation go into a room, we shut the door, we pull the shades. We say, okay, guys, we're going to set a rate that yields and RVC of 178 percent and that way the Board won't have jurisdiction over our rates. Gaming, manipulation, no. It's exactly what the regulatory landscape provides, and this Commission, this Board and it's predecessor have never said that you can't do that.

The final thing I'll say on this score is I commend for your close scrutiny of the 1991 decision by the ICC in the abandonment case Scobey/Opheim. It's really quite close in many respects to what we have, although obviously it's an abandonment case, but in effect, what the complaining Montana
grain shippers were saying in that case when they opposed abandonment is BNSF is gaming the statutory scheme that allows them to abandon an unprofitable line.

If they just maintained the rates they previously had in effect, the line would be profitable and would remain in service.

The ALJ bought their story, and the Commission said no. What they're asking you to do here is have this Board second guess BNSF's rate-making, and we can't do that by statute.

COMMISSIONER NOTTINGHAM: Mr. Sipe, don't you agree that this Board, though, does have the option or the ability to interpret how we're going to apply this so-called make-whole adjustment?

MR. SIPE: Absolutely.

COMMISSIONER NOTTINGHAM: And do we have to wait until a multi-year rule-making proceeding is concluded to do that or can we do that in a proceeding such as the one before
us?

MR. SIPE: What I respectfully suggest is that you dismiss this ill-founded complaint, and if you want to advise Montana that if they can find a complaining shipper who is willing to come forward and challenge the make-whole adjustment in the context of saying my rate is unreasonably high, do that. That's fine.

VICE CHAIRMAN MULVEY: BNSF is saying that the Board should only be concerned with the published rate, but if a shipper tenders 52 cars instead of 48, wouldn't we as the Board look at the total transportation rate which could be the 48 cars plus the four singles, and wouldn't we plug that 52-car rate into URCS, URCS Phase 3, where we look at the shipping characteristics if it's a 52-car shipment. We wouldn't look at it as a 48 plus four, we would look at it as a 52 car shipment, correct?

MR. SIPE: I think actually what
you would look at is what's waybilled and
probably what would be waybilled would be a
tender of 48 and four singles.

VICE CHAIRMAN MULVEY: But in -
running it through URCS -

MR. SIPE: That's how you'd get to
URCS in this case. You'd apply to the 48 cars
waybilled as one lot. You'd apply whatever
cost principles apply to a 48-car lot.

VICE CHAIRMAN MULVEY: Well the
division in URCS is 50 cars, so it's if
anything of 52, wouldn't you want to use the
50-car or larger rate as opposed to the 48-car
smaller unit train rate, multiple car rate?

MR. SIPE: This question points to
what a lot of people seem to perceive as a
kind of arbitrary and inequitable breakpoint
in the URCS cost allocation structure.

VICE CHAIRMAN MULVEY: We really
can't get into URCS - it's an ongoing Board
study right now, so exactly how it's going to
turn out depends upon a lot of things, but
right now that's the way it is structured.

MR. SIPE: I would just point out to you, Vice Chairman Mulvey, that one's perception of the equities of the way URCS is currently structured depends on what side of the line you're standing on.

Montana says that we have "artificially" increased the costs and evaded jurisdiction by establishing 48s, but it's equally plausible that BNSF could look at the 52-car costs under URCS and say this doesn't make sense that our costs for 52s should be very, very close to what they are for 110s. That doesn't make sense to us. 52s are not as efficient as 110s, and yet they're being treated substantially the same under URCS if they're 52s.

So we say we've had enough of this. We've had enough of these consultants driving around Montana telling the shippers, boy, do you guys realize you're paying RVCs of 225 percent. Fine.
VICE CHAIRMAN MULVEY: Forty-eight
cars are close to say 60, another break point.
And 48 is pretty far from five or six as well
as 52 is from 110.

I mean it's obviously the issue of
what the break points are. It's a continuous
function or what have you, but, as I said,
we're not going to -

MR. SIPE: Excuse me for
interrupting. If you look as those costs,
what you'll find out is the costs, the cost
differential between the 52s and the 110s is
far smaller than other cost differentials on
the URCS continuum. Thank you.

CHAIRMAN ELLIOT: Thank you, Mr.
Sipe. Why don't we let the State of Montana
have a chance here? Mr. Cutler, you have 20
minutes.

MR. CUTLER: Thank you, Mr.
Chairman. I'm John Cutler, one of the
attorneys for the State of Montana. My
partner, Andy Goldstein, will address the
grain marketing aspects of this issue, as well as the BNSF request to hold this case in abeyance.

I think, as a factual matter, the BNSF presentation has largely made our case. However, I have to take issue with Mr. Sipe's legal analysis. In fact, he ignores two of the most important provisions of the statute in this proceeding.

If you look at Page 1 of our complaint, you'll find that this case has been brought under Section 10702 of the Act. That's the section of the statute that prohibits unreasonable railroad practices.

Now if you read the BNSF Motion to Dismiss, you won't find Section 10702 acknowledged at all. It's not there.

Jumping ahead a little bit in my argument to a point made by Commissioner Nottingham about essentially a ripeness issue and couldn't a shipper bring an action to contest this in the context of an actual
captive elevator.

Let me jump ahead to a second provision of the statute that's critical, and that was ignored by Mr. Sipe and by the BNSF Motion to Dismiss, and that's Section 11701(b).

They cite one sentence in that section that says that the Board has the power to dismiss complaints that don't raise an issue worth investigating.

Obviously we allege smoke, and we're hearing that we were correct to do so. There was an effort to take advantage of the URCS situation, but back to 11701(b).

Section 11701(b) says two other things: (1) you cannot dismiss a complaint for absence of direct damage to the complainant. Montana is a valid complainant here. It doesn't need a shipper.

Second, 11701(b) authorizes governmental agencies to file a complaint. We chose to file a complaint rather than a motion
for declaratory order precisely because we think this issue is very serious, and we wanted to put forward a case that the STB would have to address.

A Motion to Dismiss -- I mean a Motion for Declaratory Order -- is discretionary. Action on a complaint must go forward unless you decide the issue.

CHAIRMAN ELLIOT: Let me ask you a question, Mr. Cutler, along those lines. I understand where you're going with the ripeness and the standing, and we got into a lot of discussion, with both Mr. Sipe and Mr. Weicher, about the URCS and the make-whole adjustments, 52 versus 48. And what I'm wondering based on what I'm reading in your complaint and in your filings, are we here today if hypothetically the Board decides that if you bring 48 and four ones, we're going to treat it as 52 for the make-whole adjustment? Are we here today - are you going to still bring that complaint, if that's the
Board's decision on how it would treat URCS's make-whole adjustment?

MR. CUTLER: Let me give my other reasons for - first, two things. One, that same section 11701 that I cited before absolutely gives Montana the right as parens patriae to bring a rate complaint if it so chooses, but let me complete my discussion of why that is not - that makes no sense even aside from the 11701(b) prohibition against dismissal on that ground.

If you brought a case like that, what you would essentially have is a two-phase rate case. Phase 1 would be is it unreasonable for BNSF to impose a 48-car shipment size limit.

If you got past the Phase 1 which is this case and for which you don't need a shipper, only then would you address the rate case issues of the reasonableness of the rates freed from that restriction, but there's another factor here.
When you decide that a railroad has engaged in an unreasonable practice, typically the STB doesn't direct the railroad to do exactly what it chooses. Rather it says you must cease and desist from the unreasonable practice, which we have found to exist here.

That frees the railroad to respond to the Board finding in a number of ways. We can't note today exactly how BNSF would remedy a Board finding that its 48-car shipment size limitation is an unreasonable practice and must be ceased.

Now that means that we can't note today - for one thing - take for example the shipper complaint case that Commissioner Nottingham raised.

If a single shipper were brave enough to tackle this issue by himself, one of the things that BNSF might do is to fix the problem for that shipper, for example, by publishing a high 52-car rate applicable only to that elevator.
This would leave the broader issue of the unreasonable practice in the gaming unresolved for all the others shippers in Montana and North Dakota and so forth, who fix the same issue. The issue is on a broader basis here.

CHAIRMAN ELLIOT: I see what your point is. I'm not - I read the statute the same way you did. I'm not quibbling with you that way with respect to standing, but I really want to get to the crux of this case which is whether or not, you know, if it's 52, if it's 48, whatever type of rate they set for number of cars, but if we still treat it as 52 if it's 48 and four ones, that's really what I'm getting at. I just want to know if we're still here, if the Board comes out and decides that the make-whole adjustment, we're going to treat it as 52 no matter what.

MR. CUTLER: Mr. Chairman, that might have worked if - that might have worked in 2008 because at that point, BNSF had a 42
to 109-car rate.

Now it's just a 48-car rate. There
is no 52-car rate. There is no 48 to 109 -

CHAIRMAN ELLIOT: So you're not
disputing that you can do the 48 and the four
ones.

MR. CUTLER: That would be a
single-car rate and a 48-car rate case.

CHAIRMAN ELLIOT: Okay, so they do
the 48. They get four ones, and there's a
make-whole adjustment issue that comes up and
the Board decides we're going to stick with
52. You've got 52 cars there. It's 52, and
I guess my question still remains are we still
here?

MR. CUTLER: The problem there is
there is no rate to bring a rate case against.
There's no 52-car rate in the BNSF tariff.

You could say we're going to -

CHAIRMAN ELLIOT: This is a
hypothetical, so if we just answer the
hypothetical, whether or not, if there are 52
cars and we're going to treat it like 52 cars, if you're at an elevator and you send out 52 cars, no matter what, 48 and four ones, 26 and 26, and we decide that it's - we're going to treat the make-whole adjustment as 52, does that satisfy what you've been arguing in your complaint?

MR. CUTLER: I think so, because I think what you're saying - and let me flush this out. We have alleged that, for example, a shipper with no transportation alternatives who today - who in 2008 had a rate producing an RVC of 260 as a result of the 48-car shipment size limit all of a sudden saw his rate, RVC, drop to 160, and of course we're concerned not only about the inability to challenge the rate that we think is high but the exposure to increases, but if what you're telling me is that the Board could apply URCS in such a way as to recreate that 260 RVC for that captive shipper, then that's the relief that we're seeking.
What we're concerned about is the inability of shippers to challenge rates they think are too high and the exposure of shippers to further rate increases as a result of the gaming.

On the gaming point, let me say a couple of things. First -

COMMISSIONER NOTTINGHAM: Mr. Cutler, I'm sorry before we leave that train of thought and develop on the Chairman's excellent line of questioning, this Board of course, I doubt will ever get to an outcome just to reach some specific R/VC ratio. That's not what we do. We look at things like movements: what's the movement at issue? And what I would assume we would hear from Montana in a hypothetical rate case would be the movement at issue is 52 cars. We've got farmers who need to move 52 cars. The railroads decided to charge - bill that with a 48-car tariff plus four singles.

The railroad would argue that it's
a 48-car rate. The State would argue that it's a 52-car movement and de facto 52-car rate, and we'd have to address that as a board.

There I think there's an old military adage, sometimes you need to know when to be willing to lose the battle in order to win the war. You might lose on a lot of your highfalutin legal arguments today, but you could very well end up winning on what I see is the major issue before us, which is whether or not this Board would countenance the strategic gaming -- whatever the word you want to use, interpretation -- of the make-whole adjustment.

MR. CUTLER: Well I was in the military too, but I think - and one of the distinguishing features of this case - one of the ways that we differentiate this case from, for example, the Union Pacific decision on which BNSF relies, Union Pacific says that if the case only involves rate levels, then you
file a rate case. You don't file an
unreasonable practice case.

This case involves exactly the
efficiency issues that you have raised. If
you're set up to ship 52 cars, the efficient
way for the elevator to operate, we can leave
aside what's most efficient from BN's
perspective. It isn't necessarily the same as
the efficient - the maximum efficiency of an
elevator operation.

You would order a 52-car block of
cars and you would load to capacity, and
that's the way you would want to operate your
elevator.

Under the 48-car rule, we're
assuming that BN would also supply a bunch of
singles to go along with the 48s. We have no
way of knowing that that's the case. There
are car supply issues every harvest season,
and this efficiency issue is part of the
reason that we're challenging this, along with
the impact on recourse to the STB, so I think
that's a fair point, but I don't think it militates against going forward on the basis of Montana's complaint.

Some of the issues we're getting into here are issues that should be developed in the course of the proceeding.

COMMISSIONER NOTTINGHAM: Just to boil this down a little bit, do you agree that the railroad can do away with all unit-car type concept pricing and just do single car pricing just say for simplicity purposes? Our rate per car is X; and if you've got 60 cars to move, it's 60 times X. And then you bring the big case, if you had a rate case, you would say, "I tried to move 60 cars at 60 times X, and I think the rate's unreasonable."

MR. CUTLER: You would run into the same problem we've asserted here. It's a different version of that problem, and in fact, the problem doesn't go away if you change URCS. If the big point shifts, they still have the question of whether it's
unreasonable practice for railroads to use shipment size limits to force you from the right side of the break point to the wrong side of the breakpoint.

VICE CHAIRMAN MULVEY: Just to follow up on one thing you said, and that was the car supply issue. Someone suggested that part of the argument here or part of the problem here was that there was a car supply issue, that BN is no problem in terms of supplying 48 cars to these shippers, but the extra cars, the extra four or five cars, et cetera, there may be a car supply shortage. Is that your understanding, that part of the problem may be a car supply issue here?

MR. CUTLER: Vice Chairman Mulvey, we wondered if we would get that argument. We have not. However, that's the kind of thing that the proceeding is for.

VICE CHAIRMAN MULVEY: One more question: you're here representing the State of Montana, but Montana is not itself a
shipper, and you're representing shippers. We don't see a lot of the grain elevators from the state here with you supporting the State in this effort, and you mentioned they might not have the courage to do so. Do you want to elaborate on that. Are we hearing this story again about retaliation or what have you?

MR. CUTLER: A couple of things, first, even major corporations don't take on major railroads without a lot of careful thinking and a lot of concern.

You know the issue of utility coal shippers who face enormous rate increases upon expiration of their contracts. It's not the kind of the thing - and the same with major corporations in the agri-business area.

Here what we're talking about are smaller elevators, not shuttle elevators. Moreover, you have a letter attached to our reply to BNSF's Motion to Dismiss from the Montana Farmers Union. We do have support from - this is not something that was just
made up in the AG's Department of the Montana Department of Transportation. This reflects a concern about the vulnerability of some of the weaker elevators which are nevertheless important for Montana farmers because they're nearby, the cover crops other than wheat, barley, and so forth. They're sources of fertilizer and marketing and so forth use.

There are about four times as many of these midsized elevators in Montana as there are the shuttle elevators. The state needs them, and we're concerned about the ability of those elevators to survive, if recourse to the STB is taken away because of the shipment size. Thank you.

CHAIRMAN ELLIOT: Mr. Goldstein.

Thank you, Mr. Cutler.

MR. GOLDSTEIN: Thank you, Mr. Chairman, Mr. Vice Chairman and Commissioner.

I really hope to cover two issues as John said a moment ago, and the first is BN's purpose for making the 52-car adjustment
to 48 cars which you have been interested in, and the second is the question of whether this proceeding should be held in abeyance indefinitely, as BN requests, pending the outcome of a rulemaking that's not yet been instituted.

Before I get to that, I want to just correct one misstatement I think I heard Mr. Weicher, make which was that since the 48 cars were instituted, the rates have come down.

According to our calculations the rates have been increased three times, and only very recently was there a small reduction so that the net effect is that there has been a $376.00 per car increase in the 48-car rates since they were placed beyond the Board's jurisdiction through application of the make-whole adjustment.

Now BN really hasn't made any claim that it switched to the 48 cars because of marketing efficiencies. They said at one
point that 52 cars were their most efficient mode. Now they say shuttles are. Indeed, that's probably true, but of course where that leaves us is that 48 cars are not, so we cannot find an efficiency motive in what they've done.

Our research also discloses that the 48 cars did not come into existence in response to any discernable market demand.

We believe the evidence will show that given a choice between 48 and 52 cars shipments, the marketplace chose 52 cars, and it wasn't until after BN eliminated 52 cars that any significant use was made of 48 cars even during that three and four-month period when they had both types of rates in place.

The result of this of course is the variable cost associated with the 48-car shipments are substantially higher than those with the 50-car or larger shipments, and these variable cost differences can exceed $1,000.00 per car in many cases lowering the RVC ratios
below 180 percent.

We take the position, of course, that use of the make-whole adjustment in that manner is an unreasonable practice.

BN acknowledges that the crux of the complaint is misuse of the make-whole adjustment. The Board has indicated its intention to commence URCS' examination but no proceeding has been initiated, and as far as we can tell, Congress has not provided the funding the Board needs.

At best, that proceeding will take two years if things go well, but they never do, and so two years is an unrealistically short decisional expectation. If the proceeding takes longer than two years, it could be 2013 or later before this issue could be revived by Montana.

During that time, critical documents now available through discovery could be misplaced, or BNSF personnel whose depositions could be taken now might leave or
retire, making it much more difficult to present evidence behind BNSF's decision to impose its 48-car limit.

More importantly, BNSF would be free to impose several years worth of rate increases beyond the Board's jurisdiction.

In prior cases, the Board has refused to indefinite abeyance requests. In ex parte 587 in 2003, the Board refused to hold a cost of capital calculation for a given year in abeyance pending the outcome of a general review of cost of capital.

In ex parte 477, the Board was asked to hold a rulemaking in abeyance until a final adoption of the URCS system, but it refused saying this, despite the Commission's intent to issue shortly a notice of proposed rulemaking on the implementation of URCS and plans to issue final rules in the spring, the completion of the proceeding is not a certainty.

There could be delays in the
process where the rulemaking process could introduce new issues or indicate new problems.

Delaying this rulemaking in anticipation of URCS is speculative, and even if the Board, and this is perhaps the most important of all, even if the Board were to complete an URCS rulemaking and maintain the make-whole adjustment, the central issue raised in this complaint will not disappear.

Regardless of how the make-whole adjustment operates, the Board will have to decide whether railroads can impose shipment-sized limits designed only or primarily to increase URCS' variable costs thereby deregulating rates on shippers with no other transportation options.

Holding this case in abeyance pending an URCS rulemaking is wrapped in uncertainty would have adverse procedural and substantive effects and should not be pursued by the Board.

I'd like to then just address one
last subject which has to do with some of the
questions being asked about 48 cars plus four,
and I believe that BN's answer was how you
would treat would depend on the waybill.

Now I think we all realize that the
reason that railroads publish 48-car shipments
or 52 or 110 is because they want those 48
cars to stay together as a unit. They want to
be able to have them loaded at one time at one
place and delivered at one time and one place.

If you try to add single car onto
that, you have no telling when you're going to
get them. You order single cars and you get
them at the railroad's inference, and so what
happens now is that instead of having to call
a crew out to load a 48-car shipment, you now
have to call one out - or a 52-car, you now
have to call one out to load a 48-car and then
on four other occasions perhaps to load single
cars. It's a horribly inefficient
alternative, and the presumption should not be
made that just because four and 48 add up to
52, you will get 52 cars in a shipment at one

time from BN. Thank you.

CHAIRMAN ELLIOT: Thank you, Mr. Goldstein. Mr. Weicher, you have, and I

apologize I think I mispronounced your name

before. You have three minutes on rebuttal.

MR. WEICHER: We will be brief and

just respond to a couple of the points that

were made.

First, in response to Mr. Goldstein's assertion, we have neither

acknowledged nor in fact in any way misused

URCS, this Agency's URCS, just like the many

rules that are promulgated, we follow those

rules.

If there is a problem here, there

is a remedy, but it's not an unreasonable

practice case. There's a remedy to review

URCS, its application in individual rate case,

and I'm not going to go into this. You could

argue endlessly, but it should happen in that

rate case whether you do - how you count them
and what you do, but that's this Board's jurisdiction. We don't deny that jurisdiction.

There's no short shipment cap we're talking about here, no car supply issue. There's a simple - if they're unhappy with the rate, bring a rate case and you can address it or examine URCS.

We have the initiative by statute to decide what kind of discount lots we offer. That's what this is all about -- is discount lots and whether there's enough of a discount for a rate.

We could offer - a manufacturer can offer a five package of paper towels or a six or a three. You happen to have the jurisdiction to decide if the price for those discount lots are appropriate and reasonable under this statute, but with all due respect, you can't tell us to offer a four pack of paper towels instead of the five or a seven. That's up to us.
We aren't deciding or limiting anybody's ability to ship on our railroad as much or as little as they want and what they bill it under, and then you have the jurisdiction if that rate is unreasonable.

They keep talking about rate levels, and it is a rate issue. It's not a practice issue. That's the difference here in what we think is the basic statutory right. We have to set the rate, and they have the right to challenge it, and we're following the rules on URCS. We didn't make them. They weren't made for this at all. They came from this agency. Thank you.

CHAIRMAN ELLIOT: Thank you, Mr. Weicher.

COMMISSIONER NOTTINGHAM: Mr. Weicher, if I could just make sure I understand your last point there. You believe then that this agency -- just to add on the natural following thought, at least that occurs to me -- that your client is just
behaving reasonably in accordance with this agency's decisions and rulemaking and our URCS process and the make-whole adjustment.

Therefore, wouldn't it naturally lead to the conclusion that this agency then, if there is a problem, should clarify that issue or correct the situation?

MR. WEICHER: Yes, sir. It is the agency's jurisdiction to review the URCS cost proceeding. If the cliffs aren't right, the angles aren't right, I personally think the proper place to do that is an URCS proceeding. I would not deny in any way the Board's jurisdiction if a complaint were brought and these iterations we've been talking about the last half hour of seven plus three plus 42 plus 24 and how do you count it. I personally think that you would follow your rules and you'd count against the rate, but you've got the jurisdiction to do it in a case.

I don't think it's the right place to do it because it permeates. There are many
other parties besides the State of Montana has appeared before you in the URCS proceeding earlier this year who have an interest in these adjustments, and you start fiddling with this stuff, whether it's on intermodal or the make-whole adjustment or shuttle, whatever it is, the regression analysis, that is a system which has been established over many years.

We criticize aspects of it from the standpoint of we'd like to think positive criticism. It should be approved an updated, but that's a different issue than fiddling with it in one case.

Would I deny you have the jurisdiction to do that? Of course not.

COMMISSIONER NOTTINGHAM: Thank you.

CHAIRMAN ELLIOT: Thank you very much, Mr. Weicher. Thank you both parties for excellent arguments.

We'll take the matter under advisement, and the hearing of the Board is
now adjourned. Thanks.

(Whereupon, the above-entitled matter was concluded at 10:29 a.m.)
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Before: Surface Transportation Board

Date: 11-30-10

Place: Washington, DC

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