

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

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ORAL ARGUMENT

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 IN THE MATTER OF: :
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 STATE OF MONTANA :
 :
 v. : Docket No.
 : NOR 42124
 BNSF RAILWAY COMPANY :
 :
 -----X

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

APPEARANCES:

On Behalf of the State of Montana:

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P R O C E E D I N G S

9:30 a.m.

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

1 minutes, with two counsel arguing jointly.

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

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

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

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

19 Speakers, please note that the
20 timing lights are in front of me. You will
21 see a yellow light when you have one minute
22 remaining, a red light when your time is

1 expired. The yellow one-minute light will be
2 accompanied by a single chime, and the red
3 light signifying that your time has expired
4 will be accompanied by two chimes.

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

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

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

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

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

21 I will initially address the
22 general nature of our proceeding and our

1 Montana grain rates our position followed by
2 Mr. Sipe on several legal issues.

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

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

13 We have normally dialogued and
14 worked with these customers including a recent
15 reduction in 48 car rates going back into the
16 1980s when BNSF first established a tiered
17 grain rate structure that originally included
18 the lowest rates on 52-car blocks. But
19 eventually with the advent of larger, more
20 efficient elevators, we introduced the shuttle
21 train concept, which included currently 110-
22 car shuttle trains, 48-car blocks, 26-car

1 blocks, and rates on single cars.

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

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

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

20 Mr. Sipe will explain our position
21 regarding several of the legal deficiencies in
22 Montana's unreasonable practice planning which

1 is the basis of this Motion to Dismiss.

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

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

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

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

18 CHAIRMAN ELLIOTT: Can you tell me,
19 and I'm just following up on that. I
20 understand your point that it's your
21 prerogative to make these changes under the
22 statute, but can you tell me your reasoning

1 behind changing from 52 to 48. My
2 understanding is that 52 was encouraged for
3 quite awhile at these various elevators, and
4 people built their facilities for the 52 and
5 now they've been asked to use a 48-car rate.
6 Can you tell me exactly why you made that
7 change?

8 MR. WEICHER: We changed as part of
9 the evolution in our structure. We also
10 changed 26s to 24. We have the 100-car
11 shuttle rates as part of our view of what
12 approached the market best and there's no
13 question about this, it also did fit in with
14 the regulatory scheme that this Board
15 established with URCS. We're not disputing
16 that there is a difference between the way the
17 Board evaluates just as we have the right to
18 set a rate under 180 percent to make it
19 presumptively reasonable, and under the
20 Board's standards. That was part of this
21 process a year and half, two years ago, when
22 they were changed.

1 CHAIRMAN ELLIOT: So the URCS
2 process itself, did that go into your
3 thinking?

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

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

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

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

14 MR. WEICHER: Yes, I'm sorry.

15 CHAIRMAN ELLIOT: I'm still not
16 quite hearing it. I just want to make sure I
17 understand. What you're saying is the 52 to
18 48 was driven by the URCS and you decided to
19 change the structure to and 24.

20 MR. WEICHER: 26 to 24.

21 CHAIRMAN ELLIOT: Right, so you've
22 got these two changes. That changes your

1 whole structure. Was it all driven by URCS or
2 was there something else out there?

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

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

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

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

20 MR. WEICHER: And to protect from
21 under regulatory challenges. There's nothing
22 wrong with that. We could publish every rate

1 on the system at 250 percent, 150 percent, 180
2 percent, wherever it was under the rules that
3 this Board sets, and we believe that's
4 something we're supposed to do to try incent
5 both movements in the free market.

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

13 MR. WEICHER: Cars can be shipped
14 that way, and this Board clearly has
15 jurisdiction over the reasonableness of the
16 48-car rate and every single-car rate that is
17 shipped on our railroad as well as 110-car
18 shuttles and the 24-car units. That's quite
19 clear, but from our standpoint, the Board's
20 jurisdiction is over the reasonableness of the
21 rates we publish, not what decisions we make
22 on what rates to publish, what packages, what

1 volume discounts, how we structure those we
2 think is within our statutory prerogative
3 under the statute.

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

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

19 We take the rules that this agency
20 promulgates as given in those areas. There is
21 - to be very clear, we did nothing here to
22 promote, unpromote, this URCS structure, this

1 make-whole. I testified here myself last
2 February or March, and we said we're quite
3 open if the review works.

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

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

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

22 MR. WEICHER: To the best of my

1 knowledge rates on 48s went down. I don't
2 know the comparison, Vice Chairman, the
3 precise one that you're doing. I can't do
4 that in my head.

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

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

19 MR. WEICHER: Vice Chairman, no
20 shipper - it's interesting. We respect the
21 State of Montana, but we don't have a
22 complaint here against either the 48 or the

1 singles or the 24s or the 110s. It's not
2 clear who Montana represents other than in
3 some broad political spectrum. Of course it's
4 the State of Montana, but we don't have a
5 single complaint from a shipper.

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

10 Someone can always file a complaint
11 if the charge of 48 plus four or the - 24 is
12 110 is too high, but we have the rate-setting
13 prerogative, and that's perfectly legitimate.

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

17 COMMISSIONER NOTTINGHAM: If I
18 could just follow because I haven't had a
19 chance to question you yet, and I'd like to,
20 just for the benefit of our record here and
21 for those who are observing this hearing, you
22 might not be full-time practitioners expert in

1 the ways of URCS and the make-whole
2 adjustment.

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

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

16 MR. WEICHER: Briefly, and I do not
17 purport to be an expert in this and can be
18 stand corrected by anyone in the room, but the
19 way URCS works, the make-whole adjustment
20 takes some general costs and puts them back in
21 certain categories. There is a break point at
22 50 cars, I believe, in which general

1 unallocated costs - general costs left in the
2 waybill sample are added to lots under 50
3 including single car lots and under 50 cars,
4 so that when you look at a chart of the way
5 URCS works, the cost levels and thereby the
6 result - the cost levels go up and the
7 resulting revenue-to-cost ratios go down. I
8 hope I did that right.

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

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

19 MR. WEICHER: The benefit is -

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

22 MR. WEICHER: Yes, we believe that

1 the market decides what we can charge and what
2 moves the grain, and we want the grain to
3 move, but the break point results in a lower
4 revenue-to-cost ratio under 50 cars because of
5 the way URCS allocates costs.

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

10 COMMISSIONER NOTTINGHAM: Thank
11 you.

12 MR. WEICHER: Sorry.

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

19 My understanding from those visits
20 and from past - the past proceeding we
21 actually had on the grain market several years
22 ago is that this 52-car rate and block, as the

1 Vice Chairman pointed out, and the Chairman as
2 well, was a concept promoted pretty strongly
3 by the BNSF Railroad, and it was somewhat
4 controversial initially, less so perhaps in
5 later years, but certainly substantial
6 investments were made. So I've got to believe
7 that the switch to 48 cars was not just an
8 overnight decision by a summer intern law
9 clerk at the railroad, that he gave some
10 serious thought to this and it took some
11 resources to communicate out to all of your
12 customers that there is now no such thing as
13 a 52-car rate, but there was a 48-car rate.

14 What I'm getting at is to walk you
15 through kind of the time and thought and
16 investment that goes into making that kind of
17 change, and I'd like to get into a little
18 discussion wondering what the benefits are.
19 Because it seems like the only real specific
20 reason you've given is the very reason that
21 Montana has cited in their brief: that this
22 was an effort to "game" the URCS costing model

1 which is probably not against the law.

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

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

20 The most controversial in some
21 areas we've been in forums both politically
22 and regulatory where the criticism is between

1 110-car trains and the single-car trains and
2 what does this do the country elevator.

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

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

17 COMMISSIONER NOTTINGHAM: Mr.
18 Weicher, is it fair to say, though, that the
19 trend over many years on behalf of the BNSF
20 and other railroads is -- especially in the
21 agricultural sector -- has been to encourage
22 larger unit trains? 26's, 52's, 100's,

1 doesn't this go kind of against the general
2 grain, the general flow which again may not be
3 an illegality or anything. I'm just curious.

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

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

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

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

20 I will be happy to address more of
21 it. I'll give Mr. Sipe an opportunity to
22 address a couple of legal issues if that's acceptable.

1 CHAIRMAN ELLIOT: Sure. You have
2 ten seconds.

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

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

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

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

20 The other exception is unless the
21 rate-setting violates some other provision of
22 this part, and Montana says, well, we've said

1 it's unreasonable, therefore, arguably it
2 violates another provision of this part.

3 It can't be the case when you think
4 about this analytically. It can't be the case
5 that an empty vessel concept like
6 unreasonableness trumps a specific statutory
7 provision.

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

17 Suppose we change the color of the
18 locomotives that we use to haul Montana grain.
19 Montana comes roaring into the STB and says,
20 outrageous. Those locomotives have been
21 orange ever since BNSF merged. We want them
22 back the way they used to be. Have they

1 stated a claim for violation of ICCTA? Does
2 that violate a policy or a substantive
3 provision of ICTA?

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

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

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

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

19 COMMISSIONER NOTTINGHAM: Mr. Sipe,
20 if I could ask, couldn't your client, the
21 BNSF, or Montana conversely have - if there
22 was some question or concern about how this

1 Board would interpret the make-whole
2 adjustment. Let's say a farmer wants to move
3 52 or 62 or 79 cars. It's harvest time.
4 That's the number that the farmer has to load
5 up, and they ask for a tariff rate for that
6 number, isn't the railroad obligated to
7 provide service and move that and charge a
8 rate that relates to that movement, whatever
9 that movement size is?

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

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

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

1 get it to move.

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

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

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

22 There are a lot of important

1 matters pending before this Board. The issue
2 of whether BNSF has the right to establish its
3 own grain rate structure is simply not that
4 big a deal.

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

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

20 Find a shipper who really has some
21 skin in the game. We don't have any of those
22 here. Find a shipper with a skin in the game

1 and ask him to bring a complaint and ask the
2 Board for the relief they really want which is
3 some adjustment to URCS.

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

16 The final thing I'll say on this
17 score is I commend for your close scrutiny of
18 the 1991 decision by the ICC in the
19 abandonment case Scobey/Opheim. It's really
20 quite close in many respects to what we have,
21 although obviously it's an abandonment case,
22 but in effect, what the complaining Montana

1 grain shippers were saying in that case when
2 they opposed abandonment is BNSF is gaming the
3 statutory scheme that allows them to abandon
4 an unprofitable line.

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

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

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

18 MR. SIPE: Absolutely.

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

1 us?

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

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

22 MR. SIPE: I think actually what

1 you would look at is what's waybilled and
2 probably what would be waybilled would be a
3 tender of 48 and four singles.

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

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

10 VICE CHAIRMAN MULVEY: Well the
11 division in URCS is 50 cars, so it's if
12 anything of 52, wouldn't you want to use the
13 50-car or larger rate as opposed to the 48-car
14 smaller unit train rate, multiple car rate?

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

19 VICE CHAIRMAN MULVEY: We really
20 can't get into URCS - it's an ongoing Board
21 study right now, so exactly how it's going to
22 turn out depends upon a lot of things, but

1 right now that's the way it is structured.

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

7 Montana says that we have
8 "artificially" increased the costs and evaded
9 jurisdiction by establishing 48s, but it's
10 equally plausible that BNSF could look at the
11 52-car costs under URCS and say this doesn't
12 make sense that our costs for 52s should be
13 very, very close to what they are for 110s.
14 That doesn't make sense to us. 52s are not as
15 efficient as 110s, and yet they're being
16 treated substantially the same under URCS if
17 they're 52s.

18 So we say we've had enough of this.
19 We've had enough of these consultants driving
20 around Montana telling the shippers, boy, do
21 you guys realize you're paying RVCs of 225
22 percent. Fine.

1 VICE CHAIRMAN MULVEY: Forty-eight
2 cars are close to say 60, another break point.
3 And 48 is pretty far from five or six as well
4 as 52 is from 110.

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

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

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

19 MR. CUTLER: Thank you, Mr.
20 Chairman. I'm John Cutler, one of the
21 attorneys for the State of Montana. My
22 partner, Andy Goldstein, will address the

1 grain marketing aspects of this issue, as well
2 as the BNSF request to hold this case in
3 abeyance.

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

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

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

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

1 captive elevator.

2 Let me jump ahead to a second
3 provision of the statute that's critical, and
4 that was ignored by Mr. Sipe and by the BNSF
5 Motion to Dismiss, and that's Section
6 11701(b).

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

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

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

20 Second, 11701(b) authorizes
21 governmental agencies to file a complaint. We
22 chose to file a complaint rather than a motion

1 for declaratory order precisely because we
2 think this issue is very serious, and we
3 wanted to put forward a case that the STB
4 would have to address.

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

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

21 Are we here today - are you going
22 to still bring that complaint, if that's the

1 Board's decision on how it would treat URCS's
2 make-whole adjustment?

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

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

17 If you got past the Phase 1 which
18 is this case and for which you don't need a
19 shipper, only then would you address the rate
20 case issues of the reasonableness of the rates
21 freed from that restriction, but there's
22 another factor here.

1 When you decide that a railroad has
2 engaged in an unreasonable practice, typically
3 the STB doesn't direct the railroad to do
4 exactly what it chooses. Rather it says you
5 must cease and desist from the unreasonable
6 practice, which we have found to exist here.

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

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

17 If a single shipper were brave
18 enough to tackle this issue by himself, one of
19 the things that BNSF might do is to fix the
20 problem for that shipper, for example, by
21 publishing a high 52-car rate applicable only
22 to that elevator.

1 This would leave the broader issue
2 of the unreasonable practice in the gaming
3 unresolved for all the others shippers in
4 Montana and North Dakota and so forth, who fix
5 the same issue. The issue is on a broader
6 basis here.

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

20 MR. CUTLER: Mr. Chairman, that
21 might have worked if - that might have worked
22 in 2008 because at that point, BNSF had a 42

1 to 109-car rate.

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

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

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

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

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

19 You could say we're going to -

20 CHAIRMAN ELLIOT: This is a
21 hypothetical, so if we just answer the
22 hypothetical, whether or not, if there are 52

1 cars and we're going to treat it like 52 cars,
2 if you're at an elevator and you send out 52
3 cars, no matter what, 48 and four ones, 26 and
4 26, and we decide that it's - we're going to
5 treat the make-whole adjustment as 52, does
6 that satisfy what you've been arguing in your
7 complaint?

8 MR. CUTLER: I think so, because I
9 think what you're saying - and let me flush
10 this out. We have alleged that, for example,
11 a shipper with no transportation alternatives
12 who today - who in 2008 had a rate producing
13 an RVC of 260 as a result of the 48-car
14 shipment size limit all of a sudden saw his
15 rate, RVC, drop to 160, and of course we're
16 concerned not only about the inability to
17 challenge the rate that we think is high but
18 the exposure to increases, but if what you're
19 telling me is that the Board could apply URCS
20 in such a way as to recreate that 260 RVC for
21 that captive shipper, then that's the relief
22 that we're seeking.

1 What we're concerned about is the
2 inability of shippers to challenge rates they
3 think are too high and the exposure of
4 shippers to further rate increases as a result
5 of the gaming.

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

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

22 The railroad would argue that it's

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

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

16 MR. CUTLER: Well I was in the
17 military too, but I think - and one of the
18 distinguishing features of this case - one of
19 the ways that we differentiate this case from,
20 for example, the Union Pacific decision on
21 which BNSF relies, Union Pacific says that if
22 the case only involves rate levels, then you

1 file a rate case. You don't file an
2 unreasonable practice case.

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

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

15 Under the 48-car rule, we're
16 assuming that BN would also supply a bunch of
17 singles to go along with the 48s. We have no
18 way of knowing that that's the case. There
19 are car supply issues every harvest season,
20 and this efficiency issue is part of the
21 reason that we're challenging this, along with
22 the impact on recourse to the STB, so I think

1 that's a fair point, but I don't think it
2 militates against going forward on the basis
3 of Montana's complaint.

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

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

17 MR. CUTLER: You would run into the
18 same problem we've asserted here. It's a
19 different version of that problem, and in
20 fact, the problem doesn't go away if you
21 change URCS. If the big point shifts, they
22 still have the question of whether it's

1 unreasonable practice for railroads to use
2 shipment size limits to force you from the
3 right side of the break point to the wrong
4 side of the breakpoint.

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

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

20 VICE CHAIRMAN MULVEY: One more
21 question: you're here representing the State
22 of Montana, but Montana is not itself a

1 shipper, and you're representing shippers. We
2 don't see a lot of the grain elevators from
3 the state here with you supporting the State
4 in this effort, and you mentioned they might
5 not have the courage to do so. Do you want to
6 elaborate on that. Are we hearing this story
7 again about retaliation or what have you?

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

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

17 Here what we're talking about are
18 smaller elevators, not shuttle elevators.
19 Moreover, you have a letter attached to our
20 reply to BNSF's Motion to Dismiss from the
21 Montana Farmers Union. We do have support
22 from - this is not something that was just

1 made up in the AG's Department of the Montana
2 Department of Transportation. This reflects
3 a concern about the vulnerability of some of
4 the weaker elevators which are nevertheless
5 important for Montana farmers because they're
6 nearby, the cover crops other than wheat,
7 barley, and so forth. They're sources of
8 fertilizer and marketing and so forth use.

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

16 CHAIRMAN ELLIOT: Mr. Goldstein.
17 Thank you, Mr. Cutler.

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

20 I really hope to cover two issues
21 as John said a moment ago, and the first is
22 BN's purpose for making the 52-car adjustment

1 to 48 cars which you have been interested in,
2 and the second is the question of whether this
3 proceeding should be held in abeyance
4 indefinitely, as BN requests, pending the
5 outcome of a rulemaking that's not yet been
6 instituted.

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

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

20 Now BN really hasn't made any claim
21 that it switched to the 48 cars because of
22 marketing efficiencies. They said at one

1 point that 52 cars were their most efficient
2 mode. Now they say shuttles are. Indeed,
3 that's probably true, but of course where that
4 leaves us is that 48 cars are not, so we
5 cannot find an efficiency motive in what
6 they've done.

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

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

17 The result of this of course is the
18 variable cost associated with the 48-car
19 shipments are substantially higher than those
20 with the 50-car or larger shipments, and these
21 variable cost differences can exceed \$1,000.00
22 per car in many cases lowering the RVC ratios

1 below 180 percent.

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

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

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

19 During that time, critical
20 documents now available through discovery
21 could be misplaced, or BNSF personnel whose
22 depositions could be taken now might leave or

1 retire, making it much more difficult to
2 present evidence behind BNSF's decision to
3 impose its 48-car limit.

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

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

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

22 There could be delays in the

1 process where the rulemaking process could
2 introduce new issues or indicate new problems.

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

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

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

22 I'd like to then just address one

1 last subject which has to do with some of the
2 questions being asked about 48 cars plus four,
3 and I believe that BN's answer was how you
4 would treat would depend on the waybill.

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

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

1 52, you will get 52 cars in a shipment at one
2 time from BN. Thank you.

3 CHAIRMAN ELLIOT: Thank you, Mr.
4 Goldstein. Mr. Weicher, you have, and I
5 apologize I think I mispronounced your name
6 before. You have three minutes on rebuttal.

7 MR. WEICHER: We will be brief and
8 just respond to a couple of the points that
9 were made.

10 First, in response to Mr.
11 Goldstein's assertion, we have neither
12 acknowledged nor in fact in any way misused
13 URCS, this Agency's URCS, just like the many
14 rules that are promulgated, we follow those
15 rules.

16 If there is a problem here, there
17 is a remedy, but it's not an unreasonable
18 practice case. There's a remedy to review
19 URCS, its application in individual rate case,
20 and I'm not going to go into this. You could
21 argue endlessly, but it should happen in that
22 rate case whether you do - how you count them

1 and what you do, but that's this Board's
2 jurisdiction. We don't deny that
3 jurisdiction.

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

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

14 We could offer - a manufacturer can
15 offer a five package of paper towels or a six
16 or a three. You happen to have the
17 jurisdiction to decide if the price for those
18 discount lots are appropriate and reasonable
19 under this statute, but with all due respect,
20 you can't tell us to offer a four pack of
21 paper towels instead of the five or a seven.
22 That's up to us.

1 We aren't deciding or limiting
2 anybody's ability to ship on our railroad as
3 much or as little as they want and what they
4 bill it under, and then you have the
5 jurisdiction if that rate is unreasonable.

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

15 CHAIRMAN ELLIOT: Thank you, Mr.
16 Weicher.

17 COMMISSIONER NOTTINGHAM: Mr.
18 Weicher, if I could just make sure I
19 understand your last point there. You believe
20 then that this agency -- just to add on the
21 natural following thought, at least that
22 occurs to me -- that your client is just

1 behaving reasonably in accordance with this
2 agency's decisions and rulemaking and our URCS
3 process and the make-whole adjustment.

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

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

21 I don't think it's the right place
22 to do it because it permeates. There are many

1 other parties besides the State of Montana has
2 appeared before you in the URCS proceeding
3 earlier this year who have an interest in
4 these adjustments, and you start fiddling with
5 this stuff, whether it's on intermodal or the
6 make-whole adjustment or shuttle, whatever it
7 is, the regression analysis, that is a system
8 which has been established over many years.

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

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

16 COMMISSIONER NOTTINGHAM: Thank
17 you.

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

21 We'll take the matter under
22 advisement, and the hearing of the Board is

1 now adjourned. Thanks.

2 (Whereupon, the above-entitled
3 matter was concluded at 10:29 a.m.)

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This is to certify that the foregoing transcript

In the matter of: State of Montana v BNSF Rail Road

Before: Surface Transportation Board

Date: 11-30-10

Place: Washington, DC

was duly recorded and accurately transcribed under
my direction; further, that said transcript is a
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Neal R Gross

Court Reporter

NEAL R. GROSS

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